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Federal Law Held To Govern Effect of the Release of a Joint Tortfeasor in Private Antitrust Suit—*Winchester Drive-in Theatre, Inc. v. Twentieth Century Fox Film Co.**

Private antitrust litigation occasionally raises the question of whether state or federal law should be applied to determine the effect of the release of a joint tortfeasor. When federal law is applied, as it was in *Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co.*,[1] there remains the necessity of formulating a rule of federal law, since there appears to be no established federal rule governing releases in antitrust suits.[2]

The determination of whether state or federal law is to be applied to a collateral issue arising under a federal statute depends upon the relationship of that issue to the purpose, policy, and scope of the legislation.[3] State law will readily be adopted unless the matter is so intimately connected with a general federal program that congressional intent would be subverted by an application of diverse local rules.[4] When the policy of the statute does not provide the court with any specific guidelines, a well-established state rule may offer a convenient alternative to the difficult task of judicial legislation.[5] However, when federal interest predominates[6] or when the

* 232 F. Supp. 556 (N.D. Cal. 1964).

1. 232 F. Supp. 556 (N.D. Cal. 1964).

2. *Compare* Dura Elec. Lamp Co. v. Westinghouse Elec. Corp., 249 F.2d 5 (3d Cir. 1957) (following the rule set forth in *Restatement of Torts*), *with* Hilton, Inc. v. Triangle Publications, Inc., 198 F. Supp. 638 (S.D.N.Y. 1961) (following the distinction between release and covenant not to sue). A case occasionally cited as setting forth the "federal rule" is McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943), which followed the intent-full compensation test. See text accompanying note 21 *infra*. However, this case did not arise under a federal statute, and it is usually cited in connection with general tort actions. It is either implicitly rejected or not mentioned in many antitrust cases. See cases cited note 9 *infra*.

3. See generally Mishkin, *The Variousness of "Federal Law"—Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Comment, 40 CORNELL L.Q. 561 (1955); Note, 9 GEO. WASH. L. REV. 465 (1941); Note, 59 HARV. L. REV. 966 (1946).

4. This practice is followed under the Federal Tort Claims Act where the application of state law is clearly preferable to a separate "federal tort law." See, *e.g.*, Montellier v. United States, 315 F.2d 180 (2d Cir. 1963); Matland v. United States, 285 F.2d 752 (3d Cir. 1961).

5. For example, when the federal act fails to specify a statute of limitations, the question is usually regarded as one of local law. This was the prevailing situation under the antitrust laws prior to the enactment by Congress of a uniform statutory period. See, *e.g.*, Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906); Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645 (4th Cir. 1942); Note, 53 COLUM. L. REV. 68 (1953); Note, 60 YALE L.J. 553 (1951). State law has also been utilized to decide collateral issues arising under federal statutes such as the Bankruptcy Act (Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940)) (effect of a deed); Tax

purpose of a statute can be achieved only through a comprehensive system of uniform national regulation, collateral issues are governed by federal law.[7] If the determination has been made that the area is exclusively federal, it becomes the responsibility of the federal courts to fashion a rule designed to effectuate the policy of the statute, independent of existing state law.[8]

It is presently unsettled whether the effect of the release of a joint tortfeasor in a private action brought under the federal antitrust laws is of sufficient federal concern to dictate the application of federal rather than state law. Courts applying state law treat the problem in substantially the same manner as that of any other release; they do not discuss choice of law alternatives, despite the fact that the action is based upon a federal statute rather than a common-law tort.[9] Implicit in these decisions is the assumption that the release issue is not encompassed within the comprehensive scheme of antitrust regulation. Similarly, in those cases where the effect of a release has been regarded as a matter of federal law, the single fact that the cause of action arises from a federal statute has been determinative, without further analysis of the relationship of the collateral issue to the overall program.[10] The approach of the

(Lyeth v. Hoey, 305 U.S. 188 (1938)) (determination of heirs according to state law, but application of exemption in statute governed by federal law); Bank Act (Reno Nat'l Bank v. Seaborn, 99 F.2d 482 (9th Cir. 1938)) (segregation of funds for a trust).

