

# The Unsettling Problem of Contribution in Private Antitrust Litigation

*This comment explores the consequences of denying contribution among antitrust defendants. After concluding that the reasons advanced in support of the present rule are unconvincing, the comment then proposes a contribution rule that will promote antitrust policies and assure fairness to defendants.*

[A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.<sup>1</sup>

## INTRODUCTION

With one exception, federal courts have uniformly denied contribution among antitrust violators.<sup>2</sup> Reasoning that contribu-

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<sup>1</sup> *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974) (contribution available among joint tortfeasors in noncollision maritime cases).

<sup>2</sup> See *In re Beef Indus. Antitrust Litigation*, 607 F.2d 167, 183 (5th Cir. 1979), *petition for cert. filed, sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214); *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995, at 79,704 (10th Cir. 1979); *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 905-06 (5th Cir. 1979), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144); *Hedges Enterprises, Inc. v. Continental Group, Inc.*, 84 F.R.D. 615, 617 (E.D. Pa. 1979); *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41-42 (S.D. Tex. 1979), *aff'd mem.*, 607 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom. Westvaco Corp. v. Adams Extract Co.*, 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647, 650 (D.D.C. 1979); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533, at 72,112 (N.D. Cal. 1976); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1345-46 (S.D.N.Y. 1969).

The only case to the contrary is *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186 (8th Cir. 1979), cited with approval in *Heizer Corp. v. Ross*, 601 F.2d 330, 333 (7th Cir. 1979) (contribution available in 10(b)(5) securities actions).

tion would conflict with fundamental antitrust policies, these courts have declined to follow the general trend towards permitting contribution among joint tortfeasors.<sup>3</sup>

Denial of contribution in the antitrust context is particularly harsh. Applied in conjunction with treble damages<sup>4</sup> and joint

However, a bill is pending in the Senate which would permit contribution in price-fixing cases. S. 1468, 96th Cong., 1st Sess. (1979). See *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. 123-25 (1979)* [hereinafter cited as *Hearings on the Antitrust Equal Enforcement Act*]. In addition, the Antitrust Section of the American Bar Association has drafted a legislative proposal that provides for contribution in all antitrust cases. RESOLUTIONS AND REPORT OF THE SECTION OF ANTI-TRUST LAW OF THE AMERICAN BAR ASSOCIATION ON PROPOSED AMENDMENT OF THE CLAYTON ACT TO PERMIT CONTRIBUTION IN TREBLE DAMAGE ACTIONS BROUGHT THEREUNDER, reprinted in 936 ANTITRUST & TRADE REG. REP. (BNA) E-1 (Oct. 25, 1979) [hereinafter cited as ABA PROPOSAL]. It should be noted that the Antitrust Section's report and recommendation reflect only the views of the Section, and do not purport to be those of the ABA or its House of Delegates.

<sup>3</sup> Thirty-eight states, as well as the District of Columbia, presently allow some form of contribution among joint tortfeasors. Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 698 (1978).

In addition, federal law provides for contribution in numerous contexts. The Securities Act of 1933, § 11(f), 15 U.S.C. § 77k (1976), and the Securities Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i, 78r (1976), do so expressly. Even where the statutes are silent, federal courts have not hesitated to permit contribution in securities cases. See, e.g., *Heizer Corp. v. Ross*, 601 F. 2d 330 (7th Cir. 1979) (contribution available in 10(b)(5) securities actions); *Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D. Del. 1974) (contribution permitted in actions predicated on § 14(a) of the Securities Exchange Act of 1934), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970) (contribution available in actions brought under § 17(a) of the Securities Act of 1933), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied, sub. nom. Law Research Service, Inc. v. Blair & Co.*, 404 U.S. 941 (1971).

Contribution is also permitted under maritime law, *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and in tort cases stemming from mid-air collisions, *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974). See also *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967) (applying Virgin Islands law to hold contribution is available).

<sup>4</sup> Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides: "Any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

and several liability,<sup>5</sup> the no-contribution rule subjects individual defendants to the risk of potentially devastating liability. It permits antitrust plaintiffs to employ "divide and conquer" with "escalation of demands" settlement strategies. Defendants are frequently intimidated into settlements that bear little relationship to their true antitrust liability.

Small businesses are particularly susceptible to these coercive settlement tactics. Since massive exposure to liability threatens their very existence, small business defendants lack a realistic opportunity to assert their innocence at trial.

This comment examines the policy justifications underlying the antitrust no-contribution rule and concludes that contribution is consistent with fundamental antitrust policies and basic equitable principles. The comment then proposes a contribution rule that will further antitrust goals while ensuring fairness among defendants.

## I. PRESENT LEGAL FRAMEWORK

### A. *Antitrust Policies, the Private Treble Damage Action and the No-Contribution Rule*

The basic premise of federal antitrust law is that society benefits from a competitive market economy.<sup>6</sup> Competition promotes material prosperity by ensuring the efficient allocation of scarce resources and encouraging innovation.<sup>7</sup> Competition also fur-

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<sup>5</sup> Antitrust violators are jointly and severally liable for any damages they inflict. *See, e.g.*, *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974); *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 (S.D. Cal. 1968).

<sup>6</sup> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). *See also* C. KAYSER & D. TURNER, *ANTITRUST POLICY* 11-18 (1959). *See generally* 1 E. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* (1978).

<sup>7</sup> C. KAYSER & D. TURNER, *supra* note 6, at 11.

thers goals that are not purely economic; fostering a favorable environment for small, independent businesses helps prevent undue concentration of wealth and power that might interfere with democratic processes.<sup>8</sup> To realize these benefits, the anti-trust statutes outlaw private restraints which threaten competition.<sup>9</sup>

The effectiveness of the antitrust laws depends in large part upon private enforcement. Limited resources necessarily render

<sup>8</sup> The Sherman Act was enacted in an era of trusts and combinations which threatened to control the political life of the country. J. VAN CISE, *THE FEDERAL ANTITRUST LAWS* 21 (2d rev. ed. 1967). Congress hoped to combat "the vast accumulations of wealth in the hands of corporations and individuals . . . and the widespread impression that their power had been and would be expected to oppress individuals and injure the public generally." *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1910).

Populist concern over the growing concentration of wealth and power in the hands of big business led to a philosophy favoring the dispersal of economic power. This philosophy is "rationalized in terms of certain Jeffersonian symbols of wide political appeal and great persistence in American life: business units are politically irresponsible, and therefore large powerful business units are dangerous." C. KAYSEN & D. TURNER, *supra* note 6, at 17.

Judicial interpretation of the antitrust laws often reflects a solicitude for small businesses. Judge Learned Hand stated the classic formulation: "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

The two basic goals of the antitrust laws—maximizing consumer welfare and preserving an economy consisting of many small producers—may at times conflict.

It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small locally owned businesses. Congress appreciated that occasional higher costs and prices might result from maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.

*Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). See generally R. BORK, *THE ANTITRUST PARADOX* (1978).

<sup>9</sup> The Sherman Act merely states the general principle that competition should be unrestrained. Section 1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade . . . is declared to be illegal. . . ." 15 U.S.C. § 1 (1976). Congress left the difficult task of applying and developing this simple principle to the courts. 1 E. KINTNER, *supra* note 6, at 365.

public enforcement efforts selective, primarily directed at continuing or flagrant violations.<sup>10</sup> By providing for treble damages, recovery of reasonable attorney's fees and other statutory measures,<sup>11</sup> Congress established the private suit as an integral part of the overall system of antitrust enforcement.<sup>12</sup> In seeking recovery for injury to business or property,<sup>13</sup> the private claimant furthers the deterrence objectives of the antitrust laws and thus vindicates the public interest.<sup>14</sup>

In deference to the congressional policy favoring private enforcement, federal courts have generally encouraged antitrust plaintiffs. The Supreme Court, for example, eliminated the *in pari delicto* defense,<sup>15</sup> rejected the pass-on defense,<sup>16</sup> and relaxed the standards of proof concerning damages.<sup>17</sup> Similarly,

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<sup>10</sup> 2 P. AREEDA & D. TURNER, ANTITRUST LAW § 311(a), at 33 (1978).

<sup>11</sup> Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), set forth in note 4 *supra*, provides for recovery of reasonable attorney's fees as well as treble damages. In addition, Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1976), provides that a prior final judgment or decree in favor of the United States shall be available to private plaintiffs as prima facie evidence of all matters with respect to which the judgment would work an estoppel between the defendants and the United States. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951). Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b) (1976), suspends the statute of limitations applicable to private actions during the pendency of proceedings brought by the Department of Justice or the Federal Trade Commission. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321-22 (1965).

