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# APPORTIONMENT OF DAMAGES AND CONTRIBUTION AMONG COCONSPIRATORS IN ANTITRUST TREBLE DAMAGE ACTIONS

PETER G. CORBETT

## I. INTRODUCTION

THE title of this article may be misleading because it implies that law exists on the subject, whereas to the writer's knowledge, at least with respect to the question of contribution, there is not a single decision in point. It seems appropriate, therefore, to consider what are, or rather what would be, the rights and liabilities among several defendants who are found liable for treble damages in an antitrust conspiracy action, both *inter se* and against conspirators who have not been joined. While undoubtedly most treble damage codefendants settle their respective obligations among themselves, which may explain the dearth of authority,<sup>1</sup> it is conceivable in this era of increasing antitrust activity that a defendant faced with liability for an *entire* treble damage judgment may wonder what are his rights by way of apportionment of damages or contribution from his codefendants and conspirators.

The arguments that have been raised from time to time against the desirability of contribution in the tort field generally, whether sound or not, do not necessarily have validity in the antitrust context. For example, objections have been made that contribution unnecessarily complicates the plaintiff's litigation and makes for an inequitable distribution of damages where some cotort-feasors are insured and others are not.<sup>2</sup> Since it is common practice for an antitrust plaintiff to join as many defendants as may reasonably be expected to be liable, with a view to ensuring full recovery, it is difficult to see how his burden would be increased by permitting contribution. On the contrary, the existence of this right should be an additional incentive, at least to smaller corporate defendants, to settle with a plaintiff in return for an agreement not to sue.<sup>3</sup> In any event, simplicity of litigation is not an end in itself, and if

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1. See 1 Harper & James, Torts 717 (1956); James, Contribution Among Joint Tort-feasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156 (1941), contending that there should be no right of contribution on the part of the insured tort-feasor. For the opposing viewpoint, see Gregory, Contribution Among Joint Tort-Feasors: A Defense, 54 Harv. L. Rev. 1170 (1941). See also James, Replication, 54 Harv. L. Rev. 1178 (1941); Gregory, Rejoinder, 54 Harv. L. Rev. 1184 (1941).

2. A release of one joint tort-feasor for good consideration would, of course, release all. See Rector v. Warner Bros. Pictures, Inc., 102 F. Supp. 263 (S.D. Cal. 1952). A plaintiff could, therefore, hardly be expected to give a release in return for settlement with one of the parties, and it would be unlikely that the latter would be satisfied with anything less. However, both plaintiff and settling defendants have been protected where a covenant not to sue,

justice is better served by an equitable rule of division of damages, the possibility of some increment in complexity should not be permitted to stand in the way. Furthermore, insurance, as a practical matter, and probably as a matter of public policy, plays no part in antitrust liability. While corporate size and resources must often be greatly disparate, they would seldom be as acute a problem of ability to pay as in the case of insured and uninsured individual tort-feasors.

It is the purpose of this article to show that, as a matter of both law and sound antitrust policy, contribution among coconspirators in treble damage actions should be allowed whether or not the coconspirators are joined in the action.

While the rule against contribution, at least where the parties are in *pari delicto*, is generally claimed to be a fundamental principle of the common law (based either on the public policy that no one should profit through his own wrong or on the premise that the judiciary is not equipped to fashion rules of contribution)<sup>3</sup>, it is neither sound in terms of the precedent on which it is alleged to be based, nor does it prevail in the majority of common-law jurisdictions.

The leading case of *Merryweather v. Nixan*<sup>4</sup> involved deliberate and intentional tortious acts, and the rule against contribution which it established was so confined by both the English<sup>5</sup> and early American<sup>6</sup> cases. Accordingly, it does not support the absolute denial of contribution among joint tort-feasors for which it is generally cited in those American jurisdictions which have not limited the rule in accordance with the original *Merryweather* rationale.<sup>7</sup>

which is not in settlement of the full amount of the plaintiff's damages, is executed. Such an agreement, it has been held, falls short of a release. See *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir.), cert. denied, 355 U.S. 835 (1957).

