Contribution and Antitrust Policy

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NOTES

Contribution and Antitrust Policy

Contribution has suddenly become one of the most hotly debated issues in antitrust law. Until recently, courts did not compel antitrust violators to contribute to the satisfaction of a judgment.

Contribution, according to the common law of torts, is defined as distribution of the amount of damages sustained by the victim among the joint tortfeasors by requiring each to "contribute" to the total damages assessed. Indemnification is a concept similar to, and often confused with, contribution. Indemnification shifts the entire loss from one tortfeasor to another who is deemed responsible for making the full payment. See Heizer Corp. v. Ross, 601 F.2d 330, 331 (7th Cir. 1979); W. Prosser, Handbook of the Law of Torts § 50 (4th ed. 1971).


English common law denied contribution to intentional tortfeasors under the doctrine of Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799). A mistaken interpretation of the Merryweather doctrine led most American jurisdictions to deny contribution to both negligent and intentional tortfeasors. See W. Prosser, supra note 1, at § 50; Leffler, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130 (1932); Reath, Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan, 12 Harv. L. Rev. 176 (1898). The common-law rule barring contribution has been modified by statute in most states, see Note, Contribution Among Joint Tortfeasors, 12 Ga. L. Rev. 553 (1978), and several uniform acts allowing contribution have been drafted by the National Conference of Commissioners on Uniform State Laws, e.g., Uniform Contribution Among Tortfeasors Act (1939 & 1955 versions); Uniform Comparative Fault Act §§ 4-6.

against a fellow joint violator. In February 1979, however, the Eighth Circuit in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc. broke ranks with other courts and ruled that under


Because each violator is severally liable for all damages sustained by a private plaintiff, the plaintiff need not sue all violators but may choose which of the conspirators he will name as defendants. Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d at 899 n.3 (5th Cir. 1979); Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 8 (9th Cir. 1963), aff'd, per curiam, 362 F.2d 1008 (9th Cir. 1966); cert. denied, 385 U.S. 976 (1966); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 12 (N.D. Ga. 1973); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804 (W.D. Wash. 1968). Similarly, the government need not sue all possible conspirators in a civil antitrust suit, see United States v. General Motors Corp., 384 U.S. 127, 129 n.2 (1966), and need not name all conspirators in a criminal antitrust indictment, United States v. Gasoline Retailers Assn., Inc., 285 F.2d 688, 692 (7th Cir. 1961). For a discussion of the possible unfairness which may result from a plaintiff's power to choose which of several potential defendants he will sue, see text at notes 68-93 infra.


7. 594 F.2d 1179 (8th Cir. 1979).
some circumstances an antitrust defendant would be entitled to contribution from joint violators. The chorus of reaction to Professional Beauty has been loud and dissonant. Courts, Congress, and antitrust practitioners have proposed a wide range of alternative contribution rules. The Fifth Circuit's decision in Wilson P. Abraham Construction Corp. v. Texas Industries, Inc. denies contribution in all cases; the Tenth Circuit's ruling in Olson Farms, Inc. v. Safeway Stores, Inc. denies it to intentional violators. A bill proposed by Senator Bayh authorizes contribution only in price-fixing cases, while a statute proposed by the Antitrust Section of the American

8. The Eighth Circuit ruled that contribution should be allowed where, in the discretion of the district court after a consideration of all the circumstances of the particular case, fairness between the parties requires it. 594 F.2d at 1185-86. The court did not rule that the defendant in Professional Beauty was entitled to contribution. It ruled only that contribution might be appropriate, and remanded the case for a consideration of all the circumstances. 594 F.2d at 1186. As of yet, no antitrust defendant has received contribution in a reported federal case.

9. Professional Beauty has also provoked confusion and uncertainty in antitrust settlement negotiations. One district court in the Eighth Circuit has refused to approve an antitrust settlement that failed to release non-settling defendants from liability for the settling defendant's actions. In Little Rock School Dist. v. Borden, Inc., [1980-1 Trade Cas. (CCH) ¶ 63,059 at 77,251 (E.D. Ark. 1979)] (letter opinion), Chief District Judge Eisele refused to accept a proposed settlement with two of the defendants in an antitrust suit. Eisele ruled that, in view of Professional Beauty, an antitrust settlement must release non-settling defendants from liability for the settling defendants' actions before it can be approved.

At least four settlements filed in the Ninth Circuit have attempted to protect settling defendants from subsequent contribution claims. The settlements, all filed in In re Cement and Concrete Antitrust Litigation, M.D.L. 296, No. Civ. 76-488A (D. Ariz. 1979), each include one of two methods of insulating settling defendants from contribution liability. Two of the agreements provide that the plaintiff will satisfy any contribution judgments against settling defendants. See Settlement Agreement with New Pueblo Materials, Inc. (lodged Oct. 3, 1979) (copy on file with the Michigan Law Review); Settlement Agreement with Phoenix Redi-Mix Co. (lodged Oct. 1, 1979) (copy on file with the Michigan Law Review). In the other two agreements, the plaintiffs agreed to reduce their own judgment against the contribution claimants by the amount of any contribution judgments against settling defendants. See Settlement Agreement with Columbia Building Materials, Inc. (lodged Sept. 19, 1979) (copy on file with the Michigan Law Review); Settlement Agreement with River Cement Co. (lodged July 31, 1979) (copy on file with the Michigan Law Review).

10. 604 F.2d 897 (5th Cir.), rehearing en banc denied, 608 F.2d 524 (5th Cir. 1979). Two district courts have dismissed antitrust contribution claims since the Professional Beauty decision. See In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), aff'd. without opinion, 605 F.2d 319 (5th Cir. 1979) (see 949 Antitrust & Trade Reg. Rep. (BNA) A-9 (Jan. 31, 1980) for a statement that the Fifth Circuit in affirming relied on Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979)), cert. granted sub nom. Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3820 (U.S. June 16, 1980) (No. 79-972); In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1980) (contribution claim against settling defendants denied when filed nearly nine years after original complaint filed). In the Ampicillin decision, the court indicated only that contribution would be inappropriate in the immediate case, not that contribution should be denied in all cases. 82 F.R.D. at 650 (citing Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979)).


Bar Association would allow contribution in all private suits.  

This Note examines the contribution controversy from an antitrust policy perspective. Part I summarizes the Professional Beauty, Abraham Construction, and Olson Farms decisions and sketches the major provisions of the Bayh Bill and the ABA Statute. Part II discusses four antitrust policy goals that figure prominently in both Circuit Court decisions and Congressional debate: fairness, deterrence, promotion of settlement, and reduced complexity of litigation. Part III argues that none of the rigid contribution rules proposed since Professional Beauty achieves the optimal balance of these policy goals. The Note concludes that a flexible rule permitting courts to assess the propriety of contribution in each case would best resolve this complex antitrust dilemma.

I. POSITIONS IN THE CONTRIBUTION DEBATE

A. Professional Beauty

The controversial Professional Beauty decision involved a dispute between the two Minnesota distributors of La Maur, Inc. Professional Beauty Supply alleged that National Beauty Supply had persuaded La Maur to terminate Professional's franchise. Professional sued National for treble damages, claiming that National's demand upon the manufacturer for an exclusive dealership was an attempt to monopolize in violation of section 2 of the Sherman Act. National filed a third-party complaint seeking contribution from

13. The Antitrust Section's proposed statute is contained in American Bar Association, Report of the Section of Antitrust Law with Legislative Recommendation (Sept. 6, 1979), reprinted without Minority Report in 936 ANTITRUST & TRADE REG. REP. (BNA) E-1, E-2 to E-3 (Oct. 25, 1979) [hereinafter cited as ABA Report]. The full text of the statute can be found at note 60 infra.

14. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1181 (8th Cir. 1979). Before the suit was brought, Professional's franchise was renewed by La Maur. 594 F.2d at 1185. The existence of a business relationship between La Maur and Professional at the time of the suit may explain why La Maur was not named as a defendant in the original complaint. See text at notes 77-79 infra.


16. A third-party complaint is filed before judgment against a person not previously party to the action. It is the most common procedure for asserting rights to contribution when the plaintiff has failed to name the joint antitrust violators as a defendant. See, e.g., Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1341 (S.D.N.Y. 1969); El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. 72,110, 72,111 (N.D. Cal. 1976). Contribution has also been sought in antitrust suits by (1) separate suit after judgment against the violators not named in plaintiff's antitrust treble damages action, see Olson Farms, Inc. v. Safeway Stores Inc., [1979-2] Trade Cas. 79,699 (10th Cir. 1979), and by (2) cross-claim against defendants who had previously settled with the plaintiff in the litigation, see Hedges Enterprises v. Continental Group, Inc., [1979-1] Trade Cas. 77,993 (E.D. Pa.), modification denied, 84 F.R.D. 615 (E.D. Pa. 1979); In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), aff'd without published opinion, 606 F.2d 319 (5th Cir. 1979), cert. granted sub nom.
La Maur for its part in the alleged wrongdoing.\textsuperscript{17} The federal district court dismissed the third-party complaint, though Professional had not objected to it,\textsuperscript{18} and National appealed.

The Eighth Circuit reversed the district court’s contribution ruling.\textsuperscript{19} After deciding that federal law governed the antitrust contribution issue,\textsuperscript{20} Circuit Judge Stephenson\textsuperscript{21} ruled that policies of fairness and deterrence required a right to contribution in some antitrust cases.\textsuperscript{22} The court sanctioned contribution despite contrary district court precedent\textsuperscript{23} and despite claims that such a rule would

\textsuperscript{17} 594 F.2d at 1181. National sought contribution or indemnification under both federal and Minnesota law. 594 F.2d at 1181. La Maur argued that the complaint failed to state a claim upon which relief could be granted and moved for dismissal under Federal Rule of Civil Procedure 12(b)(6). 594 F.2d at 1181.

\textsuperscript{18} 594 F.2d at 1184.

\textsuperscript{19} 594 F.2d at 1186. The Eighth Circuit affirmed the district court’s ruling that no federal right of indemnification existed under the antitrust laws. Indemnification was denied because allowing an antitrust violator to shift the entire loss to another party would decrease antitrust deterrence. Consistent with its contribution holding, the Court sought to ensure that “the loss will be apportioned among the joint wrongdoers so that the deterrent effect of the judgment will be felt by all culpable parties.” 594 F.2d at 1186. This reasoning has already been endorsed by several courts. See Heizer Corp. v. Ross, 601 F.2d 330, 334 (7th Cir. 1979) (no right to indemnification where defendant violated section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976)); Florida Power Corp. v. Granlund, [1979-2] Trade Cas. 78,493 (M.D. Fla. 1979) (rejecting antitrust settlement which would effectively permit indemnification).


\textsuperscript{21} Judge Stephenson wrote for himself and Circuit Judge Heany. District Judge Hanson, sitting by designation, vigorously dissented. 594 F.2d at 1188.

