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RECENT DEVELOPMENTS

Contribution Among Antitrust Defendants

I. INTRODUCTION

Joint tortfeasors traditionally have been held jointly and severally liable for a plaintiff's damages.[1] Thus, a plaintiff can choose to bring suit against only one of several wrongdoers, or he can elect to collect the full amount of a joint judgment from any one of several defendants. The inherent inequity of this situation—requiring one defendant to pay for all—is remedied by contribution, which requires each tortfeasor to pay a proportionate share of the damages to any other joint tortfeasor who has paid more than his fair share.[2] The common law rule, however, generally disallowed contribution among joint tortfeasors.[3]

Coviolators of the federal antitrust laws[4] are tortfeasors and thus are jointly and severally liable.[5] The antitrust laws, however, do not provide expressly for contribution. Moreover, until recently,

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1. W. PROSSER, LAW OF TORTS § 47, at 296 (4th ed. 1971).

2. Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 168 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); Leflar, *Contribution And Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932). The basis of contribution is the equitable notion that parties jointly responsible for harm should share the burden of liability. Ruder, *Multiple Defendants In Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 647 (1972).

A distinction should be made between contribution and indemnity because the two are often confused. Contribution distributes the loss among tortfeasors by requiring each to pay his proportionate share, whereas indemnity shifts the entire loss from one tortfeasor to another. W. PROSSER, *supra* note 1, § 51, at 310.

3. The American common law rule traditionally disallowed contribution among joint tortfeasors—whether intentional or unintentional. Union Stock Yards v. Chicago, B. & Q.R.R. Co., 196 U.S. 217 (1905). The English common law rule denies contribution only to intentional tortfeasors. Merryweather v. Nixan, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799). In *Merryweather* Lord Kenyon held that no right of contribution existed among joint tortfeasors. At that time, however, torts were only intentional wrongs. Therefore, later cases applied the rule to joint *intentional* wrongdoers. Adamson v. Jarvis, 4 Bing. 66, 130 Eng. Rep. 693 (1827). Although early American courts properly applied this rule, later courts misinterpreted *Merryweather* and disallowed contribution to both intentional and unintentional tortfeasors. *See* W. PROSSER, *supra* note 1, at § 50, at 305-06. The harshness of the American rule has been criticized by a number of commentators. W. PROSSER, *id.* § 50, at 307; Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941); Leflar, *supra* note 2. A majority of states have thus either judicially or statutorily modified the rule. *See* Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1967); S. REP. No. 96-428, 96th Cong., 1st Sess. 5 (1979).

4. Sherman Act, 15 U.S.C. §§ 1-7 (1976); Clayton Act, 15 U.S.C. §§ 12-27, 44 (1976).

5. Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944).

courts have followed the common law rule and have uniformly declined to imply a right of contribution among antitrust defendants. This situation poses special problems for antitrust defendants because they are liable for *treble* the amount of plaintiff's damages. Several unpleasant scenarios thus develop for an antitrust defendant. Despite the presence of other wrongdoers, a plaintiff may choose to sue only one defendant for all damages or to collect the full amount of a treble damage judgment from one of several defendants. Furthermore, as individual defendants settle, the total potential liability of the remaining defendants increases proportionately because only the actual settlement amount is deducted from a treble damage award.

From the standpoint of the antitrust defendant, however, the most unpleasant prospect is the recent trend toward staggering damage awards. For example, estimates of the liability of the few remaining defendants in the *Corrugated Container Antitrust Litigation* ranges from 200 million to one billion dollars—before trebling.[6] The prospect of such huge damages has prompted reevaluation of the traditional no contribution rule and judicial departure from existing precedent.

Recently, the Eighth Circuit concluded that fundamental fairness requires that "contribution be enforced among joint tortfeasors in an antitrust action."[7] Subsequently, however, the Fifth[8] and Tenth[9] Circuits considered the contribution issue, but rejected the Eighth Circuit analysis, instead holding that no right of contribution exists among antitrust defendants.[10] The purposes of this Recent Development are to analyze these recent judicial developments in light of existing precedent and to make recommendations concerning the future of contribution in antitrust law. This Recent Development argues that no single federal common law rule of contribution exists and that federal securities law decisions provide the best analogy from which to imply a right of contribution under the antitrust laws. Thus, the Recent Development proposes

6. *In Re* Corrugated Container Litigation, No. 310 (S.D. Tex. May 30, 1979), *reprinted in* 919 ANTITRUST & TRADE REG. REP. (BNA) E-1, *petition for cert. filed sub nom.* Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3500 (U.S. filed Dec. 21, 1979).

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

8. Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979). *Petition for cert. filed sub. nom.* Texas Industries, Inc., v. Radcliff Materials, Inc., 48 U.S.L.W. 3570 (U.S. filed Jan. 24, 1980).

9. Olson Farms, Inc. v. Safeway Stores, Inc., No. 77-2068 (10th Cir., Nov. 8, 1979), *rehearing en banc granted,* Dec. 27, 1979.

10. The Tenth Circuit, however, did leave open the possibility that contribution would be allowed in the case of an unintentional antitrust violator. *Id.* at 15.

that the Supreme Court should fashion a rule permitting contribution among antitrust defendants.