<sup>12</sup> See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

<sup>13</sup> A prerequisite for bringing suit under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), set forth in note 4 *supra*, is injury to plaintiff's business or property.

<sup>14</sup> See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

<sup>15</sup> *Id.* at 140. For a more extensive discussion of the *Perma Life* decision, see notes 91-94 and accompanying text *infra*.

<sup>16</sup> *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). Prior to *Hanover Shoe*, some lower courts denied recovery to plaintiffs who had "passed on" illegal overcharges to their customers. The Supreme Court rejected the pass-on defense since permitting it would reduce the number of potential private plaintiffs, thus allowing some antitrust violators to "retain the fruits of their illegality." *Id.* at 494.

<sup>17</sup> *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931). Following these decisions, lower courts have held that once the fact of injury is proven, all that an antitrust plaintiff need produce is evidence reasonably tending to show the amount of damages. E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 21.01, at 305 (1965).

the Court recognized that the class action, by permitting individuals to aggregate their damages to achieve a more powerful litigation posture, enhances the efficacy of private enforcement.<sup>18</sup> These procedural and substantive measures underscore the important public policy of encouraging the antitrust plaintiff.

The private claimant's favored status is particularly evident in cases predicated on joint conduct.<sup>19</sup> Since courts characterize anticompetitive behavior as a tort,<sup>20</sup> antitrust violators are held jointly and severally liable.<sup>21</sup> Consequently, a plaintiff may select and then sue any combination of wrongdoers to obtain full recovery.<sup>22</sup>

There is a pronounced trend in tort law to counterbalance the rigors of joint and several liability by permitting contribution among joint tortfeasors.<sup>23</sup> Absent contribution, an individual defendant may be required to shoulder entire responsibility for a plaintiff's damages—regardless of relative fault. Nonetheless, with the exception of the Eighth Circuit Court of Appeals,<sup>24</sup> federal courts have consistently refused to permit contribution in

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<sup>18</sup> *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972). Since private antitrust actions enjoy an independent jurisdictional grant (Clayton Act § 4, 15 U.S.C. § 15 (1976), set forth in note 4 *supra*), individual class members need not satisfy an amount in controversy requirement.

<sup>19</sup> For purposes of this comment, "joint conduct" refers to conduct proscribed by the antitrust laws engaged in by two or more parties which gives rise to joint and several liability.

<sup>20</sup> *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 (N.D. Ga. 1973); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 29 (6th Cir. 1903), *aff'd*, 203 U.S. 390, 397 (1906).

One commentator has questioned the assumption that antitrust violations sound in tort. Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 692-97 (1978). The Fifth Circuit recently considered this argument but rejected it and reaffirmed the tortious nature of antitrust violations. *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 902 n.5 (5th Cir. 1979), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144).

<sup>21</sup> For cases holding that antitrust violators are jointly and severally liable, see note 5 *supra*.

<sup>22</sup> *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D. Ga. 1973).

<sup>23</sup> For documentation of this trend, see note 3 *supra*.

<sup>24</sup> See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (1979).

antitrust cases.<sup>25</sup>

Surprisingly, the issue did not surface until 1969. In *Sabre Shipping Corp. v. American President Lines, Ltd.*,<sup>26</sup> a New York district court held that contribution is unavailable among antitrust defendants.<sup>27</sup> The court believed that it would be "presumptuous" to depart from the traditional federal common-law rule prohibiting contribution among joint tortfeasors.<sup>28</sup> In addition, the court felt that by failing to provide for it, Congress intended to deny contribution among antitrust defendants.<sup>29</sup> Finally, the court feared that permitting contribution might hinder private antitrust enforcement by complicating the plain-

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<sup>25</sup> For the cases refusing to recognize a right of contribution among antitrust violators, see note 2 *supra*.

<sup>26</sup> 298 F. Supp. 1339 (S.D.N.Y. 1969). The plaintiff, a shipping firm, alleged that the defendants had unlawfully cut prices resulting in the plaintiff's bankruptcy. Five non-settling defendants sought contribution from fourteen settling defendants.

<sup>27</sup> *Id.* at 1345-46.

<sup>28</sup> Since it was the first to consider the issue of contribution in antitrust cases, the *Sabre* court had to decide whether federal or state law controlled. It concluded that federal law governed. *Id.* at 1343 (citing *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173 (1942)).

In holding that contribution is unavailable under federal common law, the *Sabre* court relied on two older Supreme Court cases. In *Union Stock Yards Co. v. Chicago B. & Q. R.R.*, 196 U.S. 217, 224 (1905), the Court said that "the general principle of law is well settled that one of several wrongdoers can not recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done." *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) (involving the scope of the maritime "moiety" rule), explicitly reaffirmed the earlier holding.

The precedential value of these cases, however, was substantially eroded by *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), which limited the holding in *Halcyon Lines* to cases in which the tortfeasor from whom contribution is sought is immune from liability to the plaintiff because of a statutory employee compensation scheme. Noting that "a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution," the Court established a right of contribution in maritime non-collision cases. *Id.* at 111.

<sup>29</sup> 298 F. Supp. at 1345.

More recent opinions, however, have concluded that the absence of express contribution provisions merely indicates that Congress did not consider the matter. See, e.g., *Wilson P. Abraham Constr. Co. v. Texas Indus., Inc.*, 604 F.2d 897, 900 (5th Cir. 1979), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144); *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1183-84 (8th Cir. 1979).

tiff's case.<sup>30</sup>

Seven years later, in *El Camino Glass v. Sunglo Glass Co.*,<sup>31</sup> a California district court relied on *Sabre* to hold that contribution is not available even to unintentional antitrust violators.<sup>32</sup> Although the court noted the "considerations of equity and fairness" which underly a contribution rule,<sup>33</sup> it concluded that prohibiting contribution furthers the antitrust policies of deterrence and private enforcement.<sup>34</sup>

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,<sup>35</sup> the Eighth Circuit rejected the holdings of *Sabre* and *El Camino*. Writing for the majority, Judge Stephenson concluded that granting contribution would further the deterrent purposes of the antitrust laws.

The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go "scot free." This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.<sup>36</sup>

The court thus held that even intentional antitrust violators

<sup>30</sup> 298 F. Supp. at 1346.

<sup>31</sup> 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976). The plaintiffs were automotive glass retailers who accused their suppliers of price-fixing. One of the defendants sought contribution from an alleged co-conspirator who had not been joined in the original action.

<sup>32</sup> *Id.* at 72,112. The third-party plaintiff had asserted that any antitrust violation it had committed "was at most unintentional and in good faith. . . ." *Id.* at 72,111.

Although intent is a necessary element of a criminal antitrust violation, *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), civil liability may exist for unintentional violations. *Id.* at 436 n.13. See also L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 74, at 198 (1977) ("the per se rule against price fixing applies to any arrangement among competitors which, *in purpose or effect*, directly or indirectly inhibits price competition") (emphasis added).

<sup>33</sup> 1977-1 Trade Cas. ¶ 61,533, at 72,112.

<sup>34</sup> *Id.* at 72,112-13.

<sup>35</sup> 594 F.2d 1179 (8th Cir. 1979). Both Professional and National had been wholesalers of beauty supplies manufactured by LaMaur, Inc. Professional alleged that National attempted to monopolize the wholesale business by demanding that LaMaur grant National the exclusive dealership for LaMaur's products. Professional further alleged that as a result of these demands LaMaur terminated Professional's dealership. National filed a third-party complaint against LaMaur for contribution should National be found liable to Professional.