6. *E.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471-72 (1942) (concurring opinion). Federal law may be held controlling even in the absence of a specific statute. See, *e.g.*, Howard v. Lyons, 360 U.S. 593 (1959); United States v. Standard Oil, 332 U.S. 301 (1947); Royal Indem. Co. v. United States, 313 U.S. 289 (1941); Note, 53 COLUM. L. REV. 991 (1953); Note, 59 HARV. L. REV. 966 (1946).

7. *E.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (federal courts required to fashion federal common law of arbitration based on policy of national labor laws); Dice v. Akron, C. & Y. Ry., 342 U.S. 359 (1952) (validity of release in FELA action held a matter of federal law). In O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940), it was held that the defense of privilege for a defamatory telegraph message was to be determined by federal common law since the Communications Act indicated an intent by Congress to institute a comprehensive system of regulation which required a uniform rule.

8. The federal act may thus preclude defenses which could be exerted under state law. See, *e.g.*, Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942) (Sherman Act); Prudence Realization Corp. v. Geist, 316 U.S. 89 (1942) (Bankruptcy Act); D'Oench, Duhme & Co v. FDIC, 315 U.S. 447 (1942) (Federal Reserve Act); Deitrick v. Greaney, 309 U.S. 190 (1940) (Bank Act).

9. Dura Elec. Lamp Co. v. Westinghouse Elec. Corp., 249 F.2d 5 (3d Cir. 1957) (assumed state and federal law identical); Eagle Lion Films Inc. v. Loews Inc., 219 F.2d 196 (2d Cir. 1955) (contract stipulated that it was to be governed by state law); Duffy Theatres v. Griffith Consol. Theatres, 208 F.2d 316 (10th Cir. 1953); Suckow Borax Mines Consol. v. Borax Consol. Ltd., 185 F.2d 196 (9th Cir. 1950); Solar Elec. Corp. v. General Elec. Co., 156 F. Supp. 51 (W.D. Pa. 1957).

10. *E.g.*, Hilton, Inc. v. Triangle Publications, Inc., 198 F. Supp. 638 (S.D.N.Y. 1961). In Taxin v. Food Fair Stores, Inc., 181 F. Supp. 181 (E.D. Pa. 1960), holding (by analogy to FELA actions) that federal law did not require a tender back of consideration in order to repudiate a release allegedly induced by fraud, the court

Winchester court in concluding that federal law should control and in selecting a governing rule from among the divergent state rules represents the first real judicial attempt to correlate federal antitrust policy with the choice of law rules as they both relate to the effect of the release of a joint tortfeasor.

The court in *Winchester* found the application of federal law necessary to the enforcement of a uniform federal antitrust policy. This conclusion seems valid because the application of state law would cause a geographical disparity resulting from the wide diversity of local rules regarding the release of a joint tortfeasor.[11] This conclusion is also supported by other considerations. It is clear that the application of state law would prolong antitrust litigation with complex collateral issues due to the presently unsettled nature of choice of law rules.[12] Further, the increasing emphasis on the law of the forum in modern theories of conflict of laws[13] would often provide the opportunity for the litigant to engage in forum-shopping if state law were to govern the effect of a release. Similar considerations prompted Congress to enact a uniform statute of limitations for private antitrust litigation[14] and led the United States Supreme Court to adopt federal law as controlling the effect of a release of a joint tortfeasor in actions under the Federal Employers' Liability Act.[15] It is of course true that a determination that federal law should govern will not in itself produce national uniformity, because the federal courts may adopt differing rules as the controlling federal law.[16] The application of federal law is, nevertheless, a necessary first step on the path to the desired uniformity that can probably be obtained only at the national level.[17]

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concluded that the area was "dominated by the sweep of federal statutes." Presumably the effect on the remaining defendants of a valid release would also be a matter of federal law, although this question was not decided and the court regarded federal and state law as the same for the purpose of this case. Occasionally a court will adopt a rule without specifying whether state or federal law is being applied. See, *e.g.*, Lysfjord v. Flintkote, 135 F. Supp. 672 (S.D. Cal. 1955), *rev'd on other grounds*, 246 F.2d 368 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957); Combined Bronx Amusements, Inc. v. Warner Bros. Pictures, Inc., 132 F. Supp. 921 (S.D.N.Y. 1955).