II. Contribution Among Joint Tortfeasors in Federal Courts

A. *Federal Common Law*

In *Erie v. Tompkins*[11] the Supreme Court limited the scope of federal common law to matters governed by the federal constitution or by federal statute. Application of federal common law, however, also has been deemed appropriate in those areas that are "dominated by the sweep of federal statutes"[12] or concerned with federally created rights.[13] Therefore, the starting point for courts in determining whether a federal common law rule of contribution exists is to examine "the statute and the federal policy which it has adopted."[14]

In *Union Stock Yards Co. v. Chicago, Burlington and Quincy Railroad Co.*[15] the Supreme Court denied indemnity in a negligence action and set forth the general principle in contribution actions "that one of several wrongdoers cannot recover against another wrongdoer . . . ."[16] Almost fifty years later, in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,[17] the Court relied upon this statement and denied contribution for damages stemming from a noncollision marine accident. The Court observed that "[i]n the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors."[18] These two cases form the basis of the argument that federal common law bars contribution among joint tortfeasors.[19]

A number of federal courts, however, have implied a right of

11. 304 U.S. 64 (1938). Prior to *Erie,* federal courts sitting in diversity jurisdiction applied rules of "general" federal common law. The Supreme Court abolished this practice, holding that no general federal common law exists and that state law applies in such cases.

12. Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 172, 174 (1942).

13. Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1942).

14. 317 U.S. at 176; Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940). *See also* Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 69 (1966). Federal courts are not *required* to fashion rules of federal common law. Instead, they may choose to apply state law in the appropriate case. *See* 318 U.S. at 367.

15. 196 U.S. 217 (1905).

16. *Id.* at 224.

17. 342 U.S. 282 (1952). The established marine rule at the time permitted contribution only in collision cases. The Court declined to extend the rule to allow contribution.

18. 342 U.S. at 285.

19. *See* DiBenedetto v. United States, 35 A.F.T.R.2d ¶ 75-692 (D.R.I. 1974) (contribution denied under § 6672 of the I.R.C. because "no federal common law right of contribution exists"); Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960)(contribution denied in an antitrust action because federal common law "with no right of contribution" governs).

contribution among joint tortfeasors. A review of these cases indicates that there is no single federal common law rule of contribution. For example, in *George's Radio, Inc. v. Capital Transit Co.*[20] the court adopted a rule permitting contribution among tortfeasors in *negligence* actions. The court concluded that *Union Stock Yards* was not a "fixed and binding federal rule of general application" because *Erie* had abolished such rules.[21] Thus, the court fashioned a new rule appropriate to the circumstances by distinguishing between intentional and unintentional tortfeasors.

This conclusion was reinforced by the Supreme Court's limitation of *Halcyon* in *Cooper Stevedoring v. Fritz Kopke, Inc.*[22] Declaring that "a 'more equal distribution of justice' can best be achieved by amelioration of the common-law rule against contribution," the Court concluded that no countervailing maritime law considerations detracted from an extention of the maritime contribution rule to noncollision cases.[23]

The Seventh Circuit reached a similar decision in an aviation collision case in *Kohr v. Allegheny Airlines, Inc.*[24] Based upon the federal policy of uniform regulation in aviation matters, the court concluded that federal common law controlled decisions concerning the existence of contribution. The court then rejected the traditional no contribution rule as "outmoded and entirely unsatisfactory" and adopted instead a rule of contribution based upon comparative negligence.[25]

B. *Federal Securities Law*

The civil liability provisions of the federal securities laws are designed to deter violations, to encourage institution of private suits, and to compensate injured plaintiffs.[26] Civil securities suits, like civil antitrust actions, sound in tort.[27] Unlike the antitrust laws, however, both the Securities Act of 1933 (1933 Act)[28] and the

20. 126 F.2d 219 (D.C. Cir. 1942). The statutory and decisional law of the District of Columbia is federal law.

21. *Id.* at 223.

22. 417 U.S. 106 (1975).

23. *Id.* at 111.

24. 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975).

25. 504 F.2d at 404-05.

26. Globus v. Law Research Serv., Inc, 418 F.2d 1276, 1288 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970); 3 L. Loss, Securities Regulation 1831 (2d ed. 1961); Note, *Contribution Under the Federal Securities Law,* 1975 Wash. U. L.Q. 1256, 1303 (1975).

27. Heizer Corp. v. Ross, 601 F.2d 330, 332 (7th Cir. 1979).

28. 15 U.S.C. § 77a-aa (1976). Section 77k(f) expressly provides for contribution:

> All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable, and every person who

Securities Exchange Act of 1934 (1934 Act)[29] contain express contribution provisions. Moreover, courts have implied a right of contribution in other circumstances.[30] No courts that have permitted contribution under the securities laws, however, have distinguished between intentional and unintentional violators.[31]

In *deHaas v. Empire Petroleum Co.*[32] the Colorado District Court implied a right of contribution under section 10(b) of the 1934 Act. The court reasoned that because the express civil liability sections of the 1934 Act provide for contribution, an implied right of contribution logically follows when civil liability is implied.[33] In *Globus, Inc. v. Law Research Service, Inc.*[34] a New York federal district court expanded the reasoning of *deHaas* by concluding that barring contribution actually dilutes the deterrent impact of the securities laws by permitting nonpaying defendants to escape their "liability for compensatory damages by leaving the whole burden to the more prompt and diligent party."[35]

Recently, in *Heizer Corp. v. Ross*,[36] the Seventh Circuit rein-

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

29. 15 U.S.C. § 78a-jj (1976). Identical express contribution provisions appear in subsections 78i(e) and r(b), which provide that "[e]very person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment."

30. *See, e.g.*, deHaas v. Empire Petroleum Co., 286 F. Supp 809 (D. Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970) (implied private remedy and implied right of contribution under rule 10b-5); Wassel v. Eglowsky, 399 F. Supp. 1330 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976) (implied contribution under section 12(2) of the 1933 Act).

31. In other contexts, this distinction has been the controlling factor in determining whether there is a right of contribution. *See* notes 11-25 *supra* and accompanying text.