\textsuperscript{22} The opinion is vague as to just what circumstances would warrant contribution in an antitrust case. The remand to the district court for a consideration of “all of the circumstances,” 594 F.2d at 1186, suggests that the district judge should consider in the instant case the factors of fairness, deterrence, complexity, and encouragement of settlement, just as the circuit court considered them in the abstract. Judge Stephenson referred to Justice White’s concurring opinion in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 146-47 (1968), for specific factors a district court should consider: (1) “relative responsibility for originating, negotiating, and implementing the scheme”; (2) “who might reasonably [be] expected to profit from . . . the conduct making the scheme illegal”; (3) “whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other”; (4) “who ultimately profited or suffered from the arrangement.”

\textsuperscript{23} 594 F.2d at 1182-83. Judge Stephenson cited seven district court decisions, four expressly denying contribution, one denying it in dictum, and two denying it “arguably by implication.” He dismissed all but the El Camino Glass and Sabre Shipping decisions because they failed to give reasons for their contribution ruling. Sabre Shipping was questionable authority
violate congressional intent,\textsuperscript{24} deter settlement,\textsuperscript{25} and further complicate litigation.\textsuperscript{26} The case was remanded for the district court to determine whether, upon consideration of all the circumstances, National was entitled to pro rata\textsuperscript{27} contribution from La Maur.\textsuperscript{28}

"The deciding factor in our decision," wrote Judge Stephenson, "is fairness between the parties."\textsuperscript{29} The Eighth Circuit identified two elements of unfairness in the denial of contribution to National: the placing of the entire loss upon National even though La Maur might be equally responsible for plaintiff's damages, and the possibility that only undue influence by La Maur upon Professional had prevented the manufacturer from being named as a defendant.\textsuperscript{30}

The Eighth Circuit also argued that denying contribution dilutes the deterrent effect of the antitrust laws. Since the absence of contribution allows many antitrust violators to go "scot-free" while one is held liable for all the damages, the court reasoned that "[t]his possibility of escaping all liability might cause many to be more willing for denying contribution, claimed the Circuit Judge, because it relied heavily on a similar ruling in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), a case significantly narrowed by Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974). See generally Note, Contribution in Private Antitrust Suits, 63 CORNELL L. REV. 682, 687-92 (1978). The Eighth Circuit agreed with much of the reasoning of El Camino Glass; it differed only on the relative weights to be assigned to arguments for and against antitrust contribution. 594 F.2d at 1183.

\begin{itemize}
\item \textsuperscript{24} The Sabre Shipping and El Camino Glass decisions argued that Congress intended to deny contribution to antitrust violators. In part, they reasoned that the absence of express contribution provisions in the antitrust laws, coupled with the presence of express contribution provisions in certain sections of the securities laws, indicated congressional intent to prohibit contribution in the former class of cases. See El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. 72,110, 72,112 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1345 (S.D.N.Y. 1969). The Fifth Circuit agreed with the Eighth Circuit's rejection of this "congressional intent" rationale for denying contribution, and most commentators would probably agree with its statement: "We do not . . . interpret this omission [of statutory contribution rights from the Sherman and Clayton Acts] as evidence that Congress necessarily intended to deny contribution under the antitrust laws. . . . It is more likely that this narrow question . . . never occurred to the drafters of the legislation." Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 900 (5th Cir. 1979). See Note, supra note 23, at 699-700. Since both the Eighth and Fifth Circuits rejected congressional intent as a deciding factor in their contribution decisions, this Note will deal no further with that issue.
\item \textsuperscript{25} 594 F.2d at 1184. See text at notes 117-33 infra for a discussion of the settlement issue.
\item \textsuperscript{26} 594 F.2d at 1184-85. See text at notes 134-49 infra for a discussion of the increased complexity that allowing antitrust contribution might cause.
\item \textsuperscript{27} Contribution could be measured in a number of ways. As pro rata contribution is usually defined, each violator contributes equally to any judgment returned against one, regardless of the violator's relative fault. See W. PROSSER, supra note 1, § 30, at 310. Antitrust contribution shares could also be measured according to comparative fault, percentage of sales, or percentage of profits. See notes 170-72 infra and accompanying text.
\item \textsuperscript{28} 594 F.2d at 1182. The circuit court also directed the district court to consider further the pendent Minnesota state law claims for contribution and indemnity. 594 F.2d at 1187-88.
\item \textsuperscript{29} 594 F.2d at 1185.
\item \textsuperscript{30} 594 F.2d at 1185.
\end{itemize}
... to engage in wrongful activity." Even intentional violators, who were routinely denied contribution at common law, were to be allowed contribution because of this deterrence argument.

Senior District Judge Hanson, sitting by designation, dissented from the majority's contribution ruling. He argued that the policy of deterrence did not support the majority's rule allowing contribution because it was unclear whether the rule would deter or encourage antitrust violations. Noting that Professional's suit could succeed only if National intentionally violated the law, Judge Hanson suggested that contribution among intentional antitrust violators would be especially inappropriate. The dissent also claimed that allowing contribution would intolerably increase confusion, delay, and complexity in antitrust suits, and would thereby chill plaintiffs' incentive to bring private suits.

B. Abraham Construction

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc. arose out of a conspiracy among New Orleans-area concrete manufacturers to raise and stabilize prices. In 1973 a grand jury indicted four manufacturers, including Texas Industries, for violating section 1 of the Sherman Act. Criminal prosecutions culminated in nolo contendere pleas. In 1975 Wilson P. Abraham Construction Corporation brought a treble damages action against Texas Industries alone, basing its claim on the same violation that was the subject of the prior criminal suit. Texas Industries thereupon filed a third-party complaint against its three criminal codefendants, seeking contribution from them should it be found liable to Abraham. Bowing to the weight of authority, the United States District Court for the Eastern District of Louisiana granted a motion by the third-party defendants to dismiss the contribution claim. Judge Thornberry of the Fifth Circuit affirmed the dismissal, ruling that under no circumstances

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31. 594 F.2d at 1185. This reasoning contrasts sharply with that in Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 901 (5th Cir. 1979), as well as that in El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. 72,110, 72,112 ("the court believes that the deterrent effect of the antitrust laws may be increased by not permitting defendants to redistribute the cost of an antitrust violation"). See text at notes 101-16 infra for an analysis of the deterrence debate.

32. 594 F.2d at 1186.

33. 594 F.2d at 1189-90.

34. 594 F.2d at 1188-89. *But cf.* Getter v. R. G. Dickinson & Co., 366 F. Supp. 559 (S.D. Iowa 1973) (implying a right of contribution under certain sections of the securities laws in favor of an intentional violator). In *Getter*, Judge Hanson argued that an intentional tortfeasor "should not be allowed to escape liability under the Securities Act by the fortuitous circumstance that he was not sued in the main cause of action. If he is a joint-tortfeasor, he should be held to contribution to facilitate enforcement of the obligations imposed by the Securities Act." 366 F. Supp. at 569.

35. 594 F.2d at 1189-90.

36. 604 F.2d 897 (5th Cir.), rehearing en banc denied, 608 F.2d 524 (5th Cir. 1979).
stances would contribution be available to antitrust violators in the Fifth Circuit.\footnote{37. Those aggrieved by the decision were instructed to turn to Congress for a statutory remedy. 604 F.2d at 906.}

The Abraham Construction decision rejected the Eighth Circuit's conclusion that deterrence and fairness require contribution. The court observed that “prevailing economic theory” indicates that denying contribution is more likely to deter anticompetitive conduct than allowing it.\footnote{38. 604 F.2d at 901 & n.8 (citing Note, \textit{supra} note 23, at 702).} The Fifth Circuit minimized the unfairness of a no-contribution rule, concluding that the threat of collusion\footnote{39. A rule barring contribution permits a plaintiff to “collude” with one of the potentially liable parties and then to bring a suit against a different defendant. “Collusion” is loosely used and rarely defined by the courts when contribution is at issue. \textit{See} note 77 \textit{infra} and accompanying text.} or coercion\footnote{40. Coercion is possible where contribution is barred because a plaintiff can threaten a defendant who refuses to settle with the possibility of bearing the entire liability for a conspiracy alone. \textit{See} text at notes 84-95 \textit{infra}.} posed by a no-contribution rule was insufficient to outbalance the advantages of a no-contribution rule, and was mitigated by the possibility that a victim of collusion or coercion might have an independent cause of action for relief.\footnote{41. 604 F.2d at 901-02. \textit{See} text at note 83 \textit{infra}. The court also noted that Texas Industries did not allege any instance of coercion or collusion in the immediate litigation. 604 F.2d at 901-02.}

The Fifth Circuit made it clear that its ruling barred contribution even among unintentional violators. Judge Thornberry claimed that allowing contribution to unintentional violators would reduce deterrence.\footnote{42. Judge Morgan took strong issue with this point. 604 F.2d at 907 (Morgan, J., dissenting). He has the better of this argument. \textit{See} text at notes 107-09 \textit{infra}.} He dismissed as “problematic” the harshness that might result should unintentional violators be barred from contribution. Circuit Judge Morgan dissented from the part of the Abraham Construction decision that denied contribution to unintentional antitrust violators. He found it intolerable to force a defendant guilty of no conscious wrongdoing to “bear total responsibility for the sins of many.”\footnote{43. 604 F.2d at 908 (Morgan, J., dissenting). “I would, in the interest of fairness, award contribution to a defendant whose liability is based solely on an unintentional violation of the antitrust laws.” 604 F.2d at 906-07 (Morgan, J., dissenting).}

\section*{C. Olson Farms}

In Olson Farms, Inc. \textit{v.} Safeway Stores, Inc., the Tenth Circuit created a hybrid contribution rule from the Professional Beauty and Abraham Construction decisions. Five Utah egg distributors, including Olson Farms, had fixed the prices at which eggs were purchased from producers. Fourteen producers singled out Olson Farms for an
antitrust suit,\textsuperscript{44} even though it had purchased only eleven percent of the eggs involved.\textsuperscript{45} Olson Farms lost the suit and subsequently satisfied a $2,400,000 judgment, more than twenty-four times the damages directly attributable to its purchases.\textsuperscript{46} The district court dismissed Olson Farms's separate suit seeking contribution from its coconspirators.\textsuperscript{47}

Judge Miller, writing for the Tenth Circuit,\textsuperscript{48} affirmed the denial of contribution rights. After a review of the policy arguments made for and against contribution in the \textit{Professional Beauty} majority and dissenting opinions, the Tenth Circuit decided to wait for a clear signal from Congress before entering “such a complex policy thicket.”\textsuperscript{49} Like the Fifth Circuit, the Tenth ruled that intentional antitrust violators such as Olson Farms were barred from asserting contribution rights. Circuit Judge Holloway dissented, pointing out that “[t]here are important reasons rooted in the antitrust laws for . . . allow[ing] recovery by intentional tortfeasors.”\textsuperscript{50}

In dicta, the Tenth Circuit briefly mentioned that unintentional violators might be excepted from its decision barring contribution. With that single phrase and its accompanying footnote, the opinion at least partially endorses \textit{Professional Beauty}.\textsuperscript{51} For the sake of unintentional violators the Tenth Circuit is apparently willing to plunge into the policy thicket it avoided in the \textit{Olson Farms} case.

