1979

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CONTRIBUTION IN ANTITRUST DAMAGE ACTIONS

ROBIN STONE SELLERS†

I. INTRODUCTION

THE INCREASING AMOUNT OF PRIVATE ANTITRUST LITIGATION1 in federal courts2 has drawn public attention to the antitrust implications of daily business transactions.3 Of special concern to potential defendants in private antitrust suits is the favor with which the courts have regarded plaintiffs4 and the increas-


1. For a general discussion of the private antitrust suit, see E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS §§ 3.01-.08 (1965). For a discussion of the purposes underlying the private antitrust suit, see id. § 3.01, at 10-12.


4. The Supreme Court has explained this favorable treatment of plaintiffs in private antitrust suits, stating:

[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.


The policy favoring private antitrust suits has been effectuated by the courts in many areas. See, e.g., id. at 138-40 (the doctrine of in pari delicto is not a defense to a private antitrust action); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 214 (1951) (antitrust plaintiff may recover notwithstanding proof that he had engaged in an unrelated antitrust violation); Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir.), cert. denied, 355 U.S. 835 (1957) (dollars received by plaintiff from settling defendant are subtracted from trebled damages rather than untrebled jury verdict to avoid weakening the penal impact of the treble damage provision).

Courts have also liberalized the standing requirements in antitrust cases. See, e.g., Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2331 (1979) (consumers who purchase price-fixed goods for personal use suffer injury to their property and have standing under § 4 of the Clayton Act); Malamud v. Sinclair Oil Corp., 321 F.2d 1142, 1151 (6th Cir. 1965) (plaintiff need only allege injury in fact and that the interest plaintiff seeks to protect is arguably within the zone of interests to be protected by antitrust law). See also Note, Standing To Sue in Private Antitrust Litigation: Circuits in Conflict, 10 IND. L. REV. 532 (1977). For a discussion of the Malamud case, see Note, 45 GEO. WASH. L. REV. 100 (1977). But see Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (although not strictly concerned with standing, the case implies a limitation on standing to sue under § 4 of the Clayton Act).
ingly substantial damages which have been awarded to them.  

Private antitrust suits for treble damages, many of which have been characterized as intentional tort actions, are brought under section 4 of the Clayton Act. To recover under section 4, a plaintiff must establish the following elements: 1) a violation of the federal antitrust laws; 2) an injury to the plaintiff's business or property; 3) a causal relation between the violation and the injury, and

5. See, e.g., Telex Corp. v. IBM, 510 F.2d 894, 897 (10th Cir.), cert. dismissed, 423 U.S. 803 (1975) (damage award of $259.5 million reversed, but parties settled out of court after petitions for certiorari were filed); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1084 (2d Cir.), cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971) (settlement fund of over $82 million).


7. 15 U.S.C. § 15 (1976). Section 4 provides as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.


"[F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove . . . antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.


10. See Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952). The plaintiff's injury to his business or property must be the direct result of the defendant's unlawful action. Id. See also Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2331 (1979) (broad interpretation given to the requirement of injury to business or property).
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4) the amount of the damages suffered. Establishing or refuting these elements of proof with precision is often a difficult and expensive task. Consequently, pretrial settlement provides an alternative to trial attractive to all parties. Nevertheless, settlements involving fewer than all the defendants may generate contribution problems.

The right to contribution becomes an issue when nonsettling defendants, upon losing at trial, thereafter seek to recover from settling defendants a share of the plaintiff's damage award. The body of law controlling the availability of a right to contribution in private antitrust actions is meager as well as conflicting. The recent decision by the United States Court of Appeals for the Eighth Circuit, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., is the only case recognizing a general right to contribution in

11. See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946). A plaintiff in a private treble damage action is not required to prove the amount of damages with exactness, but a verdict may not be based upon speculation. Id.

12. See Antitrust Advisor, supra note 3, § 11.7, at 697-98. This problem is compounded by the fact that plaintiffs generally join as many defendants as is reasonably possible in order to ensure the recovery of the full amount of damages. See Paul, Contribution and Indemnification Among Antitrust Coconspirators Revisited, 41 Fordham L. Rev. 67, 68 (1972).


14. A settlement usually takes the form of a pretrial stipulation in which all of the participating defendants disclaim liability. See E. Timberlake, supra note 1, § 11.04, at 138. In connection with a settlement, the plaintiff generally executes a release or a covenant not to sue in favor of the settling defendants. Id. The settlement is enforced by the court's dismissal of the action, with or without prejudice, upon payment into the court of an agreed upon sum. Id. For a discussion of these release agreements, see notes 92-101 and accompanying text infra.

15. Contribution allocates the financial burden of liability among joint tortfeasors, requiring each to pay his own share of the judgment. W. Prosser, Law of Torts § 51, at 310 (4th ed. 1971). Contribution is to be distinguished from indemnification which shifts the entire burden of liability from one tortfeasor to another. Id.

16. See id. § 50, at 309. Traditionally, where a plaintiff has settled with one of several defendants prior to trial, the amount received is deducted from the treble amount awarded by the court at the trial of the remaining defendants. Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir.), cert denied, 355 U.S. 835 (1957). This rule, however, is presently in a state of flux. See notes 141 & 183 infra. A bill recently introduced in the Senate proposes that in price fixing suits, where the plaintiff has settled with some defendants, the judgment against remaining defendants should be reduced by the greatest of 1) the amount stated in the release or covenant; 2) the amount actually paid for the release or covenant; or 3) treble the actual damages attributable to the settling defendants. See S. 1468, 96th Cong., 1st Sess. § 41(b), 125 Cong. Rec. S8,931 (daily ed. July 9, 1979). For the text of this bill, see note 275 infra. For a further discussion of this proposed legislation, see notes 275-87 and accompanying text infra.

17. 594 F.2d 1179 (8th Cir. 1979).
private antitrust damage suits.\textsuperscript{18} Prior to \textit{Professional Beauty}, three federal district courts directly confronting the issue held that a general right to contribution is not available.\textsuperscript{19} Only one of these cases, \textit{Sabre Shipping Corp. v. American President Lines, Ltd.},\textsuperscript{20} dealt specifically with the liability of settling defendants.\textsuperscript{21} Since \textit{Professional Beauty}, three district courts have held that contribution may not be asserted against settling codefendants.\textsuperscript{22}

In an era of huge antitrust damage awards and prolific litigation,\textsuperscript{23} the dearth of settled authority seems inexplicable. Many defendants will be concerned about their rights and obligations in the event that their joint tortfeasors are not amenable to conciliation. This article examines the rights of nonsettling defendants to contribution from settling codefendants in private antitrust actions and concludes that a right to contribution should not be available in such cases. An analysis of the propriety of a rule barring contribution in such suits requires an examination of two basic issues. The first, discussed in Part II, is whether federal or state law governs contribution issues. The second, discussed in Part III, is whether a nonsettling tortfeasor has a right to contribution under the governing law.

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\textsuperscript{18} Id. at 1186. See notes 146-83 and accompanying text infra.
\textsuperscript{21} Id. at 1340-41. It should be noted that many cases involving the right to contribution have involved a named defendant who seeks to implead an alleged co-conspirator who had not been joined in the original action. See, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1181; Olson Farms, Inc. v. Safeway Stores Inc., [1977] 2 Trade Cas. ¶ 61,698, at 72,861 (D. Utah 1977); El Camino Glass v. Sunglo Glass Co., [1977] 1 Trade Cas. ¶ 61,533, at 72,111 (N.D. Cal. 1976).
\textsuperscript{23} See notes 1-5 and accompanying text supra.
II. CHOICE OF LAW

A. Should Federal or State Law Apply?

Neither case law, 24 nor the Constitution, 25 nor the antitrust statutes 26 clearly resolve whether state or federal law should control contribution questions in antitrust actions. 27 Generally, the supremacy clause of the Constitution 28 mandates that federal law govern claims arising under the Constitution, federal statutes, and treaties. 29 Where, however, the claims asserted do not depend upon an issue of federal law, the Rules of Decision Act 30 provides that state law should apply. 31

Two factors arguably indicate the applicability of state law to antitrust contribution questions. First, contribution outside of the antitrust context, as a matter of substantive tort law, has traditionally been governed by state statute. 32 Second, the federal antitrust stat-

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24. For a discussion of case law examining choice of law in the area of antitrust contribution, see notes 47-89 and accompanying text infra.
25. See notes 28-29 and accompanying text infra.
28. U.S. CONST. art. VI, cl. 2.
29. Id. The supremacy clause provides as follows:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
31. Id. The Rules of Decision Act provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
utes contain no explicit provisions concerning contribution; 33 the absence of such a provision, it can be argued, not only suggests a congressional intent to exclude contribution from the purview of federal law, 34 but also seems to invoke the application of the Rules of Decision Act.

On the other hand, where an action brought under a federal statute involves an issue not specifically controlled by federal statutory language, 35 strong policy considerations override the factors favoring state law and justify applying federal law to such an issue. 36 One such policy argument mandating the choice of federal law rests upon the federal statutory dominance in the antitrust area. 37 Federal stat-


34. It is interesting to compare antitrust contribution with contribution in the securities area. Both antitrust and securities law are governed by federal statutes; yet Congress expressly provided for contribution in the securities area but it was silent on the issue in the antitrust statutes. See Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1976); Securities Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i(e), 78r(b) (1976). See also McLean v. Alexander, 449 F. Supp. 1251, 1265-68 (D. Del. 1978); Liggett & Myers Inc. v. Bloomfield, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); Globus, Inc. v. Law Research Servs., Inc., 318 F. Supp. 955, 958 (S.D.N.Y. 1970), aff'd in part per curiam, 422 F.2d 1346 (2d Cir.), cert denied, 404 U.S. 941 (1971); deHaas v. Empire Petroleum Co., 286 F. Supp. 809, 815-16 (D. Colo. 1968). This omission in the antitrust laws suggests that Congress did not intend for federal law to govern antitrust contribution or else it would have expressly so provided. Cf. UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966). In Hoosier, the Supreme Court determined that the application of a state statute of limitations to actions brought pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. §§ 141-87 (1976), was justified by congressional silence. 383 U.S. at 703-04. The Court observed that when Congress disagrees with judicial interpretations of its silence, it will enact federal legislation to supersede those interpretations. Id. at 704. For example, the Court noted that in 1955 Congress enacted a federal antitrust statute of limitations after having found the application of state statutes of limitations to private antitrust damage actions inadequate. Id.