32. 286 F. Supp 809 (D. Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

33. 286 F. Supp. at 815-16. Though no express cause of action exists under rule 10b-5, it is now generally accepted that an implied right of action does exist. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

34. 318 F. Supp 955 (S.D.N.Y.), *aff'd per curiam on opinion below*, 442 F.2d 1346 (2d Cir. 1970), *cert. denied*, 404 U.S. 941 (1971) *(Globus II)*. In *Globus I*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970), plaintiffs recovered a judgment under the 1933 and 1934 Acts. One of three defendants paid the judgment in full and then sought contribution from the other two in *Globus II*.

35. 318 F. Supp. at 958. The court ordered the two nonpaying defendants to reimburse the moving party on a pro rata basis. *Id. See also* Gould v. American-Hawaiian Steamship Co., 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976). For a thorough discussion of the particulars involved in applying contribution, see Note, *supra* note 26.

36. 601 F.2d 330 (7th Cir. 1979).

forced this line of cases, holding that an implied right of contribution exists under rule 10b-5. The court stated that because private remedies could be implied under the securities laws, contribution could also be implied to achieve an "equal distribution of justice."[37] The court buttressed its result by noting the express contribution provisions of the securities laws and by pointing out that apportioning the loss deters future wrongdoing by all culpable parties.[38]

Thus, allowing contribution reinforces the policies underlying the securities laws. First, the presence of express contribution provisions is a solid base from which to imply contribution in other situations. Second, inclusion of such provisions indicates a congressional intent to distribute large damage awards equitably;[39] implying contribution when civil liability itself is implied enhances this congressional policy. Finally, contribution deters future wrongdoing because no culpable party escapes liability due to a plaintiff's "whim or spite" in selecting defendants, or because the more diligent party pays the judgment by himself.

C. *Federal Antitrust Law*

The civil liability provisions of the federal antitrust laws, like those of the securities laws, are designed to deter violations, to encourage the institution of private suits, and to compensate injured plaintiffs.[40] Prior to the Eighth Circuit's decision[41] to allow contribution, however, only two district courts specifically had decided the issue of contribution among antitrust defendants. In *Sabre Shipping Corp. v. American President Lines,*[42] after twenty-five defendants had settled with plaintiff, the nonsettling defendants filed

37. *Id.* at 332. *See also* notes 32-33 *supra* and accompanying text.

38. *Id.*

39. Note, *supra* note 35, at 1258.

40. *See* Pfizer, Inc. v. Government of India, 434 U.S. 308, 314 (1978); Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 486 n.10 (1977); E.J. Delaney Corp. v. Bonnie Bell, Inc., 525 F.2d 296 (10th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976). Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), which provides for recovery of treble damages, is designed to further the goals of deterrence and encouragement of private suits.

41. *See* notes 50-59 *infra* and accompanying text.

42. 298 F. Supp. 1339 (S.D.N.Y. 1969). Two courts have mentioned the issue in dictum. In Goldlawr Inc. v. Shuhert, 276 F.2d 614 (3d Cir. 1960), the court stated that if the complaints were actionable "solely by reason of federal law there would seem to be strong justification for appellee's contention that the tort asserted to lie in the third party complaint is governed hy federal common law with no right of contribution between tortfeasors." *Id.* at 616. In Baughman v. Cooper-Jarrett, Inc., 391 F. Supp. 671 (W.D. Pa. 1975) the court stated that although defendant was "not presenting a claim for contribution against its two alleged co-conspirators . . . this antitrust action is governed by federal common law under which there is no right of contribution for intentional torts." *Id.* at 678 n.3.

a third party suit for contribution and indemnity against several of the settling defendants. The court granted the third party defendant's motion for summary judgment on the ground that there was no right of contribution among antitrust defendants. Citing the Supreme Court decisions in *Union Stock Yards* and *Halcyon Lines*, the court pointed out that federal common law prohibited contribution among joint tortfeasors.[43] The court refused to relax this rule in the antitrust context, reasoning that contribution would thwart the main goal of antitrust law—deterrence—by diminishing plaintiff's control over the action and by influencing his choice to sue. The court further emphasized that contribution would hamper settlement and would therefore deny plaintiff a prompt recovery.[44] In addition, the court noted that Congress expressly included contribution in securities statutes but not in antitrust statutes. Therefore, the court concluded that the issue of contribution in antitrust cases is a legislative, rather than a judicial, concern.[45]

Subsequently, in *El Camino Glass v. Sunglo Glass Co.*,[46] a California federal district court held that there was no right of contribution among *unintentional* violators of antitrust laws. The court remarked that other federal decisions on contribution were at best "helpful analogies" and thus not dispositive of the issue. Instead, the court weighed the countervailing considerations concerning contribution. In favor of denying contribution, the court noted the possibilities that Congress intended to exclude contribution, that plaintiffs would lose control of their lawsuits, and that settlements would be deterred. Additionally, the court expressed concern that contribution would further complicate already "enormously complex" antitrust suits.[47] In favor of allowing contribution, the court cited the existence of contribution in complex securities cases, the fact that courts could fashion rules protecting the rights of settling and nonsettling parties, and the notion of fairness to defendants.[48] Although admitting the persuasiveness of the arguments in favor of contribution, the court nevertheless concluded that congressional silence on the issue indicated a conscious policy decision that the nonavailability of contribution would better serve "the ends of justice."[49]

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43. The court applied federal common law because the asserted claims were federally created. 298 F. Supp. at 1343.

44. *Id.* at 1346.

45. *Id.* at 1345-46.

46. 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976).

47. *Id.* at 72,111.

48. *Id.*

49. *Id.*

D. Summary

A review of the relevant decisional law discloses that no single rule of contribution exists under federal common law. The original common law rule disallowed contribution altogether. Federal courts have ameliorated the harshness of this rule, however, by distinguishing between intentional and unintentional tortfeasors and by allowing contribution among the latter.