<sup>36</sup> *Id.* at 1185.

could seek contribution so that others would not escape liability for their wrongful conduct.<sup>37</sup>

Several months after *Professional Beauty Supply*, the Fifth Circuit confronted the contribution issue in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*<sup>38</sup> The court rejected the arguments found in *Professional Beauty Supply* in favor of contribution and concluded that “[t]he chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share.”<sup>39</sup> The court also noted that permitting contribution might “open a Pandora’s box of procedural problems” which could discourage antitrust plaintiffs from pursuing legitimate claims.<sup>40</sup>

In a forceful partial dissent, Judge Morgan argued that the majority’s reasoning did not justify denying contribution to unintentional wrongdoers.<sup>41</sup> Judge Morgan felt that the majority’s deterrence argument was valid only with respect to intentional violators.<sup>42</sup> In addition, he believed that existing procedural safeguards could minimize any chilling effect that contribution might have on private enforcement.<sup>43</sup>

### B. The Settlement Process

Neither the Eighth Circuit in *Professional Beauty Supply* nor the Fifth Circuit in *Abraham Construction* considered the no-contribution rule’s effect on the settlement of multiple defen-

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<sup>37</sup> *Id.* at 1186. The court did not, however, create an unqualified right of contribution. After stating that even intentional violators could seek contribution, the court remarked: “We do not hold that contribution is available to all violators of the antitrust laws regardless of the flagrancy of the conduct of the party seeking contribution.” *Id.* For a discussion of factors listed by the court bearing upon whether a particular defendant is entitled to contribution, see note 105 and accompanying text *infra*.

<sup>38</sup> 604 F.2d 897 (5th Cir. 1979), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144). The plaintiff sought damages arising out of an alleged price-fixing conspiracy involving ready-mix concrete in the New Orleans area. The defendant sought to implead for contribution alleged co-conspirators unnamed in the complaint.

<sup>39</sup> *Id.* at 901.

<sup>40</sup> *Id.* at 906.

<sup>41</sup> *Id.* at 907-08.

<sup>42</sup> *Id.* at 907.

<sup>43</sup> *Id.* at 908.

dant antitrust litigation. Denial of contribution has a profound influence on the settlement process. It enables plaintiffs to employ "[a] 'divide and conquer' with 'escalation of demands' strategy, designed to isolate defendant companies and force each to make a separate and costly settlement without regard to the merits of a case . . . ."<sup>44</sup>

The recent settlements negotiated in the *Corrugated Container Antitrust Litigation*<sup>45</sup> illustrate the dynamics of this settlement strategy. In December, 1975, a federal grand jury began investigating the corrugated container industry for alleged price-fixing.<sup>46</sup> The investigation of thirty-nine companies led to fourteen criminal indictments and over fifty private lawsuits.<sup>47</sup>

After consolidation of the civil suits, but prior to commencement of the criminal trials, two of the largest defendants settled with plaintiffs class.<sup>48</sup> Shortly thereafter, fifteen other defendants also settled. The settlement formula required payment of a fixed sum multiplied by a defendant's percentage point share of the relevant market.<sup>49</sup> With some minor deviations, this sum steadily increased with each successive settlement. Amounts paid per percentage point ranged from \$.428 million in the first settlement to \$6.5 million in the seventeenth amendment.<sup>50</sup> To date, twenty-three of the defendants sued in the civil action

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<sup>44</sup> *Hearings on the Antitrust Equal Enforcement Act*, *supra* note 2, at 46 (prepared statement of Thomas R. Long).

<sup>45</sup> 84 F.R.D. 40 (S.D. Tex. 1979), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom.* Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972).

<sup>46</sup> *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921, 924 (J.P.M.D.L. 1977).

<sup>47</sup> *Hearings on the Antitrust Equal Enforcement Act*, *supra* note 2, at 158-59 (statement of the Continental Group, Inc.).

<sup>48</sup> These two defendants were St. Regis Paper Company and International Paper Company. The net working capital in 1977 for St. Regis and International Paper was \$522,134,000 and \$574,500,000 respectively. St. Regis' share of the market during the relevant period (1972-1976) was 3.97%. International Paper's market share during this period was 8.3%. For a comparison of these figures with those for the other defendants, see *Hearings on the Antitrust Equal Enforcement Act*, *supra* note 2, at 181-84.

<sup>49</sup> See generally *id.* at 181-84.

<sup>50</sup> The defendants' respective percentage point payments in the first seven settlements were as follows:

have settled by paying nearly 300 million dollars.<sup>51</sup>

Such a "divide and conquer" settlement strategy is a natural consequence of the no-contribution rule. Although settlement amounts are deducted from any judgment the plaintiff receives,<sup>52</sup> this only occurs after the damage award is trebled.<sup>53</sup> Thus, if the plaintiff settles early with a few defendants for less than their actual share of liability, the potential liability of non-settling defendants significantly increases.<sup>54</sup> Since the settling tortfeasors are immune from contribution, the non-settling de-

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Defendant	\$1 Million Per Point
1. St. Regis Paper Co.	.428
2. International Paper Co.	1.0
3. Union Camp Corp.	2.0
4. Diamond International Corp.	2.0
5. Dura Containers Inc.	2.0
6. Chesapeake Corp. of Virginia	2.4
7. Longview Fiber Co.	2.5
8. Boise Cascade	3.5
9. Willamette Industries Inc.	2.7
10. Champion International (Hoerner Waldorf)	4.5
11. Menasha Corp.	2.75
12. Container Corp. of America	4.0
13. Weyerhaeuser Co.	5.0
14. McMillan Bloedel Ltd.	4.0
15. Owens-Illinois Inc.	6.0
16. Olinkraft Inc.	6.0
17. The Continental Group Inc.	6.5

<sup>51</sup> *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex. 1979), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom. Westvaco Corp. v. Adams Extract Co.*, 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972).

<sup>52</sup> *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971).

<sup>53</sup> *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D. Ga. 1973).

<sup>54</sup> [I]f an antitrust plaintiff sues four co-conspirators alleging \$100,000 damages, and during the suit three of the co-conspirators are released upon a total payment of \$50,000, and the jury returns a verdict assessing damages at \$100,000, as a matter of computation the remaining co-conspirator is liable for the entire amount of damages trebled—\$300,000—and his defense of payment will result in a deduction of \$50,000 from the trebled amount, leaving him with a liability of \$250,000.

*Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D. Ga. 1973).

defendants may be left "holding the bag" for liability justly attributable to settling defendants.<sup>55</sup> Indeed, although denying contribution, Judge Singleton in the *Corrugated Container* case acknowledged that this scenario is "inherently coercive."<sup>56</sup>

In addition, plaintiffs often demand cooperation from settling defendants in developing the case against remaining defendants. For example, plaintiffs frequently demand, as a condition of settlement, access to a defendant's files.<sup>57</sup> Such cooperation may

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<sup>55</sup> In the following cases non-settling defendants sought contribution from settling defendants to avoid being left "holding the bag." In each case, however, contribution was denied. *In re Beef Indus. Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979), *petition for cert. filed, sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214); *Hedges Enterprises, Inc. v. Continental Group, Inc.*, 84 F.D.R. 615 (E.D. Pa. 1979); *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40 (S.D. Tex. 1979), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom. Westvaco Corp. v. Adams Extract Co.*, 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647 (D.D.C. 1979); *Sabre Shipping Corp. v. American President Lines Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

In class action cases, where court approval of settlements with a plaintiffs class is required under FED. R. Civ. P. 23(e), antitrust defendants sometimes attempt to challenge the propriety of proposed settlements which increase their liability exposure. The courts, however, have uniformly held that these defendants lack standing to contest the fairness of such settlements. *See, e.g.*, *In re Beef Indus. Antitrust Litigation*, 607 F.2d 167, 172 (5th Cir. 1979), *petition for cert. filed, sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647, 654-55 (D.D.C. 1979). *See also* *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977). Indeed, courts routinely approve settlements which increase the liability of non-settling defendants since the criteria by which class settlements are tested focus solely on the economic interests of the plaintiffs class. *See, e.g.*, *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D. Ga. 1973) ("[s]ince the remaining defendants named in this action will still be responsible for the entire amount of the damages caused by [the settling defendant] . . . the class will sustain no economic loss by settling. . .").

<sup>56</sup> *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex. 1979), *aff'd mem.*, 607 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom. Westvaco Corp. v. Adams Extract Co.*, 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972).