35. Federal law has been described as "generally interstitial in its nature. It rarely occupies a legal field completely . . . . Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives." P. BATOR, P. MISKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-71 (2d ed. 1973).

36. See Federal Common Law, supra note 27, at 1519-26; Federal Court Competence, supra note 27, at 1089-94. For a discussion of these policy factors, see notes 37-46 and accompanying text infra.

37. See Mishkin, supra note 27, at 799-801. As Professor Mishkin has stated:
At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation. Id. at 800 (footnote omitted).

In areas other than antitrust law, federal courts have applied federal common law where a federal statute dealt with the area as a whole but did not contain a provision governing a particular issue. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (federal common law applied to collective bargaining agreements to promote uniformity where statute is silent); Royal Indemn. Co. v. United States, 313 U.S. 289, 296 (1941) (federal law governs the determination of damages for delayed payment of a contractual obligation of the
utes govern antitrust law; federal courts have exclusive federal question jurisdiction over cases arising under these statutes. Moreover, the Supreme Court has recognized in other contexts the competence of a federal court to extend federal antitrust law to related areas not specifically covered by statutory language. Since the contribution issue arises as a result of a violation of the federal antitrust laws, federal law appears applicable.

Another policy supporting the application of federal law to antitrust contribution is the importance of uniformity to the effectuation of a legislative program, such as the federally-created and federally-enforced antitrust statutes. A threefold rationale under-
lies this emphasis upon uniformity: 1) the equitable interest in assuring consistent interpretations of federal rights, regardless of the state in which the federal court sits; 43 2) the administrative convenience to the federal government in administering one rather than fifty disparate rules; 44 and 3) the avoidance of forum-shopping and prolonged litigation involving complex choice of state law questions. 45 Thus, although the antitrust statutes do not specifically cover contribution, policy dictates that a uniform federal common law should govern antitrust contribution in order to foster the swift and efficient enforcement of the antitrust laws. 46

B. Antitrust Case Law

Professional Beauty 47 and the prior antitrust contribution cases, Sabre Shipping, 48 El Camino Glass v. Sunglo Glass Co., 49 and Olson Farms, Inc. v. Safeway Stores Inc., 50 do not squarely address the choice of law question, although all four cases assume that federal law controls the issue of contribution. 51 Of the three cases dealing with

most frequently involve charges of illegal activities transcending state, regional, and even national boundary lines.


43. See Federal Common Law, supra note 27, at 1529. For example, in Jerome v. United States, 318 U.S. 101 (1943), the Court supported a uniform federal law interpretation of the word "felony" in the Federal Bank Robbery Act. Id. at 104-05.

44. See Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (federal law governs issues arising in connection with the federal function of making and handling commercial paper, partly because commercial paper must be issued on a vast scale and transactions concerning the paper can occur in several states).


46. See Williamson v. Columbia Gas & Elec. Corp., 27 F. Supp. 198, 204 (D. Del.), aff'd, 110 F.2d 19 (3d Cir. 1939), cert. denied, 310 U.S. 639 (1940). The Court noted that:

An action to recover triple damages under the federal antitrust laws is based upon a federal statute and enforceable only in a federal court. A federal court has the power to determine the nature of the action. . . . If state courts determine the nature of the action, we might have . . . the antitrust laws . . . depend upon the particular district court in which action was brought. The interpretation of a federal statute is federal business. Federal decisions construing an Act of Congress must be exclusive and uniform.

Id. (citation omitted).

47. 594 F.2d 1179 (8th Cir. 1979). See notes 17-18 and accompanying text supra.


51. See 594 F.2d at 1182-86; [1977] 2 Trade Cas. ¶ 61,698, at 72,861; [1977] 1 Trade Cas. ¶ 61,533, at 72,111-12; 298 F. Supp. at 1343-44. For a discussion of the federal substantive law applied in these cases, see notes 122-45 and accompanying text infra.
antitrust combination decided after Professional Beauty, none even mentions the choice of law issue.52 Sabre Shipping and El Camino Glass do, however, provide some insight.

In Sabre Shipping, the first case assuming federal law to govern the contribution question, the rights of nonsettling defendants were directly at issue.53 The United States District Court for the Southern District of New York applied federal common law to deny the contribution claim of nonsettling defendants.54 The principal litigation focused upon a claim by Sabre Shipping Corporation (Sabre) that the defendant shippers conspired to drive it out of business by monopolizing the market.55 Twenty-five defendants settled with Sabre and obtained from it a dismissal without prejudice and covenant not to sue.56 Subsequently, five nonsettling defendants impleaded seventeen of the settlors as third-party defendants for contribution and indemnification.57 In denying the contribution claim, the court stated that since the antitrust claims asserted were “federally created by Congressional enactment . . . we must apply federal law to determine the rights of the parties.”58 The court reasoned that “[c]ertainly the respective rights of the antitrust defendants among themselves are questions touching upon the extent and nature of the legal consequences of the condemned acts, involving decision of a federal, not a state, question.”59 Nevertheless, since all the

52. See cases cited note 22 supra. For a discussion of the post-Professional Beauty cases, see notes 184-306 and accompanying text infra.
53. 298 F. Supp. at 1343. For a very good, although somewhat dated, analysis of Sabre Shipping, see Paul, supra note 12, at 69-77.

The contribution rights of a joint tortfeasor who has settled in good faith are being considered for the first time at the circuit court level in Iowa Beef Processors, Inc. v. Spencer Foods, Inc., No. 78-3346 (5th Cir., oral argument held June 19, 1979), and in Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., No. 78-1788 (5th Cir., oral argument held Dec. 5, 1978).
54. 298 F. Supp. at 1343.
56. Id. at 950-51.
57. 298 F. Supp. at 1341. The nonsettling defendants claimed that if the alleged illegal acts were found to have been committed, they were the joint acts of all of the defendants. Id. Therefore it was argued that if Sabre recovered against the nonsettling defendants, then as a necessary consequence the settling defendants would also be liable to Sabre. Id.
58. Id. at 1343.
parties agreed that federal law should govern, the court’s finding was merely dictum.61

Sabre Shipping cited Goldlawr, Inc. v. Shubert, an earlier antitrust case which also discussed in dictum the choice of law problem.62 Contribution was not at issue in Goldlawr, where the plaintiffs charged that the defendants had monopolized the motion picture industry, since the impleaded third-party defendants were not found to be joint tortfeasors with the defendants.63 However, the Goldlawr court noted, relying upon Supreme Court contribution decisions in the maritime area, that since the tort committed was “actionable solely by reason of federal law there would seem to be strong justification for [the] contention that the tort asserted to lie in the third party complaint is governed by federal common law with no right to contribution between tortfeasors.”64

The court in El Camino Glass looked to Goldlawr and Sabre Shipping to support its no-contribution rule.65 In El Camino Glass, the United Glass Company, which had previously been held liable for antitrust violations, sought contribution from an alleged co-conspirator and joint tortfeasor not a party to the original suit.66 Before dismissing the third-party complaint and denying the contribution claim, the court noted that “federal law governs the issue of whether there is a right to contribution in an antitrust case.”67 The court applied

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60. 298 F. Supp. at 1343.
61. The major issue under consideration in Sabre Shipping was whether there is a substantive right to contribution under federal common law. Id. at 1343-46. See notes 128-38 and accompanying text infra.
62. 276 F.2d 614 (3d Cir. 1960).
63. 298 F.2d at 1345. The Sabre Shipping court noted that Goldlawr was distinguishable because the third party complaint in Goldlawr did not deal with a claim for contribution. Id. See 276 F.2d at 616-17. Thus, federal law clearly covered the third party dispute. Id.
64. 276 F.2d at 616-17.
65. Id. at 616 & n.3. The court cited the following cases: Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952); Union Stock Yards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217 (1905). 276 F.2d at 616 n.3. For a discussion of choice of law in the maritime area, see note 91 infra.
66. 276 F.2d at 616 (footnotes omitted).
67. [1977] 1 Trade Cas. ¶ 61,533, at 72,111 & n.1. The El Camino Glass court relied in part upon Baughman v. Cooper-Jarrett, Inc., 391 F. Supp. 671 (W.D. Pa. 1975), vacated and remanded in part on other grounds, 530 F.2d 529 (3d Cir.), cert. denied, 429 U.S. 825 (1976). As in Goldlawr, contribution was not at issue in Baughman, but the court noted that “this antitrust action is governed by federal common law under which there is no right of contribution for intentional torts. Unlike the federal securities laws the Sherman Act contains no provisions by which Congress has legislated an exception to the common law rule.” 391 F. Supp. at 678 n.3 (citations omitted).
68. [1977] 1 Trade Cas. ¶ 61,533, at 72,111.
69. Id. at 72,111 n.1.
federal law since the claims in the main and third-party actions arose from alleged violations of federal law. 70

Recent decisions have reiterated the conclusions drawn in Sabre Shipping and El Camino Glass. In Olson Farms, an egg distributor, who had been held liable for conspiring to fix prices, sought contribution from a co-conspirator not a party to the original action. 71 The court denied the contribution claim, 72 stating (without citing any authority): "The court is of the opinion that under the circumstances of this case the availability of ... contribution to the plaintiff for alleged violation of antitrust laws is governed exclusively by the Federal antitrust laws ... ." 73

The most recent decision assuming that federal law governs the issue of contribution in an antitrust suit is Professional Beauty. 74 The case involved a suit by Professional Beauty Supply, Inc. (Professional), a wholesaler of beauty supplies, against National Beauty Supply, Inc. (National), also a wholesaler. 75 Professional claimed that National's exclusive dealership in Minnesota constituted a monopoly and violated section 2 of the Sherman Act as well as the Minnesota antitrust laws. 76 National sought to implead La Maur, Inc. (La Maur), the manufacturer which had granted National the exclusive dealership, 77 maintaining that if National were found liable, it would be entitled to contribution from La Maur. 78 The Eighth Circuit, in considering National's claim, cited El Camino Glass and Sabre Shipping as support for its threshold observation that federal law governs contribution in an antitrust case. 79

The only case which ever applied state law to antitrust contribution is Webster Motor Car Co. v. Zell Motor Car Co. 80 an opinion which has never been cited subsequently for its discussion of this issue. The plaintiff in Zell brought two antitrust actions against