11. 232 F. Supp. 556, 561 (N.D. Cal. 1964). See notes 18-22 *infra* and accompanying text.

12. See generally Ehrenzweig, *Release of Concurrent Tortfeasors in the Conflict of Laws—Law and Reason Versus the Restatement*, 46 VA. L. REV. 712 (1960); Wade, *Joint Tortfeasors and the Conflict of Laws*, 6 VAND. L. REV. 464 (1953); Note, 60 COLUM. L. REV. 522 (1960); Note, 15 OKLA. L. REV. 38 (1962); Annot., 69 A.L.R.2d 1034 (1960). See also ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 380-81 (1955) [hereinafter cited as *Attorney General's Report*] (regarding choice of law problems existing prior to enactment of a statute of limitations for antitrust litigation).

13. *E.g.*, Van Dusen v. Barrack, 376 U.S. 612 (1964); Griffin v. McCoach, 313 U.S. 498 (1941). See generally CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

14. 69 Stat. 283 (1955), 15 U.S.C. § 15b (1958). See *Attorney General's Report* 380-85.

15. Dice v. Akron, C. & Y. Ry., 342 U.S. 359 (1951); Note, 107 U. PA. L. REV. 1213 (1959).

16. See note 2 *supra*.

17. The *Winchester* court fully recognized the lack of uniformity among state

The prevailing practice among federal courts, however, is the application of state rather than federal law. The majority view among the states follows the strict common-law rule that a general release of one tortfeasor operates to release all others, unless the instrument can be construed as a covenant not to sue.[18] Many states, however, modify this rule by providing that an express reservation of rights against the remaining defendants will prevent total discharge.[19] Considerable criticism has been directed at the strict common-law rule,[20] and a minority of states now adhere to the more modern view that the effect of a release is a question of the intent of the parties and of whether full compensation has been received.[21]

The *Winchester* court selected as the controlling federal rule this modern view as it is incorporated in section 4 of the Uniform Contribution Among Joint Tortfeasors Act,[22] which specifically provides that an express reservation is not required in order to preserve the plaintiff's claim against nonsignatory defendants.[23]

The court is to be commended for discarding, in its search for a uniform rule for the antitrust laws, the older rules which can

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and federal courts and attached to its opinion a Certificate of Probable Cause suggesting an immediate appeal in order to "materially advance the ultimate termination of the litigation . . . ." 232 F. Supp. 556, 563 (N.D. Cal. 1964). One might predict that the release issue in antitrust litigation will eventually follow the same path toward uniformity as releases in FELA actions.

18. PROSSER, TORTS § 46 (3d ed. 1964); Annot., 73 A.L.R.2d 403, 410-13 (1960).

19. *Id.* at 413-15. This is also the position taken by the RESTATEMENT, TORTS § 885(1) (1939): "A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document." However, where the defendants can be classified as independent rather than joint tortfeasors, the rule does not apply. *E.g.*, Panichella v. Pennsylvania R.R., 150 F. Supp. 79 (W.D. Pa. 1957); Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944). *Contra*, Rushford v. United States, 92 F. Supp. 874 (N.D.N.Y. 1950), *aff'd*, 204 F.2d 831 (2d Cir. 1953).

20. 4 CORBIN, CONTRACTS §§ 931-35 (1951); HARPER & JAMES, TORTS § 10.1 (1956); PROSSER, *op. cit. supra* note 18, § 46; Havighurst, *The Effect of a Settlement With One Co-obligor Upon the Obligations of Others*, 45 CORNELL L.Q. 1 (1959); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937); Note, 107 U. PA. L. REV. 1213 (1959); NOTE, 12 VAND L. REV. 1414 (1959). Avoidance of the common-law rule by the device of a covenant not to sue has also been recognized as an artificial legal technicality based more on semantics than substance. See, *e.g.*, McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P.2d 783 (1945); Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954); Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).

21. Annot., 73 A.L.R.2d 403, 422-31 (1960). Some courts take the position that receipt of full compensation is the controlling test. *E.g.*, Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Iowa 1953); Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954); Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556 (1962); Note, 63 COLUM. L. REV. 1142 (1963).

