Contribution in Antitrust Actions: Is Fairness Reason Enough?

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INTRODUCTION

Modern antitrust litigation is infamous for its complexity both in terms of the number of parties brought before the court and the issues to be resolved. Because of current procedural difficulties in managing major antitrust cases, courts are reluctant to entertain new theories of liability which might interject additional complexity. Measures taken to prevent further complication are, however, not always consonant with fairness between

1. The Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, 15 U.S.C. §§ 12-27 (1976), are the primary statutory sources for private enforcement of federal antitrust laws. These statutory provisions proscribe, in very broad and general language, anticompetitive business conduct. See L. Sullivan, HANDBOOK ON THE LAW OF ANTITRUST § 3 (1977). Anticompetitive behavior is not defined more precisely because anticompetitive effects of business practices vary within the confines of a particular industry. The burden of analyzing those practices challenged as anticompetitive, in the context of a particular industry, falls on the courts, however, and has been cited as a source of substantive complexity. See Blecher & Woodhead, The Small Prospects for Shrinking the Big Antitrust Case by Procedural Reform, 11 Loy. L.A.L. Rev. 513, 517-25 (1978). The prevalence of large, multiparty antitrust cases stems in part from the conspiratorial nature of many antitrust violations. Allegations of conspiratorial price-fixing, a Sherman Act § 1 offense, are frequently directed at pricing practices utilized industry-wide, or at least by a substantial number of industry members in a particular geographic area. See, e.g., In re Corrugated Container Antitrust Litig., 80 F.R.D. 244 (S.D. Tex. 1978) (37 companies nation-wide sued for allegedly participating in a price-fixing conspiracy); In re Plywood Anti-Trust Litig., 76 F.R.D. 570 (E.D. La. 1976) (defendants named in suits according to geographic area). Accordingly, both the size and substantive complexity of antitrust cases have been attributed to the very nature of the antitrust violations.

2. An example of judicial reluctance to further complicate antitrust proceedings is the Supreme Court decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In Illinois Brick, the Court held that indirect purchasers of illegally over-priced products may not pursue a treble damage action. In foreclosing indirect purchaser suits, the Court stressed the increased complexity that would follow if it were necessary to determine to what extent, if any, an illegal overcharge had been passed down the distribution chain rather than simply absorbed by the first purchaser. Id. at 737-48. Thus, the Court exalted judicial expediency over strict compliance with § 4 of the Clayton Act, the treble damage provision. Section 4 authorizes recovery for any person who is damaged as the result of illegal, anticompetitive acts, regardless of his or her position in a distribution chain. See generally Newman, Limiting the Antitrust Damage Suit: The Emergence of a Policy Against Complex Litigation, 23 N.Y.L. Sch. L. Rev. 253 (1977); Note, Illinois Brick: The Death Knell of Ultimate Consumer Antitrust Suits, 82 St. John's L. Rev. 421 (1978). See also Blecher & Woodhead, supra note 1, at 515-17.
the parties. The question of whether contribution should be available to antitrust defendants evidences this tension.

Antitrust violators are jointly and severally liable for the business injuries suffered by the plaintiff because of their illegal conduct. An antitrust plaintiff need not sue all members of an antitrust conspiracy, but may select his defendants. Upon

3. *Illinois Brick*, for example, foreclosed suits by indirect purchasers without regard to whether or not they suffered actual injury. As a result, indirect purchasers are without a remedy even when the direct purchasers do not bring suit. After *Illinois Brick*, if direct purchasers do not bring suit, the antitrust violation goes unsanctioned, and the party actually suffering damage is without a remedy. See Newman, *supra* note 2, at 267-68.


6. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 144 (1968) (White, J., concurring) (“A third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility . . . .”); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 904 n.15 (5th Cir. 1979), aff’d sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (“Antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party.”); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11 (N.D. Ga. 1973) (“It is well settled that . . . in multi-defendant antitrust actions the co-conspirator joint tortfeasors are jointly and severally liable . . . .”).

7. See *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966) (“A plaintiff need not sue all conspirators; he may choose to sue but one.”); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 12 (N.D. Ga. 1973) (“Thus, an antitrust plaintiff may choose to sue but one of several co-conspirators . . . . and that one co-conspirator will be responsible for the entire amount of damages caused by all.”); *Washington v. American Pipe & Constr. Co.*, 280 F. Supp. 802, 804 (S.D. Cal. 1968) (“[N]umerous courts have held that an antitrust plaintiff need not sue all possible defendants but may choose which of the conspirators he will make party to the action.”); see *Corbett, Apportionment of Damages and Contribution Among Coconspirators in*
proving a violation, the plaintiff may collect the entire trebled\(^8\) damage award from any one defendant, or from those defendants of his choice.\(^9\) Thus, one antitrust co-conspirator\(^10\) may be held liable for all resulting injury to the plaintiff, while other co-conspirators completely escape liability.\(^11\) Many commentators perceive this imbalance as an inequity and therefore urge a rule of antitrust contribution to assure fairness between the parties.\(^12\)

Contribution carries with it, however, a genuine threat of increasing the complexity of antitrust proceedings. Under a contribution rule, an antitrust defendant would be permitted to


\(\text{8. Section 4 of the Clayton Act, the damages provision, provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976).}\)

\(\text{9. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 144 (1968) ("[D]amages normally may be had from either or both defendants . . . "); see also Corbett, supra note 7, at 117.}\)

\(\text{10. Much of the conduct prescribed by the antitrust laws involves two or more parties acting in concert. Section 1 of the Sherman Act, for example, provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared illegal . . . ." 15 U.S.C. § 1 (1976). Accordingly, many private antitrust cases include conspiracy claims. See, e.g., In re Corrugated Container Antitrust Litig., 84 F.R.D. 40 (S.D. Tex. 1979); see generally Corbett, supra note 7.}\)

\(\text{11. Certain participants in an antitrust conspiracy may be intentionally overlooked by a plaintiff because of an on-going business relationship. This situation was perceived in two recent cases dealing with contribution in antitrust proceedings. In Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370 (10th Cir. 1979), aff'd on reh'g en banc, 649 F.2d 1382 (10th Cir. 1981), out-of-court testimony indicated that several of the larger coconspirators were omitted from the suit because the plaintiff was afraid of jeopardizing his future business relations. See Note, Contribution and Antitrust Policy, 78 Mich. L. Rev. 890, 906 n.82 (1980). Similarly, in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), the court alluded to possible improper motives on the part of a plaintiff wholesaler who sued only a competing wholesaler, while alleging an illegal agreement between that wholesaler and the manufacturer. Apparently, the plaintiff wholesaler had resumed business dealings with the manufacturer just prior to filing suit. See Note, supra, at 905.}\)

implead additional parties.\textsuperscript{13} Accordingly, the liability issues would necessarily expand to include a determination of which third parties are liable for contribution\textsuperscript{14} and what the contributed share should be.\textsuperscript{15}