Antitrust and securities law are alike in that both have been described as "sounding in tort" and both attempt to deter violations, encourage private actions, and compensate injured plaintiffs. Antitrust and securities law also have another similar characteristic—staggering individual liability. The similarity between antitrust and securities law, however, ends when contribution rules are applied. Under the securities laws, in addition to the express contribution provisions, courts have liberally implied rights of contribution. Antitrust defendants, however, have not met with the same degree of success and still face the prospect of being forced to pay a disproportionate share of a judgment. Against this backdrop, three circuits recently reconsidered the question of contribution among antitrust defendants.

III. Recent Reconsideration of Contribution Among Antitrust Defendants

A. Contribution Permitted: Professional Beauty Supply

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*[50] the Eighth Circuit reviewed a district court's dismissal of a third party complaint for contribution and indemnity. Originally, Professional, a beauty supply wholesaler, sued National, also a beauty supply wholesaler, alleging an attempt to monopolize in violation of section 2 of the Sherman Act.[51] Professional complained that National's inducement of LaMaur, Inc., a beauty supply manufacturer, to grant National an exclusive dealership in Minnesota caused Professional's termination as a LaMaur dealer. National filed a third party claim for contribution and indemnity against LaMaur, claiming that LaMaur was the primary wrongdoer. The

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50. 594 F.2d 1179 (8th Cir. 1979). In Heizer Corp. v. Ross, 601 F.2d 330, 333 (7th Cir. 1979), the Seventh Circuit approved in dictum the decision in *Professional Beauty Supply*.

51. Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or . . . combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1976).

district court dismissed the third party action for failure to state a claim. The Eighth Circuit, however, reversed, holding "that under certain circumstances an antitrust defendant may be entitled to pro rata contribution from other joint tortfeasors."[52]

Initially, the court noted that federal law governed the issue of contribution in antitrust cases.[53] After reviewing the relevant case law, the court concluded that only *Sabre Shipping* and *El Camino Glass* provided insight into the issue. Noting that *Sabre Shipping* relied heavily on *Halcyon Lines,* the court pointed out that *Halcyon* had been "seriously eroded" by the Court's decision in *Cooper Stevedoring.*[54] Moreover, the later case demonstrated that even the Supreme Court was willing to fashion a rule allowing contribution without express direction from Congress. Thus, the court addressed five major policy reasons normally thought to prohibit contribution: first, that Congress intentionally excluded contribution from the antitrust laws; second, that contribution interferes with a plaintiff's ability to control his lawsuit; third, that contribution deters settlements; fourth, that contribution increases the complexity of already complex antitrust suits; and last, that contribution dilutes the deterrent effect of the antitrust laws.[55]

Addressing the issue of congressional intent, the court noted that the federal antitrust statutes are not comprehensive and that courts have decided many significant antitrust matters without congressional direction. Additionally, the court stated that express provisions for contribution in the securities laws indicated that, if enacted today, the antitrust laws would likewise provide for contribution. Moreover, the court emphasized that, considering the sparse case authority relating to contribution in antitrust actions, congressional action was unlikely on such a complicated issue. Finally, the court found support for judicial formulation of contribution rules in other federal cases that had fashioned such rules without express congressional direction.

The court also found that any potential loss of control by plaintiff of his lawsuit could be avoided by the district court's prudent use of the severance power under the Federal Rules.[56] Deterrence of settlements, the court continued, could be avoided through rules of contribution that protected settling defendants. Conceruing the complexity of antitrust suits, the court reemphasized its belief

52. 594 F.2d at 1182.
53. *Id.*
54. *See* notes 17-21 *supra* and accompanying text.
55. 594 F.2d at 1184-85.
56. *See* FED. R. CIV. P. 20.

that the power to sever issues and parties would alleviate any difficulties. Furthermore, the court found this argument against contribution somewhat specious because contribution is allowed in complex securities cases without unmanageable administrative problems.

Finally, the court concluded that the deterrence rationale is an equally persuasive argument for allowing contribution because it insures that all violators pay a proportionate share of any award of damages.[57] The court emphasized that this is especially true when, as alleged in the instant case, a powerful defendant can economically influence a plaintiff not to include it as a defendant.

Noting that contribution is an equitable doctrine based on justice between the parties, the court then asserted "that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances."[58] The court thus ruled that even intentional tortfeasors may obtain contribution in antitrust cases, but held that a specific defendant's right to contribution is a determination for the trier of fact upon consideration of all the circumstances.[59]

B. *Contribution Denied*

(1) *Abraham Construction*

The Fifth Circuit reviewed the dismissal of a claim for contribution among antitrust defendants in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*[60] Abraham originally instituted the action against Texas Industries for an alleged price fixing scheme designed to raise the price of concrete in violation of section 1 of the Sherman Act.[61] Abraham also alleged that certain unnamed coconspirators participated in the scheme. Texas Industries, in turn, filed a third party suit for contribution against the alleged coconspirators after discovering their identities. The coconspirators moved to dismiss on the ground that no right of contribution existed among antitrust defendants. The district court granted the

57. 594 F.2d at 1185.

58. *Id.*

59. *Id.* By contrast, the dissent maintained that contribution would hinder, rather than further, antitrust policy, and that Congress is the appropriate body to decide the issue. *Id.* at 1188-90 (Hanson, J., dissenting).

60. 604 F.2d 897 (5th Cir.), *rehearing denied en banc*, 608 F.2d 524 (1979), *petition for cert. filed sub nom.* Texas Industries, Inc. v. Radcliff Materials, Inc., 48 U.S.L.W. 3570 (U.S. filed Jan. 24, 1980).

61. Section 1 of the Sherman Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976).

motion, and the Fifth Circuit affirmed.