70. Id.
71. [1977] 2 Trade Cas. ¶ 61,698, at 72,860-61.
72. Id. at 72,861.
73. Id.
74. 594 F.2d at 1181.
75. Id.
76. Id.
77. Id.
78. Id.
79. Id. at 1182. The Professional Beauty court disagreed, however, with the El Camino and Sabre Shipping courts' conclusions that federal law permits contribution in antitrust cases. Id. at 1183. For a discussion of this split regarding the substance of federal law in the contribution area, see notes 122-206 and accompanying text infra.
80. 234 F.2d 616 (4th Cir. 1956).
different conspirators, one in the federal district court in the District of Columbia, and the other in the federal district court in Maryland.\footnote{Id. at 616-17.} One issue in the case was whether a dismissal of the defendants in the Maryland action constituted a release of the defendant in the District of Columbia suit.\footnote{Id. at 619.} The court held that such a release would be "an outrageous miscarriage of justice"\footnote{Id. (emphasis added) (citation omitted).} stating: "[I]t should be remembered that Packard [the District of Columbia defendant] has been found by the District of Columbia Court to be a co-conspirator with defendants, and that, under Maryland law, defendants would be liable for contribution to Packard as joint tortfeasors."\footnote{Id. Since 1941, Maryland law has included the Uniform Contribution Among Tortfeasors Act (1939 version), \textit{reprinted} in 12 \textit{Uniform Laws Annotated} 57 (1975 & Supp. 1977) [hereinafter cited as \textit{Uniform Laws Ann.}]. \textit{See} Md. Ann. Code art. 50, §§ 16-24 (Michie 1979). Thus, the Act was in force in 1956 when \textit{Zell} was decided. \textit{See} 234 F.2d at 616. For a discussion of this Act, \textit{see} notes 211-18 and accompanying text \textit{infra}. It is noteworthy that the only states which currently permit contribution among intentional tortfeasors, where the plaintiff has settled with some of the defendants prior to trial, are those following the 1939 Act. \textit{See} notes 211-12 and accompanying text \textit{infra}.} The court’s language suggests that the Maryland dismissal would cause Packard to lose its right to contribution—a right which the court determined to exist by applying Maryland law.\footnote{M. MITCHELL, \textit{PRIVATE ANTITRUST ACTIONS} 84 (1970). Another author, Professor Moore, believes that state law, and state conflict of law principles, should apply to contribution questions arising in cases based upon federal question jurisdiction. \textit{See} 3 \textit{MOORE'S FEDERAL PRACTICE} ¶ 14.03[3], at 14-156 to -157 n.6 (rev. 2d ed. 1978 & Supp. 1978-1979). The flaws in the analysis presented are, however, easily revealed. In discussing third-party practice under rule 14 of the Federal Rules of Civil Procedure, Professor Moore indicates that the rule itself does not create a substantive right to contribution; rather, he contends that "[t]he third-party defendant's liability to the defendant, if predicated on a contribution . . . theory, must be determined under applicable state law, even though jurisdiction in the main case is based on a federal statute." \textit{Id.} While noting that \textit{Sabre Shipping} represents precedent to the contrary, Moore cites several securities cases to support his conclusion. \textit{Id.} \textit{See} Wassel v. Eglowsky, 399 F. Supp. 1330 (D. Md. 1975), \textit{aff'd}, 542 F.2d 1235 (4th Cir. 1976); B & B Inv. Club v. Kleinsert's, Inc., 391 F. Supp. 720 (E.D. Pa. 1975); Herzfeld v. Laventhal, Kreksstein, Horwath & Howarth, 378 F. Supp. 112 (S.D.N.Y. 1974), \textit{aff'd in part, rev'd in part}, 540 F.2d 27 (2d Cir. 1976). In actuality, however, these cases support the opposite rule, \textit{i.e.}, that federal law governs the contribution issue. \textit{See} 398 F. Supp. at 1367; 391 F. Supp. at 724-25; 378 F. Supp. at 136. Since no antitrust case, except \textit{Zell}, (which was not cited by Moore), follows what he considers to be the proper rule, Moore's contention is not likely to be persuasive.}
question jurisdiction. As one author has explained, perhaps "the court in Zell was unconsciously following the Erie [diversity case] rule" to apply state law. Such an approach is, of course, without basis in a federal question case. It appears, therefore, that Zell's precedential value is marginal.

In summary, the weight of authority supports the conclusion that federal law governs antitrust contribution questions. The only case law to the contrary, Zell, is not convincing. Since, however, the meager law in this area rests primarily upon dicta, the analogous area of antitrust releases will be consulted to more definitively resolve this choice of law issue.

The plaintiff's grant to a settling defendant of a release normally precedes, and in fact, may trigger a nonsettling defendant's contribution claim. Nonetheless, the legal theories underlying releases on the one hand, and contribution on the other, are not identical. Contribution is founded in tort law. Releases are essentially

87. 234 F.2d at 617.
88. Corbett, supra note 27, at 123.
89. See id. at 123-24.
90. For other authorities to the contrary, see note 86 supra.
91. In addition to analogous areas of law in the antitrust context, it is useful to consider how federal courts have dealt with the contribution choice of law question in another area of exclusive federal court jurisdiction. The courts in El Camino Glass, Sabre Shipping, and Goldlawr relied upon Supreme Court maritime contribution cases in their selection of federal law to govern antitrust contribution issues. See El Camino Glass v. Sunglo Glass Co., [1977] 1 Trade Cas. ¶ 61,533, at 73,111; Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. at 1344; Goldlawr, Inc. v. Shubert, 376 F.2d at 616 n.3. In Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), the Supreme Court confronted the issue of whether a right to contribution exists between joint tortfeasors in a non-collision maritime injury case. Id. at 284. The Court denied Halcyon's request for contribution on the basis of federal common law, which did not provide such a right. Id. at 285-87. The Halcyon Court specifically noted that "Congress has already enacted much legislation in the area of maritime personal injuries." Id. at 285 (footnote omitted). As a result of the absence of legislation on the issue of contribution, the Court held that it would be inappropriate to fashion such a rule and that "the solution of this problem should await congressional action." Id. Although a later case held that Halcyon did not constitute an absolute bar against contribution in non-collision cases, that same case also reviewed the question as one governed by federal maritime law. See Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111-14 (1974). For a very good discussion of Halcyon and Cooper, see Note, supra note 6, at 87-92.

92. A release is a contractual settlement in which a claim asserted against a party is abandoned and extinguished. J. VAN KALINOWSKY, ANTITRUST LAWS AND TRADE REGULATIONS § 109.05 (1976). A covenant not to sue is a contract not to enforce an existing cause of action in exchange for some consideration. The claim is not relinquished; it is merely not enforced. W. PROSSER, supra note 15, §49, at 303. Thus, the granting of a covenant not to sue has no effect on tortfeasors who are not parties to it. ANTITRUST ADVISOR, supra note 3, §11.81, at 832. For a discussion of the effect of a release, see note 98 infra. However, the decision in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 322 (1971), made releases and covenants not to sue functionally equivalent. See notes 97-102 and accompanying text supra.

93. See ANTITRUST ADVISOR, supra note 3, §§11.74 & 11.81, at 825-26 & 831-32.
94. See W. PROSSER, supra note 15, §49, at 306.
contractual agreements.\textsuperscript{95} Contribution and releases are, however, analogous in the choice of law area since, like tort actions, contract suits have traditionally been governed by local law.\textsuperscript{96} In addition, the antitrust laws do not specifically govern either releases or contribution. Thus, a demonstration that federal law controls antitrust releases provides a persuasive argument for federal law to govern antitrust contribution issues.

In Zenith Radio Corp. v. Hazeltine Research, Inc.,\textsuperscript{97} the Supreme Court rejected the old common law rule that a release of one tortfeasor also releases all other joint tortfeasors,\textsuperscript{98} holding instead under federal law "a party releases only those other parties whom he intends to release."\textsuperscript{99} The Zenith Court based its conclusion that federal law controls issues concerning antitrust releases\textsuperscript{100} upon the

\textsuperscript{95} See note 92 supra.
\textsuperscript{96} See Restatement (Second) of Conflict of Laws § 188, at 575 (1971).
\textsuperscript{97} 401 U.S. 322 (1971).
\textsuperscript{99} 401 U.S. at 347.
\textsuperscript{100} Id. at 346-47. Since Zenith, federal courts have interpreted the effect of a release of one tortfeasor on the remaining joint tortfeasors in accordance with federal common law. See, e.g., Baughman v. Cooper-Jarrett, Inc., 391 F. Supp. 671 (W.D. Pa. 1975), vacated and remanded on other grounds, 530 F.2d 529 (3d Cir.), cert. denied, 429 U.S. 825 (1976); Wiederhold v. Elgin, J. & E. Ry., 368 F. Supp. 1054 (N.D. Ind. 1974). In Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3d Cir. 1975), however, the Third Circuit applied state law to resolve a dispute concerning the meaning of a general release in an antitrust suit. Id. at 892. Since the release in question was on its face applicable to all disputes between the parties, the court chose to apply state law because it would be anomalous to interpret the release according to federal common law in the antitrust action, when the same language would be interpreted according to state law in a tort action between the parties. Id. at 891. In choosing to apply state law, the court emphasized that a federal court could competently have applied federal common law to the question. Id. at 888-89. The court distinguished Zenith from the case before it on the ground that Zenith involved the effect of a release on tortfeasors who were not parties to it and who held multi-state residency, while Three Rivers raised a simple question of interpreting a contract in a dispute solely between parties to that contract. Id. at 888-92. The Three Rivers court also provided a caveat to its application of Pennsylvania law, stating, "A federal court would still be permitted . . . to reject the rule of a particular state whose doctrine . . . is not entirely consistent with federal antitrust objectives." Id. at 892. Thus, the Three Rivers decision
necessity of maintaining uniform rules in private antitrust litigation. Similarly, the effectuation of the antitrust laws demands that a uniform federal law govern antitrust contribution. Therefore, if antitrust releases, traditionally an aspect of state contract law, are subject to federal law, contribution in the antitrust area should also be governed by federal law.

III. SUBSTANTIVE CONTRIBUTION LAW

A. Sources of Federal Common Law

Assuming a court has concluded that federal law governs the resolution of antitrust contribution questions, it must then determine what the federal law is. A federal court may look to three sources to choose the appropriate substantive rule to govern antitrust contribution. First, a federal court may select the traditional federal common law rule which prohibits contribution. Second, a federal court may adopt the contribution law of the appropriate state, in does not undermine the contention that federal law governs antitrust contribution claims. Moreover, in Goldlawr, the Third Circuit recognized the applicability of federal law to contribution issues. See notes 62-66 and accompanying text supra. The Third Circuit did not discredit its Goldlawr dictum in Three Rivers.