Proponents of an antitrust contribution rule consistently point to available procedural safeguards, primarily the court's discretionary severance power,\textsuperscript{16} as a solution for perceived problems of increased complexity.\textsuperscript{17} Courts and commentators also note that securities laws contain explicit provisions authorizing contribution.\textsuperscript{18} They suggest that securities cases share the same potential for complexity in terms of economic issues and large, multiparty proceedings that is present in antitrust cases.\textsuperscript{19} Sup-

\textsuperscript{13} The current contribution proposal under consideration by Congress explicitly authorizes third-party claims for contribution. S. REP NO. 359, 97th Cong., 2d Sess. § 41(a) (1982). Additionally, even if the legislative proposal made no specific authorization, it is clear that the Federal Rules of Civil Procedure permit contribution to be asserted by means of third-party claims. FED. R. CIV. P. 14. See J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 14.03 \[3\] (2d ed. 1976).

\textsuperscript{14} Only impleaded parties found to be jointly liable for the plaintiff's injury are subject to contribution claims. See supra note 4.

\textsuperscript{15} The proper standard for determining contribution shares is the subject of much debate. The only court decision touching on the proper contribution formula in an antitrust context stated that the damages should be allocated on a pro rata basis among all defendants and those third parties found liable for contribution. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 n.4 (8th Cir. 1979). Commentators, however, have advocated alternative methods. See, e.g., Sullivan, supra note 4 (calling for a contribution formula based on comparative fault). The current proposal in Congress calls for contribution "according to the damages attributable to each such person's sales or purchases of goods or services." See infra note 79.

\textsuperscript{16} Rule 42(b) authorizes severance of third-party claims where necessary "in furtherance of convenience or to avoid prejudice." FED. R. CIV. P. 42(b).

\textsuperscript{17} The availability of severance has been relied on by courts and commentators and recognized by Congress in advocating a contribution rule. See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979) ("[W]e are confident that such problems can be avoided by the district court's prudent use of its power to sever where necessary to insure justice."); Jacobson, supra note 12; Note, Solution, supra note 12, at 1051. See also The Antitrust Equal Enforcement Act: Hearings on S.1468 Before the Subcomm. on Antitrust Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 29 (1979) (statement by John Shenefield, Asst. Attorney General) [hereinafter 1979 Senate Hearings].


\textsuperscript{19} See Professional Beauty, 594 F.2d at 1185 ("[C]ontribution is allowed by statute under certain sections of the Security Acts, and security cases are often as complex as antitrust cases.") See also Jacobson, supra note 12, at 235. For a general reference to the complexity of securities cases, see Janofsky, The "Big Case": A "Big Burden" on Our Courts, 66 A.B.A. J. 848 (1980).
porters of an antitrust contribution rule offer the securities analogy to show that fears of unmanageable complexity are unfounded and do not support a continued prohibition of contribution in antitrust proceedings. 20

This comment will examine the validity of this securities analogy. First, the current status of the contribution issue will be discussed and the scope and development of the competing policy arguments presented. The discussion will then focus on the complexity issues, examining the perceived areas where contribution would further complicate antitrust proceedings. Next, asserted claims for contribution under the securities laws will be surveyed to see how the courts have sought to deal procedurally with the threat of prejudice to the plaintiff resulting from increased complexity. Finally, the validity of the analogy will be specifically examined, with the distinctions between antitrust and securities cases offered to show that the analogy is an unpersuasive one.

CURRENT STATUS OF THE CONTRIBUTION DEBATE

Currently, antitrust defendants may not claim contribution. 21 Because the antitrust laws contain no provision authorizing contribution, much of the judicial debate has centered on whether antitrust policy might suffer or be better served by implying such a right.

Judicial Development of a No-Contribution Rule:
A Policy Debate

The courts have looked to federal law to determine whether contribution might be implied in antitrust cases. 22 Federal common law prohibits contribution among tortfeasors absent


21. Although Congress has been considering an antitrust contribution rule since 1979, no formal provision has yet been enacted. See infra notes 68-81 and accompanying text. The power of the courts to imply a right of contribution among antitrust defendants has recently been foreclosed by the decision in Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981). See infra notes 50-54 and accompanying text.

specific enabling legislation. Prior to 1979, only two district courts had directly decided the availability of contribution in antitrust cases. Both courts held that the absence of enabling provisions in the antitrust laws indicated congressional intent not to permit contribution. The two courts, however, accorded different weight to congressional silence.

The first decision briefly addressed policy considerations other than congressional silence. The court noted that contribution might result in impediments to settlement or in the plaintiff's loss of control over the scope of the lawsuit. The court placed primary emphasis, however, on the absence of enabling provisions in the antitrust laws. Because Congress had included contribution provisions in other statutory schemes, the absence of such provisions from the antitrust laws implied that Congress had intended to omit them.


23. The Supreme Court first articulated a no-contribution rule in Union Stock Yards Co. v. Chicago, Burlington & Quincy R.R., 196 U.S. 217, 224 (1905) ("The general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done."). Subsequently, in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), the Court reaffirmed its position, noting that any dissatisfaction with the rule might best be remedied by legislative action. Id. at 286. Proponents of an antitrust contribution rule criticize judicial reliance on these precedents. It is suggested that the Union Stock Yards limitation is only dicta and Halcyon only an admiralty decision, both inappropriate precedents for general federal law. See Sullivan, supra note 4, at 392-96.

24. El Camino Glass Co. v. Sunglo Glass Co., 1977-1 Trade Cas. (CCH) ¶ 61,533 (N.D. Cal. Apr. 28, 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969). The question of contribution among antitrust defendants had been previously raised, but addressed only indirectly by the courts. See Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960) (alleged illegal conduct held not to be joint activity, so contribution issue inapplicable); Webster Motor Car Co. v. Zell Motor Car Co., 234 F.2d 616 (4th Cir. 1956) (dicta suggests contribution between antitrust defendants might be available under state law).


27. Id.

28. Id. at 1345-46.
The second contribution decision treated congressional silence as just one of several policy considerations. The court reiterated the potential for plaintiff's loss of control and deterrence to settlement. Additionally, the court voiced a concern over increasing the complexity of already complex proceedings. The court rejected the suggestion that unintentional antitrust violators be treated differently and, in sum, deemed the policy arguments important grounds on which to base the denial of contribution.

