# CARVE-OUT AS AN ANSWER TO THE CONTRIBUTION QUESTION IN PRIVATE ANTITRUST LITIGATION

One of the most frequently litigated matters in federal antitrust law today is the issue of whether to permit contribution among antitrust defendants in private, treble damage actions.[1] Contribution is the spreading of liability assessed against one defendant among all defendants responsible for the plaintiff's injury.[2] Traditionally, federal common law did not recognize a right of contribution among alleged violators of the antitrust laws.[3] In 1979, however, the Eighth Circuit

1. *See* Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773 (10th Cir. Nov. 8, 1979); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979); Little Rock School Dist. v. Borden, Inc., [1980-1] Trade Cas. (CCH) ¶ 63,059 (E.D. Ark. 1979) (letter opinion); *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979); Hedges Enterprises v. Continental Group, Inc., [1979-1] Trade Cas. (CCH) ¶ 62,717 (E.D. Pa.); *In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), *aff'd per curiam*, No. 79-2439 (5th Cir. Oct. 30, 1979); *In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979), *appeal denied*, J.P.M.D.L. 50 (D.C. Cir. Nov. 1, 1979); Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. May 18, 1979); *In re* Eastern Sugar Antitrust Litigation, J.P.M.D.L. 201A (E.D. Pa. April 2, 1979); *In re* Beef Industry Antitrust Litigation, J.P.M.D.L. 248 (N.D. Tex. Sept. 1, 1978), *aff'd*, 607 F.2d 167 (5th Cir. 1979), *pet. for cert. filed*, 48 U.S.L.W. 3615 (U.S. Feb. 6, 1980) (No. 79-1214); Olson Farms, Inc. v. Safeway Stores, Inc., [1977-2] Trade Cas. (CCH) ¶ 61,698 (D. Utah), *aff'd*, [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., No. 75-2820 (E.D. La. Oct. 5, 1977), *aff'd*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. granted sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 49 U.S.L.W. 3321 (U.S. Nov. 4, 1980) (No. 79-1144).

"The vast class action damage exposure from which the [contribution] problem results did not surface until the 1970's after the revision of Rule 23 to permit the modern class action in 1966, and the denial of the pass-on defense in the *Hanover Shoe* case in 1968." S. REP. No. 428, 96th Cong., 1st Sess. 11 (1979).

2. *See* Martello v. Hawley, 300 F.2d 721, 723 (D.C. Cir. 1962). *See generally* Brief for Amicus Curiae at 7, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979) (contribution is mechanism to apportion damages among defendants). *See also* RESTATEMENT (SECOND) OF TORTS § 886(A) (1979); Corbett, *Apportionment of Damages and Contribution Among Co-Conspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111, 117 (1962) (contribution is division of damages between joint tortfeasors; indemnity is shifting of entire loss on one whose wrong has been primarily responsible for injury sustained); Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326 (1965).

3. *See* Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960) (dictum). *Goldlawr*, however, involved two distinct tortious acts rather than the actions of joint tortfeasors and placed a great deal of emphasis on an admiralty decision that was later modified. *See* note 29 *infra* and accompanying text. *But see* Webster Motor Car Co. v. Zell Motor Car Co., 234 F.2d 616 (4th Cir. 1956) (suggesting that contribution between Sherman Act co-conspirators may be permissible under Maryland law). *See generally* Union Stockyards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217, 224 (1905) (federal common law will not permit contribution among any type of joint tortfeasors).

Settlements entered into among defendants under current antitrust law are subtracted from

Court of Appeals in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.* reversed a lower court ruling[4] and granted defendant's motion to implead a third party for contribution purposes.[5] Courts have disagreed sharply with the Eighth Circuit decision.[6] The resulting conflict among the circuits,[7] proposed congressional legislation supporting contribution in price-fixing actions,[8] and sharp debate on the issue among members of the antitrust bar[9] has generated a controversy that jeopardizes effective enforcement of the intricate antitrust laws.[10]

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judgments against remaining defendants after trebling. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

4. No. 78-1229 (D. Minn. Jan. 26, 1978).

5. 594 F.2d 1179 (8th Cir. 1979).

6. *See* Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773 (10th Cir. Nov. 8, 1979); Little Rock School Dist. v. Borden, Inc., [1980-1] Trade Cas. (CCH) ¶ 63,059 (E.D. Ark. 1979) (letter opinion); *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979); Hedges Enterprises v. Continental Group, Inc., [1979-1] Trade Cas. (CCH) ¶ 62,717 (E.D. Pa.); *In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), *aff'd*, No. 79-2439 (5th Cir. Oct. 30, 1979); *In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979), *aff'd per curiam*, J.P.M.D.L. 50 (D.C. Cir. Nov. 1, 1979); Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. May 18, 1979); *In re* Eastern Sugar Antitrust Litigation, J.P.M.D.L. 201A (E.D. Pa. April 2, 1979); *In re* Beef Industry Antitrust Litigation, J.P.M.D.L. 248 (N.D. Tex. Sept. 1, 1978), *aff'd*, 607 F.2d 167 (5th Cir. 1979), *pet. for cert. filed*, 48 U.S.L.W. 3615 (U.S. Feb. 6, 1980) (No. 79-1214); Olson Farms, Inc. v. Safeway Stores, Inc., [1977-2] Trade Cas. (CCH) ¶ 61,698 (D. Utah), *aff'd*, [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., No. 75-2820 (E.D. La. Oct. 5, 1977), *aff'd*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. granted sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 49 U.S.L.W. 3321 (U.S. Nov. 4, 1980) (No. 79-1144).

7. The Eighth Circuit in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.* granted contribution but the Tenth Circuit in *Olson Farms, Inc. v. Safeway Stores, Inc.* and the Fifth Circuit in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., In re Corrugated Container Antitrust Litigation*, and *In re Beef Industry Antitrust Litigation* denied a right of contribution among antitrust defendants. The Circuit Court of Appeals for the District of Columbia refused to rule on the lower court's denial of contribution for lack of jurisdiction in *In re Ampicillin Antitrust Litigation.*

8. *See* S. 1468, 96th Cong., 1st Sess. (1979) (advocates contribution except against good faith settling defendants).

9. *See* ABA, REPORT OF THE SECTION OF ANTITRUST LAW WITH LEGISLATIVE RECOMMENDATIONS (majority report) (1979) [hereinafter cited as ABA MAJORITY REPORT] (generally in accord with position advanced by S. 1468); Rhodes, *Professional Beauty and the Beast: Contribution in Antitrust Litigation*, 61 CHI. BAR REC. 11 (July-Aug., 1979); Nat'l L.J., Nov. 19, 1979, at 23, col. 1. *But see* ABA, REPORT OF THE SECTION OF ANTITRUST LAW WITH LEGISLATIVE RECOMMENDATIONS (minority report) (Aug. 1, 1979) [hereinafter cited as ABA MINORITY REPORT].

10. *See* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L.J. 779 (1979); Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829 (1979); Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution*, 1980 U. ILL. L. F. 389; Note, *Contribution Among Antitrust Violators*, 29 CATH. L.

This Note proposes that the "carve-out" or "claim reduction" theory satisfies both opponents and proponents of antitrust contribution. Carve-out suggests that nonsettling defendants should be credited for a settling defendant's settlement with plaintiff. The first section of this Note traces the evolution of contribution in the antitrust context. The second section presents recent cases that have dealt with the antitrust contribution issue. The third section lays the ground rules for a proper resolution of the contribution question. This Note then sets forth the pragmatic, policy, and constitutional arguments raised in the antitrust contribution debate. The final section of the Note enunciates a carve-out theory that will provide the courts with an efficient and equitable solution to the contribution question in antitrust litigation.

## I. DEVELOPMENT OF A CONTRIBUTION THEORY

A violation of the antitrust laws is tortious conduct[11] and results in the imposition of joint and several liability[12] on the antitrust tortfeasors.[13] In private actions, plaintiffs may seek relief from any or all of the joint tortfeasors.[14] Antitrust violators generally manifest some degree of illegal intention[15] during the commission of their wrongful

REV. 669 (1980); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540 (1980); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV . 890 (1980); Note, *Contribution for Antitrust Codefendants*, 66 VA. L. REV. 797 (1980); 33 VAND. L. REV. 97 (1980). *See also* note 47 *infra*. For a discussion of the current state of complexity in federal antitrust litigation, see BOARD OF EDITORS, FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION; NATIONAL COMMISSIONERS FOR THE REVIEW OF THE ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND ATTORNEY GENERAL (1979).

11. *See* Simpson v. Union Oil Co., 311 F.2d 764, 768 (9th Cir. 1963), *rev'd on other grounds*, 377 U.S. 13 (1964); Williamson v. Columbia Gas & Elec. Corp., 110 F.2d 15 (3d Cir. 1939), *cert. denied*, 310 U.S. 639 (1940); City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906); Tondas v. Amateur Hockey Ass'n, 438 F. Supp. 310 (S.D.N.Y. 1977); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506 (D. Colo. 1952).

12. *See* Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392 n.4 (5th Cir. 1976); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11-12 (N.D. Ga. 1973); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804 (W.D. Wash.), *cert. denied*, 393 U.S. 842 (1968).

13. *See* Lawlor v. National Serv. Screen Corp., 349 U.S. 322 (1955) (co-conspirators who violate antitrust laws are joint tortfeasors). *But see* Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 705 (1978) (not all antitrust violators are tortfeasors).

14. *See* Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 5 (M.D. Ala. May 18, 1979).

15. *See* United States v. General Motors Corp., 384 U.S. 127 (1966); Bluefield Steamship Co. v. United Fruit Co., 243 F. 1 (3d Cir. 1917), *appeal dismissed*, 248 U.S. 595 (1919); E. KINTNER, FEDERAL ANTITRUST LAW 14 (1980); Address by Jonathan Rose, American Bar Association Antitrust Section Meeting (Aug. 13, 1979) (all antitrust tortfeasors treated as exhibiting general intent for purposes of contribution analysis).

acts.[16] The common-law rule denying contribution among intentional tortfeasors[17] gained wide acceptance in the antitrust laws.[18] Federal courts, bound to adhere to federal common law in antitrust actions,[19]

16. *But see* United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978); United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 907 (5th Cir. 1979) (Morgan, J., concurring in part and dissenting in part); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 198 (1977) (parties may violate antitrust laws either unintentionally or through passive acquiescence).

> Finally the existence of "intention" is itself a somewhat elusive concept, particularly when applied in the context of vicarious employer liability for the acts of employees. Antitrust defendants are often companies whose employees are alleged to have committed intentional acts which violate company policy as much as they violate the antitrust laws. . . . [U]nder no rational scheme of analysis can it be said that such injuries are the product of the "intentional" tort of the company.

ABA, REPORT OF THE CIVIL PRACTICE AND PROCEDURE COMMITTEE TO THE SECTION OF ANTITRUST LAW REGARDING RIGHTS OF CONTRIBUTION AMONG ANTITRUST DEFENDANTS 8 (1979). *See also* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979) ("There well may be antitrust violators who are entirely unwitting, but we refuse to distort the antitrust laws in order to remedy a problematic inequity"), *petition for cert. granted sub nom.* Texas Indus., Inc., v. Radcliff Materials, Inc., 49 U.S.L.W. 3321 (U.S. Nov. 4, 1980) (No. 79-1144); ABA MAJORITY REPORT, *supra* note 9, at 5 (courts should not expend energy searching for differences among antitrust defendants based on degree of intent in resolving contribution question).

The antitrust statutes arguably are premised on strict liability concepts, which provide for damages regardless of the tortfeasor's state of mind. *See, e.g.,* El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976).

17. *See* Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799); Battersey's Case, Winch's Rep. 48 (C.P. 1623). *See also* Reath, *Contribution Between Persons Jointly Charged for Negligence*, 12 HARV. L. REV. 176, 177 (1899).

The early American common law mistakenly extended the English rule, which prohibited contribution among intentional tortfeasors, to all types of torts. *See* Union Stockyards Co. v. Chicago, B. & Q. R.R., 196 U.S. 217, 224 (1905); W. PROSSER, THE LAW OF TORTS 305-07 (4th ed. 1971); RESTATEMENT OF RESTITUTION, Introductory note to Ch. 3, Title C, at 386 (1937). *Compare* James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941) *with* Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941).

18. *See* Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1343-46 (S.D.N.Y. 1969); RESTATEMENT OF RESTITUTION, Title C, at 385 (1937) (antitrust violation is too heinous to allow contribution). *But see* Brief for Amicus Curiae at 8, 9, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979):

> An antitrust violation is simply not the kind of "tort" that motivated the original exception to the rule of contribution. A corporation held vicariously liable for the illegal and unauthorized . . . activities of its employees certainly cannot be said to have committed an "intentional" tort in any traditional sense. . . . [I]t is logically inconsistent and manifestly unjust to apply such an unwarranted distinction [different contribution rules for intentional and negligent torts] in assessing the availability of the right of contribution [in antitrust actions].