101. 401 U.S. at 346-47. The Supreme Court in Zenith stated:

We must keep in mind the multistate and multiparty character of much private antitrust litigation; often, defendants who have conspired together may be sued in a number of different States if all are to be reached, and, while defendants in some States may be willing to enter into settlements, defendants in others may not. To adopt the ancient common-law rule would frustrate such partial settlements, and thereby promote litigation, . . . [and] create a trap for unwary plaintiffs' attorneys.

102. For a discussion of the important of a uniform interpretation and application of federal statutes, see notes 41-46 and accompanying text supra.

103. For articles discussing the competence of federal courts to apply varying substantive rules, see note 27 supra. The sources to which a federal court will look in fashioning a substantive rule will necessarily vary with the issue. See Hill, supra note 27, at 1080.

104. See notes 123-145 and accompanying text infra.


As to which state's law is appropriate, it should be noted that "where a federal interest underlies an application of state law, the selection of the appropriate state is a matter of federal choice of law." Federal Court Competence, supra note 27, at 1089. See also Note, Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases, 68 HARY. L. REV. 1212 (1955).
which case the state rule would operate not by its own force but by its adoption into federal law. 106 Third, a court may fashion a new federal common law rule 107 which would reflect state law trends, 108 or analogous federal statutory patterns. 109

The few antitrust contribution cases provide little guidance as to why the courts applied a particular rule and, thus, give little assurance of the direction they might later take. 110 Furthermore, the recent Eighth Circuit decision in Professional Beauty, which broke with the traditional federal rule, 111 has intensified the uncertainty. Consequently, in the future, a federal court confronted with the problem of determining the contribution rights of a nonsettling defendant 112 may wish to undertake a fresh analysis of the issue, and would profit...


107. For a comprehensive discussion of the competence of federal courts to fashion new common law rules, see Hill, supra note 27; Mishkin, supra note 27, at 810-34.

108. See Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. at 1343 n.1, 1346 (noting the trend in state law in favor of contribution).

109. For example, in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), the Supreme Court fashioned a new federal common law right to bring a wrongful death action, thereby replacing an old common law maritime rule to the contrary. Id. at 389-93. In reaching this decision, the Court relied substantially upon Congress' creation of wrongful death actions in other federally-regulated areas. Id.

110. See notes 127-206 and accompanying text infra.

111. See 594 F.2d at 1182-83, 1186; notes 146-83 and accompanying text infra.

112. When an antitrust defendant settles with fewer than all the defendants prior to trial, the question often arises as to whether the plaintiff may voluntarily dismiss the action as to the settling defendants. E. Timberlake, supra note 1, § 9.07, at 118. The nonsettling defendants usually object to the dismissal for fear of loss of right to contribution. Id. The nonsettling defendants, however, have generally been unsuccessful. Id.

Under rule 41(a) of the Federal Rules of Civil Procedure, a plaintiff may voluntarily dismiss an action in one of three ways. Fed. R. Civ. P. 41(a). First, a plaintiff has an absolute right to dismiss by filing notice of dismissal before the adverse party answers or moves for summary judgment. Id. at 41(a)(1)(i). Second, a plaintiff may dismiss by filing a stipulation signed by all parties who have appeared. Id. at 41(a)(1)(ii). Third, the court may order a dismissal at the plaintiff's insistence upon such terms and circumstances as it deems proper. Id. at 41(a)(2).

Since rule 41(a) does not specifically define dismissal of an "action," it is not clear from the rule whether an action may be dismissed as to fewer than all the defendants involved. In the antitrust area, it has been held that "action" under rule 41(a) can mean not only all claims asserted against all defendants, but also all claims asserted against any one defendant. Southern Elec. Generating Co. v. Allen Bradley Co., 30 F.R.D. 135, 136 (S.D.N.Y. 1962). Hence, a voluntary dismissal against fewer than all of the severally named defendants is proper if the court determines that such a dismissal would not violate any of the remaining defendants' legal rights. Id. See also Broadway, & Ninety-Sixth St. Realty Corp. v. Loew's Inc., 23 F.R.D. 9, 11 (S.D.N.Y. 1958); United States v. E.I. duPont de Nemours & Co., 13 F.R.D. 490, 494 (N.D. Ill. 1953). In Sabre Shipping, the court permitted the dismissal of fewer than all the defendants, stating that "even though the plaintiff had originally sued all defendants as joint tortfeasors, it had the absolute right to settle with some of them and covenant not to continue its suit against them, while reserving its right to continue against the non-settling defendants." Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. at 1346.
from an examination of the various substantive rules and their policy underpinnings.

The traditional federal common law rule prohibiting contribution, and the recently fashioned Professional Beauty rule permitting contribution, will be examined first. The next section analyzes the Uniform Contribution Among Tortfeasors Act of 1939 (1939 Act), which provides a right of contribution to nonsettling defendants. Then, the 1939 Act will be compared to the Uniform Contribution Among Tortfeasors Act of 1955 (1955 Act), the Uniform Comparative Fault Act of 1977, and the contribution law of New York — all of which exclude a right to contribution after settlement and release. The final section summarizes and evaluates the proposals concerning contribution and settlement in Senate Bill 1468, presently pending in Congress.

**B. Federal Common Law**

1. **Case Law Before Professional Beauty**

Under English common law, contribution was not permitted between intentional joint tortfeasors. American federal courts later extended this rule to encompass all tortfeasors, thereby obliterating the distinction between intentional and unintentional wrongdoers. In the antitrust contribution area, the courts in Olson...
Farms,\textsuperscript{124} El Camino Glass,\textsuperscript{125} and Goldlawr\textsuperscript{126} joined in Sabre Shipping's conclusion that there is "no reported case in which contribution was permitted under federal common law for intentional torts."\textsuperscript{127} Sabre Shipping and El Camino Glass are the only decisions presenting extensive discussions of a federal common law rule barring contribution.

The Sabre Shipping court relied upon decisions in analogous areas of securities and maritime law in denying the contribution claim.\textsuperscript{128} For example, the court discussed Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.,\textsuperscript{129} an admiralty case in which the Supreme Court refused to fashion a new rule of contribution.\textsuperscript{130} The Sabre Shipping court found this significant in light of the Halcyon Court's exercise of admiralty jurisdiction, an area where a court is relatively free to fashion new rules.\textsuperscript{131} The Sabre Shipping court also looked to securities law, noting that Congress' failure to provide for contribution in the antitrust statutes, when compared with the explicit statutory provisions for contribution in the securities area, manifests a Congressional intent to exclude a right of contribution in an antitrust suit.\textsuperscript{132}

The court next noted two policy considerations which justified the denial of the contribution claim.\textsuperscript{133} First, in the court's view, a contribution rule would discourage private actions,\textsuperscript{134} which have proven to be particularly important in deterring antitrust violations,\textsuperscript{135} since potential plaintiffs would fear losing control over their lawsuits with the introduction of third-party actions.\textsuperscript{136} Second, the

\begin{itemize}
\item \textsuperscript{124} [1977] 2 Trade Cas. ¶ 61,698, at 72,861.
\item \textsuperscript{125} [1977] 1 Trade Cas. ¶ 61,533, at 72,111-12.
\item \textsuperscript{126} 276 F.2d at 616.
\item \textsuperscript{127} Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. at 1343.
\item \textsuperscript{128} \textit{Id.} at 1344-46.
\item \textsuperscript{129} 342 U.S. 282 (1952). For a discussion of Halcyon in the choice of law context, see note 91 supra.
\item \textsuperscript{130} 342 U.S. at 285.
\item \textsuperscript{131} 298 F. Supp. at 1344.
\item \textsuperscript{132} 298 F. Supp. at 1345. For a discussion of contribution in the securities area, see note 34 supra.
\item \textsuperscript{133} 298 F. Supp. at 1346.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} See note 4 and accompanying text supra.
\item \textsuperscript{136} \textit{Id.} The court stated that
\begin{quote}
[i]f one or two defendants sued by a plaintiff . . . could turn around and implead all other persons directly and indirectly involved in the alleged conspiracy, it could well spell death to the plaintiff's suit and thus thwart the statutory purpose. Plaintiff's choice to sue those of the defendants it considers most culpable or most capable of making him whole would be totally nullified, and control of his action would be taken out of his hands.
\end{quote}
\item \textsuperscript{137} \textit{Id.}
court showed great concern that contribution would discourage settlement. The court reasoned that if a settling defendant would remain liable to nonsettling defendants for contribution, settlement would lose that characteristic most meaningful to settlors: final and complete termination of their involvement in the case.

*El Camino Glass* adhered to *Sabre Shipping*’s no-contribution rule. Although noting that “considerations of equity and fairness . . . underly the modern trend towards permitting contribution in cases of unintentional torts,” and that a court could create a rule protecting both settling and nonsettling defendants, the *El Camino Glass* court, nonetheless, denied the contribution claim. The court explained that contribution was undesirable in the antitrust area for two reasons: first, it would interfere with a plaintiff’s ability to control the litigation by choosing who should be joined as parties; and second, a right to contribution would decrease the deterrent effect of the private treble damage action since a prospective violator would not risk liability for more than his share of the total damages.

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137. Id.
138. Id.
139. [1977] 1 Trade Cas. ¶ 61,533, at 72,112. The third-party plaintiff claimed that its joint tortfeasors were liable for contribution for *unintentional* violations of the antitrust laws, presumably to avoid the traditional common law rule barring contribution among intentional tortfeasors. *Id.* For a discussion of the federal no-contribution rule, see notes 122-206 and accompanying text. The court, however, found intent irrelevant in its contribution discussion. [1977] 1 Trade Cas. ¶ 61,533, at 72,112. The reasoning in *El Camino Glass* is therefore applicable to the discussion of the contribution rights of settling intentional tortfeasors. See *id.* at 72,111 n.2.

140. *Id.*
141. *Id.* In support of this proposition, the court referred to the case of *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968). [1977] 1 Trade Cas. ¶ 61,533, at 72,112. *Gomes*, a negligence action, held that a covenant not to sue given by the plaintiff to a settling defendant barred an action for contribution against that settling defendant by a nonsettling codefendant in order to encourage settlement. 394 F.2d at 467-68. The court posited that if contribution were to be permitted in such a situation, “[n]ot only would a joint tortfeasor defendant be stripped of an incentive to settle but he would have a positive incentive to stand trial and actively participate in his defense in order to minimize his liability.” *Id.* at 468. In determining the amount owed the plaintiff by the nonsettling defendant, *Gomes* rejected both the rule which subtracts the settlement amount from the verdict, and the pro rata reduction rule based on the number of tortfeasors. *Id.* See note 183 infra. Instead, to protect the nonsettling defendant, the court applied a rule of “comparative negligence” or equitable apportionment. *Id.* at 468-69.