3. The concept of contribution would not appear to conflict with the maxim (that no one should profit by his own wrong) since it would afford defendants not a positive gain but merely a mitigation of loss. It would seem, furthermore, that public policy is better served by an equitable division of damages than by permitting wrongdoers to escape liability on what must be a fairly frequent basis. After all, the purpose of an award of damages, with rare exceptions, is to compensate the injured plaintiff, not to punish his transgressors.

4. 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

5. See, e.g., *Palmer v. Wick & Pulteneytown Steam Shipping Co.*, [1894] A.C. 318 (Scot.); *Betts v. Gibbins*, 2 Ad. & E. 57, 111 Eng. Rep. 22 (K.B. 1834); *Adamson v. Jarvis*, 4 Bing. 66, 130 Eng. Rep. 693 (C.P. 1827).

6. See *Bailey v. Bussing*, 28 Conn. 455 (1859); *Hunt v. Lane*, 9 Ind. 248 (1857); *Acheson v. Miller*, 2 Ohio St. 203 (1853); *Armstrong County v. Clarion County*, 66 Pa. 218 (1870). See also Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 Harv. L. Rev. 176, 180-82 (1898).

7. For examples of denial of contribution in personal negligence cases, see *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389 (1921); *Wise v. Berger*, 103 Conn. 29, 130

Despite this misinterpretation, however, six and possibly seven states and the District of Columbia retained the original common-law rule of judicial contribution, limiting it to those torts which do not involve intentional misconduct.<sup>8</sup> In addition, twenty-three states now have legislation permitting contribution in varying circumstances. Of these, only one expressly denies contribution in the case of certain intentional torts,<sup>9</sup> while six others limit the right to joint-judgment defendants.<sup>10</sup> The remainder, eight of which have adopted, in whole or in part, the Uniform Contribution Among Joint Tort-Feasors Act, permit contribution in the broadest sense,<sup>11</sup> as do both England and the Canadian provinces.<sup>12</sup>

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Atl. 76 (1925); *Royal Indem. Co. v. Becker*, 122 Ohio St. 582, 173 N.E. 194 (1930). Federal courts have also recognized the rule in diversity cases. *Union Stock Yards Co. v. Chicago, B. & Q. R.R.*, 196 U.S. 217 (1905).

8. Louisiana, *Linkenhogor v. Owens*, 181 F.2d 97 (5th Cir. 1950) (only in judgment in *solido* cases); Minnesota, *Duluth, M. & N. Ry. v. McCarthy*, 183 Minn. 414, 236 N.W. 766 (1931); *Underwriters at Lloyds v. Smith*, 166 Minn. 388, 208 N.W. 13 (1926); Oregon, *Furbeck v. I. Gevurtz & Son*, 72 Ore. 12, 143 Pac. 654 (1914) (overruled on other grounds); Pennsylvania, *Goldman v. Mitchell-Fletcher Co.*, 292 Pa. 354, 141 Atl. 231 (1928); Tennessee, *Davis v. Broad St. Garage*, 191 Tenn. 320, 232 S.W.2d 355 (1950) (active-passive negligence distinction); Wisconsin, *Mitchell v. Raymond*, 181 Wis. 591, 195 N.W. 855 (1923); District of Columbia, *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949). Maine has also indicated recognition of a limited right, *Hobbs v. Hurley*, 117 Me. 449, 104 Atl. 815 (1918).

9. North Dakota, N.D. Cent. Code § 32-38-01 (1960). The statute is based on the revised Uniform Contribution Among Tort-Feasors Act, which denies the right in cases of intentional torts.

10. Michigan, Mich. Comp. Laws § 691.561 (1948); Mississippi, Miss. Code Ann. § 335.5 (1956); Missouri, Mo. Ann. Stat. § 537.060 (1953); New York, N.Y. Civ. Prac. Act § 211-a; Texas, Tex. Rev. Civ. Stat. art. 2212 (1950); West Virginia, W. Va. Code Ann. § 5482 (1961).