\begin{footnotesize}
\begin{enumerate}
\item [1979-2] Trade Cas. at 79,700 n.4.
\item [1979-2] Trade Cas. at 79,704. The court specified four species of thorny issue within the contribution “policy thicket”: (1) For what type of conduct will contribution be allowed? (2) How will contribution shares be calculated? (3) What effect will rights to contribution have on settlements? and (4) By what procedures will defendants be able to assert contribution claims?
\item [1979-2] Trade Cas. at 79,704 & n.15. Footnote 15 of the opinion outlines how trial judges are to exercise their discretionary power to grant contribution rights to unintentional violators. First, where contribution is sought in a separate suit after judgment, account should be taken of whether the party seeking contribution made a reasonable effort to bring joint violators into the original suit through rules 13 (cross-claim and counterclaim) and 14 (third-party claim) of the Federal Rules of Civil Procedure. The trial judge may further examine the factors listed by Justice White in \textit{Perma Life} and cited in \textit{Professional Beauty}. \textit{See} note 22 supra. Finally, the court noted that exceptions for violators “may be squeezed out in the rare ‘ad absurdum’ or ‘shock the conscience’ type case, but not where contribution might predictably tend to frustrate observance and enforcement of the antitrust laws.”
\end{enumerate}
\end{footnotesize}
D. The Bayh Bill

Senator Bayh's contribution bill, S. 1468, was Congress's first reaction to the Professional Beauty decision. The bill would amend section 4 of the Clayton Act to grant contribution rights to all price-fixing antitrust defendants. According to the Judiciary Committee

52. See Bayh Bill, supra note 12. The text of S. 1468 is as follows:

A Bill To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

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:

"Sec. 41 (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 this 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 this 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 only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section."

53. The Bayh bill was first proposed as an amendment to S. 390, 96th Cong., 1st Sess. (1979), in May 1979. Hearings on the amendment were held in June. See Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) [hereinafter cited as Senate Hearings]. The amendment was subsequently withdrawn and reintroduced as a separate bill, which was reported out of the Judiciary Committee on July 31, 1979. See S. REP. NO. 428, 96th Cong., 1st Sess. (1979) [hereinafter cited as Senate Report]. The Bill now awaits action on the Senate floor.

54. The Bill and the Senate Report fail to define price-fixing. This could be the source of some confusion. The Supreme Court has recognized that price-fixing is essentially a term of art attached to any of the variety of practices which are found to be per se illegal. See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 8-9 (1979). It is therefore difficult to predict whether many practices, such as exchange of information among competitors, will be defined as price-fixing by the courts. See Fosler, Information and Antitrust: Reflections on the Gypsum and Engineers Decisions, 67 GEO. L.J. 1187, 1197 (1979). And in the wake of the Supreme Court's per curiam decision in Catalano Inc. v. Target Sales Inc., 100 S. Ct. 1925 (1980), it seems likely that the Court will broadly define the term price-fixing in the future. See Nannes, A Price-Fixing Surprise, Per Se: Implications of the Catalano Case, NATL. L.J., July 7, 1980, at 23, col 1.

It is also uncertain how the bill applies to vertical price-fixing. See 940 ANTITRUST & TRADE REG. REP. (BNA) A-16 (Nov. 22, 1979) (statement of Asst. Atty. Gen. Shenefield).
report on the Bayh Bill, courts would remain free to grant or withhold contribution rights in non-price-fixing cases.\textsuperscript{55}

Senator Bayh and other supporters of S. 1468 claim that its primary purpose is to prevent coercion of settlements from small and medium-sized corporate defendants.\textsuperscript{56} Novel provisions governing contribution-share measurement and claim reduction are designed to achieve this goal without deterring fair settlements. Each violator contributes to the plaintiff's recovery according to the damages directly attributable to that violator's sales.\textsuperscript{57} If the plaintiff settles with one defendant, the court will reduce his claim against the remaining violators by treble the damages attributable to the settling defendant's sales.\textsuperscript{58} To preserve the incentive to settle, the bill exempts settling defendants from liability for contribution.\textsuperscript{59}

E. The ABA Statute\textsuperscript{60}

In reaction to the rapid progress of the Bayh Bill in the Senate, the Antitrust Section of the American Bar Association proposed its


\textsuperscript{56} See \textit{Senate Report}, supra note 53, at 1; \textit{Senate Hearings}, supra note 53, at 3. Coercion of settlements is discussed at text accompanying notes 84-95 infra.

\textsuperscript{57} Where the conspiracy fixed prices at which goods or services were purchased, purchases rather than sales are the basis for measuring damages.

\textsuperscript{58} See Bayh Bill, supra note 12, at 41(b), \textit{reproduced at note 52 supra}. The subsection duplicates New York's contribution statute, which provides that a plaintiff's recovery against non-settling defendants shall be reduced by the greatest of (1) the consideration paid for the settlement release, (2) the amount stipulated in the settlement agreement, or (3) the amount of the released tortfeasors' equitable share of the damages. N.Y. GEN. OBLIG. LAW § 15-108(a) (McKinney 1978).

\textsuperscript{59} See text accompanying notes 121-25 infra.

\textsuperscript{60} "A Statutory Proposal for Contribution," \textit{ABA Report}, supra note 13, at E-2, E-3 [hereinafter cited as ABA STATUTE]. The full text of the proposed statute reads as follows: Contribution Rights of Defendants.

"(a) In any action brought under section 4, 4A or 4C of the [Clayton] Act, if the damages recoverable from any defendant were, in whole or in part, caused by the wrongful acts or omissions of another, rights of contribution shall exist and be enforceable in accordance with this section, and not otherwise.

"(b) Claims for contribution in antitrust actions may be asserted by the filing of a
own broader and more detailed contribution statute. The ABA Statute would grant contribution rights to all defendants in private antitrust suits. The Antitrust Section argues that the need to prevent unfairness by allowing contribution is just as great in non-price-fixing cases as in price-fixing cases.61

Other provisions of the ABA Statute resemble those of the Bayh Bill. The proposed statute would bar contribution claims against settling defendants.62 It would require a court to reduce the plaintiff's claim against the remaining defendants by the amount of the contribution share otherwise chargeable to the settling defendant.63 The ABA Statute, however, measures contribution shares according to the "relative responsibility" of each party,64 rather than according to
counter-claim, cross-claim or third party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action.

"(c) Claims for contribution will be barred unless they are filed (i) within one year of the date of service of the original complaint giving rise to potential liability, or (ii) within sixty (60) days after the claimant for contribution receives reasonable notice of his liability or potential liability based in whole or in part upon damages caused by the wrongful acts or omissions of another, whichever date occurs later. Notwithstanding the foregoing, claims for contribution shall be barred unless they are filed within sixty (60) days after the entry of final judgment by the district court awarding damages against a prospective claimant for contribution.

"(d) 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.

"(e) Contribution may not be obtained in favor of or against a person who, pursuant to a settlement agreement with a plaintiff in the action in respect of which contribution rights are claimed, has been released from potential liability for the underlying claim. To avail itself of this paragraph, a settling defendant must advise the court and all other defendants, in writing, of the existence of the settlement agreement within sixty (60) days of its execution.

"(f) Following a settlement in the action in respect of which contribution rights are claimed with less than all defendants, the plaintiff may, within sixty (60) days of the settlement, elect to withdraw from the damage action all claims based upon the acts or omissions of the settling person or persons. Failing such an election by plaintiff, the court shall reduce any judgment by the amount for which each settling defendant would have been liable for contribution had there been no settlement.

"(g) Contribution claims shall be determined by the court following the trial of the action in respect of which contribution rights are claimed in accordance with the relative responsibility of each party for the damages awarded in the main action which are subject to contribution rights as provided herein.

"(h) Nothing in this section shall preclude two or more persons from agreeing to (i) apportion their collective liability in some manner other than as specified in this section or (ii) toll the automatic barring effect of paragraph (c).

"(i) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section."
the "damages attributable to each . . . person's sales or purchases," as the Bayh Bill provides.\textsuperscript{65}

The circuit court opinions and statutes summarized above can be ordered according to their liberality in creating contribution rights:

(1) Contribution rights mandated in all antitrust cases (ABA Statute).

(2) Contribution rights mandated in price-fixing cases and available at the courts' discretion in other cases (Bayh Bill).\textsuperscript{66}

(3) Contribution allowed at the district court's discretion in all cases (Eighth Circuit in \textit{Professional Beauty}; Judge Holloway's dissent in \textit{Olson Farms}).

(4) Contribution allowed at the district court's discretion for unintentional violators and barred in all other cases (Tenth Circuit in \textit{Olson Farms}).

(5) Contribution barred in all cases (Fifth Circuit in \textit{Abraham Construction}; Judge Hanson's dissent in \textit{Professional Beauty}).

The rational means to choose among these rules is to determine which best promotes relevant antitrust policy goals.

\section*{II. Contribution and the Conflicting Goals of Antitrust Policy}

The debate among courts and commentators over antitrust contribution revolves around four goals of antitrust policy: fairness, deterrence, promotion of settlement, and reduction of complexity of litigation. Other antitrust reforms besides allowing contribution would promote some of these same policy goals. Unfairness might be reduced by holding a joint violator liable for only a portion of the plaintiff's total damages. Exacting more severe penalties, such as quadruple or quintuple damages, might better deter antitrust violators. Settlements could be encouraged by exacting substantial fees for the use of the courts. Yet Congress has been reluctant to use such direct means to achieve antitrust policy goals, preferring instead to tinker with procedural devices such as contribution.\textsuperscript{67}

This Part of the Note discusses the relation between the various policy goals and a defendant's right to contribution. Although the goals are considered separately, they are neither independent nor absolute. A contribution rule that achieves perfect fairness may entail

\textsuperscript{65} Bayh Bill, \textit{supra} note 52, at § 41(a).

\textsuperscript{66} The Bayh Bill leaves contribution rules in non-price-fixing cases to judicial development. \textit{See} text accompanying note 55 \textit{supra}.

intolerable complexity; a rule that deters all violations may be intolerably unfair.

A. Fairness

Because joint antitrust violators are jointly and severally liable for all damages caused by their common activity, a private plaintiff may sue one violator for all damages incurred. When a defendant singled out for such a suit is denied contribution, he alone must pay treble the damages caused by all the joint violators. Courts and commentators often refer to the unfairness of this result. Three types of inequity fall under the fairness rubric in the antitrust contribution debate. Denying contribution may cause unfairness (1) by inequitably allocating loss among joint violators, (2) by making possible collusion against one of the violators by the plaintiff and another violator, and (3) by enabling plaintiffs to coerce defendants into settlement.

1. Unfairness in the Allocation of Loss

Regardless of the plaintiff's motive for targeting one antitrust violator for suit, the denial of contribution in such a case seems unfair because it "places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss." This result seems especially unfair if the violators that escape liability are more culpable than the defendant, or if the defendant unintentionally violated the law.