Initially, the court reasoned that the absence of express contribution provisions in the antitrust laws did not evidence a congressional intent to deny contribution, but instead was simply a narrow issue not addressed by the drafters. Therefore, the court concluded that the issue was a matter of federal common law requiring a discrete inquiry into the circumstances of a particular case. Texas Industries advanced five arguments in favor of permitting contribution: first, that contribution enhances the deterrent effect of the antitrust laws; second, that it eliminates collusion between plaintiff and potential defendants; third, that it is consistent with the Supreme Court's rejection of *in pari delicto* as a defense to an antitrust action; fourth, that it is consistent with the allowance of contribution under other federal laws; and last, that it is a denial of due process and equal protection to prohibit contribution.[62] The court, however, rejected each of these arguments.

The court initially concluded that the very possibility of sole liability enhances the deterrent effect of the antitrust laws and that contribution might ameliorate this effect. Thus, because the court considered the deterrence issue inconclusive, it did not see a compelling reason to fashion a new rule of contribution. On the issue of collusion, the court reasoned that "[a]lthough the possibility of collusion or coercion has always existed under a no-contribution rule, the courts and legislatures have not deemed this threat sufficient to counterbalance the advantages derived from denying contribution to wrongdoers."[63] Moreover, the court noted that if a defendant established such activity, he would have an independent cause of action.

The court then rejected defendant's *in pari delicto* rationale for contribution. Texas Industries had argued that the Supreme Court's rejection of *in pari delicto* as a defense to an antitrust action[64] meant that contribution should be allowed among equally culpable defendants. The court, however, stated that Texas Industries had misinterpreted the Supreme Court's *in pari delicto* holding and that the defense still applied in some situations. More importantly, the court failed to discern any correlation between *in pari delicto* and contribution. The court reasoned that a rule allowing culpable plaintiffs to file suit strengthened deterrence by increasing the pool of potential private attorneys general. A rule allowing contribution, however, could diminish deterrence by

62. 604 F.2d at 901-05.

63. *Id.* at 901.

64. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1958).

permitting defendants to cut their losses.[65]

With regard to the trend toward allowing contribution in other areas of federal law, the court first distinguished the securities decisions by noting the express contribution provisions of the federal securities laws. The court then distinguished other cases as being decided either on the basis of state law or without a sufficient rationale to justify contribution in the antitrust context.[66] The court then dismissed as without merit the contention that denying contribution violates a defendant's due process and equal protection rights. In both contexts the court found a rational basis—deterrence of violations—to support a no-contribution rule.

The court also rejected the argument that at least *unintentional* violators should be allowed to seek contribution. First, the court contended that such a rule might diminish the deterrent function by decreasing the incentive to avoid questionable conduct. Second, it reasoned that such a rule might also adversely affect a plaintiff's control of his case by opening a "Pandora's box" of procedural problems.[67] Finally, because the court could find no apparent reason for the intent-based distinction except "to ensure equity in a particular case,"[68] it concluded that forging a new contribution rule with only arguable benefits was a matter best left to Congress.[69] The dissent, in contrast, would have permitted contribution among unintentional violators. The dissent maintained that deterrence is unaffected by allowing contribution and that plaintiffs are protected by the trial judge's ability to sever parties and issues.[70]

(2) *Corrugated Container*

In *In Re Corrugated Container Litigation*[71] a Texas federal district court disallowed contribution among antitrust defendants. Shortly after the *Abraham Construction* decision, the Fifth Circuit affirmed the Texas case in an unpublished per curiam opinion. The moving defendants have since filed a petition for certiorari to the United States Supreme Court.[72]

65. 604 F.2d at 902-03.
66. *Id.* at 903.
67. *Id.* at 906.
68. *Id.*
69. *Id.*
70. *Id.* at 906-08 (Morgan, J., dissenting). The Fifth Circuit, however, subsequently approved this opinion in *In Re* Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979).
71. No. 310 (S.D. Tex. May 30, 1979), *reprinted in*, 919 ANTITRUST & TRADE REG. REP. (BNA) E-1.
72. Westvaco Corp. v. Adams Extract Co., No. 79-972 (5th Cir. Oct. 30, 1979), *petition for cert. filed*, 48 U.S.L.W. 3500 (U.S. filed Dec. 21, 1979).

Corrugated Container was a consolidation of several class action suits charging a number of defendants with price fixing violations in the corrugated box industry. When defendants filed their motion for contribution, twenty-three other defendants representing approximately eighty percent of the market had already settled with plaintiff. In reviewing the motion, the district court first noted that the remaining defendants faced potentially staggering liability. The court then weighed this possible unfairness to defendants against the additional complexity and the possible chilling of settlements that contribution would cause and concluded that contribution was improper and undesirable.[73]

(3) *Olson Farms*

In *Olson Farms, Inc. v. Safeway Stores*[74] the Tenth Circuit affirmed the dismissal of an action seeking a declaratory judgment that Olson Farms was entitled to contribution or indemnity from defendants. Originally, egg producers filed suit against Olson and Oakdell Farms alleging a price fixing conspiracy in violation of sections 1 and 2 of the Sherman Act.[75] Judgment was rendered against Olson only, and after trebling, fees and interest, it exceeded $2,400,000.[76] The egg producers, however, had claimed $99,656 in damages against Olson and $745,760 in damages against other unnamed egg buyers. Olson subsequently filed its suit for declaratory judgment against these buyers. The district court dismissed Olson's suit on the ground that no right of contribution existed among antitrust defendants.