142. [1977] 1 Trade Cas. ¶ 61,533, at 72,112.
143. *Id.* Thus, a plaintiff’s suit might be prolonged by defendant’s motions to implead others for contribution, as well as by the presentation of evidence solely related to that claim. A possible response to this reasoning is that rule 42(b) of the Federal Rules of Civil Procedure permits a court to order a separate trial of a third-party claim when it would avoid prejudice or further the interests of convenience or economy. See *Fed. R. Civ. P.* 42(b). Nevertheless, the existence of this discretionary power did not impress the *El Camino Glass* court as sufficient protection for antitrust plaintiffs, for the court stated: “Severance of the third party complaint is an uncertain and inadequate remedy.” [1977] 1 Trade Cas. ¶ 61,533, at 72,112.
Thus, the court held that no right to contribution should be permitted in private antitrust actions.

2. The Professional Beauty Decision

Professional Beauty fashioned new law in rejecting the traditional federal common law rule prohibiting contribution, and held "that sound policy reasons dictate . . . that under certain circumstances an antitrust defendant may be entitled to pro rata contribution from other joint tortfeasors." The Professional Beauty court granted the third-party contribution claim, feeling free to make a new rule notwithstanding the uniform prior decisions upholding the traditional common law. The court first discussed and distinguished prior cases, and then disposed of five arguments supporting a no-contribution rule. A review and analysis of how the court handled each of these arguments follows.

First, Judge Stephenson dismissed the argument that congressional inaction in the antitrust contribution area implied that Congress intended there should be no right to contribution. The court weakly suggested that the antitrust statutes did not purport to be comprehensive and that the dearth of case law on antitrust contribution had been unlikely to spur congressional action. The dissent, however, joined El Camino Glass and Sabre Shipping, finding legislative silence particularly significant in view of ample statutory precedent in other federal law areas.

144. [1977] 1 Trade Cas. ¶ 61,533, at 72,112.
145. Id.
146. 594 F.2d at 1182 (footnotes omitted).
147. Id. at 1182-83. Recognizing that Sabre Shipping was the lead case against contribution, the court focused most of its criticism upon it. Id. at 1183. The Professional Beauty court criticized what it felt to be Sabre Shipping's misplaced reliance on Halcyon, arguing that since Cooper Stevedoring Co. v. Kopke, Inc., 417 U.S. 106 (1974), overturned Halcyon and granted a right to contribution, this indicates that "under certain circumstances the Supreme Court is willing to fashion a rule allowing contribution without express direction from Congress." Id. Such reasoning is, however, imprecise because it overlooks the following crucial factors: 1) courts have greater freedom to fashion new law in the maritime area than in the antitrust area; 2) Sabre Shipping looked to Halcyon for at most analogous law; and 3) Sabre Shipping's holding was otherwise supported with cases and policy. See notes 29-31 and accompanying text supra; note 91 supra.
148. 594 F.2d at 1183-85.
149. Id. at 1183-84.
150. Id.
151. See notes 139-44 and accompanying text supra.
152. See notes 128-38 and accompanying text supra. The Sabre Shipping court stated: "Congress, aware of the rule against contribution, saw fit to provide for it explicitly in the securities statutes but not in the enforcement of antitrust laws which dominate so much of our litigation, and . . . no such right should be implied." 298 F. Supp. at 1345.
153. 594 F.2d at 1190 (Hanson, J., dissenting).
Second, the majority recognized that third-party litigation could destroy the plaintiff's control over his lawsuit,154 and inhibit future private attorney general actions.155 The court quickly passed over this fear, however, in light of the fact that Professional, the plaintiff, did not object to the third-party suit.156 The Professional Beauty court failed to fully appreciate that the addition of new parties not only fundamentally alters the nature of an action, but also increases the cost of the suit and complicates the issues. The majority felt that the problem could be ameliorated by the district court's power of severance,157 an alternative not appealing to a plaintiff wary of relying upon a court's discretionary protective instincts.158

Third, with alarming brevity, the Professional Beauty court stated that contribution would not undermine the antitrust and judicial policy encouraging settlement.159 The court appears to have ignored the probability that a joint tortfeasor would refuse to settle if any benefit derived could be obliterated by its being forced to contribute to an enormous verdict. Particularly in the case of small defendants which are relatively powerless to negotiate favorable settlements, the right to contribution would encourage such defendants to litigate the case, and then seek contribution from codefendants if unsuccessful.160

The court's scanty analysis of the settlement issue is problematic since the case did not involve settling tortfeasors. The court recognized that the settling tortfeasor presents unique questions.161

154. Id. at 1184.
155. Id. The dissent agreed, stating:

To a substantial extent, the enforcement of antitrust policy depends on the attractiveness of litigation to private attorneys general. . . . Before formulating a rule which permits additional parties and issues to be joined in an antitrust case, we should be sure that we do not thereby counterbalance the motivation to sue provided by the treble damage award.

Id. at 1190 (Hanson, J., dissenting) (citations omitted).
156. Id. at 1184.
157. Id.
158. For a similar observation by the El Camino Glass court, see note 143 supra.
159. 594 F.2d at 1184.
160. Contribution—Fairness or Folly in Antitrust Litigation, 917 ANTITRUST & TRADE REG. REP. (BNA) at B-1 to -6 (June 7, 1979).
161. 594 F.2d at 1184. The court briefly acknowledged the settlement problem when it stated: "The problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case. However, in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants." Id., citing Gomes v. Brodurst, 394 F.2d 465, 468-70 (3d Cir. 1968) (other citations omitted). For a discussion of Gomes, see note 141 supra.
Nevertheless, in endorsing contribution, the court did not notice its detrimental effect on the settlement initiative.\textsuperscript{162} The majority failed to perceive what most state statutory drafters\textsuperscript{163} and subsequent courts\textsuperscript{164} have found: that the best incentive for settlement and the most protection for the settling defendant is the no-contribution rule.

Fourth, the court gave no credence to the fact that the addition of new parties through contribution claims could create unmanageable administrative difficulties not avoidable by severence.\textsuperscript{165} The dissent in \textit{Professional Beauty}, on the other hand, noted “the potential for confusion, delay and complexity” resulting from contribution.\textsuperscript{166} Recently, in \textit{Illinois Brick Co. v. Illinois},\textsuperscript{167} the Supreme Court echoed this concern for the growing complexity of issues in private antitrust litigation, the effect of which “could seriously impair this important weapon of antitrust enforcement.”\textsuperscript{168}

Lastly, the \textit{Professional Beauty} court addressed the contention that a no-contribution rule increases the deterrent effect of the antitrust laws by denying defendants the power to redistribute the cost of an antitrust violation.\textsuperscript{169} Noting that the deterrence argument “cuts both ways,”\textsuperscript{170} the majority argued that without contribution an economically powerful defendant may convince a plaintiff not to sue it.\textsuperscript{171} The plaintiff may not be so persuaded, the court explained, if the defendant could redistribute its liability through contribution.\textsuperscript{172} Therefore, according to the majority, contribution would deter antitrust violators by foreclosing an escape from liability.\textsuperscript{173} The court

\begin{itemize}
  \item \textsuperscript{162} 594 F.2d at 1184.
  \item \textsuperscript{163} For examples of this choice by state law drafters, see notes 219-34 & 252 and accompanying text \textit{infra}. But see also text accompanying notes 217-18 \textit{infra}.
  \item \textsuperscript{164} See cases discussed notes 184-206 \textit{infra}.
  \item \textsuperscript{165} 594 F.2d at 1184-85.
  \item \textsuperscript{166} \textit{Id.} at 1189-90 (Hanson, J., dissenting). One commentator, agreeing with the dissent and noting that it was written by a senior district court judge sitting by designation, opined that Judge Hanson’s strong objection to contribution may result from his closer knowledge of the complications of trial court management than the “insulated” court of appeals judges. Brown, \textit{Franchising—Contribution Among Joint Tortfeasors}, N.Y.L.J., July 10, 1979, at I, col. 1.
  \item \textsuperscript{167} 431 U.S. 720 (1977).
  \item \textsuperscript{168} \textit{Id.} at 745.
  \item \textsuperscript{169} 594 F.2d at 1185.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Id.}
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} \textit{Id.} The court founded its argument on National’s claims in its depositions that Professional was persuaded not to name La Maur as a defendant because La Maur renewed Professional’s franchise. \textit{Id.} For a discussion of a later case which distinguished \textit{Professional Beauty} on the basis of, among other reasons, this deterrence theory, see note 190 and accompanying text \textit{infra}.
\end{itemize}
conceded, however, that a defendant's fear that he has no recourse against codefendants may provide some deterrent to violators and, at the same time, encourage settlement. 174

The *Professional Beauty* opinion sought to achieve "fairness between the parties" and "justice," which ends it felt are not served when one tortfeasor is permitted to shoulder more than its fair share of responsibility "because of the plaintiff's whim or spite, or his collusion with the other wrongdoer." 175 Fairness to the nonsettling defendant and the avoidance of collusion should not, however, have blinded the court to its duty to redress the antitrust violation. 176 The majority may have understandably believed that contribution would create a spirit of cooperation among defendants intending to settle in private antitrust suits. Yet, once a defendant feels that settlement by codefendants will not expose it to the bulk of the damage award (as a result of redistribution of liability through contribution), it will no longer be inclined to settle. The *Professional Beauty* dissent expresses the view of this author, that the majority opinion presents "no compelling reason to allow contribution in antitrust causes . . . ." 177

A particularly troubling aspect of the *Professional Beauty* opinion is the court's adoption of a pro rata measure of contribution, whereby liability is determined by dividing the total judgment award by the number of joint tortfeasors. 178 Beyond *Professional Beauty*, and regardless of the contribution rule adopted by a court, the problem of measuring liability is especially acute since the exposure of the nonsettling defendant will be the measure of the settlor's share of liability deducted from the plaintiff's total damages. The *Professional Beauty* court selected the pro rata measure "[b]ecause of the administrative difficulties of assessing exact percentages of fault in complicated antitrust actions . . . except in unusual circumstances." 179 The court's

174. 594 F.2d at 1185.
175. Id. at 1185-86 (citations omitted).
176. In addition, the court's reliance on the state trend towards allowing contribution was inaccurate. Id. at 1184 n.7. Only the ten states which have adopted the 1939 Act permit contribution among intentional tortfeasors following settlement and release. See notes 211-16 and accompanying text infra.
177. 594 F.2d at 1188 (Hanson, J., dissenting). See also Axinn, *Antitrust and Trade Practice—Right of Contribution for Antitrust Defendants*, N.Y.L.J., March 20, 1979, at 1, col. 1.
178. 594 F.2d at 1182 & n.4. For a general discussion of the policy rationales relating to contribution, see Corbett, note 27 supra; Note, *Contribution and Indemnity Among Tortfeasors*, 31 MONT. L. REV. 69, 77 (1969); Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486 (1966) [hereinafter cited as *Joint Tort Cases*].
179. 594 F.2d at 1182 n.4.
choice of such a simplistic measure appears ironic in light of its rejection of administrative difficulties as a rationale for objecting to contribution. 180 In fact, the court’s major reasons for supporting contribution—fairness and equity—argue against the pro rata measure. Surely a court which believes it can fashion a rule to protect settling tortfeasors should also have confidence in its ability to overcome the difficulties of finding a more equitable means to assess culpability.