<sup>57</sup> *In re Beef Indus. Antitrust Litigation*, 607 F.2d 167, 170 (5th Cir. 1979) (settling defendants agreed to allow plaintiffs access to their records and employees for discovery purposes), *petition for cert. filed, sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214); *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 42 (S.D. Tex. 1979) (settling defendants cooperated with class plain-

strengthen a plaintiff's case and yield additional settlement leverage. In these ways, antitrust plaintiffs use the no-contribution rule to coerce even relatively innocent defendants into settlement.<sup>58</sup>

### C. IMPACT ON SMALL BUSINESS DEFENDANTS

Small business<sup>59</sup> antitrust defendants are particularly vulnerable to the coercive impact of the no-contribution rule. Under principles of joint and several liability, the liability exposure in absolute dollar amount is identical for both large and small defendants. The ratio of potential liability to total net worth, however, necessarily increases as net worth decreases. Treble damage liability based upon the conduct of many defendants thus poses a real threat to a smaller company's survival.<sup>60</sup>

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tiffs in their discovery), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom.* Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972); Liebman v. J.W. Peterson Coal & Oil Co., 63 F.R.D. 684, 689 (N.D. Ill. 1974) (settling defendants waived constitutional objections to plaintiff's use of tapes and documents); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 12 (N.D. Ga. 1973) (settling defendant agreed to open files to plaintiff). *See generally* 3 H. NEWBERG, CLASS ACTIONS § 5650b (1977).

<sup>58</sup> Although denying contribution, Judge Singleton noted that "[e]ven a defendant relatively certain of a judgment in his favor must have serious doubts about risking such [massive] exposure by going to trial." In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex. 1979), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom.* Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972).

<sup>59</sup> The Small Business Act defines a "small business" as an entity that is both independently owned and not dominant in its field of operation. 15 U.S.C. § 632 (Supp. II 1978). The Small Business Administration has promulgated detailed regulations which further refine this definition. *See* 13 C.F.R. § 121.3-1 (1979). *See also* Small Business Size Standards; Revision to Method of Establishing Size Standards and Definitions of Small Business, 45 Fed. Reg. 15,442 (1980) (proposing a unitary size standard focusing on the number of persons employed by a business in a particular industry).

For the purposes of this comment, however, a "bright line" definition of a "small business" is inappropriate. The no-contribution rule's coercive impact is a function of the relationship between business size and exposure to liability. Thus, even a relatively large "small business" may be compelled to settle because of the no-contribution rule.

<sup>60</sup> In his testimony during the hearings on Senate Bill 1468, the chairman of the board of Greenbay Packaging Co., one of the defendant companies in the Corrugated Container Litigation said "[t]he effect . . . upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over 50 years of effort and coerced into paying an exorbitant settlement

For small business antitrust defendants, the relationship between exposure to liability and net worth assumes special importance. Distinguishing prohibited from permitted—and indeed encouraged—conduct is often difficult.<sup>61</sup> In many instances, defendants are unable to determine whether specific past conduct will engender liability under the antitrust laws.<sup>62</sup> Smaller defendants therefore derive little solace from judicial reminders that innocent defendants will stand the test of trial and “not pay a penny in damages.”<sup>63</sup> To the contrary, the *in terrorem* effect on small business defendants often renders the risk of trial prohibitive.<sup>64</sup>

Moreover, generally accepted principles of accounting require a corporation to list contingent liabilities, including those from pending litigation, in its financial statements.<sup>65</sup> The combination of a high ratio of potential liability to net worth and the uncertain nature of antitrust litigation seriously impairs a small defendant's ability to secure outside sources of working capital.<sup>66</sup> Consequently, even if a smaller company is willing to assume the risk of an adverse judgment, the necessity of maintaining credit

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rather than being afforded the privilege of ultimately proving our corporate innocence.” *Hearings on the Antitrust Equal Enforcement Act*, *supra* note 2, at 35 (testimony of George Kress).

<sup>61</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422, 441-42 n.17 (1978).

<sup>62</sup> Case law contains many examples of good faith efforts to comply with the antitrust laws that were later held unlawful. *See, e.g.*, *United States v. Topco Associates, Inc.*, 405 U.S. 596, 605-06 (1972); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374-75 (1967); *Simpson v. Union Oil Co.*, 377 U.S. 13, 26 (1964) (Stewart J., dissenting).

<sup>63</sup> *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 42 (S.D. Tex. 1979), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom. Westvaco Corp. v. Adams Extract Co.*, 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972).

<sup>64</sup> *See* note 60 *supra*.

<sup>65</sup> *See generally* FINANCIAL ACCOUNTING STANDARDS BOARD, STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 5, ACCOUNTING FOR CONTINGENCIES (1975).

<sup>66</sup> “This contingent liability would have to be reported to Green Bay's mortgage holders, and potential lenders, who would be very reluctant to even consider lending additional money to a corporation facing [such] severe liability. Our company's borrowing power was voided.” *Hearings on the Antitrust Equal Enforcement Act*, *supra* note 2, at 45 (prepared statement of George Kress, chairman of the board of Green Bay Packaging Co., one of the defendant companies in the Corrugated Container litigation).

may nevertheless compel it to forego a trial. For these reasons, small business defendants are particularly susceptible to "divide and conquer" settlement tactics.<sup>67</sup>

## II. ANALYSIS OF CONTRIBUTION IN LIGHT OF ANTITRUST POLICIES

As discussed above,<sup>68</sup> the antitrust no-contribution rule is at odds with the important policy favoring increased economic participation of small businesses.<sup>69</sup> Moreover, a rule which enables plaintiffs to manipulate the threat of massive liability to compel settlement is manifestly unfair. Accordingly, the antitrust policies thought to justify denial of contribution among antitrust violators should be critically reevaluated.

### A. Deterrence

The no-contribution rule arguably promotes deterrence by preventing defendants from reallocating treble damage liability. Several courts have reasoned that "the threatening specter of sole liability"<sup>70</sup> augments the deterrent effect of treble damages.<sup>71</sup>

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<sup>67</sup> Indeed, one of Senator Bayh's primary reasons for introducing Senate Bill 1468 is to remedy the plight of smaller businesses named as defendants in large price-fixing cases.

[T]he Antitrust Equal Enforcement Act of 1979, is designed to rationalize the process of the allocation of damages in an antitrust price-fixing suit, so that the largest and most responsible price-fixers do not escape their share of the liability, and so that smaller and middle-sized businesses which find themselves left in the midst of a price-fixing suit are not left responsible for the liability caused by another's wrongdoing.

S. REP. No. 96-428, 96th Cong., 1st Sess. 1 (1979).

<sup>68</sup> See notes 59-67 and accompanying text *supra*.

<sup>69</sup> This policy is reflected in judicial interpretation of the antitrust laws. See note 8 *supra*. In addition, the Small Business Act provides: "It is the declared policy of the Congress that the Government should aid, counsel, assist and protect . . . the interests of small-business concerns in order to preserve free competitive enterprise. . . ." 15 U.S.C. § 631(a) (1976).

<sup>70</sup> *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 64 F.2d 897, 905 (5th Cir. 1979), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144).

<sup>71</sup> See *Olson Farms, Inc. v. Safeway Stores, Inc.* 1979-2 Trade Cas. ¶ 62,995, at 79,703 (10th Cir. 1979); *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 901 (5th Cir. 1979), *petition for cert. filed, sub nom. Texas*

This "threatening specter," however, is not always in society's best interest. The antitrust laws are intended to encourage competitive behavior, not to curb it. Limitless exposure to liability may cut against this objective by chilling aggressive competition. The Supreme Court recently warned against this very danger in antitrust criminal prosecutions.<sup>72</sup> The Court's observations, however, apply with equal force to the threat of massive civil liabil-

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*Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533, at 72,112 (N.D. Cal. 1976).

In *Abraham Construction*, the court concluded that "[c]onsistent with prevailing economic theory" the threat of sole liability has an enhanced deterrent effect. 604 F.2d at 901. This argument presumes that business decisionmakers are "risk averse"—i.e., that they are deterred more by a small risk of a large loss, than by a high risk of a small loss, even if the ultimate liability under probability theory is the same. See Breit & Elzinga, *Antitrust Penalties and Attitudes Towards Risk: An Economic Analysis*, 86 HARV. L. REV. 693 (1973) (concluding that business decisionmakers are "risk averse"). After making this assumption, the *Abraham Construction* court reasoned that "application of the rule denying contribution should inhibit those managers who are aware of the rule from participating in unlawful group activity: Although [*sic*] the rule decreases the likelihood that an individual participant will be held liable, it increases the size of the potential liability." 604 F.2d at 901 n.8.