On appeal, the Tenth Circuit initially noted the lack of express contribution provisions in the antitrust laws and then, citing *Union Stock Yards, Halcyon Lines,* and *Sabre Shipping,* concluded that there is no right of contribution under federal common law.[77] In reaching this conclusion, the court rejected several of Olson's rationales for a contribution rule. First, Olson argued that under the *Kohr* analysis it was an unintentional tortfeasor and thus entitled to contribution. The court, however, disagreed, reasoning that Olson's acquiescence in the price fixing conspiracy was an intentional violation of the antitrust laws.[78] Second, Olson contended

73. 919 ANTITRUST & TRADE REG. REP. at E-1.
74. No. 77-2068 (10th Cir. Nov. 8, 1979), *rehearing en banc granted,* Dec. 27, 1979.
75. *See* notes 51 & 61 *supra.*
76. Olson Farms, Inc. v. Safeway Stores, Inc., No. 77-2068, slip op. at 6.
77. *Id.* at 6-7. *See* notes 15-18 & 42-45 *supra* and accompanying text.
78. Olson Farms, Inc. v. Safeway Stores, Inc., No. 77-2068, slip op. at 8.

that the federal securities law offered a convincing analogy to antitrust actions. The court, however, remarked that the express contribution provisions in securities laws indicated that Congress intended to deny contribution in the antitrust context.[79] Third, Olson contended that the Supreme Court's rejection of *in pari delicto* as an antitrust defense supported a rule of contribution. The court again disagreed, however, stating that there is no linkage between the two concepts.[80] Finally, Olson argued that the Eighth Circuit's decision in *Professional Beauty Supply* supported a finding that contribution enhanced the deterrent effect of the antitrust laws. Noting that there were strong arguments on both sides of the deterrence rationale,[81] the court concluded that it should await a "clear signal" from Congress before basing its decision on this factor.[82] The court, however, did recognize "a possible exception in the case of an unintentional violator."[83]

The dissent rejected the notion that a defendant found guilty of an antitrust violation is "a lost soul with no claim on the conscience of the courts."[84] The dissent pointed out that damages claimed against Olson Farms amounted to $298,968 when trebled. The original plaintiffs, however, chose to sue the wrongdoer with the smallest amount of liability, possibly reflecting a conscious decision to sue a less formidable, although financially responsible, defendant.[85] Nevertheless, Olson paid the full amount of liability—in excess of $2,400,000—and the dissent concluded that denying contribution in such a situation significantly frustrates the deterrent policy of the antitrust law.[86] Finally, the dissent disagreed with the suggestion that courts should await congressional action, noting that judicial determination of such an "ancillary" matter was proper and was supported by the fact that the Sherman Act was not intended to be comprehensive legislation.[87]

79. *Id.* at 8-9.

80. *Id.* at 9.

81. The court quoted at length from both the majority and minority opinions in *Professional Beauty Supply. Id.* at 10-13.

82. *Id.* at 15.

83. *Id.*

84. Olson Farms, Inc. v. Safeway Stores, Inc., No. 77-2068, dissenting op. at 5 (Holloway, J., dissenting).

85. *Id.* at 4.

86. *Id.*

87. *Id* at 6-7.

IV. Analysis

A. *Permitting Contribution Among Antitrust Defendants*

(1) Compatibility With Antitrust Policy

Although the purported federal common law rule disallows contribution among joint tortfeasors, a review of the case law proves that adherence to this view is overly strict and most likely incorrect. Contribution rules range from no contribution to contribution for unintentional torts to contribution without regard to fault. Moreover, the strict rule ignores the policies underlying individual federal statutes. Although the Fifth and Eighth Circuits correctly perceived this problem, only the latter decided that contribution should be allowed among antitrust defendants.

Although antitrust law and policy is the basis for deciding the contribution issue, the securities laws provide an appropriate analogy. The underlying policies of civil liability and the potential size and complexity of lawsuits are similar in the securities and antitrust contexts. Furthermore, contribution has existed in securities law for a number of years; thus, its effect on securities law policy is readily ascertainable. The Fifth and Tenth Circuits nevertheless rejected the securities law analogy due to the express contribution provisions in the securities statutes. Although the express provisions are a significant difference, they do not destroy the basis of the analogy—that both statutory schemes are designed to deter violations and encourage private actions. If contribution, whether express or implied, fosters these purposes in the securities context, then it should foster similar goals in the antitrust context.

Upon close examination, the arguments against allowing contribution prove unpersuasive. For example, it is claimed that contribution dilutes the deterrent effect of the antitrust laws. As noted above, however, it is difficult to understand how contribution enhances the deterrent effect of the securities laws,[88] but dilutes the deterrent effect of the antitrust laws. The fact that contribution has been implied in the securities context for over ten years is persuasive evidence that contribution does not diminish deterrence. Moreover, this argument fails to take into account the deterrent effect of treble damages and criminal liability. It seems unlikely that a defendant would risk treble his proportionate share of damages and possible criminal sanctions simply because he did not face the prospect of shouldering the entire amount of liability alone. Furthermore, as one commentator has suggested, it would be diffi-

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88. *See* notes 38-39 *supra* and accompanying text.

cult for a business manager to understand exactly the degree of his involvement and potential liability at the inception of an antitrust violation.[89]

It also has been argued that contribution will complicate antitrust suits to such a point that potential plaintiffs may forego a legitimate cause of action. The power of the district courts to sever issues and parties, however, provides plaintiffs with adequate protection. In addition, application of contribution rules in complex securities cases has not resulted in unmanageable problems.[90] Finally, this argument fails to take into account the great incentive to sue under treble damage statutes.

With regard to the contention that allowing contribution deters settlements, rules can be fashioned to protect the settling parties. Two recent proposals—one by Congress[91] and one by the American Bar Association's Antitrust Section[92]—offer such protection by releasing settling defendants from contribution.

Thus, contribution can be implemented with little or no serious erosion of antitrust law policy. The mere absence of negative factors, however, is not enough to justify contribution. A rule of contribution in antitrust suits must also be prompted by positive factors in order to tip the scales in favor of change.