69. See, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979); Note, supra note 23, at 703.

70. See text at notes 77-83 infra.

71. Gomes v. Brodhurst, 394 F.2d 465, 467 (3d Cir. 1968). See also Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) (contribution among jointly negligent tortfeasors allowed because "... 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").

72. Consider the case of a small distributor unable to resist a large manufacturer's pressure to join a resale price conspiracy. A plaintiff injured by the conspiracy may prefer to sue the distributor, fearing that the manufacturer's resources would make it too formidable an opponent in court.


In a sense, Olson Farms was forced to pay more than its "share" of the damages, since the recovery included damages attributable to sales of the other violators. But joint and several liability is imposed upon antitrust defendants for the very reason that violator's wrongdoing was necessary to the combination or conspiracy. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 144 (1968) (White, J., concurring); W. Prosser, supra note 1, § 47, at 296-97. Although Olson Farms allegedly purchased only eleven percent of the eggs sold by
Olson Farms dramatically illustrates how the denial of contribution can result in an unfair allocation of damages among joint violators. Although Olson Farms was the smallest of the price-fixers by sales, the plaintiffs sued that company alone for treble damages. The judgment Olson Farms eventually paid amounted to twenty-four times the damages immediately caused by the company’s egg purchases.

Concerns for allocative unfairness should not be dismissed by appealing to the rationale for joint and several liability under the antitrust laws. Joint and several liability enables an antitrust plaintiff to recover all his damages from any one joint violator because each violator is deemed to have been a material cause of the damages. Joint and several liability need not, however, be applied so as to punish a defendant by requiring that he alone bear the loss for all violators. Joint and several liability probably seeks only to ensure that the plaintiff is fully compensated for his loss, regardless of whether he is able to name all those responsible for the loss in his suit. There is a fundamental difference between saying a plaintiff can state a sufficient case by suing any one violator, and saying that the loss must remain entirely upon a defendant so singled out. This latter result, and the allocative unfairness which accompanies it, is solely the result of a rule barring contribution.

2. Unfairness in Plaintiff’s Choice of a Defendant

The unfairness of requiring a single violator to bear the entire burden of a judgment may be aggravated by a plaintiff’s improper motives for selecting a particular defendant. Where there is joint

the plaintiffs, without its cooperation the conspiracy might have broken up with no injury to the plaintiffs. In that sense, Olson Farms was responsible for the plaintiffs’ entire loss. The percentage of sales or profits made by each violator may be an appropriate measure of contribution shares, however. See note 171 infra and accompanying text.


76. The chief benefit of joint and several liability in tort actions is to help the plaintiff recover full compensation for his injury in a single judgment. It allows the plaintiff to limit his suit or the execution of a joint judgment to the violator or violators best able to pay. See Fleming, Foreword: Comparative Negligence at Last — By Judicial Choice, 64 Calif. L. Rev. 239, 251 (1976). A plaintiff forced to sue each violator separately for a portion of his loss would risk an incomplete recovery: even if he could overcome the obstacles to obtaining and executing a judgment against each violator, the sum of these separate judgments might fall short of total loss. A rule allowing contribution would still permit the plaintiff to recover his entire loss in a single judgment while enabling a sole defendant to spread the burden of this judgment among other violators. See Timmons & Silvis, Pure Comparative Negligence in Florida: A New Adventure in the Common Law, 28 U. Miami L. Rev. 737, 790 (1974).

The rule of joint and several liability may also deter violators more effectively than a rule that would limit a joint violator’s liability to a portion of the plaintiff’s loss. Allowing contributions would erase this difference. Whether contribution would decrease deterrence, and whether such a decrease is undesirable, is discussed at text accompanying notes 101-16 infra.
and several liability, a plaintiff may use any of a number of criteria in deciding whom to sue. He may consider the convenience of suing a violator, the strength of evidence against that violator, and the violator's ability to satisfy a judgment. Two criteria for a plaintiff's choice of defendant seem particularly troublesome. First, a plaintiff may choose a competitor for suit over other joint violators due to an anticompetitive motive. Second, some joint violators may escape being sued because of a special relationship with the plaintiff. 77

These last two motives are arguably present in the Professional Beauty case. Professional may have chosen to sue National rather than the larger and allegedly more culpable La Maur because of a desire to maintain good business relations with the manufacturer which supplied its needs. 78 National may also have been singled out for suit because it was Professional's competitor in the sales of La Maur products in Minnesota. 79

Some have implied that the improper motives present in Professional Beauty occur infrequently in antitrust litigation. 80 Although cases of 'collusive' activity are very rarely recorded in reported decisions, 81 it nevertheless seems likely that plaintiffs in most antitrust

77. The relationship may take a variety of forms. The plaintiff may be a blood relative of one of the potential defendants. See Norfolk & Southern R.R. v. Beskin, 140 Va. 744, 125 S.E. 678 (1924). The plaintiff may own a company that is one of the potential defendants. See Pennsylvania Co. v. West Penn Rys. Co., 110 Ohio St. 516, 144 N.E. 51 (1924). One of the potential defendants may have bribed the plaintiff with either money or testimony against coconspirators. See Leflar, supra note 3, at 137. This last relationship is not as horrendous as Leflar indicates, for it is really the equivalent of a settlement agreement in which a defendant exchanges money and access to its files for a release of liability.

To speak of these relationships as "collusive," see, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1186 (8th Cir. 1979); Senate Rep., supra note 53, at 1, is not helpful. Collusion is a secret agreement between two parties, whose interests apparently conflict, to make use of the forms and proceedings of law to defraud a third person. See Texas & P. Ry. Co. v. Gay, 86 Tex. 571, 26 S.W. 599 (1894). Regardless of a plaintiff's motives, an antitrust defendant is not legally wronged when the plaintiff agrees, or decides on his own, not to sue a joint violator. See text at note 83 infra.

Improper motives may result in more than just unfairness to a party selected for suit. To the extent that a violator can predict his omission as a defendant, either because he knows he can effectively threaten the plaintiff or because the plaintiff will otherwise not wish to sue him, he will not be deterred from the unlawful behavior. A right to contribution, however, assures that if the defendant decides to sue any violator, that violator can force other favored or feared violators to share the loss. If contribution were allowed, the plaintiff would have to choose between foregoing any recovery and exposing the favored or feared violator to liability.


79. 594 F.2d at 1181.


81. All the literature discussing contribution in the contexts of tort law, securities, and antitrust has cited only two cases of "collusive activity," by plaintiffs, both occurring more than fifty years ago. See note 71 supra. Professor Leflar suggested that although a record of collusion rarely appears in reported decisions, "It is common knowledge that such undercover dealings occur constantly in personal injury cases. . . ." Leflar, supra note 3, at 137 n.35.
suits consider their relationship to violators as competitor or customer before selecting a defendant. Judge Thornberry’s claim that a victim of improper motives may have an independent cause of action is unfounded. Since contribution rights enable a victim of improper motives to spread the loss among joint violators, this type of unfairness could be remedied by a liberal contribution rule.

3. Unfairness in the Coercion of Settlements

Joint antitrust violators may suffer the unfairness of the no-contribution rule even in cases that never go to trial. An astute plaintiff’s attorney can threaten to sue a smaller company alone for treble damages attributable to the sales of much larger joint violators. A company faced with this massive liability may have little choice but to settle and to surrender its opportunity to go to trial on the merits of its case. Antitrust practitioners have spoken bitterly of this un-

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82. The Utah egg producers may well have considered Olson Farm’s small size, and hence the relative unimportance of having it continue to buy eggs, in their decision to sue Olson Farms rather than their more important customers. During the trial of the original plaintiffs’ suit against Olson Farms, one of the defense attorneys asked one of the plaintiffs why another more important violator had not been sued:

Q. You didn’t sue Countryside in this case?
A. No, sir.
Q. Why not?
A. For the simple reason that we were doing business with them, and they was taking [sic] our eggs. And it’s pretty hard when you have 1,200 cases on the market to be dropped.

Trial Record at 4632-33, Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), cert. denied, 429 U.S. 1122 (1977).

83. A single suit with an anticompetitive motive may be a violation of Sherman Act § 2 within the “sham” exception to the Noerr-Pennington doctrine, see Colorado Petroleum Marketers Assn. v. The Southland Corp., 476 F. Supp. 373 (D. Colo. 1979); Cyborg Sys., Inc. v. Management Science America, Inc., [1978-1] Trade Cas. 73,914 (N.D. Ill. 1978), but the suit must be baseless for the victim to gain relief. The only other independent actions a victim of collusion might bring would sound in tort. An action for wrongful civil proceedings would not lie because the victim cannot show termination of the collusive plaintiff’s suit in his favor. See W. Prosser, supra note 1, § 120 at 853. An action for abuse of process would also fail, because “there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” Id., § 121 at 857.

84. See Senate Hearings, supra note 53, at 105 (statement of Harold Kohn).

Plaintiffs’ attorneys claim that small defendants are infrequently coerced into settlement. Id., at 97, 104 (statement of Harold Kohn). This is refuted, however, by a plaintiffs’ lawyer’s testimony in the Senate Hearings. When one defendant’s attorney refused to settle in a suit involving fifteen companies, the plaintiffs’ attorney told him,

All right, it is obvious that you are holding up everybody else from settling this litigation. You leave. We won’t settle with you. We are going to settle with everybody else. . . . [W]e are going to go after you alone, not only for the damages that you caused but for everybody else’s damages. . . . Goodbye, . . . we are not going to talk to you anymore.

Id. at 54 (statement of David Shapiro). Within half an hour the threatened defendant had settled. Id.

In the nearly half century of my practice I have never seen a single other circumstance which has created the cynicism at the bar that has arisen from the settlement negotiations in these cases. . . . Nor have I ever seen before anything to equal the consternation of unbelieving businessmen, large and small, when told that the law literally does not provide them with a process for determining the merits of their defense; that any settlement within their purse, as a practical matter, may be their only chance for survival.86

The coercion of settlements in joint antitrust violation cases has been refined into a litigation device known as the “whipsaw.” Whipsawing is the process by which lawyers for class action plaintiffs negotiate settlements with different defendants in stages, charging progressively more for settlement at each stage. Under present law, when one antitrust defendant settles, other defendants remain liable for three times all damages incurred by the plaintiff minus only the amount received in settlement.87 Plaintiffs typically settle cheaply with smaller defendants early in the litigation,88 using the money thus raised to finance the litigation against remaining defendants. Defendants who settle early in the whipsaw usually pay far less than their share of the trebled liability — whether computed according to market shares or on some other basis89 — and non-settling defendants remain liable for the difference. As increasing numbers of defendants settle, leaving an ever-smaller pool of non-settling defendants to share the remaining potential liability,90 plaintiffs are


87. If two violators caused a plaintiff $100,000 in damages, and the plaintiff settles with one prior to trial for $25,000, the remaining violator is liable for $100,000 trebled minus $25,000, or $275,000. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 344 (1971); Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 509-10 (1964) (plurality opinion).