A more equitable method of computing liability is on the basis of comparative fault, whereby the court determines each tortfeasor’s percentage of culpability. Although this measure is inherently fair, especially where the damage award bears no relationship to the benefits received by the defendants, 181 it too does not escape criticism. A settling tortfeasor who wishes to extricate himself from the suit must remain nominally in the case (bearing the court costs and legal fees) for purposes of apportionment.

Neither the comparative fault nor the pro rata measure will satisfactorily apply to every antitrust case, 182 and no court has, as yet, provided a convincing argument to support a consistent choice in all situations. Thus, if contribution were to be permitted—or, in any event, when measuring the nonsettlor’s liability exposure under a no-contribution rule—it appears that the fairest method would be to permit the court to determine the proper measure on a case by case basis, in light of the complexities and equities of each case. 183

180. See text accompanying note 165 supra.


182. Id. at 15-16.

183. In the settlement situation, no general rule has as yet emerged to determine the amount of the total damage judgment to be assessed against the nonsettling defendants. The traditional rule is to subtract the amount paid by the settling defendants from the trebled damages. See Flintkote Co. v. Lysfold, 246 F.2d 368, 398 (9th Cir.), cert. denied, 355 U.S. 835 (1957); note 16 supra. Another possibility is to deduct the equitably apportioned share of the settling defendant based on comparative fault. Still another is to subtract the settlor’s pro rata share. Finally, a fourth procedure would be to deduct from the damage award the greatest of the first three measures. The fourth manner provides some protection for the nonsettling defendants. However, it may also cause plaintiffs to be reluctant to settle for fear of relinquishing an unknown and major part of the award for a relatively small settlement sum. See Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1968); note 141 supra. The first measure provides the greatest overall recovery for the plaintiff. The third suffers from the unfairness inherent in simplistic numerical adjustments. The method based on comparative fault appears most equitable to this author. See Gomes v. Brodhurst, 394 F.2d at 468-69. For a discussion of the measure of liability in the post-Professional Beauty cases, see note 195 and accompanying text infra. For a discussion of this liability analysis under state statutes, see notes 237-38 and accompanying text infra. See also 1979 Hearings, supra note 181, at 16-20.
3. Case Law After Professional Beauty

The Professional Beauty decision has spurred considerable controversy within the antitrust bar; the contribution issue promises to monopolize the thoughts and practices of counsel, judges, and legislators. Three recent district court opinions indicate that, at least in cases involving settling tortfeasors, Professional Beauty will not be followed. These decisions have unequivocally held that a nonsettling tortfeasor has no right to contribution from a settling codefendant.

In In re Ampicillin Antitrust Litigation, the United States District Court for the District of Columbia denied the motions of a nonsettling defendant (Bristol) to assert cross-claims for contribution against a settling codefendant (Beecham). The court believed that contribution would undermine Beecham’s incentive to settle, since Beecham was motivated to settle by a desire to “end its participation in this litigation.” The court was also concerned that contribution would undermine the public interest in deterring antitrust violations. Professional Beauty was limited, in the court’s view, to “circumstances in which contribution might further rather than hamper the deterrent purposes of the antitrust laws,” and to situations where the plaintiff did not object to the nonsettling defendant’s attempt to recover from its co-conspirator. In addition, while the Professional Beauty court observed that a no-contribution rule would permit a powerful tortfeasor to escape liability by “exercising ‘sufficient economic influence to prevent a plaintiff from including it as a defendant,’” in the instant case, Beecham would not avoid liability since the settlement was negotiated in good faith and was beneficial to the plaintiffs as well as to Beecham. Furthermore, the plaintiffs had joined Beecham in opposing Bristol’s contribution motion.

184. 917 ANTITRUST & TRADE REG. REP. (BNA) at E-1 (D.D.C. May 21, 1979). The plaintiffs charged that Bristol and Beecham conspired to monopolize and restrict trade in ampicillin and other semisynthetic penicillins,” in violation of §§ 1 and 2 of the Sherman Act. Id.
185. Id.
186. Id. at E-1 to -2. The court stated:

> With these cross-claims pending against it, Beecham would have reason to participate fully in the defense of the case, in order to reduce any primary liability to the plaintiffs. Therefore, to grant the current motion to amend would cause Beecham and the plaintiffs to lose the benefit of their settlement bargain.

187. Id. at E-2.
188. Id.
189. Id.
191. 917 ANTITRUST & TRADE REG. REP. (BNA) at E-2.
192. Id. The Ampicillin court also considered the untimeliness of Bristol’s motion to be an important factor, noting that Bristol waited almost nine years from the commencement of the...
Finally, the court denied Bristol's motion to amend its answer insofar as it attempted to assert a new affirmative defense which would reduce Bristol's liability due to Beecham's settlement payment. Bristol apparently sought a reduction of its total exposure, as a result of Beecham's settlement, in excess of the usual amount derived by subtracting the settlement sum from the full amount of the treble damages. The court stated that it had the power to make any size reduction without an amended pleading, but it did not indicate whether it would impose a rule other than the usual subtraction of the settlement sum from the full amount of treble damages.

In In re Corrugated Container Antitrust Litigation, the United States District Court for the Southern District of Texas similarly denied motions by nonsettling defendants to assert cross-claims for contribution against settling joint tortfeasors for three reasons. First, the court posited that allowing contribution would make “settlements impossible to achieve,” giving defendants “little incentive to buy peace from plaintiffs if they may be obligated to litigate the same claims against other defendants.” Second, the court felt that contribution would exacerbate the “already notorious complexity and unmanageability of antitrust cases,” since severance would only cause wasted time in duplicative efforts without lessening administrative difficulties. Third, the court noted that a contribution rule would deter private plaintiffs from exercising their enforcement role as private attorneys general. The Corrugated Containers court denied the contribution motions, in view of the deterrent policies of litigation to assert its cross-claims. Id. at E-1. The court found this delay inexcusable since no new facts had recently been discovered which were not previously available in Bristol. Id. Id. at E-2.

193. Id. at E-2.

194. Id. For a discussion of this traditional formula for establishing a nonsettling defendant's liability exposure, see notes 16, 181-83 and accompanying text supra.

195. 917 ANTITRUST & TRADE REG. REP. (BNA) at E-2. The amount by which the nonsettling defendants' liability should be reduced following a settlement by a joint tortfeasor remains unclear and will surely become an important part of the contribution debate. For a discussion of various measures used in computing this reduction, see notes 69, 70 & 83 and accompanying text supra, and 1979 Hearings, supra note 181, at 16-20.


197. Id. at 77,879.

198. Id.

199. Id. The court summarized: "It seems . . . that a policy of allowing contributions would complicate litigation procedurally, frustrate settlements, and inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage." Id.

200. Id.

201. Id. at 77,880.
the antitrust laws,\textsuperscript{202} and noted that contribution has been considered particularly unsuitable in the context of intentional torts.\textsuperscript{203}

Most recently, in\textit{Hedges Enterprises v. Continental Group, Inc.},\textsuperscript{204} the United States District Court for the Eastern District of Pennsylvania denied a nonsettling tortfeasor's motion to amend its answer to assert a cross-claim for contribution against settling codefendants in a price-fixing case.\textsuperscript{205} The court maintained, \textit{inter alia}, that it "would be futile to allow an amendment because there is no right to contribution as against settling codefendants in antitrust litigation."\textsuperscript{206}

\section*{C. State Law Models}

In contrast with traditional federal common law,\textsuperscript{207} many states permit contribution in some form. Some states allow it only among unintentional tortfeasors.\textsuperscript{208} Others require a joint judgment against all defendants before a claim for contribution can accrue.\textsuperscript{209} Nearly every state, in some way, protects from contribution the settling defendant who has been released by the plaintiff.\textsuperscript{210}

\begin{footnotes}
\item[202.] For lists of jurisdictions which permit contribution among intentional tortfeasors and those which do not, see notes 208 & 211 infra.
\item[203.] [1979] 5 TRADE REG. REP. (CCH) ([1979] 1 Trade Cas.) ¶ 62,689, at 77,880. The court noted that jurisdictions allowing contribution usually restrict such recovery to unintentional violators. \textit{Id}.
\item[205.] \textit{Id}.
\item[206.] \textit{Id}. The \textit{Hedges} court also denied the motion on the grounds that it was untimely since the nonsettling defendants moved to amend two and one-half years after the case began and two months after the last of its codefendants had settled. \textit{Id}. For the \textit{Ampicillin} court's similar discussion of the untimeliness of the motion, see note 192 supra.
\item[207.] See notes 123-27 and accompanying text supra.
\item[208.] This more traditional position is held by those states which have enacted the 1955 version of the Uniform Contribution Among Joint Tortfeasors Act. They are: Alaska, A\textsc{laska} Stat. \textsection{}s 09.16.010-060 (1973); Colorado, C\textsc{olo.} Rev. Stat. \textsection{}s 13-50.5-101 to -106 (Supp. 1978); Florida, F\textsc{la.} Stat. Ann. \textsection{} 768.31 (West Supp. 1978); Massachusetts, M\textsc{ass.} Gen. Laws Ann. ch. 231B, \textsection{}s 1-4 (West Supp. 1979); Nevada, N\textsc{ev.} Rev. Stat. \textsection{}s 17.210-300 (1971); North Carolina, N.C. Gen. Stat. \textsection{}s 1B-1 to -6 (1969); North Dakota, N.D. Cent. Code \textsection{}s 32-38-01 to -04 (1976); Tennessee, T\textsc{enn.} Code Ann. \textsection{}s 23-3101 to -3106 (Supp. 1978); and Wyoming, W\textsc{yo.} Stat. \textsection{}s 1-1-110 to -113 (1977). For a discussion of the 1955 Act, see notes 219-34 and accompanying text infra.
\item[209.] See, e.g., C\textsc{al.} Civ. Proc. Code \textsection{} 875 (West 1958); M\textsc{ich.} Comp. Laws Ann. \textsection{} 600.2925 (1968); M\textsc{o.} Ann. Stat. \textsection{} 537.060 (Vernon 1953); O\textsc{kla.} Stat. Ann. tit. 12, \textsection{} 831 (West 1960); T\textsc{ex.} Rev. Civ. Stat. Ann. art. 2212 (Vernon 1971); W\textsc{va.} Code \textsection{} 55-7-13 (1966).
\item[210.] See notes 225-31 & 256-61 and accompanying text infra. The exceptions are the states which permit contribution among intentional tortfeasors even after a settlement and release—that is, those following the 1939 Act. See note 211 infra.
\end{footnotes}
1. The Uniform Contribution Among Tortfeasors Act of 1939