22. 9 U.L.A. 242 (1957) [hereinafter cited as the Uniform Act].

23. "A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid." *Ibid.*

provide a "giant trap for the unwary."[24] However, the selection of the *original* version of the Uniform Act as the controlling federal rule is questionable.[25] It would seem preferable to adopt the 1955 revised version,[26] which eliminated a provision subjecting the released tortfeasor to liability for contribution and added a requirement that releases must be given in good faith.[27] These changes were intended to encourage out-of-court settlements by providing releases with finality while prohibiting collusive agreements.[28]

The trebling of damages in antitrust suits[29] raises significant problems with regard to the manner in which the out-of-court settlement should affect the continuing liability of the tortfeasor not released. First, it must be determined whether the plaintiff's claim against the non-released tortfeasor is to be reduced by the pro-rata share of the released tortfeasor[30] or by the actual amount received in settlement. Second, it must be determined whether the credit is to be applied before or after the court trebles the plaintiff's damages. If the judgment is credited to the extent of the released tortfeasor's pro-rata share, it obviously makes no difference whether the credit is applied before or after the damages are trebled.[31] However, this could result in a substantial decrease in the satisfaction a claimant would otherwise receive if he accepts an amount from the released tortfeasor below the amount of his pro-rata share, which can be finally determined only by the judgment.[32] The develop-

24. Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co., 232 F. Supp. 556, 561 (N.D. Cal. 1964).

25. Only eight states have enacted this version of the Uniform Contribution Among Joint Tortfeasors Act, and of these only three states have retained the act in anything like its original form. See 9 U.L.A. 116-17 (Supp. 1964) (Commissioners' Note). No other federal court has adopted the Uniform Act for antitrust cases.

26. *Id.* at 122.

27. It is interesting to note that California has enacted a variation of the 1955 Uniform Act (CAL. CIV. PROC. CODE § 877) and therefore, in terms only of the effect given to a general release, the result in the *Winchester* case would have been the same under state law. For a comparison of the California statute with the original Uniform Act, see Comment, 9 HASTINGS L.J. 180 (1958).

28. 9 U.L.A. 123 (Supp. 1964) (Commissioners' Note).

29. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

30. For example, if plaintiff releases one of two defendants for $10,000 and then recovers $30,000 against the other, the released defendant's pro-rata share of $15,000 is deducted from the verdict. See, *e.g.*, Judson v. Peoples Bank Trust Co., 17 N.J. 67, 110 A.2d 24 (1954); Smootz v. Ienni, 37 N.J. Super. 529, 117 A.2d 675 (L. 1955). *Cf.* Daugherty v. Hershberger, 386 Pa. 367, 126 A.2d 730 (1956). See generally Note, 35 N.C.L. REV. 141 (1956); Note, 12 RUTGERS L. REV. 533 (1958).

31. Taking the example of note 30, if the credit is applied before trebling, the $30,000 judgment is reduced to $15,000 and then trebled to $45,000. If the credit is applied after trebling, the trebled judgment of $90,000 is reduced to $45,000.

32. Taking the example of note 30 *supra*, plaintiff is entitled to $90,000, yet after deduction of the released defendant's pro-rata share he would be allowed to recover half this sum of $45,000 which, added to the $10,000 already received in settlement, makes his total satisfaction only $55,000. See Daugherty v. Hershberger, 386 Pa. 367, 126 A.2d 730 (1956) (dissenting opinion).