88. See Senate Hearings, supra note 53, at 95, 97, 106 (statement of Harold Kohn). But see Senate Hearings, id. at 68 (statement of Donald Kempf describing a suit in which one of the largest defendants settled first).

89. See notes 170-72 infra and accompanying text.

90. Until judgment is executed, a non-settling defendant theoretically risks the possibility that he may at any time become solely liable for the total outstanding liability: the plaintiff may suddenly drop his case against all other remaining joint defendants, subject to approval by the court in a class action, or, if the plaintiff recovers a joint judgment, he may choose to execute it solely against the particular defendant. Practically, however, the defendant knows that if the plaintiff recovers a joint judgment, he will usually choose to execute it against all the
able to exact progressively higher settlements. By the latter stages of the whipsaw, a company directly responsible for only a small fraction of a plaintiff's damages may alone face liability for damages caused by an entire industry. As one court observed, "[t]hat this possibility is inherently coercive is indisputable."

A rule allowing antitrust contribution against settling defendants would put an end to whipsawing, as would a rule reducing a plaintiff's claim by the contribution share a settling defendant would have had to pay if he had not settled. It is each non-settling defendant's growing share of liability that gives teeth to the plaintiff's threat at each stage of settlement. If claims for contribution against settling defendants were allowed, or if a plaintiff's claim were reduced by the contribution share of a settling defendant, the threat would evaporate.

It may not be too much to say that a desire on the part of large defendants' attorneys to end whipsawing, and a similar desire by class action plaintiffs' lawyers to maintain it, is the real inspiration for a controversy which has been couched in the broader language of contribution. Whipsawing has been successful and profitable for plaintiffs and plaintiffs' lawyers, and enormously costly for corporate defendants. Settlements achieved through whipsawing are inequitable both because defendants may have no practical opportunity to go to trial on the merits, and because defendants often pay damages attributable to those settling before them.

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91. Suppose, for example, that an antitrust plaintiff alleges $1,000,000 in damages caused by five defendants, each with a 20% market share. Suppose also that each defendant, having computed the probability of an unfavorable judgment and the relative costs of trying and settling the case, is willing to settle for 50% of his share of the potential liability. Defendant A, the first defendant approached for settlement, settles for $300,000 — 50% of his 1/5 share of the potential $3,000,000 judgment. The second settling defendant, defendant B, would be willing to pay $337,500, figuring that he risks a 1/4 share of the remaining $2,700,000 potential liability. Or he may fear that if he does not settle quickly, the three remaining nonsettling defendants will settle for $400,000 each, leaving him to face alone a $1,500,000 potential liability. To avoid this later, more expensive settling position, B may be willing to settle for up to $750,000 — 50% of the potential $1,500,000 liability. The fear of being the last one to settle thus motivates prompt as well as large settlements.


94. Such a rule, however, would deter violators from settling. See text at notes 121-25 infra.

95. This rule also has its drawbacks. See text at notes 126-30 infra.
Some practitioners have argued that fairness concerns in the contribution debate are unwarranted because defendants can use sharing agreements with joint violators to prevent whipsawing and unfair allocation of loss.\textsuperscript{96} A sharing agreement contractually allocates liability for an antitrust violation among the defendants. It typically provides that, should one of the parties to the agreement settle before judgment at trial, that party will still be liable to the other parties for its specified share of damages minus the sum paid in settlement. Sharing agreements, like contribution rights, enable defendants to spread the loss among themselves.

Sharing agreements are not a perfect substitute for contribution rights, however. Although sharing agreements are fairly common among larger antitrust defendants in class action suits,\textsuperscript{97} in many cases — especially those involving large numbers of defendants — the defendants may not be able to reach an agreement.\textsuperscript{98} In addition, a court might refuse to enforce antitrust sharing agreements on the grounds that they hinder settlement and reduce deterrence.\textsuperscript{99} The existence of sharing agreements therefore does little to ease the fairness concerns raised by a rule barring contribution.

If our only concern in antitrust suits involving joint violators were to achieve fair outcomes, the case for contribution would be unassailable. The rule barring contribution allows plaintiffs, through their nearly absolute power to allocate liability, to force violators to pay more than their fair share of damages, to single out competitors as defendants, and to coerce settlements from innocent.

\textsuperscript{96} See ABA Report, supra note 13, at E-2.

\textsuperscript{97} See Letter from Carl Steinhouse to Michigan Law Review Association (Oct. 22, 1979) (on file with the Michigan Law Review); Letter from Harold Kohn to Michigan Law Review Association (Nov. 9, 1979) (on file with the Michigan Law Review). Mr. Steinhouse is a former director of the Great Lakes Field Office of the Justice Department's Antitrust Division; Mr. Kohn is a prominent antitrust plaintiffs' attorney.

\textsuperscript{98} See Paul, supra note 2, at 83; Senate Hearings, supra note 53, at 55, 85; Senate Report, supra note 53, at 2; Letter from Darryl Snider to Michigan Law Review Association (Aug. 20, 1980) (on file with the Michigan Law Review). Violators not named in the plaintiff's suit will not assume contractual liability because the no-contribution rule effectively frees them from fear of tort liability. Even defendants who are named in suits may refuse to join in a sharing agreement because of a tactical belief that they will pay less by settling with the plaintiff than by contracting with codefendants. See Analysis, Contribution — Fairness or Folly in Antitrust Litigation?, 917 ANTITRUST & TRADE REG. REP. (BNA) B-1, B-4 (June 6, 1979).

\textsuperscript{99} The Second Circuit has refused to enforce an agreement completely shifting liability to one of several violators in a securities case. See Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1288 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970) (refusing enforcement because of concern for the deterrent policy of the securities laws). In securities cases parties are free to contract as to their contribution shares only if the contracts do not violate public policy. See Note, supra note 16, at 1313 & n.333. Agreements that force a settling defendant to pay further damages to codefendants after settlement might substantially reduce the incentive to settle.

Both the ABA Statute, see ABA Statute, supra note 60, at § (b), and the Bayh Bill, see Senate Report, supra note 53, at 2, assume the legality of sharing agreements.
defendants. But equity is not costless. Greater fairness must be balanced with the effects of contribution on other antitrust policy goals.

B. Deterrence

The primary purpose behind private treble damage suits is to encourage plaintiffs to act as "private attorneys general" in enforcing the antitrust laws. By augmenting the limited resources available for government prosecutions, this private enforcement encourages compliance with the law. Courts considering whether to allow contribution have inquired whether contribution rights would amplify or diminish the deterrent effect of private treble damage suits. Echoing the reasoning of other courts and commentators, the Eighth Circuit decided that allowing contribution would better deter violators than barring contribution. The Fifth Circuit reached the opposite conclusion. This Section first explains why the Fifth Circuit has the better of the deterrence argument. It then examines whether the increased measure of deterrence achieved by barring contribution is desirable as a matter of antitrust policy.

There are three reasons why allowing contribution will reduce the deterrent effect of private antitrust suits. First, a rule allowing contribution would probably make large class actions — in which whipsawing is common — less attractive to plaintiffs and plaintiffs' lawyers. If a primary goal of allowing contribution is to prevent coercion and whipsawing of settlements, such a rule will inevitably discourage suits which are at present financed by these techniques. Second, because most corporate managers are probably risk-averse, preferring the certainty of a small loss (with contribution) to a small possibility of a large loss (sole liability without contribution), they


103. See Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979); Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230, 238 (S.D.N.Y. 1974); Liggett & Meyers Inc. v. Bloomfield, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974). In these cases, all implying rights of contribution under the securities laws, the reasoning that allowing contribution, and hence distributing the costs of a violation among all the violators, will increase deterrence figures prominently. This reasoning may have to be reconsidered in view of its rejection by the Fifth Circuit in Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 901 (5th Cir. 1979).

104. See, e.g., Senate Report, supra note 53, at 9; Corbett, supra note 2, at 137.


107. See text at notes 84-96 supra.
will be more deterred by a rule which prevents dispersion of damages among violators. Finally, to the extent that potential plaintiffs would refrain from bringing suits because of the complexity engendered by contribution, allowing contributions would diminish deterrence.

This conclusion does not justify an absolute bar to contribution, however, because maximizing deterrence is not an unqualified goal of antitrust policy. Limits are placed on the severity of punishment for violation of the antitrust laws not because of a lessened desire for compliance, but because unlimited deterrence entails greater costs than society is willing to bear. The increased deterrence attributable to a rule barring contribution entails not only the social costs of its unfairness, but also economic costs in its effects on economically desirable conduct. Excessive penalties can cause businesses to shun competitive practices lying close to the borderline of impermissible conduct — to avoid price competition out of fear that it may be found to be predatory, for example, or to refuse to release price information for fear that it may be interpreted as price-fixing. The danger of overdeterrence suggests that there is an optimal level of deterrence that antitrust remedies should achieve, a level that varies among types of violations by their gravity and their resemblance to competitive conduct.

It is unclear whether our present system of antitrust remedies reaches, overshoots, or falls short of the optimal level of deterrence. One could reasonably argue that the optimal level is already exceeded for some violations and not yet reached for others; that price discrimination is overdeterred and blatant horizontal price-fixing not punished enough. One's opinion about the relation between the present level of deterrence and the optimal level affects one's belief

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108. As the Fifth Circuit suggests, 604 F.2d at 901 & n.8, economic theory strongly supports this conclusion. Economic theory and empirical evidence supporting the hypothesis of the "risk-averse" corporate manager are summarized in K. Elizinga & W. Breit, The Antitrust Remedies 126-29 (1976). Although much of the economic literature concerns large corporations, there is reason to believe that smaller companies will be even more risk-averse than large ones. See Note, In Pari Delicto and the Deterrence of Antitrust Violations, 62 Minn. L. Rev. 59, 77-78 (1977). The implications of risk-averseness for antitrust policy are explored in Austin, Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy, 1978 Duke L.J. 1353, 1357-66.

109. See text at notes 143-46 infra.


111. If there is some level of deterrence that is excessive because it chills competitive behavior, there must be some limit to the desirable level of antitrust deterrence.

112. See Senate Hearings, supra note 53, at 17 (testimony of John Shenefield describing greater danger of overdeterrence in monopolization than in price-fixing cases).

113. See R. Bork, supra note 110, at 382-402.
in the appropriateness of allowing contribution. If, as some suggest,\textsuperscript{114} we are already overdetererring some violators, the reduced deterrence resulting from giving those violators a right to contribution would promote procompetitive antitrust policy.

Admittedly, this analysis poses more questions than it answers. It does suggest that courts and legislators have been wrong in asking only how contribution would affect deterrence, without further inquiring whether that effect would be desirable. Policymakers need first to determine where present levels of deterrence stand relative to the optimum\textsuperscript{115} before deciding whether deterrence weighs for or against contribution.\textsuperscript{116}

C. Promotion of Settlement

Courts seek to encourage pre-trial settlement of private antitrust suits because such a compromise lessens the expense of litigation for courts, plaintiffs, and defendants alike.\textsuperscript{117} The most common argument against allowing contribution is that it will discourage settlement.\textsuperscript{118} The force of this argument depends upon whether the contribution rule (1) allows actions for contribution against other violators who have previously settled with the plaintiff, (2) forbids contribution actions against settling parties and reduces the plaintiff's claim against the remaining defendants by only the amount received

\textsuperscript{114} See generally R. Bork \textit{supra} note 110.