(2) Equity and Antitrust Defendants

Contribution is an equitable concept based on the notion that parties jointly responsible for harm should share the burden of liability. Equity requires that the right to contribution be afforded to

89. Note, *Contribution in Private Antitrust Suits,* 63 CORNELL L. REV. 682 (1978).

90. In Goldsmith v. Pyramid Communications Inc., 362 F. Supp. 694 (S.D.N.Y. 1973), there were forty-four separate defendants with varying claims for contribution. Defendants agreed to withhold their claims until the original claim was decided.

91. S. 1468, 96th Cong., 1st Sess. (1979) (The Antitrust Equal Enforcement Act of 1979). The bill proposes to amend the Clayton Act to permit contribution in price fixing cases. Section 41(c) provides that settlement "relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement." *Id.* § 41(c). In addition, the bill provides protection for nonsettling defendants by requiring the court to reduce the claim of plaintiff by "(1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it [the settlement], or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services" whichever is greatest. *Id.*

92. ABA, ANTITRUST SECTION, *Resolution and Report of the Section of Antitrust Law of the American Bar Association On Proposed Amendment of the Clayton Act To Permit Contribution in Damage Actions Brought Thereunder* (Sept. 6, 1979), *reprinted in* 936 ANTITRUST & TRADE REG. REP. (BNA) E-1 (Oct. 25, 1979). Section (e) provides that "[c]ontribution may not be obtained in favor of or against a person who, pursuant to a settlement agreement with plaintiff in the action in respect of which contribution rights are claimed, has been released from potential liability." *Id.* § (e).

antitrust defendants. First, lack of contribution opens the possibility of collusion between plaintiffs and wrongdoers not named as defendants. For example, in *Professional Beauty Supply* a more powerful company allegedly pressured plaintiff into not naming it as a defendant in return for a continued and vital business relationship. The obvious inequity is that a less powerful and perhaps less guilty party is forced to shoulder the entire burden of liability. Contribution avoids this inequity by eliminating the possibility that a wrongdoer can escape liability when a plaintiff overlooks him as a defendant.

Second, contribution eliminates coercive or "whipsaw" settlements in large cases. For example, in *In Re Corrugated Container Antitrust Litigation*[93] defendants had little or no choice but to settle, even if they were innocent of wrongdoing, because of the potentially staggering liability. As each defendant settled, the potential liability of those remaining increased by the defendant's share minus the settlement value only.[94] In view of the prevalence of large damage actions, plaintiffs increasingly may use this technique to coerce unfair settlement arrangements. The obvious inequity of such coercive potential renders inappropriate one of the more common justifications for denying contribution—that its absence "facilitates" settlement and thereby keeps antitrust litigation manageable. Indeed, the Supreme Court in *United States v. Reliable Transfer Co.* admonished that "congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations."[95]

Finally, contribution prevents a plaintiff from proceeding only against less formidable but still financially responsible defendants. Such a defendant should not be forced to shoulder the entire burden due to a plaintiff's convenience, whim, or strategy. The notion that an intentional tortfeasor is a "bad man" is nothing more than "misplaced prudery."[96] Instead, intentional violators of antitrust laws should be accorded the same treatment given to intentional violators of securities laws. Because contribution would treat antitrust defendants fairly without impairing the underlying policies of antitrust laws, it should be allowed.

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93. *See In Re* Corrugated Container Antitrust Litigation, No. 310 (S.D. Tex. May 30, 1979), *reprinted in* 919 ANTITRUST & TRADE REG. REP. (BNA) E-1.

94. *See* Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 533-35 (3d Cir. 1976); Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 12 (N.D. Ga. 1973).

95. 421 U.S. 397, 408 (1975).

96. Gregory, *supra* note 3.

B. *Judicial Implementation of Contribution*

All three circuit courts that recently reconsidered the antitrust-contribution issue addressed the question whether contribution should be implemented by Congress or the courts. There are two aspects to this issue. First, does the omission by Congress of contribution provisions from the antitrust laws mean that Congress established a no-contribution rule that only it can change, and, if not, is the decision to permit contribution more appropriately a legislative or judicial matter.

Concerning the first question, Congress probably did not consider the contribution issue. The Tenth Circuit contended that the presence of such provisions in the securities laws supports a conclusion that Congress intended to omit contribution from the antitrust laws. The more likely conclusion, however, is that the omission is a reflection of the different eras and the different circumstances under which the two bills were drafted. The original securities laws, enacted in 1933 and 1934, were patterned after the British Companies Acts, which included express contribution provisions.[97] These provisions represented a growing British dissatisfaction with the no-contribution rule that ultimately resulted in its statutory abolition.[98] The express provisions in the securities laws resulted from similar dissatisfaction in the United States and from a congressional expectation of multiple defendants in a single suit.[99] The antitrust laws, however, originally were enacted in 1890 and 1914, a period during which there was little controversy over the no-contribution rule.[100] Moreover, at the time, it was not expected that many private suits would be instituted under the civil liability sections.[101] Instead, the debates focused primarily on the constitutionality of the scheme and on the types of activities to be regulated.[102]

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97. Companies Act of 1929, 19 & 20 Geo. 5, c. 23 (1929). These acts provided for contribution "as in cases of contract."

98. Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5, c. 30 § 6 (1935).

99. L. Loss, *supra* note 26, at 1737, 1738-39 n.178 (2d ed. 1961).

100. *See* notes 15-16 *supra* and accompanying text. *See also* W. PROSSER, *supra* note 1, § 50 at 305-06.