This analysis is valid only if would-be violators fully appreciate their potential liability when contemplating anticompetitive behavior. If, in addition to treble damages for their own conduct, antitrust violators realize that they face liability for the illegal activity of others, then denial of contribution may well enhance antitrust deterrence. However, as noted by one commentator, "[u]nlike fines or penalties, which most laymen readily understand, the concept of joint and several liability, and the consequences of a rule denying contribution, are probably not fully appreciated by many non-lawyers." Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 702 (1978). In refuting this argument, the *Abraham Construction* court stated that "as a class, antitrust defendants are more likely to be familiar with the no-contribution rule than tortfeasors in general. Furthermore, the percentage of participants unaware of the rule will certainly decrease as the rule is applied." 604 F.2d at 901 n.8.

The deterrence argument against contribution is particularly suspect as a basis for denying contribution to inadvertent antitrust violators. They are not deterred by the threat of massive liability since they do not realize their conduct is illegal. See, e.g., *Hearings on the Antitrust Equal Enforcement Act*, *supra* note 2, at 28 (prepared statement of Assistant Attorney General John Shenefield) ("[c]ontribution is most compelling where the tortious conduct is unintentional; in such situations a lack of contribution would have no deterrent effect"). See also *Abraham Construction*, 604 F.2d at 907 (Morgan J., concurring and dissenting).

<sup>72</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978).

ity. In many instances, desirable, pro-competitive behavior lies close to the borderline of conduct which the antitrust laws proscribe.<sup>73</sup> Where this is the case, the possibility of sole liability predicated on the acts of others instills an overabundance of caution which might discourage competition.<sup>74</sup>

In addition to its potential to "overdeter," the no-contribution rule may actually undermine antitrust deterrence. Often, plaintiffs deliberately choose to sue only some of the parties to an illegal scheme.<sup>75</sup> As a consequence, some antitrust violators may

<sup>73</sup> *Id.*

<sup>74</sup> "[W]here the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned . . . will not necessarily redound to the public's benefit." *Id.* at n.17.

<sup>75</sup> In *Cackling Acres, Inc., v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), plaintiffs sued only 2 of 6 conspirators alleged to have fixed prices in the wholesale egg industry. Plaintiffs prevailed on the merits and collected a judgment for \$2.4 million dollars from defendant Olson Farms. Olson Farms subsequently sought contribution from its unnamed co-conspirators, alleging that its role in the conspiracy had been minimal. *Olson Farms, Inc. v. Safeway Stores, Inc.* 1979-2 Trade Cas. ¶ 62,995, at 79,700 (10th Cir. 1979). Olson Farms' complaint stated that the egg producers (the original plaintiffs) recovered damages calculated on the following purchases:

Egg Buyer	Sales (doz.)	Claimed Damages*
Safeway Stores, Inc. . . . .	6,297,999	\$271,129
Egg Products Co. . . . .	4,497,222	197,618
Snow White Egg Co. . . . .	3,574,070	157,052
Countryside Farms, Inc. and Gusto Marketing Systems, Inc. . . . .	2,724,824	119,961
Olson Farms, Inc. . . . .	2,288,650	99,656

\*(figures are prior to trebling)

Although Olson Farms made only 11% of the unlawful purchases, it was denied contribution and shouldered the entire responsibility for the price-fixing arrangement. *Id.* at 79,700.

For other cases in which the plaintiff sued fewer than all of the alleged wrongdoers, see *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979) (only one of four alleged co-conspirators), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144); *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (one of the two alleged wrongdoers); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cas. ¶

escape unpunished.<sup>76</sup> As the court in *Professional Beauty Supply* noted, "this possibility of escaping all liability might cause many to be more willing . . . to engage in wrongful activity."<sup>77</sup>

Permitting contribution would decrease the possibility that antitrust violators may evade treble damage liability. Motivated by self-interest, defendants would seek contribution from parties which the plaintiff chose not to sue.<sup>78</sup> Such defendants, therefore, would act as private attorneys general and, in effect, enlarge the pool of potential plaintiffs. Allowing contribution thus increases the probability that all of the wrongdoers are held accountable for their unlawful behavior.<sup>79</sup>

A contribution rule also promotes deterrence in a rational manner. In contrast to the risk of randomly visited liability engendered by denial of contribution, permitting contribution assures that liability is commensurate with fault.<sup>80</sup> In addition, since each defendant still faces treble damage liability for its own unlawful conduct, the cost of violating the antitrust laws outweighs the potential gain. Such a result is not only fair but

61,533 (N.D. Cal. 1976) (defendant sought contribution from an alleged unnamed co-conspirator).

<sup>76</sup> *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979). Those antitrust violators not sued, however, remain subject to possible criminal penalties. In addition, they may incur civil liability in subsequent suits brought by other private plaintiffs for injury arising from the same violation. *Id.* at 1189 (Hanson, J., dissenting in part).

<sup>77</sup> *Id.* at 1185.

<sup>78</sup> "[A] contribution rule increases one cartel member's incentive to disclose the operation of the entire cartel and seek compensation from other cartel members. Obviously, the presence of this incentive fosters the breakdown of cartels and therefore advances the purposes of the antitrust laws." *Hearings on the Antitrust Equal Enforcement Act*, *supra* note 2, at 145 (statement of Donald J. Polden, Associate Professor of Law, Drake University Law School).

<sup>79</sup> This reasoning has persuaded federal courts to permit contribution among even intentional tortfeasors in cases brought under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1976). "Because of the deterrent policy of the securities laws, even intentional tortfeasors may obtain contribution so that other tortfeasors will not escape liability. This purpose will be served if defendant tortfeasors are allowed to implead any other tortfeasors involved in the fraud." *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974). See also *deHass v. Empire Petroleum Co.*, 286 F. Supp. 809, 815 (D. Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

<sup>80</sup> The extent to which liability is truly commensurate with relative fault is, of course, dependent in large part upon the basis of apportionment. See notes 104-06 and accompanying text *infra*.

entirely consistent with the deterrence purposes of the antitrust laws.

### B. Procedural Complexity

Another reason advanced for denying contribution is the possibility of discouraging private enforcement. Specifically, opponents of contribution fear that defendants would interfere with a plaintiff's control over the litigation by impleading additional parties for contribution.<sup>81</sup> "Aware that litigation may spiral out of their control, it is foreseeable that some plaintiffs will decide to forego a legitimate cause of action."<sup>82</sup> Although this argument may have some merit, considerations of procedural convenience alone do not warrant denial of contribution.

Under the Federal Rules of Civil Procedure, a trial court may always refuse to permit third-party claims that would prove prejudicial to the plaintiff.<sup>83</sup> Alternatively, a court can sever the contribution phase of a case.<sup>84</sup> Moreover, given a district court's

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<sup>81</sup> See, e.g., *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995, at 79,703 (10th Cir. 1979); *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 905-06 (5th Cir. 1979), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144); *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1190 (8th Cir. 1979) (Hanson, J., dissenting in part); *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 42 (S.D. Tex. 1979), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom. Westvaco Corp. v. Adams Extract Co.*, 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972); *El Camino Glass v. Sunglow Glass Co.*, 1977-1 Trade Cas. ¶ 61,533, at 72,112 (N.D. Cal. 1976); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969).

<sup>82</sup> *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1190 (8th Cir. 1979) (Hanson, J., dissenting in part).

<sup>83</sup> Under FED. R. Civ. P. 14(a) "[t]he court has discretion to strike the third-party claim . . . if confusion or prejudice would otherwise result." 28 U.S.C.A. Rule 14(a), at 239 (West Cum. Supp. 1979) (Notes of Advisory Committee on Rules).

The ABA contribution proposal responds to the fear of prejudicial impleader by incorporating an express limitation on the right to seek contribution. Section (d) of the proposed statute provides: "Contribution rights may be claimed only against those persons for whose wrongful acts or omissions plaintiff seeks to recover damages from one or more defendants." ABA PROPOSAL, *supra* note 2, at 10.

<sup>84</sup> FED. R. Civ. P. 42(b) provides: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-

power to grant partial judgment,<sup>85</sup> a plaintiff's recovery need not be delayed pending resolution of contribution claims. Appreciating the antitrust plaintiff's favored status, it is unlikely that a trial judge "would deny separation and allow defendant to complicate the lawsuit or otherwise add to the private litigant's burden."<sup>86</sup> Permitting contribution, therefore, would not compromise the incentive to sue antitrust violators.