\textsuperscript{115} There is limited evidence that one set of policy-makers, the Supreme Court, may believe we have already allowed private remedies to overshoot the optimal deterrence level. See Reiter v. Sonotone Inc., 442 U.S. 330, 346 (1979) (Rehnquist, J., concurring); Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977).

\textsuperscript{116} The level of deterrence could also be affected by the broad spectrum of antitrust bills now in Congress. For a brief summary of pending legislation as of 1979, see Regner, \textit{Antitrust Reform: The Congressional Prognosis}, 15 TRIAL, no. 4, 29 (April 1979).

\textsuperscript{117} See Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l., Inc., 455 F.2d 770, 773 (2d Cir. 1972); Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir.), cert. denied, 355 U.S. 835 (1957); Columbia Pictures Indus., Inc. v. Schneider, 435 F. Supp. 742, 747 (S.D.N.Y. 1977), affd., 573 F.2d 1288 (2d Cir. 1978). Antitrust suits frequently terminate in settlement. See Withrow & Larm, The "Big" Antitrust Case: 25 Years of Sisyphean Labor, 62 CORNELL L. REV. 1, 6-8 (1976). Of the 1,307 private antitrust actions terminated in 1978, only eight percent reached trial. Five hundred thirty-seven were terminated with no court action, and 395 more were terminated before pre-trial procedures began. See \textit{Administrative Office of The United States Courts, Federal Judicial Workload Statistics Table C-4 (1978)}. It is reasonable to infer that a large percentage of these terminations involved settlements between the parties. See Note, supra note 108, at 60 n.8.

Although settlements are desirable, not all rules facilitating settlement will automatically be beneficial. Settlement is not an absolute goal, and "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." United States v. Reliable Transfer Co., 421 U.S. 397, 408 (1975) (refusing to retain an admiralty rule equally dividing damages without regard to fault).

in settlement, 119 or (3) forbids such actions but provides that the plaintiff will give up a larger portion of his claim. 120 This Section discusses the effect of each of these rules on parties’ incentives to settle.

Holding settling defendants liable for contribution 121 would diminish their incentive to settle. One reason defendants settle rather than litigate the merits of disputes is that they prefer to avoid the uncertainties of trial and to proceed with their normal business. 122 In a word, they desire finality. An antitrust settlement typically releases the defendant from all further liability to the plaintiff, 123 and, where contribution is barred, the settling defendant enjoys peace of mind in the knowledge that the litigation is behind him. Where contribution against settling defendants is allowed, settlement may not bring such repose. A joint defendant who settles with the plaintiff will still be subject to suits for contribution brought by the remaining defendants. 124 This chilling effect on defendants’ incentive to settle is a primary reason courts have denied claims seeking contribution from settling antitrust defendants. 125

Conceivably, a rule allowing contribution could exempt settling defendants. Such a rule would provide relief in cases such as Professional Beauty, Abraham Construction, or Olson Farms, where no violators settled with the plaintiff. The rule would not affect the defendant’s “finality” interest in settling, and hence would do nothing to discourage settlement. But neither would it remedy some of the unfairness from which demands for contribution have arisen. Whipsawing and coercion of settlements would remain feasible under this rule. Diluting the contribution remedy with an exemption for settling defendants will reduce its effectiveness as a cure for unfairness.

To preserve the contribution rule’s power to prevent unfairness while protecting a defendant’s finality interest in settling, the pro-

119. See text at note 87 supra.
120. An intriguing possibility beyond the scope of this Note is that of contribution actions by settling defendants against unnamed coconspirators or non-settling defendants. Such a possibility is not necessarily barred by the Bayh Bill, but is forbidden under the ABA Statute. ABA STATUTE, supra note 60, at § (e). A settling defendant is allowed to sue for contribution in certain circumstances under the Uniform Comparative Fault Act § 4(b). See generally W. PROSSER, supra note 1, § 50, at 307-10.
124. To correct this problem, the 1939 Uniform Contribution Among Tortfeasors Act was revised in 1955 to prohibit contribution against settling defendants. See Uniform Contribution Among Tortfeasors Act § 4(b) and Commissioners’ Comment.
posed contribution statutes have combined a bar to actions against settling defendants with provisions reducing the remaining defendants’ liability by an amount that will usually be larger than the amount paid in settlement.\textsuperscript{126} Under the Bayh Bill, the plaintiff’s claims against non-settling defendants are reduced by “treble the actual damages attributable to the settling [defendant’s] sales or purchases of goods or service.”\textsuperscript{127} The ABA Statute reduces claims in proportion to the relative responsibility of the settling defendant for the plaintiff’s damages.\textsuperscript{128} These rules preserve a defendant’s finality interest in settling while assuring fairness to non-settling defendants. The plaintiff, however, must give up a considerably larger portion of his claim under these rules than under present law,\textsuperscript{129} and will therefore have less incentive to settle. The plaintiff’s sacrifice is further aggravated under the ABA Statute, because he cannot predict the “relative responsibility” of the settling defendant with certainty before an adjudication of liability at trial.\textsuperscript{130} This uncertainty will further discourage plaintiffs from settling, or at the least will delay settlement until the later stages of litigation, when the benefits of settlement are greatly diminished.

Despite its tendency to discourage plaintiffs from settling, claim reduction — itself a complex and hotly debated issue within the contribution controversy\textsuperscript{131} — may be appropriate in many antitrust cases.\textsuperscript{132} Plaintiffs will still have strong incentives to settle under a contribution rule exempting settling defendants and requiring claim reduction. By settling, plaintiffs will be rapidly compensated and will avoid further litigation expenses. Plaintiffs will also avoid the risk of an unfavorable judgment at trial. The strength of these incentives is illustrated by recent settlement agreements in which plaintiffs assume any potential contribution liability of settling defendants.\textsuperscript{133}

\begin{enumerate}
\item\textsuperscript{126} At present the plaintiff’s judgment against remaining defendants is reduced by the amount paid by the settling defendant. \textit{See} note 87 \textit{supra}.
\item\textsuperscript{127} Bayh Bill, \textit{supra} note 12, at § 41(b). If the settlement agreement provides that the plaintiff will reduce his claim by a larger amount, or if the amount paid in settlement is larger, then the plaintiff’s claim is reduced by such larger amount. \textit{Id}.
\item A district court following \textit{Professional Beauty} used an apparently similar method. \textit{See} Little Rock School Dist. v. Borden, Inc., [1980-1] Trade Cas. (CCH) ¶ 63,059 at 77,251 (E.D. Ark. 1979) (letter opinion) (releasing “non-settling defendants from any joint and several liability they may have for any overcharges attributable to Settling Defendant’s sales to the Settlement Class or otherwise”). \textit{See also} note 9 \textit{supra}.
\item\textsuperscript{128} ABA STATUTE, supra note 60, at §§ (f), (g). For an explanation of “relative responsibility,” \textit{see} note 170 \textit{infra}.
\item\textsuperscript{129} \textit{See} note 87 \textit{supra} and accompanying text.
\item\textsuperscript{130} \textit{See} Minority Report, supra note 61, at § 3(1).
\item\textsuperscript{131} \textit{See} Senate Report, supra note 53, at 31-32.
\item\textsuperscript{132} The best solution may be to allow courts to fashion appropriate relief — be it claim reduction or contribution against settling defendant — when the problem arises. \textit{See} text at notes 171-74 \textit{infra}.
\item\textsuperscript{133} \textit{See} note 9 \textit{supra}.
\end{enumerate}
D. Reduced Complexity of Litigation

Private antitrust suits are often extremely complex affairs, involving numerous parties, years of negotiations and litigation, and sophisticated legal and economic issues.134 The Supreme Court has noted the concern for the heavy burden these suits impose upon the courts.135 Attorney General Civiletti has complained that antitrust litigation has become too lengthy, too costly, and too complicated.136 In view of the concern over the present level of complexity, it is not surprising that courts are reluctant to inject a new class of claims into antitrust cases. Contribution, it is feared, will “open a Pandora’s box of procedural problems.”137 The added complexity engendered by contribution claims will impose varying burdens on courts, plaintiffs, and defendants.

Allowing contribution will increase the amount of time that courts devote to antitrust litigation. Judges will have to adjudicate claims routinely barred or never brought in the past. In ruling on these claims, courts will have to develop rules to resolve such complex issues as measurement of contribution shares, the relationship of contribution to settlement, and claim reduction.138 Experience under the securities laws, which contain express contribution provisions, warns that large numbers of new claims for contribution can be expected should antitrust contribution be allowed.139


136. See Address by Attorney General Benjamin Civiletti, American Bar Association Section of Litigation (Chicago, Nov. 10, 1979).

137. Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979). See also Senate Hearings, supra note 53, at 52 (testimony of David Shapiro).

Fears that contribution will create procedural complexity have not been unique to antitrust law. More than forty years ago, when express contribution provisions were included in the securities acts, Professor (later Justice) Douglas complained of the “unseemly, inefficient, and expensive” spectacle that would result. Douglas & Bates, The Federal Securities Act of 1933, 43 YALE L.J. 171, 180-81 (1933).

138. Some of these issues may be decided by Congress. See Bayh Bill, supra note 12. Courts are still struggling with these issues in securities suits. See generally Note, supra note 16. Contribution among defendants in private securities actions is expressly allowed under section 11(f) of the Securities Act of 1933, 15 U.S.C. § 77k(f) (1976), and sections 9(e) and 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(e), 78r(a) (1976). Contribution rights have been implied under several other sections of the Acts. See Heizer Corp. v. Ross, 601 F.2d 330, 331-34 (7th Cir. 1979).

139. There were few claims for contribution under the securities laws prior to the late 1960s. After the courts began to void contractual indemnification agreements in securities cases, there was a burgeoning of contribution claims. See Note, supra note 16, at 1256. Since indemnification is barred in antitrust cases, see Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1186-87 (8th Cir. 1979), it is reasonable to expect a similar flurry of contribution claims in antitrust litigation. See In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), affd. without published opinion, 606 F.2d 319 (5th Cir.
Plaintiffs will also suffer from the increased complexity of litigation if third party claims or cross claims for contribution are allowed. Each new contribution claim will expand the scope of the plaintiff's suit, delay his recovery, and add to his litigation expenses. This hardship could be alleviated by severance of contribution claims from the plaintiff's suit, but circuit judges differ as to whether discretionary severance under Federal Rule of Civil Procedure 42(b) is an adequate remedy.