The above decisions provided the only available precedent when, in 1979, the first appellate decision on contribution issued. The Eighth Circuit rejected the conclusions reached by prior courts on the policy issues. In Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., the court held that fairness between the parties precluded a rigid rule denying contribution to antitrust defendants.

The plaintiff in Professional Beauty was a beauty supply wholesaler, who sued a competing wholesaler, National, when a beauty products manufacturer terminated Professional's franchise in order to give National exclusive distribution rights to the manufacturer's product lines. The complaint alleged that National and the manufacturer, La Maur, were parties to an illegal conspiracy to monopolize, by means of an exclusive distributorship.

30. Id. at 72,112.
31. Id.
32. Most antitrust violations are characterized as intentional torts. See Professional Beauty, 594 F.2d at 1189 (Hanson, J., dissenting). See also Sellers, supra note 22, at 829 n.6. Some courts recognize, however, that certain antitrust violations may be merely due to negligence. See Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F.2d 993, 1006-07 (9th Cir.), cert. denied, 423 U.S. 831 (1975). Antitrust defendants have offered the distinction between intentional and unintentional antitrust violations as a means to avoid the perceived common law ban on contribution among tortfeasors. Those seeking contribution point out that the source of the general no-contribution rule, the Merryweather case, was incorrectly applied to unintentional torts. See supra note 4. Therefore, any general rule against contribution should apply only to intentional torts. See El Camino Glass Co. v. Sunglo Glass Co., 1977-1 Trade Cas. (CCH) ¶ 61,533, at 72,111 (N.D. Cal. Apr. 28, 1976) See also Sullivan, supra note 4, at 404-05.
33. El Camino Glass Co., 1977-1 Trade Cas. (CCH) at 72,112.
34. 594 F.2d 1179 (8th Cir. 1979).
35. Id. at 1185.
36. Id. at 1181.
National, however, was the only defendant named in the lawsuit. National then filed a third-party complaint against La Maur, alleging that any illegality was the product of joint activity and seeking contribution should it be found liable to Professional.

Under those facts, the Eighth Circuit found unpersuasive prior policy arguments for denying contribution. The court initially rejected the argument that congressional failure to provide for contribution in the antitrust laws meant that Congress did not intend to permit contribution among antitrust defendants. The court reevaluated prior policy arguments in terms of whether allowing contribution for fairness purposes would impair the overall statutory purposes of the antitrust laws. The court balanced claims that contribution would prejudice antitrust plaintiffs, deter settlement, and add to the complexity of litigation against the fairness argument, and concluded that the competing policies of fairness to litigants and deterrence of antitrust violations required that contribution be allowed in certain circumstances. The Eighth Circuit authorized contribution on

may restrict the distribution of his products and may unilaterally terminate an existing distributor without incurring antitrust liability. United States v. Colgate & Co., 250 U.S. 300 (1919). When the manufacturer possesses monopoly power in the relevant product market, or when the manufacturer conspires to achieve monopoly power, then acts taken to further that unlawful goal, such as termination of a dealer, may violate § 2. See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (private utility company, a monopolist, which refused to permit competitors to wheel power through its transmission lines, and then tried by buy out all competitors who could not transmit power through alternative channels, found to have violated § 2). See generally 2 J. Von Kalinowski, ANTITRUST AND TRADE REGULATION, § 6C.02[3] (1969).

38. Professional Beauty, 594 F.2d at 1181.
39. Id.
40. Id. at 1183-84.
41. Id. at 1184-85.
42. The court explicitly stated that fairness was the lynchpin in its decision to permit contribution. Id. at 1185. Contribution is clearly an equitable notion designed to promote fairness. See generally Leflar, supra note 4. The court was on more uncertain ground, however, in asserting that contribution would enhance the deterrent purposes of the antitrust laws. As the dissenting judge pointed out, "the arguments on either side of the deterrence question are inconclusive." 594 F.2d at 1189 (Hanson, J., dissenting).

The competing positions on the economics of deterrence are as follows. Proponents of an antitrust contribution rule maintain that contribution will result in more certain liability, because participants in an illegal conspiracy will no longer escape liability if not sued by the plaintiff. This more certain liability would deter illegal activity. See Corbett, supra note 7, at 137; Jacobson, supra note 12, at 233-34; Sullivan, supra note 4, at 412. Opponents of contribution counter with the suggestion that business is generally risk averse.
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a case-by-case basis, but left the determination of when and how contribution was to be applied to the discretion of the trial court. 43

Following Professional Beauty, the contribution debate began in earnest. 44 The Professional Beauty decision essentially set out the policy arguments, balancing fairness to litigants against the potential for increased complexity and deterrence to settlement. 45 In discussing these policies, commentators expressed an overriding concern with the fairness issue, usually dictating the conclusion that contribution should be uniformly allowed. 46 Courts, however, consistently declined to follow the Eighth Circuit's lead. Both the Fifth and Tenth Circuits rejected contribution claims, 47 and lower courts distinguished rather than fol-

See Genovese, The Case Against Contribution and Claim Reduction, 20 ANTITRUST LAW 4 (Ill. St. Bar Ass'n Apr., 1982). Although contribution might prevent participants in an illegal scheme from escaping liability, each conspirator's share of resulting damages would be much smaller even though more certain. The smaller, more predictable liability could be planned for as a necessary business cost of participating in an illegal scheme. Thus, contribution might impede deterrence by removing the immense threat of sole liability for an entire trebled damage award. For opposing economic analyses of the deterrence question, see Easterbrook, Landes & Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. LAW & ECON. 331 (1980) (risk aversion suggests contribution will minimize deterrent purpose of the antitrust laws); but see Polinsky & Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 STAN. L. REV. 447 (1981) (contribution would enhance deterrence in antitrust).

43. Professional Beauty, 594 F.2d at 1186.

44. Prior to 1979 and the Professional Beauty decision, very little scholarly commentary was available on the subject of contribution in antitrust proceedings. See Corbett, supra note 7; Paul, Contribution and Indemnification Among Antitrust Coconspirators Revisited, 41 FORDHAM L. REV. 67 (1972); Note, Contribution in Private Antitrust Suits, 63 CORNELL L. REV. 682 (1978). Following Professional Beauty, however, commentary flourished. See supra notes 4, 7, 12.


47. Wilson P. Abraham Constr. Co. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979), aff'd sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (fairness and policy arguments offered in support of contribution rule not sufficiently compelling so that courts should imply such a right as a matter of federal common law); Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370 (10th Cir. 1979), aff'd on reh'g en banc, 649 F.2d 1382 (10th Cir. 1981) (in light of sufficiently offsetting policy arguments on both
owed *Professional Beauty*. These later decisions suggested that fairness, and arguably deterrence, did not so conclusively outweigh concerns over potential prejudice to plaintiffs and increasingly complex litigation.