More importantly, considerations of deterrence and fairness outweigh untested assertions that permitting contribution would chill private enforcement. The policy basis for assisting antitrust plaintiffs extends only as far as their suits further antitrust deterrence. When plaintiffs fail to sue all of the culpable parties yet seek to recover damages attributable to unsued antitrust violators, the public interest suffers. Not only are defendants unfairly burdened with excessive liability, but those not sued are shielded from liability. Thus, even if permitting contribution would add some complexity to a plaintiff's case, existing remedial devices would ameliorate unreasonable problems, and any remaining burden is wholly justified.

### III. STRUCTURING AN ANTITRUST RULE OF CONTRIBUTION

Since the arguments against contribution do not withstand critical analysis, the issue is not whether to permit contribution, but how to best frame a contribution rule.<sup>87</sup> A principal concern

claim, or third-party claim, or of any separate issue . . . ."

In addition, a federal court has the power to limit discovery to the segregated issues. See *Ellingson Timber Co. v. Great Northern Ry.*, 424 F.2d 497, 499 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970).

<sup>85</sup> FED. R. CIV. P. 54(b) provides: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim . . . the court may direct entry of a final judgment as to one or more but fewer than all of the claims . . . ."

<sup>86</sup> *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 908 (5th Cir. 1979) (Morgan, J., dissenting in part), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144).

<sup>87</sup> Even Senators Kennedy and Metzenbaum, who oppose Senate Bill 1468, recognize that contribution is appropriate in antitrust actions. They believe, however, that the judiciary, rather than Congress, is the appropriate body to fashion an antitrust rule of contribution. See S. REP. No. 96-428, 96th Cong., 1st Sess., at 28 (1979).

The Supreme Court has recently agreed to review the decision denying contribution in the *Corrugated Container* litigation. In re *Corrugated Container*

in fashioning such a rule is whether intentional antitrust violators should be entitled to contribution. A second problem lies in determining the appropriate basis for apportioning liability among antitrust defendants. Finally, to be consonant with public policy, an antitrust contribution rule must not unduly inhibit settlements.

#### A. *Who May Seek Contribution*

Although most jurisdictions today permit some form of contribution,<sup>88</sup> the common-law rule barring contribution among intentional tortfeasors still generally prevails.<sup>89</sup> Retention of the rule is predicated on moral considerations thought to justify the rule when first adopted, i.e., public policy does not permit intentional wrongdoers to make their own misconduct the basis for a cause of action.<sup>90</sup> As a matter of antitrust policy, however, dis-

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Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted, sub nom. Westvaco Corp. v. Adams Extract Co.*, 48 U.S.L.W. 3820 (U.S. June 17, 1980) (No. 79-972). In addition, petitions for certiorari have been filed in two other Fifth Circuit decisions in which contribution was denied. In *re Beef Indus. Antitrust Litigation*, 607 F.2d 163 (5th Cir. 1979), *petition for cert. filed, sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214); *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. filed, sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 48 U.S.L.W. 3490 (U.S. Jan. 24, 1980) (No. 79-1144).

With both congressional and judicial activity in this area, a threshold question is whether the Supreme Court should refrain from altering the present no-contribution rule. Arguably, since the antitrust laws embody basic economic policies, any change affecting them should be initiated by Congress. Deferring to Congress, however, is not appropriate on the issue of antitrust contribution; both joint and several liability and the no-contribution rule are the result of judicial, not legislative, sanction. See notes 2 & 5 *supra*. Furthermore, a contribution rule would promote antitrust policies, see notes 69-86 and accompanying text *supra*, and would not make the type of basic policy shift properly reserved for the legislative branch. Finally, Congress is of course free to alter the case law by legislation. Thus, the Supreme Court should not feel constrained to await congressional action before ameliorating the harshness of a judicially created rule.

<sup>88</sup> See note 3 *supra*.

<sup>89</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 50, at 308 (4th ed. 1971). *But see* N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976) (permitting contribution among intentional joint tortfeasors).

<sup>90</sup> The leading English case of *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799), established the common-law rule that joint tortfeasors could not obtain contribution from their fellow wrongdoers. The basis for the court's de-

tinctions based upon moral culpability should not govern the availability of contribution among antitrust defendants.

In *Perma Life Mufflers, Inc. v. International Parts Corp.*,<sup>91</sup> the Supreme Court recognized that common-law barriers to relief are inappropriate where a private suit furthers an important public interest.<sup>92</sup> Consequently, the court held that the doctrine of *in pari delicto* should not bar a private antitrust suit.<sup>93</sup> The Court reasoned that “[a] more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the private action as a bulwark of private antitrust enforcement.”<sup>94</sup>

Similarly, denial of contribution for reasons of moral culpability would substantially limit the potential deterrent effect of a contribution rule. As discussed earlier,<sup>95</sup> contribution enhances the deterrent force of the antitrust laws by decreasing the possibility that antitrust violators—including intentional violators—will escape treble damage liability. Since considerations of moral blameworthiness are irrelevant when a private suit vindi-

cision appears to have been that the parties acted intentionally and in concert. Thus, the plaintiff’s contribution claim “rested upon what was, in the eyes of the law, entirely his own deliberate wrong.” W. PROSSER, *supra* note 89, at 305.

The moralistic underpinnings of the rule still explain the refusal by most jurisdictions to permit contribution in cases of intentional torts. *See, e.g.*, *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979). “I believe that National is in a poor position to complain of any unfairness in being forced to assume the burden of restitution for the loss occasioned by its intentional wrongdoing . . . .” *Id.* at 1189 (Hanson, J., dissenting in part).

<sup>91</sup> 392 U.S. 134 (1968).

<sup>92</sup> *Id.* at 138.

<sup>93</sup> The Court, in a four member plurality opinion, stated that “the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.” *Id.* at 140. In separate concurrences, Justices White, Fortas, Marshall and Harlan argued that the *in pari delicto* doctrine should be available in limited circumstances in antitrust cases.

Some lower courts have held that the *Perma Life* case eliminated the *in pari delicto* defense in antitrust actions completely. *See, e.g.*, *Memorex v. International Business Machines Corp.*, 555 F.2d 1379 (9th Cir. 1977). Conversely, other courts have reasoned that the *Perma Life* decision merely limited the *in pari delicto* defense to cases in which the parties are, in fact, of equal fault. *See, e.g.*, *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971).

<sup>94</sup> 392 U.S. at 139.

<sup>95</sup> *See* notes 79-83 and accompanying text *supra*.

cates an important public interest,<sup>96</sup> it follows that intentional antitrust violators should be able to seek contribution in order to buttress private enforcement.<sup>97</sup>

### B. Basis Of Apportionment

There are several conceivable bases for apportioning liability among antitrust defendants. One method, used under the tort law of a number of states<sup>98</sup> and adopted in *Professional Beauty Supply*,<sup>99</sup> apportions liability according to a simple pro rata formula. Under this approach, each defendant found liable pays an equal share of the total damages. The principal benefit of such a rule is its ease of application. It dispenses with the need for inquiry into relative degrees of fault since each defendant's contribution share is categorically set by law.<sup>100</sup>

<sup>96</sup> *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

<sup>97</sup> This was the conclusion of the court in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186 (8th Cir. 1979) ("[b]ecause of the deterrent policy of the antitrust laws, even intentional tortfeasors may obtain contribution so that tortfeasors will not escape liability"). See also *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995, at 79,706 (10th Cir. 1979) (Holloway, J., concurring and dissenting) ("[t]here are important reasons rooted in the antitrust laws for making exceptions to allow recovery by intentional tortfeasors").

Similarly, those sections of the securities laws which expressly provide for civil liability also contain express provisions for contribution, even as among intentional wrongdoers. See note 3 *supra*. In addition, courts have implied a right of contribution among intentional violators of Section 10(b) of the Securities Exchange Act of 1934. See cases cited at note 79 *supra*.

<sup>98</sup> See, e.g., CAL. CIV. PROC. CODE § 875 (West Cum. Supp. 1977):

"(a) Where a money judgment has been rendered jointly against two or more defendants . . . there shall be a right of contribution among them . . . .

(c) Such right of contribution may be enforced only after one tortfeasor . . . . has paid more than his pro-rata share. . . ."

<sup>99</sup> 594 F.2d 1179, 1182 n.4 (8th Cir. 1979). The court did note, however, that in unusual circumstances pro rata apportionment might be inappropriate. *Id.*

<sup>100</sup> See generally Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle v. Superior Court*, 30 HASTINGS L.J. 1464, 1484 (1979).