11. Those states having statutes based on the 1939 uniform act are: Arkansas, Ark. Stat. Ann. §§ 34-1001 to -1009 (Supp. 1961); Delaware, Del. Code Ann. tit. 10, §§ 6301-03 (1953); Hawaii, Hawaii Rev. Laws §§ 246-10 to -16 (1955); Maryland, Md. Ann. Code art. 50, §§ 16-24 (1957); New Mexico, N.M. Stat. Ann. §§ 24-1-11 to -18 (1953); Pennsylvania, Pa. Stat. Ann. tit. 12, §§ 2082-89 (Supp. 1961); Rhode Island, R.I. Gen. Laws Ann. §§ 10-6-1 to -11 (1956) (Supp. 1961); South Dakota, S.D. Code §§ 33.04A01 to -10 (Supp. 1960). North Dakota, as noted *supra* note 9, has adopted the revised act of 1955, which also eliminated the optional provision in the 1939 act for distribution of damages according to degree of fault. The remaining states, which recognize the right of contribution are: Georgia, Ga. Code § 105 (1938); Kentucky, Ky. Rev. Stat. § 412.030 (1955); Louisiana, La. Civ. Code Ann. art. 2103 (Supp. 1961); New Jersey, N.J. Stat. Ann. § 2A:53A-1 (1952); North Carolina, N.C. Gen. Stat. § 1-240 (1953); Virginia, Va. Code Ann. § 8-627 (1957) (limited to negligence); Wisconsin, Wis. Stat. Ann. § 113.01 to 10 (1957).

12. England, Law Reform (Married Women and Tort-feasors) Act, 1935, 25 & 26 Geo. 5, c. 30, § 6; e.g., Alberta, Tort-Feasors Act, Alberta Rev. Stat. c. 143 (1942); British Columbia, Contributory Negligence Act, British Columbia Rev. Stat. c. 52 (1936); Manitoba, Tortfeasors and Contributory Negligence Act, Manitoba Rev. Stat. c. 215 (1940); Ontario, Negligence Act, Ontario Rev. Stat. c. 115 (1937).

## II. PRELIMINARY CONSIDERATIONS

### A. *Nature of the Liability of Participants in Illegal Combinations*

Determination of the nature of the cause of action for treble damages given by Section 4 of the Clayton Act<sup>13</sup> is fundamental to the question of the relative liability of the defendants, and, therefore, to that of contribution.<sup>14</sup> It appears to have been settled conclusively that a treble damage action under section 4 is one in tort, whether it be for violation of the Sherman Act<sup>15</sup> or of the Clayton Act.<sup>16</sup> For example, referring to a treble damage action arising out of an illegal conspiracy to enhance prices, a United States circuit court<sup>17</sup> spoke in terms of an "unlawful and tortious" agreement between the defendants, and of the "torts committed in the course of the illegal combination."<sup>18</sup> In affirming, the Supreme Court described the purchases made by the plaintiff at prices enhanced pursuant to the conspiracy as contracts "springing from a tort,"<sup>19</sup> and this characterization has been confirmed beyond question.<sup>20</sup>

The cases which have held treble damage suits for violations of the Sherman Act to be actions in tort have made it clear that coconspirators or participants in an illegal combination which injures a plaintiff in his business or property are joint tort-feasors and may be sued as such.<sup>21</sup>

13. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

14. It may also be significant with regard to the immediate outcome of an action. It is interesting to note that Massachusetts courts, for example, do not appear to follow the common-law rule that judgment in a tort action may be rendered against one or more of several defendants, but apply the broader common-law rule, from which tort actions are generally excepted, that, in the absence of statutory modification, if several defendants are joined in an action, recovery must be for or against all or none, at least where the liability asserted is joint. Statutory modification does exist in Massachusetts for actions in contract, Mass. Ann. Laws ch. 235, § 6 (1956), but not in tort. See *Contakis v. Flavio*, 221 Mass. 259, 108 N.E. 1045 (1915) which was an action against joint tort-feasors, where the court noted that the statute did not apply to tort actions. Whether this would follow in a treble damage action under a federal statute depends upon the court's determination of the applicable law.

15. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

16. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958) (Supp. III, 1959-1961); see *Sidney Morris & Co. v. National Ass'n of Stationers*, 40 F.2d 620 (7th Cir. 1930).

17. *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 Fed. 23 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906).

18. *Id.* at 26.

19. 203 U.S. at 397.

20. See *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 583 (8th Cir. 1945); *Farmers Co-operative Oil Co. v. Socony-Vacuum Oil Co.*, 43 F. Supp. 735, 738 (N.D. Iowa), modified on other grounds, 133 F.2d 101 (8th Cir. 1942); *Imperial Film Exch. v. General Film Co.*, 244 Fed. 985, 987 (S.D.N.Y. 1915).