*Id.*

19. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); D'Oench, Duhme & Co. v. Federal Deposit Ins. Co.,

historically refrained from conducting a serious evaluation of the strict common-law prohibition against contribution.[20] In 1960, however, the Third Circuit Court of Appeals in dictum expressly rejected the notion that antitrust defendants could seek contribution from fellow wrongdoers.[21]

State courts and legislatures vigorously attacked the common-law rule, which denied contribution among negligent tortfeasors, prior to the *Professional Beauty* decision.[22] The courts in *Knell v. Felt-*

315 U.S. 447 (1942); El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976). *But see* Webster Motor Car Co. v. Zell Motor Car Co., 234 F.2d 616, 619 (4th Cir. 1956) (dictum). *But cf.* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) (federal common law not binding in admiralty action). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 800-05 (2d ed. 1973); Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123, 129 (1965); Note, *The Role of State Law in Federal Antitrust Treble Damage Actions*, 75 HARV. L. REV. 1395, 1401 (1962).

20. A number of litigants, arguing for recognition of a right of contribution in antitrust actions, have asserted that federal common law should not bind courts on the contribution issue but should attempt instead to decipher the goals and purposes of the federal antitrust laws. *See* Brief for Appellant at 7, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting).

The task of interpreting Congress' intent on contribution when it drafted the Sherman Act in 1890 would be an arduous one. *See* Corbett, *supra* note 12, at 136-37 (inspection of both goals and purposes of antitrust laws and other areas of federal common law that have adopted contribution is the appropriate means to resolve antitrust contribution questions).

21. *See* Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960).

22. *See* National Farmers Union Property & Cas. Co. v. Nelson, 260 Iowa 163, 147 N.W.2d 839 (1967); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Royal Indemn. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975); ALASKA STAT. § 09.16.010 (1973); ARK. STAT. ANN. § 34-1002 (1962); CAL. CIV. PROC. CODE § 875 (West Supp. 1979); COLO. REV. STAT. §§ 13-50, 5-101-06 (Supp. 1979); DEL. CODE ANN. tit. 10, § 6302 (1975); FLA. STAT. ANN. § 768.31 (West Supp. 1980); GA. CODE ANN. § 105-2012 (Supp. 1980); HAWAII REV. STAT. § 663-12 (1976); IDAHO CODE § 6-803 (1979); ILL. ANN. STAT. ch. 70, § 302 (Smith-Hurd 1980); KAN. STAT. ANN. § 60-258(a) (1974); KY. REV. STAT. ANN. § 412.030 (Baldwin 1979); LA. CIV. CODE ANN. art. 2103 (West Supp. 1979); MD. ANN. CODE art. 50, § 17 (1979); MASS. ANN. LAWS ch. 231B, § 1 (Michie/Law. Co-op 1974); MICH. STAT. ANN. § 27A.2925(1) (1980); MINN. STAT. ANN. § 604.01 (West Supp. 1980); MISS. CODE ANN. § 85-5-5 (1972); MO. REV. STAT. § 537.060 (1978); NEV. REV. STAT. § 17.225 (1979); N.H. REV. STAT. ANN. § 507(7)(B) (Supp. 1979); N.J. STAT. ANN. §2A:53-A-2 (West 1952); N.M. STAT. ANN. § 41-3-2 (1978); N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976); N.C. GEN. STAT. §§ 1B-1 to -6 (Supp. 1977); N.D. CENT. CODE § 32-38-01 (1976); OR. REV. STAT. § 18.440 (1979); PA. CONS. STAT. ANN. § 8324 (Purdon 1980); R.I. GEN. LAWS § 10-6-3 (Supp. 1979); S.D. COMP. LAWS ANN. § 15-8-12 (1967); TENN. CODE ANN. § 23-3102 (Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971); UTAH CODE ANN. § 78-27-39 (1977); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1980); VA. CODE § 8.01-34 (1977); W. VA. CODE § 55-7-13 (1966); WIS. STAT. ANN. §§ 113.01-.10 (West 1974); WYO. STAT. § 1-1-110 (1977). *See generally* W. PROSSER, *supra* note 17, at 306-08; Annot., 34 A.L.R.2d 1107 (1954); Harding, *Joint Torts and*

*man*,[23] *Kohr v. Allegheny Airlines, Inc.*,[24] and *Gomes v. Brodhurst*[25] indicated that the federal judiciary recognized the state law trend toward allowing contribution among negligent, nonantitrust tortfeasors.[26] Dissatisfaction with the no contribution rule first arose, however, in the federal common law of admiralty.[27] Although the United States Supreme Court initially denied a right of contribution for admiralty claims in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,[28] the Court subsequently narrowed the holding in *Halcyon Lines*[29] and permitted contribution in a number of admiralty actions.[30]

Congress further eroded the contribution prohibition by statutorily

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*Several Liability*, 25 CALIF. L. REV. 413, 426-29 (1937); Comment, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964, 981-84 (1959); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1977).

The tort law trend among the states to adopt a comparative negligence rule, as opposed to a contributory negligence rule, is a harbinger of the trend to permit contribution among tortfeasors. *See* W. PROSSER, *supra* note 17, at 433.

23. 174 F.2d 662 (D.C. Cir. 1949) (contribution allowed in automobile accident case). *See also* George's Radio, Inc. v. Capital Transp. Co., 126 F.2d 219 (D.C. Cir. 1942).

24. 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (contribution granted in aviation disaster litigation).

25. 394 F.2d 465 (3d Cir. 1968) (nonsettling defendants received contribution from settling defendants on a comparative fault measure rather than by a proportional amount of settlement). "There is no longer a legitimate place in our system . . . for a rule of law which places the full burden of restitution upon one who is only in part responsible for plaintiff's loss." *Id.* at 467.

26. *See* W. PROSSER, *supra* note 17, at 306-08. "There is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, *unintentionally* responsible, to be shouldered onto one alone, according to the . . . plaintiff's . . . whim or spite, or his *collusion* with the other wrongdoer, while the latter *goes scot free*." *Id.* at 307 (emphasis added); RESTATEMENT OF RESTITUTION § 88 (1937); RESTATEMENT (SECOND) OF TORTS § 886(A) (1979) (allowing contribution only for such intentional wrongs as defamation and misrepresentation); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1C (1955). *See generally* Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123 (1965).

27. United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (contribution allowed on comparative fault basis); Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) (contribution allowed in admiralty between two negligent tortfeasors); *In re* Seaboard Shipping Corp., 449 F.2d 132 (2d Cir. 1971), *cert. denied*, 406 U.S. 949 (1972).

28. 342 U.S. 282 (1952) (no right of contribution through third party action for negligence in an admiralty action in absence of specific legislation).

29. *See* United States v. Reliable Transfer Co., 421 U.S. 397 (1975). *See also* Watz v. Zapata Off-Shore Co., 431 F.2d 100 (5th Cir. 1970) (*Halcyon Lines* distinguished on grounds that statute expressly immunized third party defendant from liability); Horton & Horton, Inc. v. Dyer, 428 F.2d 1131 (5th Cir. 1970), *cert. denied*, 400 U.S. 993 (1971).

30. *See* note 27 *supra*. *See also* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1183 (8th Cir. 1979). "As (*sic*) a minimum *Cooper Stevedoring* and earlier admiralty cases demonstrate that under certain circumstances, the Supreme Court is willing to fashion a rule allowing contribution without express direction from Congress." *Id.*

promoting contribution in suits brought under the Federal Employers Liability Act,[31] the Federal Tort Claims Act,[32] and the Civil Rights Act of 1964.[33] The federal courts have generally permitted contribution in suits filed under these acts.[34] Congressional amendments to the Securities Act of 1933[35] and the Securities and Exchange Act of 1934[36] continued the trend toward abrogation of the no contribution rule in negligence actions by allowing contribution for intentional abridgements of the securities acts. Federal courts not only carried out the expressed legislative intent of these amendments to the Securities Act, but also allowed contribution in securities cases[37] in which Congress had not expressly authorized contribution.[38]

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31. Employer's Liability Act of 1939, § 1, Pub. L. No. 76-382, 53 Stat. 1404 (codified at 45 U.S.C. §§ 51, 60 (1976)).

32. Federal Tort Claims Act of 1946, Pub. L. No. 80-773, 62 Stat. 982 (codified at 28 U.S.C. §§ 2671-2680 (1976)).

33. Civil Rights Act of 1964, § 701, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§2000(e)(1)-2000(e)(15) (1976)).

34. *See* Chicago & N.W. Ry. v. Minnesota Transfer Ry., 371 F.2d 129 (8th Cir. 1967) (Employer's Liability Act case); Kennedy v. Pennsylvania R.R., 282 F.2d 705 (3rd Cir. 1960) (same); Blair v. Cleveland Twist Drilling Co., 197 F.2d 842 (7th Cir. 1952) (same). For examples of cases dealing with the Federal Tort Claims Act, see United States v. Yellow Cab Co., 340 U.S. 543 (1951); Certain Underwriters at Lloyd's v. United States, 511 F.2d 159 (5th Cir. 1975); Berger v. Winer Sportswear, Inc., 394 F. Supp. 1110 (S.D.N.Y. 1975). *See also* Parson v. Kaiser Aluminum & Chem. Corp., 583 F.2d 132 (5th Cir. 1978) (civil rights case); Stevenson v. International Paper Co., 432 F. Supp. 390 (W.D. La. 1977) (same); International Union of Electrical, Radio & Mach. Workers v. Westinghouse Elec. Corp., 73 F.R.D. 57 (W.D.N.Y. 1976) (same); Grogg v. General Motors Corp., 72 F.R.D. 523 (S.D.N.Y. 1976) (same); Gilbert v. General Elec. Corp., 59 F.R.D. 267 (E.D. Va. 1973) (same).

The United States Supreme Court granted certiorari during the 1979 term to review the contribution issue in the *Corrugated Container* antitrust litigation and also in the Title VII context in Glus v. C.G. Murphy Co., 562 F.2d 880 (3d Cir. 1977). *See generally* 104 LAB. REL. REP. (BNA), no. 21, p. 41, July 14, 1980. Recently, however, the Court dismissed certiorari in the *Corrugated Container* litigation. 49 U.S.L.W. 3288 (U.S. Oct. 20, 1980) (No. 79-972).

35. *See* 15 U.S.C. § 77(k)(f) (1976).

36. *See* 15 U.S.C. §§ 78(i)(e), 78(r)(b) (1976).

37. *See* Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979); B & B Inv. Club v. Kleinert's, Inc., 391 F. Supp. 721 (E.D. Pa. 1975); Gould v. American-Hawaiian Steamship Co., 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3rd Cir. 1976); Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230 (S.D.N.Y. 1970). *See also* Note, *Contribution Under the Federal Securities Laws*, 1975 WASH. U.L.Q. 1256.

38. The courts utilize an *in pari materia* approach to allow contribution under specific sections of the securities acts that do not expressly provide a right of contribution. *See* Madigan, Inc. v. Goodman, 498 F.2d 233, 237-38 (7th Cir. 1974); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.) (per curiam), *cert. denied*, 404 U.S. 941

## II. RECENT DEVELOPMENTS IN ANTITRUST LAW

In the late 1960's the Third Circuit's dictum in *Goldlawr v. Shubert*[39] and a Sixth Circuit opinion[40] constituted the entirety of federal court decisions even tangentially related to contribution under the antitrust laws. In 1969 a federal court finally confronted the contribution issue in an antitrust context. In *Sabre Shipping Corp. v. American President Lines, Ltd.*[41] a district court held that nonsettling defendants in an antitrust action could not implead settling defendants for contribution purposes.[42] The *Sabre Shipping* court relied heavily on the Supreme Court's opinion in the *Halcyon Lines* admiralty case,[43] believing that the Supreme Court's blanket rejection of contribution in admiralty actions mandated an equivalent denial of a right to contribution under the federal antitrust laws. The Supreme Court's subsequent narrowing of the *Halcyon Lines* decision severely undercuts the significance of *Sabre Shipping* in evaluating the propriety of contribution in antitrust actions.[44]

The Eighth Circuit's divided opinion in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*[45] represents not only a significant departure from limited antitrust precedent prohibiting contribution,[46]

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(1971); deHaas v. Empire Petroleum Co., 286 F. Supp. 809 (D. Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

*In pari materia* analysis implies that all laws that relate to the same purpose should be considered together to ascertain the intent of the legislature. *See* Undercofler v. L.C. Robinson & Sons, 111 Ga. App. 411, 141 S.E.2d 847, *aff'd*, 221 Ga. 391, 144 S.E.2d 755 (1965).

39. 276 F.2d 614 (3d Cir. 1960) (dictum) (case did not involve the impleader of a joint tortfeasor).

40. *See* Huggins v. Graves, 337 F.2d 486 (6th Cir. 1964) (diversity case applying minority rule under state law to allow contribution). *See also* Perma Life Mufflers v. International Parts Corp., 392 U.S. 134 (1968) (Supreme Court rejects *in pari delecto* defense in antitrust actions).

41. 298 F. Supp. 1339 (S.D.N.Y. 1969).

42. *Sabre Shipping* dispelled whatever doubt had arisen about the availability of contribution under the federal antitrust laws. *See also* El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. (CCH) ¶ 61, 533, at 71,112 (N.D. Cal. 1976) (relying heavily on *Sabre Shipping*); Baughman v. Cooper-Jarrett, Inc., 391 F. Supp. 671, 678 n.3 (W.D. Pa. 1975), *aff'd in part and rev'd in part*, 530 F.2d 529, 534-39 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976) (Sherman Act contains no express provision by which Congress has legislated an exception to the common-law rule that forbids contribution among intentional tortfeasors).

43. *See* 298 F. Supp. at 1344.