The debate over contribution has shifted forums, and is now conducted primarily in Congress. This shift was necessitated by the only Supreme Court pronouncement on the issue of contribution in antitrust proceedings. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Court held that the federal courts lack the power to imply a right of contribution under the antitrust laws. Federal common law is appropriate to broaden and define antitrust violations, for such judicial shaping is necessary to give purpose to the overall statutory scheme. The remedial provisions of the antitrust laws, however, are sufficiently defined as set forth in the statute. Accordingly, the Court held that it would be an improper use of federal common law to imply a right of contribution, for such a right would substantially alter the remedial scheme as originally enacted.

As a result of the *Texas Industries* decision, recognition of a right of contribution between antitrust defendants must await affirmative congressional action. Active congressional debate began on the contribution issue, well before the Supreme Court conclusively established that legislative action alone could effect such a change.

sides of the contribution issue, the availability of contribution to antitrust defendants is more appropriately a legislative determination).

48. See, e.g., *Little Rock School Dist. v. Borden, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,059 (E.D. Ark. 1979) (letter opinion) (release clause in pretrial settlement agreement, purporting to release settling defendants from contribution claims, is valid as against non-settling defendants); *Hedges Enters. v. Continental Group, Inc.*, 1979-1 Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. 1979) (defendants' leave to amend complaint to include contribution claim denied on the ground that there is no right to contribution from settling defendants); *In re Corrugated Container Antitrust Litig.*, 84 F.R.D. 40 (S.D. Tex. 1979) (contribution not appropriate in complex class action such as this one where cross-claims by 37 defendants would require liberal severance and result in duplication of judicial time and effort); *In re Ampicillin Antitrust Litig.*, 82 F.R.D. 647 (D.D.C. 1979) (amendment of complaint to include contribution claim not proper against co-defendants settling in good faith—not the same situation as that addressed in *Professional Beauty*).

49. See supra note 42.


51. *Id.* at 646-47.

52. *Id.* at 643. See also *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).


54. *Id.*
The Contribution Debate in Congress

Congressional action on the contribution issue began shortly after the Professional Beauty decision in 1979. A bill was introduced in the Senate that proposed to amend section 4 of the Clayton Act to authorize contribution in price-fixing cases. The restricted scope of the bill, however, suggests that Professional Beauty did not provide the motivating force behind the proposed legislation. The antitrust violation alleged in Professional Beauty was attempted monopolization, premised on an exclusive distributorship between a manufacturer and a wholesaler. The legislative proposal authorized contribution only in price-fixing cases and thus did not address the factual situation present in Professional Beauty. Another case, In re Corrugated Container Antitrust Litigation, offered Congress a more compelling factual setting around which to center a contribution debate.

The Corrugated Container case grew out of a federal grand jury proceeding in which fourteen companies and twenty-six individuals were indicted for participating in a price-fixing conspiracy. Following the government investigation, over forty private class action suits were filed against thirty-seven container companies representing over seventy percent of the container industry nationwide. Progressive settlements ensued, by which defendants who settled early paid a smaller proportion...
of their estimated market share than later settling defendants.\textsuperscript{62} By 1979, almost all the defendants had opted to settle.\textsuperscript{63} The following year, when the jury returned the untrebled damage verdict, only one defendant remained.\textsuperscript{64}

Although virtually all of the Container defendants had settled, the plaintiffs' damage claims were not significantly reduced by each successive settlement.\textsuperscript{65} Accordingly, when the jury issued its verdict, the remaining defendant was found liable for industry-wide damages to the plaintiffs, even though the company's own market share was insignificant. The jury verdict, untrebled, was $350,000,000.\textsuperscript{66}

The first contribution proposal was introduced in the Senate at roughly the same time that the court in Corrugated Container gave preliminary approval to the first major settlement agreement.\textsuperscript{67} This agreement operated to remove twenty-three of the thirty-seven named defendants from the lawsuit. Consequently, the potential liability of the remaining defendants ballooned, and pressure to alleviate the perceived inequity was directed at Congress.\textsuperscript{68}

\textsuperscript{62} The progressive settlements in the Container litigation prompted many allegations that the settlements were coerced. See 1979 Senate Hearings, supra note 17, at 32 (case study of the effect of coerced settlements on Green Bay Packing, Inc., one of the smaller companies named in the Container litigation). The precise details of the settlement arrangements, including the difference in settlement figures paid by early settling defendants, are discussed in Jacobson, supra note 12, at 220-22. See also In re Corrugated Container Antitrust Litig., 1981-1 Trade Cas. (CCH) \$ 64,114 (S.D. Tex 1981) (final approval of settlement agreement and findings of fact).

\textsuperscript{63} See In re Corrugated Container Antitrust Litig., 1979-1 Trade Cas. (CCH) \$ 62,690 (S.D. Tex. 1979) (preliminary approval of the settlement agreement between plaintiffs and 23 defendants).

\textsuperscript{64} In re Corrugated Container Antitrust Litig., 643 F.2d 195, 205 (5th Cir. 1981) (Mead Corporation was the sole non-settling defendant when the civil jury trial commenced).

\textsuperscript{65} Flintkote Co. v. Lysfiord, 246 F.2d 368 (9th Cir.), cert. denied, 355 U.S. 835 (1957), set the rule for adjusting an antitrust plaintiff's judgment to reflect prejudgment settlements. Under the Flintkote rule, any amounts received through settlement were deducted from the plaintiff's eventual judgment only after that judgment had been trebled. Thus, even if a settlement reflected the actual damages attributable to the settling defendant, non-settling defendants would still be liable for the difference between the actual settlement amount and that amount trebled. See Salzman, The Effect of Contribution on Litigation and Settlement: The Plaintiff's Viewpoint, 48 ANTITRUST L.J. 1593, 1594-95 (1979).

\textsuperscript{66} See Jacobson, supra note 12, at 221.

\textsuperscript{67} The first contribution proposal was introduced in the Senate in May of 1979. See ANTITRUST & TRADE REG. REP. (BNA) No. 917 at B-1 (June 7, 1979). The court's preliminary approval of the first major settlement agreement occurred in May of the same year. See supra note 60.