Whether or not contribution's benefits justify forcing courts and plaintiffs to incur increased expenses, one can argue that the complexity engendered by contribution will discourage plaintiffs from bringing suits, thus lessening the threat of private antitrust enforcement. "Aware that litigation may spiral out of their control, it is foreseeable that some plaintiffs will decide to forego a legitimate cause of action." This reasoning may be challenged on two levels. First, the conclusion itself is questionable. Powerful incentives to bring private actions (including trebling of damages and recovery of


140. It has been suggested that defendants might abuse contribution rights by filing contribution claims against numerous parties who may be only remotely connected to the alleged violation. See Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). District courts would probably be able to detect and to deal with this problem should it arise.

141. The text of section (b) reads as follows:

(b) Separate Trials. 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, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

FED. R. CIV. P. 42(b).

142. Compare Judge Stephenson's opinion in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979) ("district courts have the ability to sever issues and parties if the need arises"), and Judge Morgan's dissent in Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 908 (5th Cir. 1979) ("I simply cannot believe that the discretionary nature of the Rule 42(b) separate trials provision would discourage an antitrust plaintiff from seeking treble damages"), with Judge Hanson's dissent in Professional Beauty, 594 F.2d at 1190 (stating favorable uses of district court discretion are a "mere possibility"), and Judge Thornberry's opinion in Abraham Construction, 604 F.2d at 905 (quoting Judge Hanson).

Only three securities cases have discussed severance of a contribution claim under rule 42(b). In one case the claims were severed to protect the plaintiff's interest. Sherlee Land v. Commonwealth United Corp., (1972-1973 Transfer Binder) FED. SEC. L. REP. (CCH) ¶ 93,273 at 93,273 (S.D.N.Y. 1973). In a second case the claims were so intertwined as to make severance impossible. State Mut. Life Assurance Co. of America v. Arthur Andersen & Co., 63 F.R.D. 389 (S.D.N.Y. 1974). A third, in dicta, claimed that there could be severance whenever the trial judge believes it to be in the interest of orderliness and simplification of the issues. Lyons v. Marrud, Inc., 46 F.R.D. 451, 454 (S.D.N.Y. 1968).

143. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1190 (8th Cir. 1979) (Hanson, J., dissenting in part).
attorney fees)\textsuperscript{144} would remain, despite the added complexity threatened by contribution. As the Eighth Circuit observed, contribution provisions in the securities laws have not deterred the bringing of many private suits that are as complex as private antitrust suits.\textsuperscript{145} Second, the underlying assumption — that a reduction in the deterrence of antitrust violations is undesirable — is not always valid. As noted earlier,\textsuperscript{146} there may be some classes of violations that are already overdeterred.

Even defendants, the intended beneficiaries of a rule allowing contribution, may find that the rule makes litigation more complex and expensive. Not only will they bear the additional costs of litigating the contribution claims,\textsuperscript{147} but they will also have difficulty agreeing on joint defense efforts. When all the defendants in a private suit can agree on a common defense strategy cooperatively, there is a considerable saving of court and attorney time in litigation. A joint defense is unlikely when defendants are vigorously prosecuting claims for contribution against each other.\textsuperscript{148} Proponents of contribution have impliedly acknowledged that joint defense agreements will be less frequent if contribution is allowed.\textsuperscript{149}

Policymakers considering the antitrust contribution issue need to give careful attention to the problem of increased complexity. Courts, plaintiffs, and defendants already expend vast amounts of resources litigating private antitrust suits. Contribution rules should be devised with a view to minimizing any increase in these costs.

\section*{III. Balancing Conflicting Goals: The Search for an Appropriate Contribution Rule}

Fairness is advanced by allowing contribution; settlement and procedural simplicity are advanced by barring it. Deterrence considerations may argue for or against contribution, depending on the adequacy of antitrust penalties imposed for the type of practice at issue.

\textsuperscript{146} See text at notes 110-14 supra.
\textsuperscript{147} The type of contribution rule adopted can itself affect the complexity of contribution claims. See text at note 162 infra.
\textsuperscript{148} See In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex.), aff'd without published opinion, 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 16, 1980) (No. 79-972). Plaintiffs may therefore benefit if contribution is allowed, since defendants will be attempting to prove plaintiffs' claims against each other. Of course, where contribution liability is measured by market share, rather than relative responsibility of the conspirators, defendants are much less likely to abandon joint defense efforts and to quarrel with each other, since market shares are more easily and objectively ascertained.
\textsuperscript{149} See ABA Report, supra note 13, at 16.
Thus, courts and other rulemakers deciding whether to permit contribution cannot simultaneously advance all antitrust policy goals.

Rulemakers have reacted to the contribution dilemma by formulating three types of rules, each of which implies a balancing of policy goals. Some have stated absolute, unqualified rules, either allowing or forbidding contribution in all cases. Others have created “bright-line” rules, which look to the presence or absence of a single factor (such as intent or price-fixing) in deciding when to grant contribution rights. Finally, the Eighth Circuit has elected to let courts look at multiple factors on a case-by-case basis. This Part of the Note examines the balance of policy goals struck by each of these three types of rules — absolute, bright-line, and case-by-case — in order to determine which rule is most desirable.

A. Absolute Contribution Rules

An absolute contribution rule either bars contribution in all cases, as in Abraham Construction, or allows it in all cases, as under the ABA Statute. An absolute rule makes sense if a balancing of policies in the vast majority of cases would dictate identical results, and the costs of screening out the occasional deviant case exceed the benefits. An absolute rule is appropriate under these conditions because it is both efficient and clear.

Two considerations argue strongly against application of an absolute rule to antitrust contribution. First, scarcely a dozen antitrust defendants have claimed contribution in reported cases to date. This limited experience offers an inadequate basis for deciding that a balancing of policies would dictate identical results in most cases.

Second, there is good reason to believe that a proper balance of antitrust policy goals will vary among cases, because the relevance of concerns for fairness, deterrence, settlement, and reduced complexity will vary significantly among cases. The degree of allocative, coercive, and collusive unfairness will differ with the facts of each case. In one case an Olson Farms might pay twenty-four times the loss it directly caused; in another a large manufacturer which originated a price-fixing scheme might be seeking contribution from a tiny distributor. The importance of deterrence will vary with the type of violation and with the intent of the violator. The fear of deterring settlement is only relevant where contribution is sought against a settling defendant. Problems of complexity will increase with the number of violators and potential contribution claims involved in

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150. One part of these costs is the resources spent by the parties and courts in litigating unsuccessful claims. See text following note 161 infra. Another cost is the added expense in proving that contribution is warranted in a particular case. See text at note 162 infra.
151. See text at notes 103-16 supra.
152. See text at note 157 infra.
the suit. Changing these variables simultaneously could yield an infinite number of permutations, any one of which may turn up in a single case. Two hypothetical cases illustrate the potential extremes:

(1) Large Manufacturing Company decides to fix prices in violation of the antitrust laws. It enlists the aid of Small Manufacturing Company. Buyer, who is injured by the conspiracy, brings a treble damages action against Small alone, but does not object to Small's contribution claim against Large.

(2) Huge Manufacturing Company, with the acquiescence of several hundred of its independent distributors, sets resale prices in violation of the antitrust laws, injuring Consumer. Consumer brings a treble damages action against Huge, because of Huge's size and solvency, and against Tiny Distributing Company, one of the many distributors that sell Huge's products to Consumer. Consumer settles with Tiny before trial. Huge then files claims for contribution against each of the distributors that sell to Consumer, including Tiny, and Consumer strenuously objects.

In the first case, the balance of policy goals favors allowing contribution. Denying contribution would cause considerable unfairness here, because the most culpable violator escapes liability while a less culpable violator shoulders the entire burden of liability. Since the buyer sued only one defendant, there is no fear that a contribution action will deter settlement. Because there are only two violators and the plaintiff does not object to the contribution claim, the concern for complexity of litigation is minimal. Where the resulting fairness so heavily outweighs any possible harmful effects, contribution should be allowed.

In contrast, there are strong reasons for denying contribution in the second case. Any unfairness in denying contribution is minimized by the defendant's status as ringleader of the conspiracy and sole intentional violator. Moreover, unlike the first case, other policy goals would be substantially affected if contribution were allowed. Deterrence would be reduced, since an intentional violator would be able to allocate the loss among all tortfeasors. Settlement would be discouraged if a later action for contribution against settling defendants were allowed. Finally, complexity of litigation would be significantly increased by the addition of numerous claims (as the plaintiff's objection to the claims may suggest).

If the relevance of policy goals can vary so drastically among cases, so may an appropriate balance of those goals, as the hypothetical cases indicate. Because of that potential variance and our limited experience with antitrust contribution claims, an absolute rule seems premature.
B. **Bright-Line Contribution Rules**

If an absolute rule is untenable, the next simplest standard makes the contribution issue turn on a single relevant fact.\(^{153}\) Granting contribution to unintentional but not to intentional violators, or to price-fixers but not to non-price-fixers, are examples of "bright-line" rules.\(^{154}\) The fact which is chosen to mark the line of such a rule should be drawn in such a way that improper results are minimized; the line should accurately separate cases in which contribution should be allowed from those where it should be forbidden. Since simplicity is the most positive attribute of a bright-line rule, it should also divide cases without adding significantly to the costs of antitrust litigation. The analysis below shows that bright-line rules based on intent and price-fixing inappropriately separate cases where contribution is allowed from those where it is denied, and that a rule based on intent, far from simplifying antitrust litigation, would be exceedingly expensive to apply.

A bright-line rule based on the intent of the violator is intuitively attractive, for it turns on the culpability of the violator and duplicates the English common-law rule allowing contribution only to unintentional tortfeasors.\(^{155}\) Moreover, the rule takes into account two of the policy goals that must be balanced in deciding whether to allow contribution. Fairness is a weightier concern where the party seeking contribution unintentionally violated the law.\(^{156}\) And a rule barring contribution can have little beneficial deterrent effect if the violator is unaware that his conduct is illegal and fails to consider the sanctions that could accompany it.\(^{157}\) The shift of fairness and

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\(^{154}\) The rules proposed in the Bayh Bill and the *Olson Farms* decision are not precisely "bright-line." The Bayh Bill mandates contribution in price-fixing cases, but leaves the issue open in non-price-fixing cases. See text at note 55 supra. *Olson Farms* bars contribution to intentional violators, but leaves a possible exception for unintentional violators. See text at note 51 supra. Nevertheless, even these distinctions produce starkly different standards for different classes of cases. That difference should be justified by the policy considerations addressed here.

\(^{155}\) See W. Prosser, supra note 1, § 50, at 305-06.

\(^{156}\) To the extent that rules barring contribution are based on a desire to punish, see Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 *Cornell L.Q.* 552, 559-60 (1936); Leffar, supra note 3, at 134, it is inequitable to apply the punishment with equal harshness to intentional and unintentional violators. This inequity is magnified where the unintentional tortfeasor is barred from seeking contribution from one who intentionally violated the law, and hence is arguably more culpable. See W.D. Rubright Co. v. International Harvester Co., 358 F. Supp. 1388, 1398 (W.D. Pa. 1973), in which a court refused an intentional tortfeasor contribution from an unintentional violator, in part on fairness grounds.