44. *See* Paul, *Contribution in Antitrust Revisited*, 41 FORDHAM L. REV. 67 (1972) (*Halcyon Lines* later modified by the Supreme Court in United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975), and Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111 (1974)).

45. 594 F.2d 1179 (8th Cir. 1979).

46. *See* notes 38-41 *supra* and accompanying text.

but also a potentially drastic alteration of the practice of antitrust law.[47] Plaintiff, Professional Beauty, alleged that National Beauty violated section 2 of the Sherman Act[48] by conspiring with La Maur, a manufacturer of beauty supplies, to terminate Professional Beauty's distributorship.[49] Professional Beauty, however, did not name La Maur a defendant in the action.[50] In the initial stages of discovery, the district court denied National Beauty's motion to implead La Maur as a third party defendant.[51] On appeal, the Eighth Circuit reversed this ruling and granted a right to contribution on a per capita[52] basis in the event that the lower court found a section 2 violation.[53] The court of appeals asserted that fairness under the particular circumstances[54] should per-

47. *See* Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1968):

> Voluntary settlements are to be encouraged and a rule permitting contribution under such circumstances would not work to that end. Not only would a joint tortfeasor be stripped of any incentive to settle but he would have a positive incentive to stand trial and actively participate in his defense in order to minimize his liability.

*Id. See also* McKenna v. Austin, 134 F.2d 659, 665 (D.C. Cir. 1943); Panichella v. Pennsylvania R.R., 150 F. Supp. 79, 81 (W.D. Pa. 1957).

48. Sherman Antitrust Act, 15 U.S.C. § 2 (1976).

49. *See* Brief for Appellant at 5, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

50. *Id.* at 7 (Plaintiff did not file a claim against La Maur because "it was a business decision [that] they [Professional Beauty] made due to the fact that they were getting their line [of beauty supplies] back"). *See* notes 68, 90 *infra.*

51. No. 78-1229 (D. Minn. Jan. 26, 1978).

52. The Eighth Circuit equated the term "per capita" with "pro rata"; *i.e.*, if the district court had uncovered a section 2 violation, La Maur and National Beauty would be responsible for one-half of the judgment. 594 F.2d 1179, 1182 n.4 (8th Cir. 1979). On remand to the district court, defendants La Maur and National Beauty entered into "nominal" settlements with plaintiff. (Telephone conversation with Charles A. Mays, Attorney for La Maur, October 29, 1980).

53. Sherman Antitrust Act, 15 U.S.C. § 2 (1976).

54. *See* 594 F.2d 1179 (8th Cir. 1979).

> The deciding factor in our decision is *fairness* between the parties. We conclude that fairness requires that the right of contribution exist among joint tortfeasors *at least under certain circumstances.* There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are *responsible* to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

*Id.* at 1185, 1186 (emphasis added). The *Professional Beauty* court felt that the contribution question should be resolved on a case-by-case method with particular attention paid to the Supreme Court's four factor test in Perma Life Mufflers Co. v. International Parts, Inc., 392 U.S. 134, 146-47 (1968) (White, J., concurring). The four factors are: (1) which party is relatively responsible for originating and implementing the scheme; (2) which party was reasonably expected to benefit from the plan; (3) did one of the parties attempt to terminate its participation in the illegal plan; and (4) which party ultimately profited or suffered from the arrangement. 594 F.2d at 1186. *But see Proposed Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Committee of the Judiciary*, 96th Cong., 1st Sess.

mit National Beauty to introduce evidence regarding La Maur's involvement in the conspiracy.[55] This ruling must be qualified to reflect that plaintiffs and named defendants had not executed a settlement agreement.[56] Furthermore, one of only three possible litigants filed a motion to implead in a timely manner. A tardy motion in a multiparty action did not confront the *Professional Beauty* court.

In the aftermath of *Professional Beauty*, defendants in other antitrust cases attempted to implead third party defendants or assert cross-claims against defendants who had previously negotiated settlement pacts with plaintiffs.[57] In *In re Ampicillin Antitrust Litigation*[58] one nonsettling defendant, relying on *Professional Beauty*, filed a motion for leave to amend its answer and to assert cross-claims

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11 (1979) [hereinafter cited as *1979 Hearings*] (statement of John Shenefield) (case-by-case analysis may lead to forum shopping); Nat'l L.J., Nov. 19, 1979, at 23, col. 4 (case-by-case method of *Professional Beauty* lessens certainty).

55. *See* Brief for Appellant at 29, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

> At the very least, the district court's decision in the instant case to dismiss National's claims during the initial discovery stages was premature in light of the rationale of *Perma Life* and related cases that the application of equitable doctrines in antitrust cases turns upon factual findings regarding the comparative culpability of the parties. The court should not have precluded National's right of contribution without first giving the parties an opportunity to develop the facts concerning the extent to which National's participation in the relationship was voluntary.

*Id.*

56. *See* 594 F.2d at 1184 (The "problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case"); Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 3 (M.D. Ala. May 18, 1979) (failure of *Professional Beauty* decision to deal with settling defendants is "Achilles heel" of that case).

57. In the wake of *Professional Beauty*, nonsettling defendants in *In re* Eastern Sugar Antitrust Litigation, J.P.M.D.L. 201A (E.D. Pa. April 2, 1979), sought to gain a right of contribution from settling defendants after four years of litigation on the main claim, ninety days before trial, and immediately before the opt-out date for a number of settling defendants. The court denied defendant's motion for leave to amend its answers and join additional parties.

The Middle District of Alabama in Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. May 18, 1979) dismissed nonsettling defendant's motion to assert cross-claims for contribution against settling defendants on May 18, 1979. The *Blue Bird Body* court held that contribution cannot be permitted if all potential antitrust violators are parties to the action and the settling defendants have "paid for their wrongs" by compensating the plaintiffs.

The Eastern District of Pennsylvania again confronted the contribution question in Hedges Enterprises v. Continental Group, Inc., [1979-1] Trade Cas. (CCH) ¶ 62,717 (E.D. Pa.) (*Consumer Bag* Antitrust Litigation). The *Consumer Bag* action dealt exclusively with a section 1 price-fixing charge rather than the section 1 and 2 allegations present in *In re Ampicillin Antitrust Litigation*. A nonsettling defendant filed its motion for leave to amend answers to assert cross-claims for contribution two and one-half years after the litigation commenced, two months after the last of four defendants had settled, and on the eve of the final pretrial settlement conference of the fourth settling defendant. The *Consumer Bag* court reaffirmed the *Eastern Sugar* ruling on almost iden-

for contribution against a defendant whose settlement was pending court approval. Defendant filed the motion nine years after initiation of the original action and three years after one defendant began to negotiate a settlement with plaintiff's class.[59] The district court denied the motion and held that the retroactive effect of granting contribution on settling parties and the added burden and delay imposed on all parties outweighed the possible prejudice to the movants from exposure to full, trebled liability.[60]

The *In re Ampicillin* decision to deny a right of contribution incorporated four factors that did not exist in *Professional Beauty*. First, movants in *In re Ampicillin* were nonsettling defendants whose codefendants had entered into good faith settlements with the plaintiff

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tical grounds—defendant's delay in filing the motion, prejudice to plaintiffs and settling defendants, and the absence of a right of contribution under federal antitrust common law.

Both plaintiffs filed vigorous briefs in opposition to nonsettling defendants' motion to assert cross-claims for contribution. Plaintiffs had no interest in upsetting nearly $7.5 million in settlement agreements. Furthermore, an allowance of contribution would have compelled defendants either to rescind the settlement pacts after discussing their involvement in the conspiracy with plaintiffs or to adhere to the settlements and risk further liability to nonsettling defendants for contribution.

The judge in *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979), denied a nonsettling defendant both leave to amend its answers to assert cross-claims for claim reduction and a right to file a separate action against settling defendants for contribution. The *Fine Paper* court held that a grant of contribution in a multiparty, price-fixing action would not promote the deterrent objectives of the antitrust laws, "since there is no suggestion that there are putative tortfeasors who are not now parties to the action. Indeed, the settling defendants are not about to escape liability but to the contrary, have already contributed to a fund for the benefit of the plaintiffs." *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323, slip op. at 3 (E.D. Pa. Aug. 3, 1979).

A federal district court for the Eastern District of Arkansas stated in a letter opinion on October 1, 1979, that "the *Professional Beauty* case makes it clear that in this circuit pro rata contribution may be enforced among joint tortfeasors in an antitrust action." Little Rock School Dist. v. Borden, Inc., [1980-1] Trade Cas. (CCH) ¶ 63,059, at 77,252 (E.D. Ark. 1979) (letter opinion). A review of a proposed settlement agreement triggered the court's statements concerning contribution. The court hinted that the optimal solution to the contribution issue in the antitrust context would be to encourage settlements and release settling defendants from contribution claims. The court also advocated a carve-out of the nonsettling defendant's exposure to liability by an amount of damages attributable to the settling defendants' relative fault. *See* ANTITRUST & TRADE REG. REP. (BNA) A-30, no. 937, Nov. 1, 1979.

58. 82 F.R.D. 647 (D.D.C. 1979).

59. Movant, however, had settled with one class of plaintiffs.

60. 82 F.R.D. 647, 649 (D.D.C. 1979) (court recognized that nonsettling defendant could institute separate action for contribution against settling defendants, but success of separate action or cross-claim would be speculative); *In re* Ampicillin Antitrust Litigation, J.P.M.D.L. 50 (D.C. Cir. Nov. 1, 1979) (appeal of lower court ruling dismissed for lack of finality).

class.[61] The retroactive effect of permitting contribution among the defendants who had entered into settlement arrangements relying on the absence of a contribution rule[62] would have been severe.[63] Second, movants in *In re Ampicillin* sought to assert cross-claims against existing defendants while defendant in *Professional Beauty* sought to implead an unnamed third party.[64] Third, motions filed by the nonsettling defendants in *In re Ampicillin* were not timely;[65] if granted, the motions would have stultified the proceedings. Lastly, plaintiff in *In re Ampicillin* alleged a multiparty fraudulent patent procurement conspiracy, rather than a limited party, section 2 complaint.

The Fifth Circuit in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.* formally created a split among the circuits on the contribution issue.[66] The *Abraham Construction* affirmance of a lower court contribution ruling[67] rested on facts identical to the third party[68] action in *Professional Beauty*. In *Abraham Construction* and *Professional Beauty* a divided panel of justices addressed the contribution question prospectively.[69] The litigants had not entered into settlements; thus, the belatedness of the motion or the effect of the ruling on settling parties was not in controversy.[70] *Abraham Construction*, however, involved an alleged conspiratorial price-fixing scheme as opposed

61. *See* 82 F.R.D. at 650 (court should promote rather than hinder settlements in antitrust actions).

62. *See* Defendant's (Beecham Group) Motion in Opposition to Bristol-Myer's (nonsettling defendant) Leave to Amend Answers to Assert Cross-Claims at 9, *In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979) (settling defendant's strategy in settlement negotiations would have been drastically different had nonsettling defendant asserted its motion for contribution in a timely fashion).

63. *See* 82 F.R.D. at 648 (both plaintiffs and settling defendants would lose benefit of settlement bargain if motion granted).

64. *See id.* at 651 (allowance of contribution would greatly complicate and delay the proceedings).

65. *See id.* at 649 ("movant has been lethargic if in nine years it was unable to uncover possible grounds for contribution").

66. 604 F.2d 897 (5th Cir. 1979), *petition for cert. granted sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 49 U.S.L.W. 3321 (U.S. Nov. 4, 1980) (No. 79-1144).

67. No. 78-178 (E.D. La. Mar. 29, 1979).

68. Neither the *Abraham Construction* court nor the parties' briefs offered an explanation for plaintiff's failure to name Radcliff Materials, Inc., Jimco, Inc., or OKC Dredging, Inc., to the original action. *But see* note 50 *supra*; note 90 *infra*.

69. *Compare* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979) ("problem of how to treat the joint tortfeasor who has settled in good faith is not present in this case") *with In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647, 649 (D.D.C. 1979) (allowance of contribution would nullify preexisting settlement pacts).

70. *See, e.g., In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979).

to a dealer termination suit.[71]

The *Abraham Construction* court expressly disagreed with the majority opinion in *Professional Beauty* and refused to alter the traditional federal common-law rule against contribution for intentional antitrust tortfeasors, absent an explicit congressional mandate.[72] A partial dissent in *Abraham Construction* called for a limited contribution rule in cases that involve unintentional violators of the antitrust laws.[73]

The Fifth Circuit reiterated its contribution posture in *In re Corrugated Container Antitrust Litigation*.[74] Several defendants in the *Corrugated Container* litigation, as in *In re Ampicillin*, entered into costly settlements[75] with plaintiff class in a multiparty section 1 action.[76] The nonsettling defendants, in a questionable manner, sought to amend

71. *See* Sherman Antitrust Act, 15 U.S.C. § 1 (1976).

72. *See* 604 F.2d 897, 905-06 (5th Cir. 1979). *See also* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1190 (8th Cir. 1979) (Hanson, J., dissenting).

73. *See* 604 F.2d 897, 908 (5th Cir. 1979) (Morgan, J., dissenting). *But see* notes 15 and 16 *supra*; notes 127-33 *infra* and accompanying text (questioning the establishment of different contribution rules based on existence or absence of intent).