\textsuperscript{68} References to the Container case appear throughout the Senate Hearings on the
The relationship between Corrugated Container and the form of the proposed contribution rule is evident from an examination of the bill's provisions. First, the bill tailors the availability of contribution to price-fixing cases only. Second, the bill has been characterized as authorizing limits on the liability of any one defendant rather than as a true contribution bill. The bill provides for contribution, but focuses primarily on the effect of settlement on nonsettling defendants. Under the bill, the plaintiff's damage claim would be reduced by the greatest of the amount of the settlement, a specific figure stipulated in the settlement agreement, or the actual treble damages attributable to the settling defendant. Such a provision precludes a repeat of the Corrugated Container situation, where a few non-settling defendants in an industry-wide suit were held liable for the damages attributable to the market share of settled defendants as well as their own.

The form of the initial contribution proposal introduced in the Senate suggests that congressional consideration of the contribution issue was likely prompted by the Corrugated Container case. The actual debate in Congress, however, was more broadly based. Hearings before the Senate Judiciary Committee covered the same policy arguments that had been raised by courts and commentators considering a general contribution rule. The
notion of fairness to antitrust defendants, especially smaller, more vulnerable companies, was weighed against deterrence, settlement and complexity concerns.

Although the general consensus of those testifying at the hearing was that caution and further deliberation were required, the bill, as originally proposed, was favorably voted out of committee and onto the Senate floor. The full Senate took no action, however, before the Ninety-sixth Congress formally adjourned.

Essentially the same contribution bill is currently on the Senate’s agenda. Its predecessor in the Ninety-seventh Congress, S. 995, had been favorably voted out of committee, but its

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75. Id. at 32 (Green Bay Packing case study—effect of coerced settlements on a small antitrust defendant).
76. Id. at 8 (testimony of John Shenefield, Asst. Attorney General); at 52-54 (statement of David Shapiro concerning likely complications to result from a contribution rule).
77. See id. at 30 (prepared statement of John Shenefield, Asst. Attorney General).
79. The text of the current bill, S.380 is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Clayton Act, (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:*

*(a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of the Act.

(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, 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, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

(e) This section shall apply to all actions under section 4, 4A, or 4C or the Act commenced after the date of enactment of this section.*
sponsors could not muster sufficient support from the full Senate for passage.80 Two similar contribution bills had been introduced in the House during the Ninety-seventh Congress, but like their Senate counterpart, made little progress beyond the House committees.81

Congress is presently under no immediate pressure to resolve the contribution issue.82 A Corrugated Container situation, however, is likely to arise again. Private treble damage actions have dramatically increased in recent years.83 So long as effective private enforcement continues to place the threat of sole liability on one of several antitrust co-conspirators, the pressure to recognize some form of contribution will continue to surface.

Extensive congressional reliance on a Corrugated Container type situation in formulating a contribution rule may, however,

\[(f)(1)\] The claim reduction principle of subsection (b) of this section shall also apply to actions alleging an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act which are pending on the date of enactment of this section, if upon proof by any party subject to liability for damages in such an action, the court determines that it would be inequitable, in light of all the circumstances and notwithstanding subsection \((f)(2)\), not to apply the principle in that action. In ruling on a request to apply claim reduction, the court shall find the facts specially.

\[(2)\] No agreement to settle, compromise, or release a claim under section 4, 4A, or 4C of this Act which has been signed by the parties prior to the date of enactment of this section may be rescinded, disapproved, reformed, or modified by the parties or by the court because of the application of the claim reduction principle, except upon the written consent of all the parties thereto.

\[(g)\] Each subsection of this section is severable from all other subsections, and the invalidity of any subsection for any reason shall not affect the validity of the remaining subsections: Provided, That subsections \((f)(1)\) and \((f)(2)\) are not severable from each other, and the invalidity of any provision of those subsections as applied in an action shall render the remainder of those subsections inapplicable in that action.

80. See S. REP. NO. 359, 97th Cong., 2d Sess. (1982) for a copy of the bill in the precise form recommended to the Senate. See also supra note 79. The contribution provision under consideration by the 97th Congress, S. 995, had been amended in April of 1982 to apply retroactively. See supra note 79, § \((f)(1)\). Although S. 995 had been heavily lobbied and fairly well received, Senate members disapproved of the retroactive application of the bill, and a filibuster prevented its passage. See 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1093, at 1055 (Dec. 9, 1982). The current contribution bill, S.380, is precisely the same as the ill-fated S.995.


82. The last remaining defendant in the Container litigation reached a settlement with the plaintiffs prior to a judgment being finalized. See 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1081, at 443 (Sept. 16, 1982).

83. See Jacobson, supra note 12, at 219-21.
present some dangers. Certainly, the coerced settlements and potential for industry-wide liability, evidenced by this case, present compelling fairness arguments. Accordingly, congressional efforts and research have been directed at creating a contribution rule which could alleviate some unfairness without undermining broader antitrust policy goals. The emphasis on substantive concerns has, however, resulted in unequal, almost cursory treatment of complexity issues. Both proponents and opponents in the contribution debate have devoted very little time to the possible complications contribution might create in litigating an antitrust case before settlement is a realistic possibility.

Proponents of a contribution rule, in courts, commentary, and Congress, minimize concerns over increased complexity, pointing to the courts’ power to sever claims and parties to prevent any prejudice to a plaintiff. Additionally, such proponents refer to the contribution provisions found in the securities laws. They suggest that the presence of a contribution rule in the securities area has presented no unmanageable administrative problems. These proponents offer little more to support this claim, however, other than the analogy itself.

The complexity issues, in all likelihood, are subordinated to fairness arguments and other substantive policy concerns because the problems engendered by complexity will not arise until after a contribution rule is implemented. A post hoc consideration of complexity problems is a questionable approach; especially since Congress is currently in the position to formulate a comprehensive contribution scheme which addresses such concerns within the framework of the contribution rule. The complexity concerns pose serious questions in their own right, and therefore warrant expanded treatment.

**PREDICTED COMPLICATIONS RESULTING FROM A CONTRIBUTION RULE IN ANTITRUST CASES**

Under the current proposal for a contribution rule in antitrust

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84. The almost uniform response to warnings of increased complexity has been reliance upon judicial power to sever claims and parties, and the fact that contribution in the securities field has resulted in no managerial problems. See Professional Beauty, 594 F.2d at 1185; 1979 Senate Hearings, supra note 17, at 69 (prepared statement of Donald G. Kempf, Jr.); see also supra notes 18-19.

85. See supra notes 16-17.

86. See supra notes 18-19.
cases, two factors threaten to further complicate the litigation of antitrust claims. First, contribution claims may be asserted against parties who were not named in the plaintiff’s suit. Second, once these impleaded parties are before the court, questions as to their participatory liability and their appropriate contributed share must be addressed. Both factors operate to present an antitrust plaintiff with a lawsuit potentially well beyond the scope of that which he or she undertook when filing the initial claim.