Arguably, pro rata apportionment also encourages settlements since a defendant with a low percentage of fault may decide to settle to avoid the risk of being found liable at trial and incurring a full pro rata share of liability. However, as noted by Professor Fleming, this argument "seeks to make a virtue out of [a] potential for serious abuse, namely, as a means not for encouraging but

Pro rata apportionment, however, fails to ameliorate the inequity fostered by the no-contribution rule. Unless each defendant is equally responsible for the anticompetitive wrong, more culpable defendants will enjoy a windfall while less culpable defendants will bear excessive liability.<sup>101</sup> Pro rata apportionment therefore fails to assure an equitable distribution of liability among defendants.

Another possible basis for computing contribution shares is to allocate total liability according to the illegal profits each defendant receives. This comparative benefits approach is particularly suited to cases in which the defendants' unlawful gains are directly related to the plaintiff's damages. For example, in horizontal price-fixing cases, a plaintiff's damages are often calculated by multiplying an estimated overcharge by the number of sales made pursuant to the illegal arrangement.<sup>102</sup> Liability could thus be apportioned on the basis of the defendants' respective market shares.<sup>103</sup>

In some instances, however, the relative culpability of the parties may be so disparate that liability apportioned solely by reference to comparative benefits might fail to reflect responsibility

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for extorting settlements from slightly negligent defendants." *Id.* at 1486.

Similarly, in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), the Supreme Court rejected the old admiralty rule of divided damages (pro rata apportionment) and adopted a rule of comparative fault for maritime collision cases. The Court responded to the argument that a pro rata rule encourages settlements by noting:

But even if this argument were more persuasive than it is, it could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

*Id.* at 408.

<sup>101</sup> See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 405 (1975).

<sup>102</sup> In overcharge cases, plaintiffs typically establish the amount of damages by proving "(a) the cost or price level previously existing; (b) the cost or price level during the period of the restraint; and (c) the amount of business actually transacted during the period of the restraint." E. TIMBERLAKE, *supra* note 17, § 21.03, at 313 (1965). See also Parker, *Measuring Damages in Federal Treble Damage Actions*, 17 ANTITRUST BULL. 497, 501 (1972).

<sup>103</sup> Senate Bill 1468, the Antitrust Equal Enforcement Act, adopts this basis of apportionment, presumably because the scope of the bill is limited to contribution in price-fixing cases. S. 1468, 96th Cong., 1st Sess., § b (1979).

for the wrong. Moreover, in certain types of antitrust cases, computing each defendant's relative share of unlawful gain may be exceedingly complex.<sup>104</sup> For these reasons, apportionment of liability is best left to the trier of fact upon consideration of all the circumstances of a case. Relevant factors should include: responsibility for originating and implementing the illegal scheme; evidence as to who might have been expected to benefit from the unlawful behavior; proof of whether one party attempted to terminate the arrangement; and facts showing who ultimately profited from the proscribed conduct.<sup>105</sup>

Application of this discretionary standard, combining elements of comparative fault and comparative benefits received, would assure an allocation of liability commensurate with relative responsibility for anticompetitive harm. In contrast to pro rata apportionment, allocating liability according to relative responsibility prevents a more culpable defendant from enjoying a windfall at the expense of a marginally culpable defendant. In addition, potential violators, aware that liability will reflect actual participation, will be less prone to engage in anticompetitive conduct. Relative responsibility apportionment therefore ensures not only a just result, but complements the deterrence objectives of the antitrust laws.<sup>106</sup>

### C. *The Appropriate Settlement Rule*

A contribution settlement rule must accommodate the compet-

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<sup>104</sup> In price-fixing cases, where a plaintiff's damages are often computed on the basis of sales, *see note 102 supra*, apportioning liability among the defendants would be fairly simple. However, in cases where sales are irrelevant, e.g., concerted refusal to deal cases, apportioning liability among defendants would be considerably more complex. *See generally*, E. TIMBERLAKE, *supra* note 17, § 21.04, at 316-17; L. SULLIVAN, *supra* note 17, § 83 (1977).

<sup>105</sup> These factors were first mentioned in Justice White's concurring opinion in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 146-47 (1968).

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186 n.8 (8th Cir. 1979), the court cited the factors listed by Justice White as circumstances for the trier of fact to consider in deciding whether an intentional antitrust violator is entitled to contribution under the limited rule created by the court.

<sup>106</sup> The ABA Proposal also adopts relative responsibility apportionment. Section (g) of the proposed statute provides: "Contribution claims shall be determined . . . in accordance with the relative responsibility of each party for the damages awarded in the main action." ABA PROPOSAL, *supra* note 2, at 11.

ing interests of settling and non-settling defendants. On one hand, settling defendants should remain immune from contribution to encourage settlement. Without such immunity, settlements would have little finality and defendants would have correspondingly little incentive to settle.<sup>107</sup> On the other hand, fairness dictates that non-settling defendants should not be subject to liability justly attributable to settling defendants.<sup>108</sup>

One possibility is to immunize settling defendants from contribution if they settle in "good faith."<sup>109</sup> Under this approach, the court deducts only the actual amount of the settlement from the plaintiff's recoverable damages.<sup>110</sup> The requirement of "good faith" is intended to discourage collusive arrangements,<sup>111</sup> while encouraging settlement by granting immunity from contribution.

The "good faith" approach, however, fails to achieve either of its intended goals. Since "good faith" is a subjective standard, settlement finality remains uncertain and non-settling defendants have an incentive to challenge the validity of settlements.<sup>112</sup> Consequently, a settling defendant can never be cer-

<sup>107</sup> The 1939 version of the Uniform Contribution Among Tortfeasors Act failed to immunize settling defendants from contribution claims. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT OF 1939 § 5, *reprinted in* 12 UNIFORM LAWS ANNOTATED 58 (master ed. 1975). As noted by the commissioners, this "discourages settlements; a tortfeasor has no incentive to settle if he remains liable for contribution." UNIFORM COMPARATIVE FAULT ACT OF 1977, Commissioners' Comment, *reprinted in* 12 UNIFORM LAWS ANNOTATED 41 (master ed. Supp. 1980).

<sup>108</sup> See *Gomes v. Brodhurst*, 394 F.2d 465, 468 (3d Cir. 1967). See generally Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486 (1966).

<sup>109</sup> This approach was adopted in the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT OF 1955 § 4, *reprinted in* 12 UNIFORM LAWS ANNOTATED 98 (master ed. 1975) [hereinafter cited as UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT OF 1955]. Similarly, in *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), the California Supreme Court opted for the "good faith" limitation in fashioning a rule of partial indemnity.

<sup>110</sup> Section 4 of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT OF 1955, *supra* note 109, at 98, provides: "When a release or a covenant not to sue or not to enforce judgment is given in good faith . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it . . . ."

<sup>111</sup> "The requirement that the release or covenant be given in good faith gives the court occasion to determine whether the transaction was collusive and if so there is no discharge." *Id.* at 99 (Commissioners' Comment).

<sup>112</sup> As noted by Justice Clark in his dissent in the *American Motorcycle case*: [T]he policy in favor of settlement will be frustrated by the . . .

tain of its immunity from contribution until a court determines that the settlement was in fact negotiated in "good faith."

In addition, the "good faith" approach fails to ensure an equitable allocation of liability between settling and non-settling defendants. Unless courts construe a "good faith" settlement to be synonymous with full payment of a defendant's share of plaintiff's damages, non-settling defendants may be required to shoulder excessive liability.<sup>113</sup> A "good faith" approach, therefore, promises to spawn subsidiary litigation without effectively solving the problems for which it was created.<sup>114</sup>

Another approach is the claim reduction settlement rule.<sup>115</sup>

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rule that plaintiff's recovery against non-settling tortfeasors should be diminished only by the amount recovered in a good faith settlement rather than by a settling tortfeasor's proportionate responsibility. . . . Settlement by one tortfeasor is not going to compel the other tortfeasor to withdraw his cross-complaint . . . because prior to trial these matters are necessarily uncertain and the possibility of establishing bad faith exists . . . ."

*American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 611 n.2, 578 P.2d 899, 920 n.2, 146 Cal. Rptr. 182, 203 n.2 (1978) (Clark, J., dissenting).

<sup>113</sup> Recognizing the "objective of encouraging settlements and assuring them a measure of finality," courts are reluctant to characterize a settlement as negotiated in "bad faith." *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498, 506 (3d Dist. 1972). Hence, "the burden of proving lack of good faith is in practice, a heavy one." Fleming, *supra* note 100, at 1496. Accordingly, the fact that one joint tortfeasor has settled for a disproportionately low amount does not, standing alone, signify bad faith. *See Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 848 (1st Dist. 1976).