74. 84 F.R.D. 40 (S.D. Tex.), *aff'd*, No. 79-2439 (5th Cir. Oct. 30, 1979) (order affirming lower court denial of nonsettling defendant's motion to file cross-claims for contribution in conspiratorial, price-fixing action).

On September 13, 1980, a district court jury on remand awarded plaintiffs a 350 million dollar pretrebling verdict against the four remaining nonsettling defendants. Three of the defendants settled with plaintiffs after the jury award, thus imposing a 1.5 billion dollar judgment on the lone, remaining nonsettling defendant, Mead Corporation. *See* No. 79-2439 (S.D. Tex. Sept. 13, 1980).

75. *See* ANTITRUST & TRADE REG. REP. (BNA) A-1, no. 919, June 21, 1979. Over twenty defendants, representing approximately 80% of the corrugated box market, executed the largest group antitrust settlement to date in an amount in excess of $300 million.

> Prior to class certification, two defendants had reached relatively inexpensive settlements with the plaintiffs. Between December 1977 and March 1978, plaintiffs extracted settlements from an additional twenty defendants. These settlements were based on market share, *but the settlement price per market share escalated with each new settlement.* Plaintiffs justified this strategy on the basis of the assumed increasing risk of liability faced by defendants who had not yet settled, but who might be liable for damages based on the sales of the settling defendants.

Petition for Rehearing by Weyerhaeuser Co. and Williamette Industries, Inc. at 2, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979) (emphasis added). *See also* Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 6, 7, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979). "We [appellees] agree that the 'settlement stampede' in this case was brought about by the no-contribution rule; there is no question that [appellees] paid in settlement amounts far exceeding their assessments of plaintiff's claims." *Id.*

76. Plaintiffs alleged that 37 named defendants conspired over an 18 year period to fix prices in the corrugated container and sheet industry nationwide in violation of section 1 of the Sherman Act. Sales of corrugated materials are estimated at $4.5 billion annually. Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 6, 7, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979).

their answers to assert cross-claims for contribution against settling defendants.[77] The deleterious effect of a retroactive rule on pre-existing settlements compelled a unanimous Fifth Circuit[78] to affirm a lower court ruling and deny the nonsettling defendants' motion to amend their answers.[79]

The *Corrugated Container* court rejected a "carve-out" rule as an alternative to contribution because the trial court had not expressly ruled on the "carve-out" issue.[80] The carve-out theory suggests that plaintiffs' claim against the nonsettling defendants should be reduced, prior to trebling, by a monetary amount computed with reference to the settlement figure.[81]

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77. *See* Transcript of pretrial hearing at 81, *In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979) (Singleton, J.) (evidence of bad faith in nonsettling defendant's delay in filing motions to assert cross-claims for contribution). The trial judge stated that "to some extent, I am convinced that the nonsettling defendants participated in joint defense efforts . . . without revealing their plans to seek contribution." *Id.* Mead Corp. filed a separate suit for contribution against settling defendants, rather than seeking contribution through cross-claim. (No. 4-79-245 (D. Minn. July 10, 1979)). Although dismissed, Mead Corp. filed a motion for reconsideration. (No. 879-1436 (S.D. Tex. Jan. 3, 1980)). This motion maintains the vitality of the contribution question in the *Corrugated Container* litigation despite the Supreme Court's dismissal of the certiori petition, 49 U.S.L.W. 3288 (U.S. Oct. 20, 1980) (No. 79-972).

78. *Compare In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979) (unanimous) *with* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (divided panel).

79. *Compare In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), (contribution may be appropriate in some types of antitrust cases that do not involve multiple parties and would not entail a harsh retroactive effect of a ruling in support of contribution), *aff'd per curiam*, No. 79-2439 (5th Cir. Oct. 30, 1979) *with* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 907 (Morgan, J., dissenting) (contribution may be appropriate in cases involving unintentional antitrust violations). *See also In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 42 (S.D. Tex. 1979) (although contribution might be possible in some antitrust actions, retroactive effect of allowing contribution in this case precludes granting of the nonsettling defendant's motion), *aff'd per curiam*, No. 79-2439 (5th Cir. Oct. 30, 1979).

> Such a rule [of contribution] should not be applied retroactively where the settling litigants have relied on past precedent in reaching agreements unvarying with plaintiffs' class and in undertaking joint defense efforts which may have worked very substantially to their detriment should (*sic*) those defendants who have not chosen to settle be allowed to use information gained under the guise of mutual aid to bring cross claims now [would seriously damage settling defendants].

*Id.* Furthermore, settling defendants, under the terms of their settlements, cooperated with plaintiffs' class in the plaintiffs' discovery process. For the court to permit settling defendants to return to their role as active participants in the case would prejudice plaintiffs' class. *See generally* notes 61-64 *supra* and accompanying text.

80. *See In re* Corrugated Container Antitrust Litigation, No. 79-2439, slip op. at 2 (5th Cir. Oct. 30, 1979).

81. *See* notes 234-46 *infra* and accompanying text. *See also* Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 13, *In re* Corrugated Container Antitrust Litigation, No. 79-

The Fifth Circuit again rejected a contribution motion[82] in *In re Beef Industry Antitrust Litigation*.[83] In the *Beef Industry* litigation, a defendant charged with section 1 and 2 violations executed a settlement agreement out of financial necessity.[84] The nonsettling defendants sought to file a motion to amend their answers to assert cross-claims for contribution four days before the final court approval hearing.[85] A unanimous Fifth Circuit[86] reaffirmed its previous no contribution posture with a brief reference to *Abraham Construction*.[87]

The most recent circuit court to consider the issue denied contribution to a singularly named defendant who was assessed the entire liability for a price-fixing scheme.[88] The lone defendant in *Olson Farms v. Safeway Stores, Inc. (Olson Farms I)* commanded only eleven percent of the market shared by other potential conspirators.[89] Plaintiff in the main claim, Cackling Acres, Inc., nevertheless chose to file suit against Olson Farms rather than a potential group of more than twenty alleged co-conspirators.[90] The lone defendant sought contribution in a sepa-

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2439 (5th Cir. Oct. 30, 1979) (appellees "agree that allocation by market share is appropriate for a case in which there are allegations of horizontal, industry-wide price-fixing such as this case"); notes 247-60 *infra* and accompanying text (pro-rata and other methods of contribution calculation).

82. *See also* notes 66-81 *supra* and accompanying text.

83. *In re* Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3615 (U.S. Feb. 6, 1980) (No. 79-1214).

84. *See* Brief for Appellees at 4, *In re* Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979). Spencer Foods, Inc. (appellee) was on the brink of financial ruin. Plaintiffs were quite anxious to recover whatever monies were available from Spencer Foods while the latter remained solvent because judgment against Spencer Foods would have resulted in their bankruptcy. *Id.*

85. *See* FED. R. CIV. P. 23(e). *See also* note 64 *supra* and accompanying text.

86. *See* note 77 *supra*.

87. *In re* Beef Industry Antitrust Litigation, 607 F.2d 167, 183 (5th Cir. 1979).

88. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) (divided panel). The defendant argued that it was merely a "passive participant" in the scheme. *Id.* at ¶ 62,995, at 79,701. The Tenth Circuit disagreed, however, and found that the district court had properly labeled Olson Farms an intentional violator of the antitrust laws. *Id. See also* note 16 *supra*.

89. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,700 (10th Cir.).

90. *See* Cackling Acres, Inc. v. Olson Farms, Inc., No. C-296-71 (D. Utah Mar. 26, 1974), *aff'd*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). Appellants alleged that Cackling Acres (plaintiff) did not name Safeway Stores and other alleged co-conspirators as defendants in the original action because of "contractual business obligations between those parties [plaintiff and unnamed alleged co-conspirator defendant] and a desire to weaken Olson Farms as a prelude to the plan to enter into competition with Olson Farms through a cooperative distributorship." Brief for Appellants at 28, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.). Cackling Acres contended that they did not name certain other

rate action, rather than through a cross-claim, against four principal co-conspirators after the court in the main claim rendered a judgment in excess of two million dollars.[91] The District Court of Utah denied a right of contribution to Olson Farms.[92]

On appeal, the Tenth Circuit reasoned that allowance of contribution in a separate action, despite the limited number of litigants,[93] would necessitate a complete retrial of the merits of the main claim ten years after the conspiracy arose.[94] Furthermore, the court concluded that the allowance of contribution would prolong the litigation *ad infinitum* by permitting four defendants named in the second action to seek contribution in subsequent actions from fifteen remaining alleged co-conspirators.[95] The majority applied the maxim that courts should be unwilling to aid the intentional wrongdoer.[96] The court stated that Congress, not the courts, should resolve the contribution question.[97] A partial dissent in *Olson Farms I* found inequitable the idea of holding one co-conspirator, who shared in only eleven percent of the market,[98] fully liable for a trebled judgment while the remaining nineteen alleged co-conspirators escaped liability.[99]

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egg purchasers as defendants because "suing the other distributors . . . would have disrupted the ongoing business relationships between certain of the plaintiffs and certain of the distributors. . . . We [plaintiffs] were doing business with them [unnamed defendants], and they were taking our eggs. And it's pretty hard [to sue] when you have 1,200 cases [ of eggs] on the market to be dropped." *See* Appellant's Petition for Rehearing at 4, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.). *See also* Brief for Appellant at 5, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (plaintiff did not file a claim against La Maur for "business reasons").

91. *See* Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (*Cackling Acres I*). The majority opinion in *Olson Farms* recognized that the unintentional violator of the antitrust laws might merit different treatment from the intentional wrongdoer in the allowance of contribution. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,704 (10th Cir.).

92. *See* [1977-2] Trade Cas. (CCH) ¶ 61,698 (D. Utah).

93. Olson Farms named four other alleged co-conspirators in addition to Safeway Stores in the separate action.

94. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,708 (10th Cir.) (Holloway, J., concurring in part and dissenting in part).

95. *See id.* at 79,707.

96. [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,701 (10th Cir.).

97. *See id.* at 79,704.

98. *See id.* at 79,707 (Holloway, J., concurring in part and dissenting in part).

99. *See id. Compare* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979) (fairness requires contribution among intentional tortfeasors under these particular circumstances) *with* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979) (Morgan, J., dissenting) (contribution between unintentional

A divided panel of the Tenth Circuit again denied contribution between Olson Farms and the same alleged co-conspirators in a second price-fixing action[100] brought by Cackling Acres.[101] Defendant in *Olson Farms, Inc. v. Safeway Stores, Inc. (Olson Farms II)*[102] sought contribution by cross-claim[103] from named defendants for a settlement agreement executed between Olson Farms and plaintiff.[104]

In *Olson Farms II* the Tenth Circuit reaffirmed[105] its desire to await congressional action on the contribution issue.[106] The *Olson Farms II* court also noted that contribution might result in delays and procedural and substantive complications.[107] Finally, the Tenth Circuit in *Olson Farms II* rejected Olson Farms' attempt to distinguish *Olson Farms I* on procedural grounds. The court found irrelevant the fact that Olson Farms asserted its claim for contribution in the main action rather than in a separate suit.[108] Justice Holloway reaffirmed his partial dissent in

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tortfeasors may be permissible) *and In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex.) (contribution might be allowable in cases that do not involve multiple parties or previously executed settlement agreements), *aff'd per curiam*, No. 79-2439 (5th Cir. Oct. 30, 1979).

100. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1976).

101. Cackling Acres, Inc. v. Olson Farms, Inc., No. C-75-472 (D. Utah Dec. 19, 1977) (*Cackling Acres II*).

102. Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773 (10th Cir. Nov. 8, 1979) (*Olson Farms II*).

103. In *Olson Farms II* Olson Farms attempted to assert cross-claims for contribution against three defendants named in *Cackling Acres II*. Cackling Acres failed again to name Safeway Stores as a defendant in the second action. In *Olson Farms II* Olson Farms unsuccessfully sought to implead Safeway Stores. The appellant in *Olson Farms I* filed a separate action for contribution against the defendants unnamed in *Cackling Acres I*.

104. *See* Brief for Appellees at 18, Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773 (10th Cir. Nov. 8, 1979).

> It would be one thing to permit contribution where an antitrust action has been tried to judgment . . . but, it would be quite another thing to permit contribution where, as here, no judgment of liability has ever been rendered, and the action has been dismissed by the only antitrust plaintiffs that Congress has given standing to sue.

*Id.*

105. *See* text accompanying note 95 *supra*.

106. No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979) (*Olson Farms II*). *See also* note 97 *supra* and accompanying text.

107. *See* No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979) (granting of motion for contribution would greatly complicate adjudication of main claim and would have serious retroactive effect on settlements negotiated between cross-claimants and plaintiffs). *See* Brief for Appellees at 19, Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773 (10th Cir. Nov. 8, 1979) (granting of motion would place heavy burden on the court).

108. *See* Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979).

*Olson Farms I*[109] and advocated the application of a limited contribution rule when equitable circumstances merit its use.[110]

In the event that contribution is allowed under the antitrust laws, courts will need to determine the appropriate method of calculating contribution. The *Professional Beauty* court granted contribution on a pro rata (per capita) basis.[111] The amount of contribution paid by a defendant in a pro rata method depends on the number of wrongdoers. The *Gomes* court adopted a relative (comparative) fault measure.[112] The relative fault measure demands that each defendant absorb the percentage of the judgment that best approximates its relative fault.