According to traditional tort principles, a tortfeasor’s right to claim contribution does not arise until after his liability to the plaintiff has been established and he has paid out more than his share of the damages. Thus, a plaintiff would not be burdened with proving liability on the part of third parties impleaded by the defendant. Rather, the defendant would be required to prove the joint liability of those parties from whom contribution is sought in a separate, subsequent proceeding.

Current procedural measures, however, permit contribution claims to be asserted by means of cross-claims or third-party pleadings during the original suit giving rise to potential liability. Permitting an adjudication of contribution in such a fashion burdens the original plaintiff because any judgment must await the named defendants’ proof as to the joint liability of impleaded third parties.

Courts initially deciding on the availability of contribution in antitrust proceedings have voiced concern over the potential for increased complexity likely to result from liberal impleader rules. The mere possibility that, through impleader, a defend-
A defendant could significantly expand the size of the lawsuit might deter plaintiffs from filing suit. Courts also have noted the deterrent effect of factors other than increased size. An impleaded defendant might have substantially greater resources to defend and delay a suit. Similarly, an impleaded party might occupy a different position in the pertinent market or have a distinct type of involvement in the alleged conspiracy from the defendants originally named. Finally, the potential for a change in venue necessitated by impleader of geographically diverse third-party defendants and the increase in litigation costs likely to result also provide potential for deterrence.

In addition to the threat of a chilling effect on private enforcement, recognition of a contribution rule in antitrust cases suggests further complications in the context of managing the additional parties and corresponding issues once they are before the court. Courts have recognized that contribution will inject additional issues into a lawsuit that is already enormously complex.

Contribution claims are permissible only where it can be shown that the impleaded party is jointly liable with the original defendants. Consequently, impleader of third parties necessitates expanded discovery so that the defendant can prove the liability of any third parties. Once joint liability is established, the proper contribution share must be determined. Such a

94. Sabre Shipping, 298 F. Supp. at 1346.
95. Id. See also Professional Beauty, 594 F.2d at 1190 (Hanson, J., dissenting).
96. Professional Beauty, 594 F.2d at 1190 (Hanson, J., dissenting).
97. Id.
98. Id. See also 1979 Senate Hearings, supra note 17, at 62 (prepared statement of Lowell Sachnoff).
99. See 1979 Senate Hearings, supra note 17, at 142 (statement of Donald J. Polden).
100. See infra note 111.
101. See Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370, 1376 (10th Cir. 1979), aff'd on reh'g en banc, 649 F.2d 1382 (10th Cir. 1981); Wilson P. Abraham Constr. v. Texas Indus., Inc., 604 F.2d 897, 905-06 (5th Cir. 1979), aff'd sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Professional Beauty, 594 F.2d at 1190 (Hanson, J., dissenting).
102. See W. PROSSER, supra note 4, § 50, at 309; Corbett, supra note 7, at 114-17. See also supra note 14.
103. The difficulty of proof will depend on the allocation method ultimately selected. For example, if contribution shares are allocated on a pro rata basis, a court would only have to divide the final judgment by the number of defendants and contributing parties.
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determination places an additional burden on the plaintiff, for the final judgment must be delayed until the appropriate contribution formula is applied.\textsuperscript{104} Where contribution shares are calculated according to each responsible defendant's actual sales or purchases,\textsuperscript{105} rather than on a pro rata basis,\textsuperscript{106} substantial investment of judicial time and effort, as well as additional costs to the plaintiff, would result.

One final area where a contribution rule would further complicate antitrust proceedings concerns the current use of joint defense teams during the pendency of a major antitrust case.\textsuperscript{107} Through impleader, any defendant could bring into the proceedings those co-conspirators whom the plaintiff declined to name at the outset. These co-conspirators, who would otherwise be uninvolved in the lawsuit, might be very unwilling to cooperate with the named defendants, the very parties responsible for their presence in court.\textsuperscript{108} Animosity between antitrust defendants who would otherwise have complementary goals would be inevitable. The streamlined defense efforts which result from cooperation among defendants and eliminate duplicative efforts on the part of counsel may be hampered by recognition of a contribution rule.\textsuperscript{109} For the plaintiff, this lack of cooperative effort

See Professional Beauty, 594 F.2d at 1182 n.4. If, however, a comparative fault or comparative benefit approach is taken, more in-depth judicial scrutiny is required. See Sullivan, supra note 4, at 416-23. See also supra note 15.

104. See 1979 Senate Hearings, supra note 17, at 29 (prepared statement of John Shenefiel, Asst. Attorney General).

105. S.380, the currently pending bill, provides for contribution based upon actual sales or purchases. See S. Rep. No. 359, 97th Cong., 2d Sess. 41(a) (1982). See also supra note 79. Such a formula has been criticized because of the time and consequent litigation costs necessary for a determination of the actual sales of all defendants or contributing parties. See 1979 Senate Hearings, supra note 17, at 62 (prepared statement of Lowell Sachnoff); at 137 (statement of Donald J. Polden).

106. See supra notes 14, 103.


109. See In re Corrugated Container Antitrust Litig., 84 F.R.D. 40, 41 (S.D. Tex. 1979) (mem.) ("Further complications to the efficient management of a suit such as this would
among the defendants presents further delays wholly unconnected with the merits of his claim.

Proponents of a contribution rule suggest that procedural protections, such as liberal use of a court's discretionary severance power, offset threats of deterrence and administrative complexities arising in the actual litigation of contribution issues. Courts, however, have characterized the severance power as an uncertain, and hence inadequate, remedy.

Severance power under rule 42(b) of the Federal Rules of Civil Procedure is exercised at the court's discretion. Thus, the possibility that contribution claims and the additional parties involved therein would not be readily severed from the original cause might be sufficient to deter effective private enforcement. Furthermore, severance of parties and issues may be unlikely where the contribution claims involve liability issues substantially similar to those being litigated in the primary suit. In spite of the above problems, proponents of a contribution rule suggest that the fears of increased complexity are exaggerated. Contribution is permitted in cases brought under the securities laws and, arguably, securities cases offer the same potential for multiple parties and complex economic issues present in antitrust cases. Contribution supporters point to the absence of demonstrable problems in managing contribution claims in the securities field. These proponents therefore argue that prohibiting contribution in antitrust cases to prevent further complication is unwarranted.

arise . . . from the fact that joint defense efforts, with their savings in court, staff, and attorney time, would be hindered or deterred altogether.