21. See *Rector v. Warner Bros. Pictures, Inc.*, 102 F. Supp. 263 (S.D. Cal. 1952), "It is the Court's opinion that actions such as this are actions in tort and the rule that the release for consideration of one joint tort-feasor releases all joint feasers is applicable." *Id.*

In *Sidney Morris & Co. v. National Ass'n of Stationers*,<sup>22</sup> the plaintiff brought an action for treble damages against 104 defendants, alleging a conspiracy to damage the plaintiff in its business through unlawful discrimination in price. Although the action was essentially one for violation of the Robinson-Patman Price Discrimination Act,<sup>23</sup> the analysis of the nature of conspiracy and joint liability contained in the opinion is pertinent here. The defendants contended that the gist of the action was conspiracy, and that since the cause of action was for alleged violation of the Clayton Act, the suit should be dismissed because the Clayton Act is not a conspiracy statute. The court, however, pointed out that:

An action may lie for damages suffered by reason of torts committed pursuant to a conspiracy but no action for damages lies for the conspiracy alone. . . . The gist of such action is not, as appellees assert, the conspiracy, but it is the damages for which the wrongdoer and all who conspire with him are liable.<sup>24</sup>

The court went on to hold that the complaint did not improperly join a statutory cause of action with one based on the common law, but that there was only one cause of action

for damages, the recovery of which is authorized by [Section 4 of the Clayton Act] . . . for acts condemned by [Section 2 of the Clayton Act] . . . directed against the wrongdoers and their agents and their partners who joined the tort-feasors in committing the wrong upon appellant.<sup>25</sup>

In other words, it was the conspiracy that enabled the plaintiff to join 104 defendants in one action for individual acts of price discrimination. The court concluded:

Obviously A, who has a good cause of action against B for acts committed in violation of [Section 2 of the Clayton Act] . . . cannot join similar but separate causes of action against C and make B and C defendants in the one action. It is only by virtue of C's adopting B's acts and by B's adopting C's acts (through their agreement, combination or conspiracy) that appellant may hold B and C jointly and severally for the acts of each.<sup>26</sup>

It also appears to be well established that the stage at which a participant joins a conspiracy does not determine or limit the extent of his liability. Where different parties join successively in a single continuing conspiracy by which a competitor is injured, all those joining in

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at 264. See also *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.), cert. denied, 355 U.S. 835 (1957); *Webster Motor Car Co. v. Zell Motor Car Co.*, 234 F.2d 616 (4th Cir. 1956); *Solar Elec. Corp. v. General Elec. Co.*, 156 F. Supp. 51 (W.D. Pa. 1957).

22. 40 F.2d 620 (7th Cir. 1930).

23. 49 Stat. 1526 (1936), as amended, 15 U.S.C. §§ 13(a)(b), 21(a) (1958) (Supp. III, 1959-1961).

24. 40 F.2d at 624.

25. *Ibid.*

26. *Id.* at 625.

the unlawful act at different times become liable for whatever injury results from the combination in which they participate.<sup>27</sup>

Finally, it has been held that, given a conspiracy which results in injury to the plaintiff, it makes no difference that parties shown to have participated in the illegal agreement did not actually join in the acts causing the injury. Thus, in *City of Atlanta v. Chattanooga Foundry & Pipeworks*,<sup>28</sup> plaintiff-city brought a treble damage action against three of the companies which had previously been enjoined, in a suit by the Government,<sup>29</sup> from combining and conspiring to restrain trade in the manufacture and sale of cast-iron pipe. The combination, it was ultimately proved, had established a system of bidding under which the city had been compelled to pay exorbitant prices for the pipe it had purchased. Actually, the plaintiff had purchased the pipe in question exclusively from the Anniston Pipe & Foundry Company, one of the six defendants in the Government's action.<sup>30</sup> For some unexplained reason, Anniston was not joined in the treble damage action, but this was held to have no bearing on the liability of the defendants sued:

That its purchases were made exclusively from the Anniston Pipe Company, a corporation doing business in Alabama, and that it is not suing that corporation, is of no vital significance. . . . The direct intention and effect of the combination was to limit and restrict the right of each of the several companies to compete for business with Atlanta, as well as to enhance the price of the commodity which was the subject of the agreement.