\(^{157}\) See Bohlen, supra note 156, at 558 (for unintentional torts "the deterrent force of the denial of contribution, save in rare instances, is itself entirely theoretical"). The *Abraham Construction* majority argues that barring contribution may give businesses further incentive to "steer wide" of conduct which might violate the antitrust laws. This assumes that legal conduct which approaches the borders of illegality should be deterred. As the Supreme Court
deterrence with intent indicates a more likely tip of the balance toward contribution in the case of an unintentional violator.

Nevertheless, there still may be cases where the balance tips toward contribution for an intentional violator. The first hypothetical case above, in which a denial of contribution would allow a larger, more culpable manufacturer to escape liability while forcing a small distributor to pay the entire judgment, might be such a case. At the same time, one can imagine cases where unintentional violators should be denied contribution. Consider, for example, the complexity that would result if large manufacturers filed contribution claims against all their distributors every time their systems of vertical restraints were challenged in private suits. Exactly how often claims would be wrongly decided under an intent-based rule is difficult to know because few defendants have claimed contribution in reported cases to date. Until we have more experience with contribution in an antitrust context, we cannot be sure a line based on intent would not mistakenly balance policy goals in many cases.

An intent-based rule would also add substantial costs to antitrust litigation. Distinguishing between intentional and unintentional violators is a difficult process. Ever since the Supreme Court ruled in United States v. United States Gypsum Co. that the element of intent is prerequisite to a criminal antitrust conviction, courts in criminal cases have struggled with different standards of proof of the required intent. Defendants who are uncertain whether their vio-

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159. Another example is Professional Beauty, where a small distributor was singled out in a suit alleging a joint intentional violation with a manufacturer. See text at notes 14-18 supra.


The imposition of criminal liability . . . without inquiring into the intent with which [the violation] was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the border of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good faith error of judgment.
lations will be found to be intentional will inevitably bring a large number of unsuccessful claims, wasting their own resources as well as those of other parties and the courts. More importantly, drawing a line at intentional violations adds the difficult factual issue of intent to private antitrust litigation, thereby requiring the production of additional evidence. The uncertainty of the standard will induce parties to introduce as much evidence as possible on the issue. Because it may mistakenly balance policy goals in many cases, an intent-based rule is not worth these added costs.

A price-fixing line would even less satisfactorily separate cases where contribution is permitted from those where it is forbidden. A rule granting contribution only to price-fixers would provide relief in both of the hypothetical cases described above even though contribution in the second case would be inappropriate. The rule does not seem to reflect any of the policy goals discussed in Part II. Indeed, one could argue that, since horizontal price-fixing is among the most clearly anticompetitive practices forbidden by the antitrust laws, the deterrent effect of barring contribution is of the greatest importance when applied to this type of violation. A rule granting contribution rights to price-fixers alone is therefore likely to balance policy goals incorrectly in many cases.

One could base a bright-line rule on many other criteria. Contribution could be allowed only against non-settling defendants, or only where the potential contribution claims number less than ten, or only where the case involves a practice that is already sufficiently deterred. Each of these rules turns on one of the antitrust policy goals relevant to the contribution controversy. But where multiple goals must be balanced, any single bright line drawn without the benefit of substantial experience will probably fail to reflect some of the goals, and a mistaken balance may result in many cases. A bright-line antitrust contribution rule, like an absolute rule, therefore seems inappropriate.

162. Under present law an unintentional violator of the antitrust laws may be found liable in a civil suit. See United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978). A private plaintiff therefore need not prove the defendant intended to violate the law to succeed in his suit.

163. See text following note 152 supra.


165. See text at notes 106-09 supra.

166. It is not obvious what antitrust policies would be furthered by drawing the line at "price-fixing," which is essentially a conclusory term attached to any of a variety of practices that are held to be per se illegal, see Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 8-9 (1979). The authors of the Bayh Bill may have thought that unfairness was especially prevalent in price-fixing cases. See Senate Report, supra note 53, at 14.
C. A Case-by-Case Contribution Rule

Under a case-by-case rule, judges base a decision to grant or deny contribution claims on the balance of policy goals presented in each particular case. Multiple factors, including fairness, deterrence, settlement, and complexity of the litigation could be considered in each case. Added costs and uncertainty result when policies must be balanced on a case-by-case basis, but the uncertainty, at least, can be reduced by drafting flexible guidelines for the exercise of judicial discretion. As a common law of contribution evolves from application of the guidelines, attorneys will learn when to expect contribution rights. Several commentators favor a case-by-case antitrust contribution rule.167 Two considerations indicate the appropriateness of a case-by-case rule in the antitrust context.

First, because there has been so little experience with contribution in antitrust cases, any rigid rule enacted now will likely yield mistaken results later.168 Past experience with the Uniform Contribution Among Tortfeasors Acts shows that rigid contribution rules strain severely under the weight of diverse cases that demand varying results.169 A case-by-case rule avoids this pitfall because a different balance can be struck in each case. Experience may eventually show that fears about contribution's effect on deterrence, settlements, or complexity of litigation were unwarranted. If so, judges can become more liberal in granting contribution. Or experience may show that contribution excessively diminishes deterrence, discourages settlements, or complicates litigation. Should these threats be realized, judges could withhold contribution rights except in cases of extreme unfairness. In any event, a case-by-case rule would give judges the flexibility they need to modify their decisions as they gain experience with antitrust contribution claims.

A second reason to adopt a case-by-case rule is that several difficult issues within the contribution controversy — such as how to measure contribution shares and how to handle settlements and claim reduction — can best be resolved on a case-by-case basis. Contribution shares could be allocated among violators on a per capita basis, or according to comparative fault, or according to each violator's share of the sales, purchases, or profits associated with the violation.170 A method of allocation appropriate in one case could

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167. See Senate Report, supra note 53, at 28-29, 41-42 (Supplemental Views of Senators Metzenbaum and Kennedy); Minority Report, supra note 61, at § 1; Address by Professor Jonathan Rose, ABA Antitrust Section Meeting (Aug. 13, 1979), quoted in Senate Report, supra note 53, at 28.
168. Cf. Bok, supra note 153, at 300 (noting that the consequence of formulating merger rules on the basis of limited knowledge is that "we are very likely to make mistakes").
170. A pro rata or per capita measure of contribution shares, which was mandated in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 & n.4 (8th
produce extremely unfair results in another, and courts should therefore have the flexibility to use different methods in different cases. Settlement and claim reduction pose an even more difficult dilemma. Defendants may be coerced into settlement even where they have meritorious defenses unless either (1) contribution against settling defendants is permitted (thereby preventing coercion but simultaneously reducing defendants' incentives to settle) or (2) plaintiffs' claim against remaining defendants is reduced in the event of settlement (thereby reducing plaintiffs' incentives to settle). Since we are unsure how frequently a defendant is forced to abandon a meritorious defense, perhaps the best solution is to let judges fashion appropriate relief when this situation arises.

Until these sub-issues are resolved in a particular case, a judge may not be able to decide whether contribution should be allowed at all. Contribution may be appropriate if one measure of contribution is adopted but inappropriate if a different measure is employed. And unless a court can find some means of preserving the parties' incentives to settle, denial of contribution may be appropriate. Because the sub-issues are best decided by looking at the facts of each case, little additional costs are incurred by looking to the same facts in deciding the broader issue of when to allow contribution.

Having decided that courts should have discretion to grant or deny contribution on a case-by-case basis, we should provide guidelines for the exercise of that discretion. Otherwise, "in seeking to be flexible, we may simply be obscure." The following guidelines seem especially appropriate, for they are based on the antitrust

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**Notes:**

171. A per capita measure of contribution shares is extremely inequitable where there are only a few violators of widely varying culpability. A comparative fault rule may entail intolerable complexity in antitrust suits involving large numbers of defendants. An allocation based on percentage of sales or purchases applies easily to a horizontal antitrust violation, but is troublesome when applied to a vertical restraint.


173. See Senate Report, supra note 53, at 41-42. The relief might take the form of a contribution claim against a settling defendant, or reduction of the plaintiff's claim, or some combination of the two.

174. A note analyzing contribution under the securities laws similarly concluded that a case-by-case rule was appropriate there: "The number and magnitude of unresolved questions in this field argues strongly against the premature appearance of hard and fast rules, and equally strongly in favor of continuing judicial flexibility in contribution claims." Note, supra note 16, at 1314.

175. Bok, supra note 153, at 349.
policy goals most directly affected by antitrust contribution.176

A judge should consider the following questions when faced with a claim for contribution:

(1) Fairness and Settlement
   A. Allocation of Loss: How great a difference is there between the damages the defendant would pay if contribution were allowed and if it were barred?
   B. Improper Motives: Does the plaintiff have an improper motive in singling out the party seeking contribution for his treble damages suit?
   C. Coercion of Settlements: If contribution is denied, will this defendant realistically be forced to settle despite a reasonable probability of a successful defense on the merits? If so, which of the following remedies, if any, would be most likely to preserve incentives to settle?
      — 1. reducing the plaintiff's claim by the amount of the settling defendants' contribution shares.
      — 2. allowing contribution claims to proceed against settling defendants.

(2) Deterrence
   A. Is increased deterrence likely to result if contribution is denied this type of violator?
   B. If so, is increased deterrence of the illegal practice at issue desirable?

(3) Complexity of Litigation
   A. To what degree will allowing contribution in this case burden the court and the plaintiff with added litigation costs?
   B. Does the plaintiff reasonably object to allowance of the contribution claim? If plaintiff objects, will severance of contribution claims and issues under Federal Rule of Civil Procedure 42(b) be feasible?

This list of questions is by no means exhaustive; courts should be allowed to consider all the circumstances of each unique case. The important feature of this list, or of any set of guidelines, is that it focuses the courts' attention on the sometimes-conflicting goals of antitrust policy.

CONCLUSION

Antitrust contribution rules may have significant effects on the degree to which antitrust policy goals of fairness, deterrence, pretrial settlement, and simplicity of litigation are achieved. The impact of contribution on each of these goals varies widely among the diverse cases in which contribution may be sought. Because of this variance and our limited experience with antitrust contribution claims, rigid rules such as those proposed by the Fifth and Tenth Circuits, the Bayh Bill, and the ABA Statute are inappropriate. Un-

176. Although the guidelines listed in Professional Beauty are helpful, see note 22 supra, the list here is tailored more precisely to the policy goals affected by antitrust contribution.
til such time as experience reveals an absolute or bright-line rule that would efficiently balance policy goals, district courts should have the discretion to decide in each case whether granting or denying contribution will better promote antitrust policy.

The issues raised by antitrust contribution "rank with the most complicated under the antitrust laws." Courts have found that complicated antitrust issues resolved in a rapid and simplistic manner often return to haunt them. They can avoid repeating this mistake in the area of antitrust contribution by adopting the case-by-case rule of Professional Beauty.


178. For example, a premature formulation led to trouble in the area of non-price vertical restraints. A rigid rule that certain restraints were per se illegal, see United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967), had to be retracted after experience showed the need for greater flexibility. See Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36 (1977).