The 1939 Act, which is substantially followed in ten states, does not follow the traditional federal common law; rather, it provides a right to contribution without distinguishing between intentional and unintentional tortfeasors. The policy justifications for allowing contribution among intentional tortfeasors were summarized by the Supreme Court of New Jersey in a fraud action, Judson v. Peoples Bank & Trust Co.: "[I]f each intentional wrongdoer knew that his conduct was exposing him to the risk of the certainty of liability in some amount, the desired deterrent effect would be produced more surely than if contribution among the wrongdoers is denied." The court concluded that the framers of the New Jersey contribution statute, in adopting in substantial part the 1939 Act, "embraced the creation of a right of contribution without regard to whether the tort from which the liability arose was intentionally or unintentionally inflicted."

Another major feature of the 1939 Act involves the effect of releases. Section 5 provides that

[a] release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has ac-
crude, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors. 217

Section 5 was intended to prevent collusion between the plaintiff and the released tortfeasor by refusing to permit the plaintiff "to release one tortfeasor from his fair share of liability and mulct another instead, from motives of sympathy or spite, or because it might be easier to collect from one than from the other . . . ." 218 Thus, section 5 does not permit a plaintiff to use a release to discriminate among joint tortfeasors.

In the antitrust context, since the 1939 Act permits contribution among intentional tortfeasors, a federal court following the law of Professional Beauty might logically look to the 1939 Act as a rationale for permitting contribution to a nonsettling defendant. However, the handling of the settlement issue in the 1939 Act has been criticized and modified by its authors and state legislatures in the 1955 Act.

2. The Uniform Contribution Among Tortfeasors Act of 1955

The 1955 Act, which has been adopted in nine states, 219 modified the 1939 Act by establishing a right to contribution for unintentional tortfeasors only. 220 Section 1 of the 1955 Act limits contribution to unintentional tortfeasors on a pro rata basis, 221 premised on the theory that most "tort liability results from inadvertently caused

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217. Uniform Contribution Among Tortfeasors Act § 5 (1939 version), reprinted in 12 Uniform Laws Ann. 58. Section 5 contains a pro rata rule under which liability is calculated by dividing the total judgment by the number of tortfeasors. Id.


219. See note 208 supra.

220. Uniform Contribution Among Tortfeasors Act § 1(c) (1955 rev. version), reprinted in 12 Uniform Laws Ann. 63. Section 1(c) provides: "There is no right of contribution in favor of any tortfeasor who has intentionally [willfully or wantonly] caused or contributed to the injury . . . ." Id.

221. Id. § 1, reprinted in 12 Uniform Laws Ann. 63-64. Section 1 provides in pertinent part:

(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property . . . . there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

damage” rather than deliberate wrongdoing. 222 It was intended to be an equitable rule to prevent one joint tortfeasor from paying more than his just share of the underlying claim. 223 Section 1 thus denies contribution to willful, intentional tortfeasors because “they are wrongdoers and hence not deserving of the aid of courts in achieving equal or proportionate distribution of the common burden.” 224

Section 4 also changed the 1939 Act by providing that a tortfeasor who has received a release or a covenant not to sue is discharged from liability for contribution. 225 Section 4 provides in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . .

... [i]t discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor. 226

Section 4 reflects the drafters’ intent to encourage settlement by exempting the settling defendant from liability for contribution, even at the risk of possible collusion between the plaintiff and the settlor against the nonsettling defendant. 227 Dissatisfaction with section 5 of the 1939 Act 228 proved to be the chief impetus towards this revision in the 1955 Act. 229 The 1939 Act effectively discouraged settlements by making it impossible for one tortfeasor to extricate himself from an action. 230 Apparently, the drafters of the 1955 Act considered the 1939 Act’s inhibition of settlements to be a greater evil than collusion between plaintiffs and settling defendants. 231 Moreover, the collusion problem is handled perfunctorily in section 4 by the imposition of a good faith requirement. 232

The 1955 Act has never been applied to resolve antitrust contribution issues. If, however, the law of a state which has adopted the

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222. Id., Commissioners’ Prefatory Note, reprinted in 12 UNIFORM LAWS ANN. 60 (1975).
223. Id.
224. Id. § 1(c), Commissioners’ Comment, reprinted in 12 UNIFORM LAWS ANN. 65 (1975).
225. Id. § 4(b), reprinted in 12 UNIFORM LAWS ANN. 98 (1975).
226. Id. § 4, reprinted in 12 UNIFORM LAWS ANN. 98 (1975).
227. Id. § 4(b), Commissioners’ Comment, reprinted in 12 UNIFORM LAWS ANN. 99 (1975).
228. For the text of this section, see text accompanying note 217 supra.
230. Id.
231. See id.
1955 Act were to be applied in an antitrust action, the settling defendant would probably not be liable for contribution to the nonsettling defendant for two reasons. First, since section 1 permits contribution only among unintentional tortfeasors, it would not apply to most antitrust co-conspirators. Second, under section 4, the settling defendant would not be liable for contribution to the nonsettling defendant if the contribution question arose after a covenant not to sue or a release had been granted.

3. The Uniform Comparative Fault Act and New York Law

The Uniform Comparative Fault Act was promulgated in 1977 as an alternative rather than a substitute to the 1955 Act; the 1955 Act was retained for use by states not adopting the comparative fault principle. The Uniform Comparative Fault Act is, however, intended to supersede the 1955 Act in other jurisdictions. Both the 1939 Act and the 1955 Act provide for pro rata contribution, which is inappropriate in a state which apportions liability by comparative fault. The Uniform Comparative Fault Act imposes liability on the basis of the proportionate fault of the parties involved. Although no state has as yet adopted the Uniform Comparative Fault Act, on September 1, 1974, New York enacted a new contribution statutory scheme which embodies its important features. The New York law will now be discussed to illustrate the probable impact of the Uniform Comparative Fault Act.

Under early New York law, a right of contribution could arise between joint tortfeasors only when the plaintiff made them parties to the suit and recovered a joint judgment against them. A defend-
ant could not compel a plaintiff to make a joint tortfeasor a party to the action. The plaintiff, thus, had full control over the action; if he elected not to sue one of the wrongdoers, there could be no joint judgment, and therefore no contribution claim could be asserted. Furthermore, if a defendant claimed contribution, liability would be determined on a pro rata basis.

The New York contribution rules were altered in 1972 by the New York Court of Appeals decision in Dole v. Dow Chemical Co. Dole permitted a defendant to claim contribution against a joint tortfeasor not joined in the original action, following an adjudication of its responsibility for damage. The court held that the apportionment of liability among joint tortfeasors should be based on their comparative degrees of culpability.

In reaction to Dole, New York enacted its current contribution statute which codifies, transforms, and clarifies Dole. Section 1401 of the New York Civil Practice Law (CPLR) eliminates the joint judgment rule and makes contribution among joint tortfeasors available regardless of intent:

Except as provided in section 15-108 of the general obligation law, two or more persons who are subject to liability for damages for the same injury may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom a contribution is sought.

242. See cases cited note 241 supra.
243. See cases cited note 241 supra.
246. 30 N.Y.2d at 149-50, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.
247. Id. A defendant may make his claim for contribution against a cotortfeasor not joined by the plaintiff in one of two ways: 1) he may seek to implead the cotortfeasor as a third-party defendant to the plaintiff’s action; or 2) he may wait until a judgment is entered against him and thereafter file an independent suit for contribution against the cotortfeasor. See id. See also N.Y. Civ. Prac. Law § 1403 (McKinney 1976).
248. Id. The Dole method of apportionment on a comparative basis is considered more equitable than a pro rata rule. See generally Joint Tort Cases, supra note 178.
250. Id. § 1401.
251. Id. For the exception created by § 15-108 of the New York General Obligations Law, see notes 256-61 and accompanying text infra. Section 4 of the Uniform Comparative Fault Act is similar to § 1401 of the CPLR. Section 4 provides:
In discarding the joint judgment rule, the drafters thereby rejected the common law assumption underlying the no-contribution rule “that potential tortfeasors would be less inclined to commit torts if they knew that they would have to pay the entire judgment without contribution from their cotortfeasors.” Since section 1401 does not distinguish between intentional and unintentional wrongdoers, the statute, like the 1939 Act, does not bar contribution among intentional tortfeasors. Thus, New York law seems to provide a statutory scheme adaptable to antitrust violations which have been characterized as intentional torts.

Section 15-108 of the New York General Obligations Law creates an exception to the contribution rule of section 1401 of the CPLR to encourage settlements that would otherwise be inhibited by the contribution rule. Section 15-108 provides that “[a] release given in good faith by the injured person to one tortfeasor relieves him from liability to any other person for contribution . . . .” Without section 15-108, a settling tortfeasor who has been released

[A] right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury . . . whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation . . . .


254. See N.Y. Civ. Prac. Law § 1401, Practice Commentary C1401:3 (McKinney 1976). See also Primoff v. Duell, 85 Misc. 2d 1047, 1051, 381 N.Y.S.2d 947, 950 (1976) (applying § 1401 to a fraud claim). By contrast, the Uniform Comparative Fault Act was specifically not intended to apply to intentional torts. Uniform Comparative Fault Act § 1, Commissioners' Comment, reprinted in 12 Uniform Laws Ann. 28 (Supp. 1979). Nevertheless, the drafters of the Uniform Comparative Fault Act noted that nothing in the Act precludes “a court [from] determining that the [comparative fault] principle should apply at common law to a case before it of an intentional tort . . . .” Id.