The court in *Olson Farms I*, in dictum, proposed a comparative benefit analysis.[113] A comparative benefit analysis requires a defendant to accept a share of the judgment that reflects profits received as a result of the violation. Contribution based on a defendant's market share may be an appropriate method in a multiparty, horizontal price-fixing conspiracy because all members of the conspiracy adhere to the same illegal agreement.[114]

## III. CONDITIONS OF ANALYSIS

An effective resolution of the contribution question requires acceptance of several fundamental principles. First, certainty of the law plays an integral role in the implementation and enforcement of the antitrust laws.[115] Corporate officials must be certain of the possible adverse con-

109. *See* note 99 *supra* and accompanying text.

110. *See* Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773, slip op. at 5 (10th Cir. Nov. 8, 1979) (Holloway, J., concurring in part and dissenting in part).

111. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 n.4 (8th Cir. 1979) (benefits of pro-rata technique are its deterrent value and simplicity of application). *Compare* Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delecto, Indemnification and Contribution*, 120 U. PA. L. REV. 597, 650 (1972) (contribution in securities cases is generally administered on pro-rata basis) *with* ABA, REPORT OF THE CIVIL PRACTICE AND PROCEDURE COMMITTEE TO THE SECTION ON ANTITRUST LAW REGARDING RIGHTS OF CONTRIBUTION AMONG ANTITRUST DEFENDANTS at 21 (Aug. 14, 1979) (numerous drawbacks of pro-rata method).

112. 394 F.2d 465, 468-69 (3d Cir. 1968). *See also* United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (comparative fault measure used in admiralty); RESTATEMENT (SECOND) OF TORTS § 886(A), comment h (1979).

113. *See* [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,704 (10th Cir.).

114. *See* ABA MAJORITY REPORT, *supra* note 9, at 3; S. REP. No. 428, 96th Cong., 1st Sess. 22 n.7 (1979) (market share method is also easily administered).

115. ABA MAJORITY REPORT, *supra* note 9, at 9. *See* Brief for Appelles (Menasha Corp. & Stone Container Corp.) at 6, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th

sequences of a business decision. Members of the antitrust bar must be equally certain of the law to properly counsel their clients. Consequently, a decisive answer to the contribution problem is critical.[116]

Resolution of the contribution issue also must comport with the purpose of the antitrust laws.[117] Blind adherence to federal common law will not result in a well reasoned solution.[118] Alternatively, an analysis based entirely on statutory interpretation would exclude consideration of the realities of antitrust practice, judicial insights to the contribution issue, and equitable concerns.[119]

The contribution dilemma must be resolved prospectively without the presence of proposed settlements.[120] The arguments advanced by litigants and courts in cases that have dealt with contribution sought in an untimely motion[121] or with contribution's effect on pending settlements[122] should not be dispositive.

The primary concern in antitrust practice is with settlement.[123] The

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Cir. Oct. 30, 1979) (affirming lower court's dismissal of motions to file cross-claims for contribution). "There is a need for certainty in the law affecting settlement. The settlement of a lawsuit is designed to achieve civil peace, but peace necessarily includes certainty of result. If the law is genuinely to be that settlements are favored, then the law must be clear and certain." *Id.*

116. *See* Nat'l L.J., Nov. 19, 1979, at 23, col. 4 (*Professional Beauty* case-by-case method of resolving contribution question is wholly inadequate to insure plaintiffs' and defendants' interests).

117. *See* Standard Oil Co. v. United States, 221 U.S. 1, 58 (1910) (purpose of antitrust laws is to protect public welfare by preserving competition and promoting unfettered allocation of resources in marketplace). *See also* Pfizer, Inc. v. Government of India, 434 U.S. 308, 314 (1978) (antitrust laws compensate injured parties and deprive wrongdoers of fruits of their illegalities); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (antitrust laws serve as deterrent to anticompetitive practices); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) (private treble damage action greatest deterrent to unscrupulous businessmen); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) (goal of antitrust laws to deter business practices that harm marketplace); 38 MINN. L. REV. 883, 886 (1954) (national antitrust policy to favor competition and encourage private antitrust suits).

118. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting).

119. *See* notes 20-21 *supra* and accompanying text.

120. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) (*Olson Farms I*); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979), *petition for cert. granted sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 49 U.S.L.W. 3321 (U.S. Nov. 4, 1980) (No. 79-1144); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979); Little Rock School Dist. v. Borden, Inc., [1980-1] Trade Cas. (CCH) ¶ 63,059 (E.D. Ark. 1979) (letter opinion).

121. *See* notes 57, 59, 66 *supra* and accompanying text.

122. *See* notes 59, 61, 63, 79, 107 *supra* and accompanying text.

123. *See* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234-35 (5th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (preference for settlement in antitrust litigation). "Plaintiffs have no interest

settlement alternative provides the injured plaintiff with some measure of recovery without the attendant burdens of a prolonged trial.[124] Additionally, a small corporate defendant may decide that defending against the allegation is financially unfeasible because of the expense of litigation.[125] The issues in need of judicial attention without the settlement alternative would overcome the judiciary and thus impair speedy enforcement of the antitrust laws.[126]

Resolution of the contribution question also may hinge on the type of antitrust infraction.[127] The unintentional violator may be more deserving of contribution than the intentional antitrust tortfeasor.[128] The courts could treat price-fixing co-conspirators differently from participants in an illegal territorial allocation scheme.[129] The small corporate defendant might merit contribution more than a large corporate defendant.[130] The feasibility of a rule that allows contribution under some conditions and not under other circumstances (split-rule), however, has been seriously questioned.[131] The objectives of the antitrust laws would not be furthered by adopting contribution under some sections of the antitrust laws and not under others.[132] A "split-rule" would lessen the desired certainty and deterrent value of a contribution

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in forcing a small company to bear the burden of lengthy and extraordinarily expensive litigation and the risk of bankruptcy." S. REP. No. 428, 96th Cong., 1st Sess. 38 (1979). Plaintiffs also may require settlements to finance the continuance of litigation.

124. *See* Memorandum of Hedges Enterprises (plaintiff) Contra Motion of Defendant (American Bag and Paper Corp.) to Amend Answers and Join Additional Parties at 8, Hedges Enterprises v. Continental Group, Inc., [1979-1] Trade Cas. (CCH) ¶ 62,717 (E.D. Pa.).

125. *See* note 84 *supra* and accompanying text; Brief for Appellees (Owens-Illinois, Inc.) at 2, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979) (appellees settled "to avoid thereby the trouble and expense of further litigation and the possibility . . . of potential judgment liability for the massive amounts being claimed by plaintiffs").

126. *See* Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972) (strong judicial preference for settlements in antitrust class action litigation). *See also* note 47 *supra.*

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

128. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,704 (10th Cir.); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 908 (5th Cir. 1979) (Morgan, J., dissenting).

129. *See* S. 1468, 96th Cong., 1st Sess. (1979). *See also* Nat'l L.J., Nov. 19, 1979, at 23, col. 4 (if contribution agreed upon, its implementation should be carried out gradually, possibly beginning in price-fixing arena). The defendants charged under section 2 in *Professional Beauty* would not have been granted a right of contribution under S. 1468.

130. S. REP. No. 428, 96th Cong., 1st Sess. 14 (1979) (small businesses an "endangered species").

131. *See* notes 15 and 16 *supra.*

132. ABA MAJORITY REPORT, *supra* note 9, at 5, 12.

rule.[133]

It also has been argued that contribution should be allowed only in cross-claims against parties named as defendants in the action[134] or, alternatively, in a separate action distinct from the main claim.[135] The inconclusiveness of either proposal mandates that a bifurcated contribution rule based on procedural variances should not be adopted.[136]

## IV. PRIMARY ARGUMENTS ADVANCED IN THE CONTRIBUTION DEBATE

Proponents offer three principle arguments in support of contribution. First, a no contribution rule promotes collusion among plaintiffs and defendants who are skilled at the "settlement game."[137] Collusion

133. *See* note 115 *supra* and accompanying text. The wrongdoer and defense counsel are often unsure of the exact categorization of the illegal conduct until the trier of fact has labeled the violation a section 1, section 2, or Clayton Act infraction. Thus, the desired certainty and deterrent value under a split contribution rule would be severely diminished.

134. *See* Memorandum by Defendant (Potlach Corp.) Concerning the Right of Treble Damage Antitrust Defendants to Contribution at 27, 30, *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979).

135. *See* Brief for Appellant at 29, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.). *See also* note 104 *supra*.

136. *See* Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979). *See also In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 42 (S.D. Tex.), *aff'd per curiam*, No. 79-2439 (Oct. 30, 1979).

137. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185-86 (8th Cir. 1979). *See also* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,706 (10th Cir.) (Holloway, J., concurring in part and dissenting in part).

A frequent example of the "settlement game" is the *Corrugated Container* litigation.

> The strategy of the plaintiffs was to break the defendants' ranks by offering discounted settlements to a few initially in order to pressure subsequent settlements at a higher price. The plaintiffs were successful, settling with the first defendant at *$500,000.00 per percentage point* of market share, and the second at *$1 million*. . . . Since this [settling] defendant was now protected from having to share in paying off that sum [judgment], the liability of the other defendants thus increased for all practical purposes by that [settlement] amount overnight. This dramatic escalation in liability increased the settlement pressure as other defendants—now paying at a rate of $2 million a point and rising—sought to protect themselves. Because the damages attributable to these settling defendants also remained in the case, the damage exposure and settlement price thus continued to increase greatly for nonsettling defendants every time another defendant settled.
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> . . . .
>
> The upshot was that Green Bay Packaging, all the while protesting its innocence, was forced into a settlement which was proportionately more expensive than that borne by those who settled out early. More specifically, Green Bay settled at *$3.5 million a point* for a total of $5.5 million. A small, unindicted family-owned business thus had to pay at a rate three and one-half times greater than a company which pleaded nolo and which had a market share nearly five times larger.

S. REP. NO. 428, 96th Cong., 1st Sess. 14, 15 (1979) (emphasis added).

may result in a favorable, early settlement agreement[138] or in plaintiff's failure to name a party as a defendant in the original action.[139] Both types of collusive practices work to the detriment of less culpable, named defendants.

Critics of contribution reply that the Federal Rules of Civil Procedure currently guard against the possibility of collusive settlement agreements by requiring court approval of settlements.[140] Furthermore, evidence of the frequency of collusive activities under the present no contribution rule is extremely sketchy.[141] A contribution rule may actually aggravate the incidence of collusive practices among litigants by compelling defendants to participate in sharing agreements.[142]

The second chief contention of advocates of a contribution rule is that the current state of the law coerces defendants into settlement ar-

138. *See* Address by Jonathan Rose, American Bar Association Antitrust Section Meeting (Aug. 13, 1979).

139. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979) ("a large or powerful tortfeasor has sufficient economic influence to prevent a plaintiff from including it as a defendant"); Brief for Appellant at 19, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (plaintiff will refuse to name potential defendant because latter has muscle in the business community or plaintiff does not wish to alienate valuable witness); *id.* at 7 (plaintiffs considered La Maur a wrongdoer but refrained from filing suit against La Maur because plaintiff's line of business had been reinstated). *But see* note 90 *supra.*

Plaintiff's business relationships, protectable under the current no contribution rule, may be endangered if defendants are allowed to implead for contribution. Plaintiffs may be forced to forego suit entirely to perpetuate business ties, rather than allow named defendants to implead and aggravate parties whom plaintiff requires to remain in business.

140. *See In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323, slip op. at 3 (E.D. Pa. Aug. 3, 1979); FED. R. CIV. P. 23(e). *See also* Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974) (federal courts procedurally well equipped to inspect intentions behind settlement), *cert. denied,* 421 U.S. 978 (1975).

141. *See* ABA MINORITY REPORT, *supra* note 9, at 1; S. REP. NO. 428, 96th Cong., 1st Sess. 37 (1979). *See also* Alabama v. Blue Bird Body Co., 75-23-N, slip op. at 4 (M.D. Ala. May 18, 1979) (collusion cannot be factor in resolution of contribution issue when plaintiffs have offered same settlement package to all defendants).

If a nonsettling defendant could substantiate the collusion, he "may well have an independent cause of action." Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 902 (5th Cir. 1979). Further, a plaintiff's failure to name an alleged co-conspirator a party to the action is not necessarily for fraudulent purposes. *See* note 90 *supra.*

142. *See* Transcript of pretrial hearing at 81, *In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979) (Singleton, J.) ("I'm persuaded that the non-settling defendants participated in joint defense efforts . . . without revealing their plans to allege to claim contribution").

rangements.[143] The actual risk of a nonsettling defendant's liability increases inversely to the number of nonsettling defendants because fewer defendants are left to share in the judgment.[144] Consequently, a nonsettling defendant may be coerced into negotiating a settlement irrespective of his culpability.[145] Nonsettling defendants face a "Hobson's choice of paying an extortionate settlement or risking a judgment in the billions of dollars if they go to trial."[146] Conversely, opponents of contribution argue that a contribution rule also may coerce defendants into settlement. The adoption of a contribution rule would encourage defendants to enter into "sharing agreements" (joint settlement agreements).[147] Larger, more powerful defendants therefore might exert undue influence on the defendant who maintains innocence and does not wish to enter a "sharing agreement." Under the present no contribution rule, a litigant cannot coerce a defendant to settle because a defendant always possesses an opportunity to force a trial on the merits.[148]

The third fundamental plea of the contribution proponents is that equity and fairness cannot allow one wrongdoer to absorb a trebled judgment[149] for wrongs committed by equally, or perhaps more culpable, parties.[150] A contribution rule would encourage defendants to ex-

143. *See In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex.), *aff'd per curiam*, No. 79-2439 (5th Cir. Oct. 30, 1979).