110. See supra notes 76-81 and accompanying text.

111. See Professional Beauty, 594 F.2d at 1190 (Hanson, J., dissenting) ("The chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of distinct court discretion."); see also E1 Camino Glass Co. v. Sunglo Glass Co., 1977-1 Trade Cas. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. Apr. 28, 1976).

112. See supra note 16.

113. See supra note 110.

114. See In re Corrugated Container Antitrust Litig., 84 F.R.D. 40, 41 (S.D. Tex. 1979). Commentators have suggested that because of the similarity of issues between the plaintiff's primary suit and the defendant's allegations that additional parties participated in the same illegal conduct, a consolidated trial is preferable. See Jacobson, supra note 12; Sullivan, supra note 4.

115. See supra notes 18-20 and accompanying text.
THE SECURITIES ANALOGY

Background

As proponents of an antitrust contribution rule point out, contribution is authorized under the securities laws. Both the Securities Act of 1933\(^{116}\) and the Exchange Act of 1934\(^{117}\) included contribution provisions when initially enacted.\(^{118}\) Despite the continued availability of contribution, however, only recently have contribution claims been asserted with any regularity in the securities field.

Two reasons are given for the dearth of early securities cases in which contribution was at issue. First, only three sections of the securities laws expressly authorized contribution, and these sections were seldom used to assert liability.\(^{119}\) Second, courts had consistently recognized and enforced contractual indemnity agreements by which parties potentially liable under the securities laws could prearrange shifts in liability.\(^{120}\) Contribution claims did not begin to surface until the enforceability of indemnity agreements was rejected,\(^{121}\) and the courts became willing to imply a right of contribution under more widely used liability provisions.\(^{122}\)

117. Id. §§ 78i(e), 78r(b).
119. The specific statutory provisions authorizing contribution include: § 11 of the Securities Act, which imposes liability for misrepresentations in connection with registration statements, 15 U.S.C. § 77k (1976); § 9(e) of the Exchange Act, which prohibits manipulation of securities on the stock exchanges, id. § 78i(e); and § 18(b) of the Exchange Act, which prescribes misleading statements in connection with registration documents, id. § 78r(b).
120. See Note, supra note 118 at 1270-72.
121. Globus v. Law Research Serv., Inc., 287 F. Supp. 188, 199 (S.D.N.Y. 1968), aff'd in part, rev'd in part, 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970) (Globus I) (court refused to enforce indemnity agreement where both parties were found liable of willful misconduct, on public policy grounds. The Second Circuit affirmed the opinion in all respects except for the award of punitive damages).
The early contribution cases in the securities area dealt with whether contribution might be implied for particular securities violations.\textsuperscript{123} Cases also arose which questioned the availability of contribution for certain willful or intentional violations.\textsuperscript{124} Thus, the courts delineated circumstances under which contribution was appropriate, but did not initially develop the guidelines necessary to handle such claims.

**Procedural Treatment of Contribution Claims**

An examination of securities cases in which contribution has been asserted reveals no set pattern of procedural treatment of such claims. Some courts have accepted the argument that third-party contribution claims are improper because they antedate a finding of joint liability.\textsuperscript{125} More commonly, however, third-party claims for contribution, filed in the principal suit, have been readily permitted.\textsuperscript{126}

Some courts have not only permitted third-party complaints seeking contribution, but have encouraged them. Separate proceedings for contribution, in which the original defendant must prove the existence of a common liability to the plaintiff that he


126. See, e.g., Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 958-59 (S.D.N.Y. 1975) (Fed. R. Civ. P. 14 permits contribution claims by third-party complaint); Liggett & Myers Inc. v. Bloomfield, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974) (Fact that contribution is premised on joint liability does not mean that a joint judgment is a prerequisite before such claims may be entertained. The policy goals of the securities laws are adequately served where contribution is sought in an original proceeding).
or she shares with others, might result in inconsistent verdicts based on identical facts. Accordingly, the cases suggest that a single proceeding in which all parties to an alleged scheme are before the court is preferable despite additional complexity.

Securities cases have also addressed the threat of possible prejudice to the original plaintiff in connection with contribution claims. One court denied leave to file a third-party complaint seeking contribution on the ground that prejudice to the plaintiff would result. This denial, however, has been criticized as unduly harsh. Later courts concluded that a better means to deal with potential prejudice is severance of the contribution claims. Separate trials do, however, carry the danger of potentially inconsistent verdicts.

One commentator recommends that a single proceeding should be utilized whenever possible. Severance pursuant to rule 42(b) should be exercised only where numerous parties or exceedingly complex issues create a genuine likelihood of an unfair burden to the original plaintiff. Very few securities cases which have included contribution claims involve that degree of complexity. Most impleader requests concern one or two additional parties. Consequently, the court's discretionary severance power has been infrequently invoked.


128. See Note, supra note 118, at 1289.

129. See Johns Hopkins Univ. v. Hutton, [1966-1967 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,810, at 95,766 (D. Md. 1966) (third-party complaint, which would necessitate substantial repetition of past discovery and proliferate the issues involved, would subject the original plaintiff to substantial expense and delay).

130. A direct criticism of the Johns Hopkins holding is found in C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1443, at 211-12 (1971).

131. See, e.g., Sherlee Land v. Commonwealth United Corp., [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,749, at 93,275 (S.D.N.Y. 1973) (noting the Wright & Miller criticism, supra note 130, the court allowed the defendants' third-party complaint, but also granted the plaintiff's motion for a separate trial of the contribution issues).

132. See supra note 127 and accompanying text.

133. See Note, supra note 118, at 1285-89.

134. Id.

135. See, e.g., Getter v. R.G. Dickinson & Co., 366 F. Supp. 559 (S.D. Iowa 1973) (in suit by purchaser against broker, the issuing corporation and the issuer's accounting firm were impleaded for contribution claims); but see Johns Hopkins Univ. v. Hutton, [1966-1967 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,810, at 95,766 (D. Md. 1966) (the desired third-party complaint named only one additional party, but raised numerous new and complex issues).
One final aspect of contribution claims in the securities area involves claims against settling defendants. Courts have generally allowed contribution against settling defendants where the settling party paid less than a fair share of the total liability.\textsuperscript{136}

\textbf{ANALYSIS: APPLICABILITY OF THE SECURITIES ANALOGY}

Proponents of a contribution rule for antitrust defendants point to the presence of contribution under the securities laws to counter warnings of increased complexity.\textsuperscript{137} An examination of contribution claims in the securities field, however, reveals that such an analogy may be inappropriate for several reasons.