We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe. If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued.<sup>31</sup>

If a continuing conspiracy on the part of all or some of the defendants in an action can be shown, therefore, such defendants, given the element

27. *American Steel Co. v. American Steel & Wire Co.*, 244 Fed. 300 (D. Mass. 1916); see *Dextone Co. v. Building Trades Council*, 60 F.2d 47 (2d Cir. 1932), where the court accepted as clearly correct the contention that "every person who participates in a conspiracy is liable for everything done during the period of its existence regardless of the exact time at which he becomes a member or the extent of his participation." *Id.* at 48. *Walder v. Paramount Publix Corp.*, 1955 Trade Cas. ¶ 70543 (S.D.N.Y. 1955). The principle seems to have been first authoritatively stated by the Supreme Court in *Lincoln v. Claffin*, 74 U.S. (7 Wall.) 132, 138 (1868).

28. 127 Fed. 23 (6th Cir. 1903).

29. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

30. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1899).

31. 127 Fed. at 25-26.

of damage, would be liable as joint tort-feasors, and neither lateness in joining the combination nor limited extent of participation could be advanced as exonerating or mitigating factors. The conclusion appears inescapable that each defendant proved to have participated at some stage in the conspiracy may be held liable for the entire amount of damage caused, and that it would be irrelevant whether or not such defendant had actually committed any overt illegal acts pursuant to the conspiracy.

### B. *Apportionment of Damages*

In general, where the common-law rule is not modified by statute, an assessment of damages in an action against joint tort-feasors must be for a lump sum against those found liable, and cannot be severally apportioned between them.<sup>32</sup> The applicability of this general principle to antitrust treble damage actions might raise a complicated choice-of-law question were it not for the fact that a circuit court of appeals has already held squarely in favor of the common-law rule. *Dextone Co. v. Building Trades Council*<sup>33</sup> was a treble damage action involving a conspiracy in restraint of trade in 1923 by a group of New York stonecutters and joined two years later by a similar group in Westchester County. The jury returned a verdict assessing the plaintiff's total damages at \$11,000, but finding the Westchester defendants liable for only \$2,000 of that amount, and the district court had trebled the sums on that basis. The circuit court of appeals in reversing held that there was no evidence of two distinct conspiracies, and that all defendants should, therefore, have been held jointly and severally liable.<sup>34</sup> The court stated:

The verdict therefore established the guilt of all the defendants and the total damages they caused the plaintiff by their wrongful combination. Hence the jury's attempt to apportion to the Westchester group only a part of the damages should have been ignored as surplusage, and judgment should have been entered for the full amount against all the wrongdoers.<sup>35</sup>

While the court did not specify what law it was applying, the case is nonetheless authoritative.

### C. *Contribution Between Defendants*

It is important at this point to distinguish between the often confused concepts of contribution and indemnity.<sup>36</sup> The majority of common-law

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32. *Watt v. Combs*, 244 Ala. 31, 12 So. 2d 189 (1943); *Miller v. Singer*, 131 Colo. 112, 279 P.2d 846 (1955).

33. 60 F.2d 47 (2d Cir. 1932).

34. *Id.* at 49.

35. *Ibid.* See also *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents' Conference*, 166 F. Supp. 163 (E.D. Pa. 1958), *rev'd on other grounds*, 365 U.S. 127 (1961).

36. "Historically neither the common law courts nor the legislative bodies have been



courts have not allowed contribution—the division of damages between joint tort-feasors—whether on a pro rata or culpability basis. They have, however, on occasion, permitted indemnity, shifting the entire loss in order to fasten “the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained.”<sup>37</sup> In such cases the “innocent” or slightly culpable wrongdoer has been allowed to recover the full amount of the damages he has paid from the one primarily responsible for the injury.<sup>38</sup> The principle of indemnity has been recognized by both state and federal courts.<sup>39</sup> It applies, however, only in cases where the parties are not in *pari delicto*, and, hence, would not likely serve to relieve antitrust coconspirators.<sup>40</sup>

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sympathetic with the plight of wrongdoers in the adjustment of their affairs. . . . Such an attitude is more understandable where the wrongs involve moral turpitude, as most torts involved in the earlier cases did. In more recent times, since the development of rules imposing liability for negligence, liability for the acts of others and even liability without fault on the part of anyone, both courts and legislatures have intervened to shift the burden of loss from one tortfeasor to another, either wholly or partially.