101. During the debates on the Sherman Act, Senator George of Mississippi in referring to private antitrust actions stated that "few, if any, of such suits will ever be instituted, and not one will ever be successful." 21 CONG. REC. 1768, *reprinted in* BILLS AND DEBATES RELATING TO TRUSTS 50TH-57TH CONGRESS, S. Doc. No. 147, 57th Cong., 2d Sess. 78 (1903) [hereinafter BILLS AND DEBATES]. Senator Sherman agreed stating "[v]ery few actions will probably be brought [under the private action section] . . . ." *Id.* at 2569, BILLS AND DEBATES at 166. Similar views were expressed during the debates on the Clayton Act. *See* 51 CONG. REC. 13853 (1914)(remarks of Senator Chilton).

102. *See* 1 H. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES 1-23 (1949); 2 H. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES 1-11 (1949).

Thus, the issue was probably never considered by the drafters.[103]

Once it is resolved that Congress did not intend to preclude contribution in antitrust cases, the question remains whether contribution is more appropriately a legislative or judicial matter. There are a number of reasons why the courts should decide this issue. First, contribution is a judicially created doctrine developed to ameliorate the inequitable treatment of those jointly liable for damages, and its rationale has not been altered by its adoption in common law.[104] Thus, because contribution is a judicial remedy procedural in nature, it falls within the judicial sphere.

Second, as stated in *Professional Beauty Supply*, the antitrust laws were not intended to be comprehensive, and "[t]he legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[105] In this regard, courts have dealt with many questions left unanswered by the antitrust laws, and contribution is merely another ancillary matter requiring supplementation by judicial decision.

Finally, the need for an *immediate* remedy to existing inequities militates toward prompt judicial action. Because there is no bar to judicial resolution of this issue, the recent split among the circuits provides the Supreme Court the opportunity to remedy the inequities created by the no-contribution rule. Although Congress

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103. A review of the legislative history of the Sherman and Clayton Acts reveals an absence of discussion on the contribution issue. *See* BILLS AND DEBATES, *supra* note 101, at 1-479; 51 CONG. REC. 6714, 8201, 8200, 9068-91, 9153-90, 9195-202, 9245-73, 9388-418, 9466-96, 9538-611, 9652-82, 9909-11, 13319, 13633, 13658-70, 13844-59, 13897-902, 13906-25, 13963-83, 14010-42, 14087-100, 14124, 14200-29, 14249-76, 14312-34, 14363-78, 14412, 14413-21, 14451-79, 14513-46, 14585-610, 15588-89, 15637, 15663-64, 15789, 15790-93, 15818-31, 15854-68, 15834-58, 15983-6008, 16042-68, 16105-18, 16142-70, 16212-13, 16264-84, 16317-44 (1914). Further the history of the major amendments to the Acts do not reveal discussions on the contribution issue. The Miller-Tydings Act, 15 U.S.C. § 1 (1973), amended section 1 of the Sherman Act by legalizing price maintenance contracts in some situations. It did not address the issue of civil damages. *See* 1 H. TOULMIN, *supra* note 102, at 232-38. The Robinson-Patman Act, 15 U.S.C. § 13 (1973), amended the price discrimination sections of the Clayton Act, and a review of its legislative history shows an absence of discussion on contribution. *See* W. PATMAN, A COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT app. c (2d ed. 1963). The Act of July 7, 1955, 15 U.S.C. §§ 1-3 (1976) simply amended sections 1, 2, and 3 of the Sherman Act to increase criminal penalties from $5,000 to $50,000—contribution was not at issue. *See* [1955] U.S. CODE CONG. & AD. NEWS 2322-25. Finally, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976), amended the Clayton Act to permit State attorneys general to recover on behalf of state residents for injuries caused by antitrust violations. Although the legislative history reveals discussion on large damages, contribution was not mentioned. *See* [1976] U.S. CODE CONG. & AD. NEWS 2572-648.

104. Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 170 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); Jones v. Schramm, 436 F.2d 899, 901 (1970); 18 AM. JUR. 2d *Contribution* §§ 4-5 (1965).

105. National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 688 (1978).

has shown some interest in this subject,[106] the legislative process can be slow and unproductive. Thus, the judiciary remains the more appropriate body to resolve the contribution issue.

V. Conclusion

The potential of staggering liability in several recent cases has led three federal circuits to reconsider the rule barring contribution among antitrust defendants. As demonstrated above, courts reexamining this question must begin with the antitrust laws and their underlying policy rather than apply a single federal rule. Because the securities laws have similar purposes and also involve large, complex suits, resolution of the contribution question under these statutes provides an apt analogy for judicial treatment in the antitrust context.

The experience of courts allowing contribution in the securities context indicates that contribution would not threaten the antitrust policies of deterring violations, encouraging private actions, and compensating injured parties. Indeed, the existence of treble damages and criminal penalties in the antitrust context virtually assures that these goals will be effected. Finally, a court's ability to sever parties and issues and to fashion rules protecting settling parties should adequately deal with the potential problems of complexity and settlement.

Most importantly, contribution would eliminate the substantial inequities facing defendants in large damage actions. Specifically, it would diminish the opportunity for collusion between powerful potential defendants and plaintiffs that rely on them for continued business. Contribution would also help eliminate coercive settlements in these large actions. Finally, it would decrease the chance that an individual defendant will be forced to bear the entire burden of liability merely because the plaintiff, by whim or strategy, has singled out that defendant.

Because contribution is an equitable remedy, created and traditionally administered by the courts, the courts are in the best position to make the flexible determination whether the equities of a case require that contribution be allowed. Congress' omission of contribution from the antitrust statutes was not intended as a decision to *bar* contribution. Rather, it was more likely never considered. Thus, the courts need not defer to this illusory legislative judgment, but instead should seize the opportunity to permit contribution when equity requires.

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