144. *See* Brief for Appellees (Weyerhaeuser Corp. and Williamette Industries) at 8, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979).

145. Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 4, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979); ABA MAJORITY REPORT, *supra* note 9, at 4 (small, regional defendants maintaining total innocence coerced to settle).

146. Petition for Rehearing (Weyerhaeuser Corp. and Williamette Industries) at 7, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979).

147. "The experience of parties where such [sharing] agreements have been in effect has been that settlement discussions occur on a more rational basis, with liability logically related to culpability and impact upon the plaintiff, and settlement is thus promoted." ABA MAJORITY REPORT, *supra* note 9, at 7. *But see id.* at 3 ("there are many occasions when sharing agreements cannot be recommended in a client's best interests" and are often impractical to achieve); S. REP. No. 428, 96th Cong., 1st Sess. 2 (1979) (sharing agreements difficult to accommodate in nonconcentrated industries).

148. *1979 Hearings, supra* note 54, at 101 (statement of Mr. Harold Kohn).

149. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185-86 (8th Cir. 1979); Brief for Appellants at 29, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979); D. DOBBS, LAW OF REMEDIES 705 (1973) (under present no contribution rule, one intentional antitrust violator gets off scot-free and is unjustly enriched at expense of nonsettling defendant).

150. *See* Memorandum of Mead Corp. Concerning the Issue of Contribution at 7, *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979). "[T]he lesson is simple [under

pose and implead the entire conspiratorial network to disperse the judgments among all members of the conspiracy.[151] Conversely, opponents contend that courts should deny motions to implead additional defendants for the purpose of contribution. They contend that courts should not aid violators of the antitrust laws by allowing intentional antitrust tortfeasors to seek contribution from fellow wrongdoers.[152]

The most frequently voiced concern in opposition to contribution is that defendants lose all incentive to negotiate a settlement if faced with continuing liability to nonsettling defendants.[153] Consequently, a contribution rule would encourage defendants to remain in the action and defend against liability.[154] Plaintiffs also have expressed a desire to retain the no contribution rule to maximize plaintiff's ability to receive settlements.[155]

Proponents of contribution refer to the areas of securities and tort litigation to substantiate their claim that contribution will not affect the incidence of settlements.[156] Instead, a contribution rule might foster a desire among defendants to settle with plaintiffs as one entity.[157]

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no contribution rule]: If guilty, settle and settle early, because you can get a lower price and keep the vast bulk of the profits made from the conspiracy." Memorandum of Westvaco Corp. in Opposition to Motions to Dismiss its Cross Claims for Contribution at 45, *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979).

151. *See* Corbett, *supra* note 2, at 116, 141.

152. *See* RESTATEMENT (SECOND) OF TORTS § 886(A)(3), comment j (1979) (no man will be permitted to base a cause of action on his own intentional tort); ANTITRUST & TRADE REG. REP. (BNA) B-3, no. 917, June 7, 1979 ("violators of the Sherman Act are subject to felony prosecution, and it should be contrary to public policy for federal courts to decide and apportion rights among 'felons' "). *See also* Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 4 (M.D. Ala. May 18, 1979) (fairness argument in support of contribution dissipates when all alleged violators are named in action and parties have executed good faith settlements).

153. *See* S. REP. No. 428, 96th Cong., 1st Sess. 19 (1979) (everyone will not "rush to settle" under the proposed S. 1468). *See also* Brief for Appellees at 21 n.12, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) ("[appellant's] bald assertion . . . that settlements would not be impaired [by a contribution rule] defies common sense").

154. *See In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323, slip. op. at 3 (E.D. Pa. Aug. 3, 1979). *See also* Rhodes, *supra* note 9, at 14 (July-Aug., 1979).

155. *See* Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 5 (M.D. Ala. May 18, 1979) ("In antitrust actions where the litigation is almost certain to be complicated, expensive and lengthy, encouraging such settlements puts the plaintiff in a much better position to recover damages against at least some defendants and thereby finance continued litigation against the remaining defendants").

156. *See* Nat'l L.J., Nov. 19, 1979, at 23, col. 3.

157. *See* note 143 *supra*; Memorandum for Defendant (Beecham Group) in Opposition to Bristol-Myer's Motion for Leave to Amend Answers to Assert Cross-Claims for Contribution at 9-

## V. SECONDARY POLICY ISSUES ADVANCED IN THE CONTRIBUTION DEBATE

Participants in the contribution debate have raised a myriad of policy and constitutional arguments in support of their respective stances. Champions of contribution invariably point to current trends in federal common law to buttress contribution in the antitrust field.[158] On closer examination, most of the trends are inappropriate to the analysis of contribution within the context of the antitrust laws.[159]

Cases that have granted contribution under the Federal Employer's Liability Act[160] apply state law, not federal common law, to justify the allowance of contribution.[161] Actions decided under the Civil Rights Act[162] have summarily allowed contribution without questioning the propriety of a contribution rule.[163] In addition, the burden imposed on the trial process in civil rights actions is minimal in comparison to antitrust contribution.[164]

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10, *In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979) (defendants should be encouraged to settle as group to minimize collusion).

Defendant in *In re Fine Paper Antitrust Litigation* suggested that a settling defendant might seek indemnification from the plaintiff for any amount that the settling defendant would contribute to the nonsettling defendants. *See* Memorandum of Westvaco Corp. in Opposition to Motions to Dismiss its Cross-Claims for Contribution at 14, *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979). The indemnification approach is an implicit recognition of the carve-out rule. *See* notes 234-266 *infra* and accompanying text.

158. *See* notes 22-26 *supra* and accompanying text (negligence trend); notes 27-30 *supra* (admiralty trend); notes 31-34 *supra* and accompanying text (Federal Employer's Liability Act, Federal Tort Claims Act, Civil Rights Act cases); notes 35-37 *supra* (securities law cases). *See also* RESTATEMENT (SECOND) OF TORTS § 886(A), comment a (1979); UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT (1977).

159. *See* W. PROSSER, LAW OF TORTS 307 (4th ed. 1971) (trend to allow contribution only among equally unintentional tortfeasors); RESTATEMENT (SECOND) OF TORTS § 886(A)(3) (1979).

160. *See* Employer's Liability Act of 1939, § 1, Pub. L. No. 76-382, 53 Stat. 1404 (codified at 45 U.S.C. §§ 51, 60 (1976)).

161. *See* note 34 *supra*.

162. *See* Civil Rights Act of 1964, § 701, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000(e)(1)-(15) (1976)).

163. *See* Brief for Appellee at 21, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979). *But see* Younger v. Glamgoran Pipe & Foundry Co., 418 F. Supp. 743, 797 (W.D. Va. 1976) (no federal right of contribution in sex discrimination case).

164. *Compare* Brief for Appellant at 26, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (defendant who seeks contribution in Title VII case need only prove existence of employer-union collective bargaining agreement to impose liability upon third-party defendant for contribution) *with In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex. 1979) (additional burdens imposed on court in evaluating claim for contribution in antitrust context), *aff'd per curiam*, No. 79-2439 (5th Cir. Oct. 30, 1979).

Cases arising under the Federal Tort Claims Act[165] also have applied state law to justify contribution.[166] The circuit court decisions in *Gomes v. Brodhurst*[167] and *Knell v. Feltman*[168] are often incorrectly cited to substantiate the proposition that the federal judiciary should adopt contribution among antitrust tortfeasors. Both opinions apply local law, not federal common law,[169] to a negligent, rather than intentional, tort action.[170] *Kohr v. Allegheny Airlines, Inc.*[171] is the only opinion in which a federal court enunciated a federal common-law rule of contribution among negligent tortfeasors. The *Kohr* court, however, did not address the allowance of contribution between intentional tortfeasors.[172]

Proponents of contribution frequently refer to the Supreme Court's adoption of a contribution rule in the federal common law of admiralty to support an argument in favor of antitrust contribution.[173] Commentators, however, have uniformly recognized that the law of admiralty is an historical aberration of the federal common law.[174]

The most compelling trend of federal judicial support for contribution among intentional antitrust tortfeasors exists in the securities law area.[175] The allowance of contribution in the highly complex and federally regulated security laws, which also permit a private cause of action, provides a reasonable analogy to the antitrust laws.[176] The rule of *in pari materia* has allowed courts to award contribution under those

165. *See* Federal Tort Claims Act of 1946, Pub. L. No. 80-773, 62 Stat. 982 (codified at 28 U.S.C. §§ 2671-2680 (1976)).

166. *See* note 34 *supra*.

167. 394 F.2d 465 (3d Cir. 1967).

168. 174 F.2d 662 (D.C. Cir. 1949).

169. 394 F.2d 465, 467 (3d Cir. 1967) (application of Virgin Islands law); 174 F.2d 662 (D.C. Cir. 1949) (application of District of Columbia law).

170. *See* note 26 *supra* and accompanying text.

171. 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

172. *Id.* (negligent aviation disaster).

173. *See* notes 27-30 *supra* and accompanying text.

174. *See* 1 E. BENEDICT, ON ADMIRALTY § 104 (7th ed. 1974) (American admiralty courts frequently search for supportive rules from any international jurisdiction); G. GILSOMER & C. BLACK, THE LAW OF ADMIRALTY 2 (2d ed. 1975) (admiralty law embodies its own "special mystery and . . . special-industry linkage"). *See also* Brief for Appellees at 17-18, *In re* Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979).

175. Fisher, *Contribution in 10b-5 Actions*, 33 BUS. LAW. 1821 (1978); Note, *Contribution Under the Federal Securities Laws*, 1975 WASH. U.L.Q. 1256.

176. *See* Brief for Appellants at 22, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979). *See also* Heizer Corp. v. Ross, 601 F.2d 330, 333 (7th Cir. 1979) (securities case citing *Professional Beauty* with approval).

sections of the federal securities laws that do not expressly provide for such a right.[177] One might contend, however, that the express statutory allowance of contribution in the securities field suggests that courts should not allow contribution in the antitrust field[178] because Congress has not seen fit to engraft contribution into any section of the Sherman or Clayton Acts.[179]

Critics of contribution forecast that adoption of a contribution rule in the antitrust field will immeasurably complicate an already complicated body of law.[180] Contribution among antitrust violators would encourage defendants to implead additional parties and add tangential issues to the main claim.[181] A contribution rule would force courts to scrutinize the merits of these motions before trial[182] or in a separate action and would detract from rapid adjudication of plaintiff's main claim. The addition of new parties and issues to the main claim would seriously impair plaintiff's right to control the action.[183] The prospect

177. *See* Brief for Appellees (Radcliff Materials) at 16, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979). *See generally* Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (circumstances under which private right of action for damages may be implied from federal statute without express congressional approval).

178. *See* Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1345 (S.D.N.Y. 1969).

179. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,701 (10th Cir.). *See also 1979 Hearings, supra* note 54, at 52 (statement of Lowell E. Sachnoff) (contribution in securities cases protects less culpable defendants than it would in antitrust context).

180. *See In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex. 1979). *See also* notes 10, 64, 107 *supra* and accompanying text.

One commentator suggested that the majority in *Professional Beauty* devalued the complexity factor because of their lack of contact with a trial caseload. The dissenting judge in *Professional Beauty*, Judge Hanson, was a district judge sitting on the panel by designation and was more attuned to the practical pitfalls of allowing contribution in antitrust litigation. *See* Brown, *Contribution Among Joint Tortfeasors*, N.Y.L.J., July 10, 1979, at 1, col. 1.

181. Not only would the number of third party defendants increase, but so would the number of intervenors wishing to participate in the defense of the action in the event that liability was established against the named defendants. *See* Brief for Appellees at 21, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.). *See also* Corbett, *supra* note 2, at 137 (defendants "rewarded" for impleading new parties to the action).

182. *See* Foman v. Davis, 371 U.S. 178, 182 (1962); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd., 542 F.2d 1076, 1085 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) 432-33 (1976).

183. *See* Brief for Appellees (La Maur, Inc.) at 14, 15, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979). *See also* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979); Sabre Shipping Corp. v.

of lengthy, multiparty contribution actions would deter private[184] attorneys general from securing enforcement of the antitrust laws.[185]

Advocates of contribution insist that contribution will not render antitrust litigation unmanageable.[186] They argue that federal courts are equipped with liberal procedural safeguards to oversee complex litigation.[187] The allowance of contribution in other complex areas of the law[188] has not paralyzed the adjudication of alleged wrongs.[189]

Supporters have urged, in refutation of the right of control argument,[190] that a plaintiff certainly should not object to the addition of other potential wrongdoers to the lawsuit.[191] Additionally, the prospect

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American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969) (plaintiff's right to control is legitimate interest).

184. A contribution rule would deter private plaintiffs from filing suit because of the unwillingness of defendants to engage in settlements. Plaintiffs also desire to avoid long, involved, and costly litigation. *See* note 155 *supra* and accompanying text.

185. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189-90 (8th Cir. 1979) (Hanson, J., dissenting) ("the net result [of a contribution rule] may be to deter private plaintiffs of relatively limited means from bringing or maintaining a meritorious suit"). *See also* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Brief for Appellants at 11, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) (effective enforcement of antitrust laws requires actions brought by private plaintiffs).

186. *See* Brief for Amicus Curiae (Southwest Industries) at 8, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979).

187. *See* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 908 (5th Cir. 1979) (Morgan, J., concurring in part and dissenting in part) ("I simply can't believe that the discretionary nature of the Rule 42(b) provision would discourage an antitrust plaintiff from seeking treble damages should the court recognize a right of contribution"); FED. R. CIV. P. 14(a), 42(b). *But see* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979) (allowance of contribution "may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation"). *See also* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184-85 (8th Cir. 1979).

188. *See* notes 22-37 *supra* and accompanying text. *But see* ANTITRUST & TRADE REG. REP. (BNA) B-5, no. 917, June 7, 1979 (analogy to state tort law cases is imperfect).

189. *See* Rhodes, *supra* note 9, at 13.

190. One commentator has questioned the very existence of the plaintiff's right to control. *See* Address by Jonathan Rose, American Bar Association Antitrust Section Meeting (Aug. 13, 1979).

191. *See* Brief for Appellants at 13, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) (right of control will be protected by procedural devices); Brief for Appellants at 19, 28, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (plaintiff's burden of proving existence of two party conspiracy will not be heightened by addition of alleged co-conspirators); Memorandum of Westvaco Corp. in Contra to Motions to Dismiss its Cross-Claims for Contribution at 34-38, *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979) (third party plaintiffs will bear burden of proof of alleged third party defendants' involvement in conspiracy). *But see* Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 4 (M.D. Ala. May 18, 1979) (plaintiff, as injured party, should alone determine who pays damages).

of a defendant's motion for contribution will not discourage a private attorney general from maintaining a suit.[192] Finally, any slightly injurious effect of a contribution rule on the right of control or the complexity of the litigation should not, in itself, defeat the adoption of contribution.[193]

Antagonists of contribution assert that a contribution rule would place an intolerable burden on the federal judiciary.[194] Contribution would permit defendants to toll the antitrust statute of limitations in perpetuity by repeatedly impleading or filing cross-claims against alleged wrongdoers to pressure plaintiffs into releasing their claims.[195] Opponents argue that precious docket space should not be reserved to litigate stale and dilatory claims between intentional violators of the law.[196]

Proponents of contribution respond that a solution to the contribution question cannot rest on presumed bad faith abuses of a contribution rule.[197] Supporters of contribution also suggest that the rule will provide a greater deterrent to potential antitrust violators than the current no contribution rule. Members of the business community will realize that although they are unnamed in the action or have negotiated a favorable settlement, they will be unable to escape some degree of

192. Appellees in *Olson Farms I* challenged the intent of Congress to enlist private attorneys general to enforce the antitrust laws. *See* Brief for Appellees at 20, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.). *See* Memorandum of Mead Corp. Concerning the Issue of Contribution at 8 n.3, *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979).

193. *See* United States v. Reliable Transfer, Co., 421 U.S. 397, 408 (1975) (admiralty action). The Court in that case stated that "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage greedy out-of-court accommodations." *Id.*

194. *See In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex.), *aff'd per curiam*, No. 79-2439 (5th Cir. Oct. 30, 1979); Brief for Appellees at 22, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.). *See also* notes 94, 95, 107 *supra* and accompanying text.

195. *See* Brief for Appellees at 22, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); Brief for Appellees at 20, *In re* Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979); ABA MAJORITY REPORT, *supra* note 9, at 13-15.

196. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,701 (10th Cir.); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979) (Morgan, J., dissenting) (courts should not expend energy on intentional wrongdoers); ABA MAJORITY REPORT, *supra* note 9, at 3 (suggesting imposition of cut-off date for contribution claims).

197. *See* Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (massive negligence action allowing contribution without any procedural difficulties).

liability for their anticompetitive conduct.[198]

Critics of contribution urge that the shared liability concept will not effectively deter wrongdoers.[199] The threat of a trebled judgment without assistance of contribution should provide a greater deterrent.[200] In all probability, however, any evidence of the deterrent value of contribution cuts both ways[201] and should not be a decisive factor in abandoning the current no contribution rule.[202]

Both sides in the contribution debate insist that the language of the antitrust laws[203] is consistent with their respective stances.[204] Advocates of contribution suggest that Congress' inclusion of "treble damage" remedies and criminal sanctions in the antitrust statutes reflects Congress' desire to prevent one wrongdoer from absorbing the full measure of damages.[205] Alternatively, the statutory imposition of "joint and several liability" on antitrust violators indicates a congressional intent to prohibit intentional wrongdoers from enjoying the fruits of contribution.[206] Application of the various interpretations of

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

199. *See* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

200. *See* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 901 n.8 (5th Cir. 1979) (business managers are risk adverse and deterred more by slight prospect of large loss than strong prospect of small loss); El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976). *See also* Corbett, *supra* note 2, at 137 (small company faced with prospect of singular liability especially deterred by no contribution rule).

201. Deterrence arguments are relevant only if alleged intentional violators have knowledge that contribution will not be available if they are found liable. *See* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 901 n.8 (5th Cir. 1979); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting).

202. *See In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 42 (S.D. Tex.), *aff'd per curiam*, No. 79-2439 (5th Cir. Oct. 30, 1979). *See also* S. REP. No. 428, 96th Cong., 1st Sess. 18 (1979) (private, treble damage suits serve as greatest deterrent to antitrust wrongdoers).

203. *See* notes 20, 117-19 *supra* and accompanying text.

204. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting) (allegiance to common-law rules cannot be allowed to undermine objectives of antitrust laws). *See also* El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976).

205. *See* Memorandum By Potlach Corp. Concerning the Right of Treble Damage Antitrust Defendants to Contribution and in Support of Motion to Dismiss Claims for Contribution Against Settling Defendants at 17, *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979). *But see* Brief for Appellees at 18-19, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) (no implied right of contribution action under antitrust laws; no congressional intent to aid antitrust co-conspirators; Congress chose treble damage remedy and criminal sanctions in lieu of contribution).

206. *See* Brief for Appellee (Radcliff Materials) at 31, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979).

"treble damages" or "joint and several liability" to the contribution issue may lead to divergent results.[207] For this reason, it is unwise to rely on statutory interpretation to resolve congressional silence on the contribution question.[208]

Defendants in *Professional Beauty* and *Abraham Construction* alleged that the courts' failure to provide a right of contribution abridged their substantive due process[209] and equal protection rights[210] under the fifth amendment.[211] The court in *Abraham Construction* applied a mere rationality test to conclude that a denial of the appellants' motion to implead for contribution did not infringe on defendants' substantive due process rights.[212] The *Abraham Construction* court dismissed appellants' equal protection claims under a similar rational relation test.[213]

Opponents of contribution rely on the holdings of two notable United States Supreme Court antitrust decisions, *Illinois Brick v. Illinois*[214] and *Perma Life Mufflers v. International Parts Corp.*,[215] to

207. *See* note 205 *supra* and accompanying text. *But see 1979 Hearings, supra* note 54, at 20 (contribution question must be resolved separately from "joint and several liability" terms).

208. *See* notes 117-19 *supra* and accompanying text. *See generally* Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cort v. Ash, 422 U.S. 66 (1975). Four factors are used to determine whether a private remedy is implicit in a federal statute: (1) Is plaintiff a member of the class that the statute is designed to protect; (2) is there any presence of legislative intent to create or deny the remedy; (3) would such a remedy be consistent with the underlying purposes of the statute; and (4) is the remedy one which is traditionally governed by state law? *Id.* at 78.

209. The denial of contribution among joint tortfeasors may constitute a taking of a property interest without due process of law. *See* Brief for Appellants at 10, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979); Brief for Appellants at 46, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

210. *See* Brief for Appellants at 12, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) ("[w]ithout contribution among joint tortfeasors there is no equality of protection against all similarly situated; there is no equality in the liabilities imposed on persons under like circumstances; there is no equality in the burden imposed on the one sued"). The *Professional Beauty* court did not address the due process or equal protection issues.

211. U.S. CONST. amend. V.

212. *See* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 904 (5th Cir. 1979). *See also* Parker v. Stetson-Ross Mach. Co., 427 F. Supp. 249, 251 (D.S.D. 1977); Arcell v. Ashland Chem. Co., 152 N.J. Super. 471, 502, 378 A.2d 53, 68-69 (1977) (defendant cannot claim deprivation of substantive due process from no contribution rule because due process clause guarantees only existing statutory or common-law rights).

213. Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 904 (5th Cir. 1979). Appellee (OKC Dredging, Inc.) maintained that the equal protection clause umbrella was not applicable to the contribution debate because all antitrust violators are similarly treated. *See* Brief for Appellees (OKC Dredging) at 22, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979).

214. 431 U.S. 720 (1977).

215. 392 U.S. 134 (1968).

support their position in the contribution debate. Opponents of contribution argue that the indirect nature of the antitrust defendant's injury should preclude defendant from seeking contribution because the Supreme Court in *Illinois Brick* limited standing in antitrust actions to purchasers directly harmed by defendants' actions.[216] Advocates of contribution refer to current legislative revision of *Illinois Brick* to refute any reliance on that decision in resolving the contribution dilemma.[217]

Litigants have relied on the narrowing of the *in pari delecto* defense in *Perma Life* to support the proposition that equally reprehensible defendants do not deserve a right of contribution.[218] Those unsympathetic to contribution also have interpreted *Perma Life* to hold that the right to file suit does not hinge on the degree of plaintiff's culpability. A court, therefore, may assess liability against a defendant irrespective of another party's fault.[219]

Defendants also have employed *Perma Life* to support contribution.[220] Proponents of contribution interpret *Perma Life* to hold that permitting actions between wrongdoers regardless of claimant's participation in the illegality furthers the objectives of the antitrust laws.[221]

Congressional reaction to *Illinois Brick* and the plethora of plausible holdings of *Perma Life* do not clarify the contribution issue. The im-

216. *See* Brief for Appellee (Radcliff Materials) at 34, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc. 604 F.2d 897 (5th Cir. 1979). *See also* Supplemental Memorandum of Appellee (Safeway Stores) at 8, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); ANTITRUST & TRADE REG. REP. (BNA) B-6, no. 917, June 7, 1979 (reluctance of Supreme Court to create new area of antitrust liability with incidental effects on complexity of antitrust litigation without express congressional approval).

217. *See* S. 300, 96th Cong., 1st Sess. (1979). *See also* ANTITRUST & TRADE REG. REP. (BNA) A-18, no. 931, Sept. 20, 1979.

218. *See* Brief for Appellee (OKC Dredging) at 19 n.6, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (under *Perma Life*, plaintiff is denied recovery when plaintiff and defendant are equally responsible for plaintiff's injury). *See also* Brief for Appellee (Radcliff Materials) at 36, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (contribution rule would allow supplier-defendant in *Perma Life* to file counterclaim for contribution against dealer-plaintiff).

219. *See* Brief for Appellee at 8, *In re* Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979).

220. *See* Brief for Appellant at 29, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979); D. DOBBS, LAW OF REMEDIES 704 (1973).

221. *See* Brief for Appellant at 28, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); Brief for Appellant at 21, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979).

pact of *Perma Life* and *Illinois Brick* on the Supreme Court's future treatment of the contribution issue remains speculative.[222]

Many observers of the contribution debate advocate that Congress, and not the courts, should resolve the matter.[223] Litigants feel that courts are inadequately equipped to provide a sensible answer to the problem.[224] Judicial purists, however, believe that Congress purposely drafted the antitrust laws ambiguously to allow the courts freedom to expand the law as justice requires.[225] There is little merit in contesting the role of the court in the resolution of the contribution question. Counsel, litigants, and the business community require an answer to the contribution issue irrespective of the source of such guidance.[226]

A distillation of the more conclusive arguments espoused by participants in the contribution debate reveals three compelling findings. First, under a pure no contribution rule (contribution without carve-out), a nonsettling defendant in a multiparty antitrust action is often coerced into negotiating a settlement with plaintiffs when other defendants settle out of the action.[227] Secondly, a pure contribution rule undoubtedly would complicate litigation and impose attendant burdens

222. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,702 (10th Cir.). "There has been no linkage by the Supreme Court or by Congress between [*Perma Life* and the contribution issue] . . . and the existence of such a linkage is doubtful at best." *Id.*

223. *See* Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1190 (8th Cir. 1979) (Hanson, J., dissenting); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). *See generally* S. 1468, 96th Cong., 1st Sess. (1979).

224. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,704 (10th Cir.); ABA MAJORITY REPORT, *supra* note 9, at 9. "Definitive rules of law may take years to evolve. Thus, comprehensive legislation . . . can cut short those years of litigation and attendant uncertainty as to many such rules . . . ." *Id.*

225. *See* United States v. United States Gypsum Corp., 438 U.S. 422, 434 (1978); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). In addition, congressional action on the subject may be a long and involved process. Senate bill 1468, introduced in June of 1979, needed six months to achieve the approval of the Senate Judiciary Committee. "Although the bill could be called to the Senate floor for a vote, Senate aides find ultimate passage hard to imagine." ANTITRUST & TRADE REG. REP. (BNA) A-17, no. 942, Dec. 6, 1979. Furthermore, any type of legislation will not resolve all issues surrounding the contribution question and will require some measure of judicial interpretation. *See generally* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1183 (8th Cir. 1979); ABA MINORITY REPORT, *supra* note 9, at 2.