This has been done in three ways: (1) by requiring contribution by all tortfeasors . . . ; (2) by requiring one tortfeasor to pay the entire amount of damages assessed against another . . . ; and (3) by dividing the liability among tortfeasors proportioned to their culpability. The first and third methods have been employed only when expressly authorized by legislation; the second method has been utilized by courts on their own initiative.” Hodges, Contribution and Indemnity Among Tortfeasors, 26 Texas L. Rev. 150 (1947). The last statement, however, regarding the necessity of modifying legislation is not completely accurate. See note 8 supra and Prosser, Torts 246 (2d ed. 1955).

37. Union Stock Yards Co. v. Chicago, B. & Q. R.R., 196 U.S. 217, 227 (1905).

38. The rule is well expressed in Gray v. Boston Gas Light Co., 114 Mass. (18 Browne) 149 (1873), where the court held that a building owner had an action for indemnity against the gas light company, which by fastening wires to his chimney had caused it to weaken and fall, injuring a passer-by. The court said that when two parties act together and cause an injury for which they are equally culpable or *participes criminis*, there is no indemnity or right of contribution. This rule does not apply when one party causes the injury but another is exposed to liability. In this case the parties are not in *pari delicto*, and the innocent party may recover from the wrongdoer. See also Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N.E. 657 (1901), where the plaintiff was allowed to recover indemnity on defendant's warranty even though he breached his duty of inspection.

39. See Washington Gas Light Co. v. District of Columbia, 161 U.S. 316 (1896); Boston Woven Hose & Rubber Co. v. Kendall, supra note 38; Gray v. Boston Gas Light Co., supra note 38. While the collective rationale of these cases is somewhat unclear, and appears in the last analysis to rest upon the dubious distinction between malfeasance and nonfeasance, they do serve to mark the limits of that area in which the common-law courts have generally felt free to shift responsibility as between joint tort-feasors. These cases represent the general rule. However, it is not true to say that the courts have never fashioned rules of contribution, as distinguished from indemnity. Note 8 supra; Prosser, Torts 246-48 (2d ed. 1955).

40. The contention that participation in the illegal agreement but not in the acts which caused the damage should entitle a party to indemnity appears to be precluded by the decision in Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906).

However, the issue of contribution in the antitrust context is not necessarily concluded by the foregoing common-law rules. As noted previously, twenty-three states have adopted statutory provisions allowing contribution to a greater or lesser extent,<sup>41</sup> nine of these being based on the Uniform Contribution Among Tort-Feasors Act.<sup>42</sup> Adding to these the jurisdictions in which the right exists at common law,<sup>43</sup> it is found that contribution among joint tort-feasors, in one form or another, is now in effect in more than half the states. There remains, therefore, the question whether these statutes or, alternatively, the common-law rules prevailing in those states which have not taken such legislative action, should determine the extent of liability in an action created by federal statute. If state law is inapplicable, there is the further question of what rule to apply, if indeed any exists, in the context of federal law. And if none exists, what bearing should the various state laws have upon the framing of a rule by a federal court. The answers to these questions depend initially upon the choice between state and federal law as governing.

### III. CHOICE OF LAW

#### A. *Cases in Point*

Before turning immediately to the choice of law issue, it would be appropriate to consider what appear to be the only three cases which have any significant bearing upon the ultimate individual liability of an antitrust conspirator in a treble damage action. *Webster Motor Car Co. v. Zell Motor Car Co.*<sup>44</sup> was an action brought in the district court in Maryland for treble damages on account of an alleged conspiracy in restraint of trade between the named defendants and the Packard Motor Car Company which was not named. Prior to institution of this suit, a similar action had been commenced in the District of Columbia<sup>45</sup> against the same defendants and Packard, but was dismissed against all but Packard for failure to obtain valid service. The Maryland action was brought just prior to the expiration of the period of limitation under the Maryland statute, to keep the cause of action alive in the event that plaintiffs failed to recover against Packard in the District of Columbia. The defendants had made several motions in the Maryland action, and plaintiffs obtained a continuance on the condition that, upon determination on the merits of the District of Columbia action, the Maryland suit would be dismissed with prejudice. Packard sought to use this

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41. See notes 9-11 *supra*, and Prosser, Torts 248 (2d ed. 1955).