255. See note 6 and accompanying text supra.


258. N.Y. Gen. Oblig. Law § 15-108(b) (McKinney 1978). The good faith requirement is also present in the 1955 Act. See text accompanying notes 226 & 232 supra. It attempts to ensure that the plaintiff will not release one tortfeasor “for a small sum in return for the promise of the released tort-feasor to improperly cooperate with the injured party in an attempt to extract from the other tort-feasors more than their equitable share of damages.” J. Weinstein, H. Korn & A. Miller, 2A N.Y. Civil Practice § 1401.21, at 14-72 (1978).

Section 6 of the Uniform Comparative Fault Act is similar to § 15-108. Section 6 provides in pertinent part that “[a] release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does
could nonetheless be held liable for contribution. Under section 15-108, however, a tortfeasor who settles with the plaintiff cannot be adjudicated liable to the plaintiff or another tortfeasor on the original claim; any verdict rendered for the plaintiff against a second tortfeasor does not affect the settling tortfeasor. He, so to speak, has "bought his peace." This section is similar to the 1955 Act, which permits the plaintiff's release to discharge the settling tortfeasor's liability for contribution.

Section 1402 of the CPLR codifies the Dole apportionment rule as follows:

The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.

Section 1402 is similar to section 6 of the Uniform Comparative Fault Act. The comment to section 6 provides an example comparing its apportionment rule with the pro rata settlement rules of the 1939 Act and 1955 Act. Where tortfeasors A and B seek contribution from tortfeasor C, who has settled and obtained a release or a covenant not to sue from the injured party, there are three possible results:

(1) A and B are still able to obtain contribution against C, despite the release; (2) A and B are not entitled to contribution unless the release was given not in good faith but by way of collusion, and (3) the plaintiff's total claim is reduced by the proportionate share of C. Each of the three solutions has substantial disadvantages, yet each has been adopted in one of [sic] uniform acts. The first solution was adopted by the 1939 Uniform Contribution Act. Its disadvantage is that it discourages settlements; a tortfeasor has no

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not discharge any other persons liable upon the same claim unless it so provides." UNIFORM COMPARATIVE FAULT ACT § 6, reprinted in 12 UNIFORM LAWS ANN. 34 (Supp. 1979).

259. See Impact, supra note 245, at 464.
261. See notes 225-32 and accompanying text supra.
262. N.Y. CIV. PRAC. LAW § 1402 (McKinney 1976).
263. Id., Practice Commentary C1402:1. See note 248 and accompanying text supra.
265. See UNIFORM COMPARATIVE FAULT ACT § 6, reprinted in 12 UNIFORM LAWS ANN. 34 (Supp. 1979). Section 6 provides in pertinent part that "the claims of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation. ..." Id.
266. See note 217 and accompanying text supra.
267. See note 221 and accompanying text supra.
incentive to settle if he remains liable for contribution. The second solution was adopted by the 1955 Contribution Act. While it theoretically encourages settlements, it may be unfair to the other defendants and if the good-faith requirement is conscientiously enforced settlements may be discouraged.

The third solution is adopted in this Section. Although it may have some tendency to discourage a claimant from entering into a settlement, this solution is fairly based on the proportionate-fault principle.268

As two commentators have noted, section 1402 "discourages settlement by plaintiffs whose lawyers must now be certain, before settling, that a defendant is paying a sum roughly equivalent to what the jury will ultimately determine to be his proportionate share of the total damages."269 Under section 1402, a plaintiff's verdict will be reduced, not by the amount he actually received from the settling defendant, but rather by the amount of liability which the jury later sets for that released defendant. Consequently, a plaintiff may not wish to settle unless he feels that he is capable of both approximating and obtaining an amount equal to the relative culpability of the settling defendant.270 Thus, while section 15-108 of the General Obligations Law encourages a defendant to settle by providing that a release will terminate his involvement in the case completely,271 section 1402 may have the opposite effect on plaintiffs.

The foregoing discussion reviews state statutes and uniform acts in order to present the methods which have been employed to deal with the issue of contribution in a general context. In searching for the appropriate federal rule to govern contribution in antitrust cases, a court would do well to consider the policies which these statutes reflect and the analyses which they provide.

D. Proposed Federal Legislation

A uniform solution to the problem of contribution in private antitrust actions appears to be emerging from the confusion over federal

269. Impact, supra note 245, at 465. This statement was a reaction to the situation where the plaintiff has settled with defendant-tortfeasor A for $10,000; the jury verdict against tortfeasor B is for $50,000; and the equitable shares of A and B are 50%. The plaintiff's verdict against B will be reduced to $25,000—B's equitable share. The plaintiff, therefore, will recover a total of $35,000 ($10,000 from A and $25,000 from B), instead of the $50,000 to which the jury said he was entitled. See N.Y. Gen. Oblig. Law § 15-108, Practice Commentary (McKinney 1978).
270. See Impact, supra note 245, at 465.
271. See notes 256-61 and accompanying text supra.
common law, the criticism of the Professional Beauty decision, the incipient conflicts among the federal courts concerning contribution, and the absence of congressional action. In early July, Senator Birch Bayh introduced Senate Bill 1468.

Senate Bill 1468 is limited in scope: it applies only to the intentional antitrust violation of price-fixing. Bill 1468 adopts many of the features of the Uniform Comparative Fault Act and the New York contribution statutory scheme. It permits claims for contribution to be asserted either in the original action or in a separate action. Like the 1955 Act, and the New York General Obligations Law, the proposed statute provides that persons potentially liable for price-fixing, who have received good faith releases or covenants not to sue from the plaintiff, are relieved of liability for contribution.

272. See notes 122-45 and accompanying text supra.
273. See notes 184-206 and accompanying text supra.
274. See notes 146-206 and accompanying text supra.
275. S. 1468, 96 Cong., 1st Sess. § 41 (1979). The text of the Bill is as follows:

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

"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, action 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."

276. See id. § 41(a).
277. See notes 235-71 and accompanying text supra.
279. See text accompanying note 226 supra.
280. See text accompanying note 258 supra.
to other joint tortfeasors.\textsuperscript{281} In addition, under the Bill, the plaintiff's claim against the nonsettling defendants would be reduced by the greatest of three measures: 1) any amount stipulated in the release or covenant; 2) the amount of consideration paid for it; and 3) treble the actual damages attributable to the settling person's sales or purchases of goods or services.\textsuperscript{282}

Senate Bill 1468 has already met some opposition from the plaintiff’s bar, which maintains that the contribution rule attempts to protect the small defendant who cannot afford to litigate, without considering the burden which contribution imposes upon the victim of an antitrust violation.\textsuperscript{283} Moreover, commentators have noted that a right to contribution will necessarily further complicate already protracted litigation, thus, contradicting \textit{Illinois Brick}'s message to simplify litigation.\textsuperscript{284} Even the United States Attorney General's office, although generally favoring the Bill, queries whether contribution should be generally applicable to intentional antitrust misconduct,\textsuperscript{285} and raises many questions concerning: 1) the type of conduct for which contribution should be allowed; 2) how defendants' contribution shares should be determined; 3) how to handle settlements; 4) the procedures for claiming contribution; and 5) whether a statute allowing contribution should deal with such specific issues or leave them to the courts.\textsuperscript{286}

Senate Bill 1468 is likely to see much debate and change before its final passage. Despite its limited scope and its endorsement of contribution, a statutory rule denying contribution in the settlement context should be welcomed by courts as a uniform and proper approach.\textsuperscript{287} The congressional attention given Senate Bill 1468 could precipitate the passage of a broader statute, and save the Supreme

\textsuperscript{281} See S. 1468, 96 Cong., 1st Sess. § 41(c) (1979).
\textsuperscript{282} Id. § 41(b). For other approaches used in determining the measure of a nonsettling defendant's liability, see note 183 supra.
\textsuperscript{283} Axinn, \textit{Antitrust Legislation by 96th Congress}, N.Y.L.J., July 17, 1979, at 1, col. 2.
\textsuperscript{285} 1979 Hearings, supra note 181, at 1, 13 (commenting on the predecessor to S. 1468).
\textsuperscript{286} Id. at 9-9.
\textsuperscript{287} It is to be expected that alternatives to Senate Bill 1468 will be forthcoming. A recent article, for example, suggests abolishing joint liability in antitrust cases instead of granting a right to contribution. See Izard & Miller, \textit{High Price-Fixing Awards Require Abolition of Joint, Several Liability}, Nat'l L.J., Aug. 27, 1979, at 22, col. 1. Critical of the no-contribution rule, the authors think abolition of joint liability to be the appropriate remedy because it would insure that “each conspirator would be responsible for only three times the benefit derived from its own misconduct.” Id. at 23, col. 2.
Court from its otherwise inevitable task of deciding the law of antitrust contribution.

IV. CONCLUSION

Federal law appears to govern antitrust contribution questions. Only one federal court to date has applied state law, and its reasoning is not compelling. The probability of nonuniform decisional law among the states provides a persuasive policy against the application of state law to contribution in federal antitrust cases.

Assuming federal common law governs, federal courts may continue to apply the traditional federal common law, which prohibits contribution for intentional antitrust violations, or they may develop a new rule either by adopting state contribution law or by creating new doctrine. While most states allow some type of contribution, only a minority of states permit a nonsettling defendant to claim contribution from a settling and released defendant, primarily because settlement would otherwise be discouraged. In the area of antitrust violations where a strong public policy favors settlement, there is little basis for a rule permitting contribution from settling defendants.

The recent decision of the Eighth Circuit in Professional Beauty, however, reversed the traditional rule and permitted contribution among intentional violators of the antitrust laws. Since the rights of nonsettling defendants were not in issue in Professional Beauty, since subsequent district court opinions have narrowed and distinguished the case, and since proposed legislation will deny contribution in the settlement context, it is hoped that, in the future, federal courts will not permit contribution in antitrust cases involving settling defendants.*

288. See notes 24-102 and accompanying text supra.
290. See notes 86-90 and accompanying text supra.
291. See notes 184-206 and accompanying text supra.
292. See notes 272-87 and accompanying text supra.

* Editors Note: As this article went to print, the United States Court of Appeals for the Fifth Circuit announced its decision in Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 936 ANTITRUST & TRADE REG. REP. (BNA) F-1 (Oct. 25, 1979); cited as pending note 53 supra. Expressly rejecting the analysis of the Eighth Circuit in Professional Beauty, the court held that there is no right to contribution under the federal antitrust laws. 936 ANTITRUST & TRADE REG. REP. (BNA) at F-1.