ment of antitrust laws favorable to the plaintiff,[33] more liberal requirements for proof of damages,[34] and the award of attorney's fees[35] suggest that a plaintiff would not often be willing to settle when the cost to him of undervaluing the liability of the released tortfeasor would be multiplied threefold under the pro-rata share technique. If, on the other hand, the actual consideration received in settlement is credited against the plaintiff's claim, it becomes quite important whether this is done before or after the trebling of damages. If deducted before the trebling of damages, the claimant runs the same risk of a substantial diminution in his total recovery that he encounters under the pro-rata share method. If, however, the credit is applied after the trebling of damages, the entire burden of the punitive damages may be cast upon the non-released tortfeasors. For example, in *Lysfjord v. Flintkote*,[36] plaintiff recovered twenty thousand dollars in settlement from the released parties and subsequently recovered a fifty thousand dollar verdict against the remaining defendant. It was held that the twenty thousand dollar consideration for the release should be deducted from the trebled damages of 150,000 dollars rather than from the actual damages on the ground that the trebled verdict represented the full satisfaction to which plaintiff was entitled.[37] Thus, the non-released defendant was held liable for a substantial proportion of the actual damages as well as the entire 100,000 dollars in punitive damages. Arguably, one defendant should not be so heavily penalized due to outside agreements over which he has no control.[38] Of course, a continuing liability for contribution from the released tortfeasor could eliminate this inequity, but if the release does not operate to dispose of the matter with finality, there is no reason why a tortfeasor would not personally defend in an attempt to reduce the damages.

The 1955 revision of the Uniform Act adopts the view that the consideration for the release is deducted from the final judgment and

33. *E.g.*, simplification of proof of conspiracy, growth of offenses illegal per se, a broadened concept of interstate commerce, and increased potential liability under the Robinson-Patman Act. OPPENHEIM, FEDERAL ANTITRUST LAWS 1035 n.6 (2d ed. 1959).

34. See, *e.g.*, Bigelow v. R.K.O. Radio-Pictures, 327 U.S. 251 (1946); Bordonaro Bros. Theatres v. Paramount Pictures, Inc., 176 F.2d 594 (2d Cir. 1949); William Goldman Theatres v. Loew, Inc., 150 F.2d 738 (3d Cir. 1945). See generally Clark, *The Treble Damage Bonanza—New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954).

35. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

36. 135 F. Supp. 672 (S.D. Cal. 1955), *rev'd on other grounds*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

37. This method was strongly approved on appeal, and was also discussed and followed in Bal Theatre Corp. v. Paramount Film Distrib. Corp., 206 F. Supp. 708, 714-16 (N.D. Cal. 1962).

38. The discrepancy between amounts paid by released and nonreleased defendants has been justified as an inducement to settle. See McKenna v. Austin, 134 F.2d 659, 665 (D.C. Cir. 1943), for a general discussion of the alternative methods of awarding damages where a joint tortfeasor is released.

the released tortfeasor is discharged from all liability for contribution, so long as the release was made in good faith.[39] Since the punitive damage aspect of private antitrust suits has been recognized as an effective means of promoting private enforcement of the antitrust laws,[40] the 1955 revision seems consonant with sound antitrust policy.[41] The plaintiff can freely execute a release without fear of discharging the nonsignatory tortfeasors or sacrificing a part of his eventual satisfaction, and the nonliability of the released defendant for contribution is a strong incentive for out-of-court settlement.

It is clear that the equitable application of the revised act depends upon the rigorous enforcement of its requirement of good faith, which constitutes the only protection afforded non-released defendants against collusion between the plaintiff and the released defendant.[42] This safeguard might be strengthened by placing the burden of proof upon the plaintiff to establish that the release was entered into in good faith once the nonsignatory defendants demonstrate a substantial disproportion between the pro-rata shares and the consideration given for the release. Strict enforcement of the good faith requirement of the revised 1955 Uniform Act will prevent collusive agreements without subverting the general policy of promoting the private enforcement of the antitrust laws.

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39. Uniform Act § 4, 9 U.L.A. 122 (Supp. 1964).

40. Lysfjord v. Flintkote, 246 F.2d 368 (9th Cir. 1957); Bal Theatre Corp. v. Paramount Film Distrib. Corp., 206 F. Supp. 708 (N.D. Cal. 1962).

41. *But see Attorney General's Report* 379 recommending the vesting of discretion in the trial judge to impose double or treble damages in order to penalize willful violators without imposing the harsh penalty of multiple damages on innocent offenders.

42. The dangers of a release of one tortfeasor for a nominal amount because of business reasons were alleviated under the original Uniform Act by the objective requirement of contribution. See generally the discussion of the reasons for changing to the more subjective standard of good faith in the Commissioners' Note to the revised Act, 9 U.L.A. 122-23 (Supp. 1964).