First, while the antitrust and securities laws both impose joint liability on those who violate their provisions, the illegal conduct proscribed by each area of law is quite distinct.\textsuperscript{138} The gravamen of a securities law violation is wrongful or deceptive conduct in connection with a sale or purchase of securities.\textsuperscript{139} Contribution claims brought under the securities laws arise out of some common wrongdoing to a plaintiff; the party seeking contribution must demonstrate that the third party participated in the wrongful acts, but the tortious conduct need not be precisely the same.\textsuperscript{140} Under the antitrust laws, however, concerted activity, the conspiracy, is the gist of the violation.\textsuperscript{141} An antitrust defendant seeking contribution from a third party would be alleging that the third party participated in the precise conspiracy that underlies his own liability.\textsuperscript{142} Accordingly, the distinction between common liability under the securities laws, and joint liability under the antitrust laws could affect the ease with


\textsuperscript{137} See \textit{supra} notes 16-19 and accompanying text.

\textsuperscript{138} The phrase “joint liability” may be misleading in that it encompasses both concerted wrongful activity, and a common liability arising from a series of negligent acts that cause a single harm. See Leflar, \textit{supra} note 4, at 131 n.9. For purposes of discussion, references in the text to joint liability are limited to actual concerted activity among wrongdoers. The term “common liability” will be used to describe those situations where a series of negligent actors share responsibility for a resulting wrong.

\textsuperscript{139} See \textit{generally} \textit{FED. SEC. L. REP. (CCH) \textsection 104} (Oct. 13, 1982).

\textsuperscript{140} See Note, \textit{supra} note 118, at 1287 n.182 (explaining that judicial use of the term “joint liability” in securities cases has been in reference to liability in the broadest sense and does not suggest actual concerted activity on the part of defendants).

\textsuperscript{141} See L. SULLIVAN \textit{supra note} 1, \textsection 108-109.

\textsuperscript{142} See Cellini, \textit{supra} note 108, at 1600-01.
which multiple defendants can coordinate defense efforts.

In the securities field, because identical conduct is not at issue, defendants and third parties might be willing to postpone the allocation of their respective liabilities until the plaintiffs have proved that some common duty has been breached.\textsuperscript{143} In the antitrust area, once the plaintiff establishes a conspiracy, a defendant is effectively admitting his guilt in seeking contribution from additional parties.\textsuperscript{144} The resulting precarious position for antitrust defendants will likely preclude willing cooperation among defendants, resulting in additional litigation time and expense for all parties involved.

Second, the conspiratorial nature of many antitrust violations, and the fact that such practices often exist industry-wide, imply a far greater number of potential third parties in antitrust cases than in securities cases.\textsuperscript{145} While it is not uncommon for antitrust plaintiffs to name multiple defendants, substantial complications could result if yet additional parties were brought before the court through third-party contribution claims. In contrast, contribution claims asserted under the securities laws have not, generally, greatly expanded the scope of the original lawsuit.\textsuperscript{146}

Finally, unlimited impleader in antitrust cases may potentially alter or modify the plaintiff's theory of his case. For example, a plaintiff alleging a horizontal price-fixing conspiracy could be forced to address different substantive rules of law if a defendant were to allege, through a contribution claim, that parties in different positions in the distribution chain were part of the conspiracy.\textsuperscript{147} Commentators have suggested that such a result is

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\item[143.] See Goldsmith v. Pyramid Communications, Inc., 362 F. Supp. 694 (S.D.N.Y. 1973) (44 defendants agreed to postpone their contribution and indemnity claims until after the plaintiff successfully established a securities violation).
\item[144.] See Cellini, supra note 108, at 1600-01.
\item[145.] See supra note 1.
\item[146.] See supra note 134 and accompanying text.
\item[147.] Differing legal analyses apply to antitrust conspiracies depending on the nature of the restraint alleged, and whether the participants occupy only one level on a distribution chain (a horizontal conspiracy) or several levels (a vertical conspiracy). Restraints of trade imposed by means of a horizontal conspiracy are generally subject to a per se illegality rule. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-23 (1940) (a combination of competitors "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal per se"). Under a per se rule, the plaintiff need only prove the existence of the illegal agreement; the courts do not require proof of a resulting anticompetitive effect. See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) ("there are certain agreements or practices which because of their pernicious effect on competition and lack of
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improbable because federal procedural rules limit third-party complaints to potential liability suggested by the plaintiff's claim. The current legislative proposal for contribution carries no such limitation, however, in explicitly authorizing third-party claims for contribution. The availability of contribution under the securities laws offers no analogy in this regard.

CONCLUSION

The above distinctions between substantive antitrust and securities law suggest that reliance on procedural similarities is insufficient to support the establishment of an antitrust contribution rule because such basis does not adequately address the complexity issues involved. Given congressional commitment to any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Vertical restraints, however, are usually tested under a rule of reason approach; the plaintiff must demonstrate the actual anticompetitive effects of the challenged restraint by introducing economic evidence on the relevant product market. See Board of Trade v. United States, 246 U.S. 231, 238 (1918) ("[T]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business...; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable."). Consequently, characterization of a challenged restraint as horizontal or vertical, depending on the market position occupied by the alleged co-conspirators, will determine the plaintiff's burden of proof. See generally L. Sullivan, supra note 1, §§ 65-72.

While both horizontal and vertical price restraints have been traditionally analyzed under a per se rule, there is a current movement toward treating all vertical restraints, including price restraints, under a rule of reason analysis. See Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L.J. 6, 8-14 (1981). Should the courts embrace this suggested approach, the proposed contribution bill might operate to shift a plaintiff's burden of proof even though applicable only in price-fixing cases.


149. See supra note 79, § 4I(a).

The validity of procedural rules that are included in a federal statutory scheme, but which are inconsistent with the established Federal Rules of Civil Procedure, is unclear. Generally, the Federal Rules have the effect of statute and apply in all civil matters brought in the federal courts. Where Congress demonstrates clear intent that inconsistent procedural rules are to apply, however, the Federal Rules are inapplicable. See C. Wright & A. Miller, Federal Practice and Procedure § 1023 (1971) (inconsistent notice requirements present in the federal patent laws govern in patent proceedings). The antitrust contribution proposal currently under consideration is silent as to whether its more liberal third-party claims language is intended to supersede rule 14.
the passage of an antitrust contribution measure, immediate attention should be directed toward realistically appraising potential complications while the contours of a contribution rule are still being formulated. The securities analogy may be one consideration, but the distinctions should be noted and addressed. The complexity issue warrants serious inquiry so that the resulting proposal reflects due consideration of consequential problems as well as any motivating inequities.

Laura J. Lodawer

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150. See supra notes 56-84 and accompanying text.