<sup>114</sup> *Gomes v. Brodhurst*, 394 F.2d 465, 468 n.3 (3d Cir. 1967).

<sup>115</sup> The claim reduction settlement rule is gathering increasing legislative and judicial support. Both Senate Bill 1468 and the ABA PROPOSAL, *supra* note 2, incorporate a claim reduction feature. Similarly, the Uniform Comparative Fault Act of 1977 adopts a claim reduction settlement rule. UNIFORM COMPARATIVE FAULT ACT OF 1977 § 6, reprinted in 12 UNIFORM LAWS ANNOTATED 41 (master ed. Supp. 1980). Several states have also adopted some form of the claim reduction rule. *See, e.g., N.Y. GEN. OBLIG. LAW* § 15-108 (McKinney 1978).

Twenty-six years ago Justice Brennan, then sitting on the New Jersey Supreme Court, wrote that removal of a settling defendant's share of liability from a plaintiff's claim is necessary to ensure settlement finality and discourage collusive settlements. *Judson v. People's Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954). For other cases reaching a similar conclusion, *see, e.g., Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1248-49 (5th Cir. 1979); *Gomes v. Brodhurst*, 394 F.2d 465, 468-69 (3d Cir. 1967). *See generally* Fleming, *supra* note 100; Comment, *Comparative Negligence, Multiple Parties, and Settle-*

With claim reduction, a settlement automatically reduces the plaintiff's claim against non-settling defendants by the settling defendant's actual share of liability, as determined at trial.<sup>116</sup> In this fashion, non-settling defendants are protected from the risk of liability attributable to settling defendants. And since claim reduction obviates the need for contribution against settling defendants, they are assured settlement finality. Claim reduction therefore successfully accommodates the competing interests of both settling and non-settling defendants.

The most serious objection to claim reduction is that it may discourage plaintiffs from settling.<sup>117</sup> This disincentive stems from the risk of undervaluing a settling defendant's share of liability. Should the plaintiff settle for less than a defendant's apportioned share, the deficiency is not recoverable from the other defendants. If, prior to trial, the uncertainty of accurately valuing a defendant's share of liability is high, a plaintiff may refuse to settle to avoid the risk of undercompensation.

Several factors, however, should partially offset this disincentive. First, an early settlement provides the plaintiff with the necessary funds to finance the litigation against the remaining defendants.<sup>118</sup> Second, a settlement provides the plaintiff with at

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*ments*, 65 CALIF. L. REV. 1264, 1275 (1977).

<sup>116</sup> Under a claim reduction rule, a question that arises is whether a settling defendant's presence at trial is required at the time the court assesses damages and apportions liability. If settling defendants are required to remain parties to the litigation, the policy favoring settlement might be compromised since settlement would not terminate a defendant's involvement in the suit. There seems no reason, however, to require their presence. If found liable, the non-settling defendants will be accountable for the entire verdict unless some responsibility can be shifted to the settling defendants. Since a plaintiff will want to maximize recovery against the non-settling defendants, the issue of the settling defendants' respective liability shares will be joined by truly adversarial parties. See *Meleo v. Rochester Gas & Elec. Corp.*, 72 A.D. 2d 83, 423 N.Y.S. 2d 343 (1979) (settling defendants' presence held prejudicial to the non-settling defendant); *Mielcarek v. Knights*, 50 A.D. 2d 122, 375 N.Y.S. 2d 922 (1975) (holding that under New York's claim reduction rule, the presence of settling defendants is not required).

<sup>117</sup> The Commissioners' Comment to the Uniform Comparative Fault Act acknowledges that claim reduction may "have some tendency to discourage a claimant from entering into a settlement." UNIFORM COMPARATIVE FAULT ACT OF 1977, Commissioners' Comment, reprinted in 12 UNIFORM LAWS ANNOTATED 41 (master ed. Supp. 1980).

<sup>118</sup> The need for funds may be particularly acute in class actions since the plaintiff must pay the costs of notice to all class members. *Eisen v. Carlisle &*

least some recovery and thus partially insulates against the risk of an adverse judgment.<sup>119</sup> Finally, if the plaintiff can retain the benefits of favorable settlements, the possibility of gain should, to some extent, counterbalance the risk of loss from unfavorably low settlements.<sup>120</sup>

These factors may only partially overcome a plaintiff's disincentive to settle. However, settlements in which non-settling defendants do not participate should not affect their liability.<sup>121</sup> Claim reduction assures fair treatment of non-settling defendants since plaintiffs have "an incentive to drive the hardest bargain with the settlor and not to prejudice the remaining tortfeasors by a settlement that is either collusive, deliberately discriminatory, or unintentionally inadequate."<sup>122</sup>

This self-regulatory incentive is also consonant with the deterrence objectives of the antitrust laws. It would force plaintiffs to negotiate settlements on the basis of the merits of a case rather than on the basis of their power to determine unilaterally which wrongdoers shall pay. By rationalizing the settlement process in this manner, claim reduction would substantially prevent more culpable defendants avoiding their true liability through early, inexpensive settlement.

In addition, claim reduction would ameliorate the non-contribution rule's harsh impact on small business defendants. Smaller companies would not be forced to settle due to massive potential liability predicated on the national activities of their larger competitors. Such coercive settlements are precisely the

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Jacquelin, 417 U.S. 156, 177 (1974).

<sup>119</sup> Fleming, *supra* note 100, at 1497.

<sup>120</sup> Since claim reduction subjects plaintiffs to the risk of undervaluation, it is only equitable to permit plaintiffs to retain the whole of any overvaluation. *Theobald v. Angelos*, 44 N.J. 228, 237-41, 208 A.2d 129, 135-38 (1965). Absent such a rule, plaintiffs would encounter a no-win situation which might discourage settlement. While permitting plaintiffs to retain the benefits of overvaluation could technically violate the one satisfaction rule, its spirit would not be violated. Plaintiffs would not be unjustly enriched at the expense of the defendants since non-settling defendants are liable for no more than their apportioned shares, and settling defendants have bought their peace. *Id.* at 239.

In addition, if non-settling defendants receive the benefits of an overvalued settlement, defendants might resist settlement in the hope of enjoying a windfall from settlements by their co-defendants. *See Comment, supra* note 115, at 1279.

<sup>121</sup> *See Fleming, supra* note 100, at 1495.

<sup>122</sup> *Id.* at 1496.

type a rational system of jurisprudence should discourage.<sup>123</sup>

On balance, then, considerations of fairness and deterrence outweigh the settlement costs associated with a claim reduction rule. In addition, unlike the "good faith" approach, claim reduction protects non-settling defendants from spiralling liability without jeopardizing settlement finality. Accordingly, the claim reduction settlement rule is the preferable alternative.

### CONCLUSION

The current antitrust no-contribution rule permits plaintiffs arbitrarily to select which of several wrongdoers will shoulder liability for anticompetitive harm. By using "divide and conquer" with "escalation of demands" strategies, antitrust plaintiffs can force defendants—particularly small business defendants—into settlements that bear no necessary relationship to true antitrust liability. There is an obvious lack of justice in tolerating such coercion.

Nor do policy concerns unique to antitrust law warrant this anomalous refusal to permit contribution. The "threatening specter" of sole liability is at best an irrational deterrent. Indeed, by increasing the probability that antitrust violators can escape "scot free," the antitrust no-contribution rule undercuts the overall deterrent effect of private treble damage actions.

An antitrust contribution rule would rationally promote deterrence while assuring fairness among defendants. By permitting all antitrust defendants, regardless of moral culpability, to seek contribution, such a rule would achieve more thorough enforcement of the antitrust laws. In addition, with liability apportioned according to relative responsibility for anticompetitive harm, a system of contribution would effect an allocation of damages commensurate with true antitrust liability. Finally, an antitrust contribution scheme incorporating a claim reduction rule would restore rationality to settlement negotiations.

The choices are clear. Continued adherence to the no-contribution rule undermines key antitrust policies and perpetuates unfairness. In contrast, adoption of an antitrust contribution rule embodying the above features would assure not only full,

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<sup>123</sup> Cf. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975) (overruling the longstanding admiralty rule of divided damages). See note 100 *supra*.

but fair, enforcement of the antitrust laws.

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