226. *See* notes 115-16 *supra* and accompanying text.

227. *See* notes 143-47 *supra* and accompanying text.

on the courts.[228] Finally, a pure contribution rule would undermine the preferred and necessary practice of settlement in antitrust litigation.[229] On balance, therefore, the merits of a pure contribution rule do not appear to outweigh the utility of the current no contribution rule.[230]

Although deficiencies exist in many circumstances under the present no contribution rule,[231] a formula must be fashioned to rectify these inadequacies without disturbing the positive characteristics of the no contribution rule.[232] The formula should be coherently and rapidly incorporated, without regard to procedural variances, into the entire body of the antitrust laws to promote certainty and equitable administration of the antitrust laws.[233]

## VI. CARVE-OUT: AN EMERGING SOLUTION TO THE CONTRIBUTION QUESTION IN ANTITRUST LITIGATION

The carve-out technique represents a progressive solution to the contribution morass.[234] Carve-out, a hybrid of the alternatives to contribu-

228. *See* notes 180-85, 194-96 *supra* and accompanying text.

229. *See* notes 153-55 *supra* and accompanying text.

230. *Compare* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955 & 1977 versions) *and* ABA MINORITY REPORT, *supra* note 9, at 1 (no contribution imposed against settling defendants) *with* S. 1468, 96th Cong., 1st Sess. (1979) *and* ABA MAJORITY REPORT, *supra* note 9 (contribution advocated in cases in which defendant has not executed good faith settlement; good faith, settling defendant is immune from contribution and an amount determined with reference to settlement is carved-out of plaintiff's claim).

231. *See* notes 139-43, 149-51, 227 *supra* and accompanying text.

232. *See* notes 140-42, 152, 180-85, 194-96, 199, 200, 206, 232 *supra* and accompanying text.

233. *See* notes 115-16 *supra* and accompanying text.

234. Three federal courts have implicitly acknowledged the existence of a hybrid, carve-out rule in antitrust cases. Little Rock School Dist. v. Borden, Inc., [1980-1] Trade Cas. (CCH) ¶ 63,059, at 77,254 (E.D. Ark. 1979) (letter opinion); *In re* Ampicillin Antitrust Litigation, 82 F.R.D. 652 (D.D.C. 1979); El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976) (courts might fashion rule under appropriate circumstances to protect rights of both settling and nonsettling defendants in contribution debate). The court in Hedges Enterprises v. Continental Group, Inc., [1979-1] Trade Cas. (CCH) ¶ 62,717, at 77,993 (E.D. Pa.), however, denied defendant's motion for claim reduction (carve-out). The *Corrugated Container* court lacked jurisdiction to rule on the carve-out issue. *See* No. 79-2439, slip op. at 2 (5th Cir. Oct. 30, 1979). *See also* Answer for Defendant (Beatrice Foods) at 5, *In re* Arizona Dairy Products Litigation, No. 74-569A, 74-736 (D. Ariz. Aug. 5, 1980) (Beatrice Foods asserts affirmative defense of claim reduction).

Many courts in nonantitrust cases have fashioned a carve-out rule. *See* Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1249 (5th Cir. 1979); Kassman v. American Univ., 546 F.2d 1029, 1033 n.24 (D.C. Cir. 1976); Brightheart v. McKay, 420 F.2d 242, 243-44 (D.C. Cir. 1969); Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1965). *See also* Luke v. Signal Oil & Gas Co., 523 F.2d 1190, 1191 (5th Cir. 1975) (per curiam) (application of claim reduction rule under Louisiana law

tion, permits reduction before trebling of a plaintiff's monetary claim against nonsettling defendants after one defendant has executed a settlement pact with plaintiffs. The carve-out rule treats all parties to the litigation equitably. The nonsettling defendant is "credited" each time a fellow defendant enters into a settlement with the plaintiffs.[235] The plaintiff is not affected adversely by the execution of settlement agreements because his potential recovery from nonsettling defendants is reduced commensurate with the amount of damages paid by the settling defendant to the plaintiff.[236] The carve-out rule also retains the defendant's incentive to settle with the plaintiff[237] because settling defendant's exposure to additional liability is terminated on court approval of the settlement pact.[238]

A carve-out rule reduces the inequity imposed on a single, nonsettling defendant, without coercing that defendant into negotiating a settlement because a nonsettling defendant will not assume financial responsibility for the tortious conduct of settling defendants.[239] In some cases, settlements could reduce a plaintiff's pretrial claim to a point where the claim against remaining nonsettling defendants is minimal. The reason for adopting contribution is lost when settling defendants no longer are coerced into premature settlements. The carve-out rule will not complicate antitrust actions or burden the courts.[240] A

in personal injury action on pro-rata basis); Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962) (pro-rata).

Proposed congressional legislation, although advocating contribution in price-fixing actions, has incorporated the carve-out rule (on a greater of sales/purchases or settlement method) for a defendant's good faith settlement with plaintiff's class. S. 1468, 96th Cong., 1st Sess. (1979). The ABA Section on Antitrust Law has adopted an analogous approach to S. 1468, except that plaintiff's claim would be carved out by the relative fault of the settling party. ABA MAJORITY REPORT, *supra* note 9, at 10 (report calls for contribution in all types of antitrust cases).

235. *See* note 3 *supra* (under current practice, plaintiff's claim is reduced by defendant's settlement amount after trebling).

236. Antitrust plaintiffs may express displeasure at the adoption of carve-out. Under current practices, plaintiffs often recover both a trebled judgment and any monies procured through settlements. A plaintiff, however, is not entitled to more than one recovery for the same injury. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971).

237. *See* Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 3, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979).

238. *See id.* at 13.

239. *See* Brief for Appellees (Weyerhaeuser Co. and Williamette Industries) at 3, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979). *See also* notes 143-46 *supra* and accompanying text.

240. Carve-out would not require use of third party actions, separate actions, or cross-claims to achieve its goals. The assessment of the relative fault of a settling defendant would be the only

carve-out rule, implemented without regard to the type of antitrust violation alleged in plaintiff's complaint, provides all parties to the litigation with certainty of the law.[241]

A settlement under carve-out punishes the settling, alleged antitrust wrongdoer, compensates the injured plaintiff, and comports with the purposes of the antitrust laws.[242] A carve-out formula also ameliorates the frequency of collusive practices among litigants because plaintiffs will realize that the settlement agreement will affect the amount of the final judgment.[243] Carve-out insures that a plaintiff can maintain the right to control the action because named defendants will not be able to implead third party defendants or file cross-claims for contribution.[244] Additionally, carve-out retains the deterrent value of the no contribution rule[245] without discouraging private attorneys general from bringing suit to enforce the antitrust laws.[246]

Carve-out is not, however, a panacea. The palatibility of carve-out depends on the amount "carved-out," before trebling, of plaintiff's claim for relief. Courts and commentators have posited five different methods of carve-out calculation.[247] First, some courts have advocated carve-out on a pro-rata scale.[248] Although the pro-rata method is easily administered and provides sufficient deterrent value,[249] it may expose a nonsettling defendant to more than his fair share of liability.[250]

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practical difficulty under carve-out before trial; however, "the inquiry into relative fault is not appreciably different from the determinations now made under Rule 23 [of the Federal Rules of Civil Procedure]." ABA MAJORITY REPORT, *supra* note 9, at 7.

241. *See* note 233 *supra* and accompanying text.

242. *See* notes 117-18 *supra* and accompanying text.

243. *See generally* notes 137-39 *supra*. Adoption of a method of carve-out that reduces plaintiff's claim by the "average-of" settling defendant's relative fault and the settlement amount will increase plaintiff's reluctance to participate in a collusive settlement negotiation. A plaintiff will not want to reduce his claim by more than the settling defendant's fair share.

244. *See generally* notes 183, 240 *supra* and accompanying text (under carve-out, no additional parties named to the action or tangential issues added to main claim).

245. *See* Brief for Appellees (Weyerhaeuser Co. and Williamette Industries) at 9, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979).

246. *See generally* notes 184-85 *supra* and accompanying text.

247. *See generally* Note, 18 STAN. L. REV. 486 (1966) (methods of contribution among joint tortfeasors).

248. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979); Luke v. Signal Oil & Gas Co., 523 F.2d 1190 (5th Cir. 1975) (personal injury); Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962) (personal injury).

249. *See* note 260 *infra*.

250. *See* ABA, REPORT OF THE CIVIL PRACTICE AND PROCEDURE COMMITTEE TO THE SECTION OF ANTITRUST LAW REGARDING RIGHTS OF CONTRIBUTION AMONG DEFENDANTS at 21

Secondly, the Uniform Commission on State Laws in 1955 proposed that plaintiff's claim should be reduced by the amount of defendant's settlement.[251] This method may work to the disadvantage of the non-settling defendant by compelling him to accept a judgment in excess of his relative fault[252] and by inducing collusion between settling defendants and plaintiffs.[253]

Thirdly, the American Bar Association Section on Antitrust Law has advocated a relative (comparative) fault model.[254] A relative fault rule would necessitate a pretrial hearing on the merits before the court could reduce the settling defendant's share from plaintiff's claim.[255] The relative fault rule also may discourage plaintiffs from entering into settlements because the reduction of plaintiff's claim by the degree of settling defendant's fault may be in excess of the settlement amount recovered by plaintiff.[256]

Fourthly, the Uniform Commission on State Laws in 1977 urged that plaintiff's claim be reduced by the greater of either the settlement amount or the relative fault of the settling defendant.[257] Under the "greater of" rule, a plaintiff assumes the risk that the relative fault of the settling defendant might exceed the amount of damages received by plaintiff.[258] Further, if plaintiff recovered a "profitable" settlement in excess of the settling defendant's culpability, the judgment would not

(Aug. 14, 1979). "A per capita rule does little to aid the small and innocent defendant who may face liability in excess of its net worth. Moreover, a per capita rule might encourage defendants to name third parties in order to reduce their per capita share." *Id.*

251. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955).

252. *See* note 250 *supra* and accompanying text.

253. *See* Address by Jonathan Rose, American Bar Association Antitrust Section Meeting (Aug. 13, 1979).

254. *See* ABA MAJORITY REPORT, *supra* note 9.

255. *See* ABA MINORITY REPORT, *supra* note 9, at 7.

256. The settling defendant's market share also may be an appropriate substitute for relative fault, particularly in multiparty, horizontal, price-fixing cases. *See* Brief for Appellees (Weyerhaeuser Co. and Williamette Industries) at 12, *In re* Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979); Memoranda of Defendants Weyerhaeuser Co. and Westvaco Corp. Concerning the Issue of Contribution at 8, 9, *In re* Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979); ABA MAJORITY REPORT, *supra* note 9, at 3. *But see* S. REP. NO. 428, 96th Cong., 1st Sess. 38 (1979) ("No plaintiff in his right mind is going to settle with a defendant with a small net worth and a large market share if by doing so he is going to take thirty or forty or fifty percent of the market out of the case.").

257. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1977). *See also* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,704 (10th Cir.); N.Y. GEN. OBLIG. LAW § 15.108(a) (McKinney 1978); S. 1468, 96th Cong., 1st Sess. (1979).

258. *See* note 256 *supra* and accompanying text.

award plaintiff the benefit of his bargain. This rule would discourage plaintiffs from settling to an even greater extent than the relative fault method.

Finally, an "average of" carve-out rule would reduce plaintiff's claim by the mean of the settlement amount and the relative fault of the settling defendant.[259] Adoption of the "average of" rule would neither overtly deter plaintiffs from executing settlement agreements[260] nor unfairly penalize the nonsettling defendant.[261] Plaintiffs would hesitate to collude with defendants because the value of plaintiff's claim against nonsettling defendants would depend on the amount of the settlement.

## VII. CONCLUSION

The federal antitrust laws should not incorporate a right of contribution among defendants in a private, treble damage antitrust action. The traditional federal common-law rule, which denies a right of contribution among all antitrust defendants, is imperfect yet preferable to a pure contribution rule. Statutory or judicial acceptance of a carve-out formula in antitrust actions may provide a solution to the inadequacies inherent in the no contribution approach without eliminating the numerous positive traits of the traditional rule. The Supreme Court's inevitable statement on the contribution issue[262] should contain an acknowledgement of the validity and vitality of carve-out in private, treble damage antitrust actions.

*R. Mark McCareins*

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259. The average of the settling defendant's market share and the amount of the settlement might be employed as a carve-out measure in a horizontal price-fixing action. *See* note 256 *supra.*

260. *See* note 256 *supra* and accompanying text.

261. *See* notes 250, 253 *supra* and accompanying text.

262. The Supreme Court dismissed as moot its original grant of certiorari in the *Corrugated Container* litigation, 49 U.S.L.W. 3288 (U.S. Oct. 20, 1980) (79-972), because petitioners eventually settled with plaintiffs' class. *See* ANTITRUST & TRADE REG. REP. (BNA) A-1, no. 986, Oct. 23, 1980; Nat'l L.J., Nov. 3, 1980, at 7, col. 1.