42. See notes 9 & 11 *supra*.

43. See note 8 *supra*.

44. 234 F.2d 616 (4th Cir. 1956) (not reported in the district court).

45. *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4 (D.D.C. 1955).

consent order as a release in its defense of the District of Columbia action. The court there overruled the argument, found Packard a coconspirator, and the case was appealed.<sup>46</sup> The defendants in the Maryland action claimed this was a determination on the merits by the District of Columbia court, and sought an order of dismissal with prejudice, which was granted. The circuit court in Maryland then, reversed that order on the ground that in view of the manifest injustice resulting, and the likelihood that the original continuance was intended to extend to a final determination of the District of Columbia action, the dismissal constituted an unsound exercise of discretion. The manifest injustice was found by the court to arise as follows:

In this connection it should be remembered that Packard 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 tort-feasors. . . . Assuming that the recovery in the District of Columbia Court is sustained against other attacks, for Packard to be released from the liability because of the order . . . [of continuance] or dismissal of defendants here pursuant to that order would result in an outrageous miscarriage of justice, not contemplated by the court or by the parties in the entry of the order.<sup>47</sup>

The language of the second sentence quoted above is markedly inconsistent with that in the first. The clear implication of the first sentence is that Packard would be put at a disadvantage by the dismissal with prejudice of the Maryland action. However, the use of the phrase "released from . . . liability" in the second sentence seems to intimate that it is Packard that would be perpetrating the "outrageous miscarriage of justice" if the Maryland action were to be so dismissed. It must be assumed that the court still meant to conclude that the loss by Packard of the right to contribution would have been unconscionable under the circumstances; otherwise, the court's conclusion does not follow from its premise. If this be the correct interpretation, it is clear that, since Packard was not a defendant in the Maryland action, the court was of the view that contribution would not be limited to joint-judgment defendants. This is in accord with the provisions of the Maryland statute which, being based on the 1939 Uniform Contribution Among Tort-Feasors Act, expressly precludes joint judgment as a prerequisite to the right of contribution.<sup>48</sup> Unfortunately for purposes of this discussion, however, the District of Columbia decision was reversed on appeal,<sup>49</sup>

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46. For a summary of the combined history of both actions including unreported decisions, see 234 F.2d at 616-17.

47. *Id.* at 619.

48. Md. Ann. Code art. 50, §§ 16-24 (1957).

49. 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957). This was the well-known companion case to *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), which the circuit court followed in finding no restraint of trade.

thus exonerating Packard and extinguishing what might have been a case of first impression on the question of antitrust contribution.

The second case is *Goldlawr, Inc. v. Shubert*,<sup>50</sup> where the court dismissed a third-party complaint against the third-party defendants alleged to have participated in the conspiracy on which the plaintiff sued. The plaintiff argued first that federal law would govern the question of joinder and that, since federal law would deny a right of contribution between joint tort-feasors, the attempted joinder was improper. While tending to agree with this reasoning, the court nevertheless disposed of the case on the ground that there was no joint tort, since the conspiracy allegedly participated in by the proposed third-party defendants was separate from that on which the action was based. Accordingly, even under the Pennsylvania statute providing for contribution between joint tort-feasors,<sup>51</sup> the defendants would not be entitled to contribution from the third-party defendants. As the court stated:

Since both sets of claimed torts are declared in the complaints to be actionable solely by reason of federal law there would seem to be strong justification for appellee's contention that the tort asserted to lie in the third party complaint is governed by federal common law with no right of contribution between tortfeasors. In any event from the inescapable factual allegations, under the Pennsylvania Act to provide for contribution among tortfeasors . . . which was in effect when the alleged tort commenced, and its successor . . . [Uniform Contribution Among Joint Tort-Feasors Act] there would be no contribution from the third party defendant to the defendants. The former Section 2081 defines joint tort feasors "as those who are jointly or severally liable for a tort where, as between them, such liabilities are either all primary or all secondary." The current Section 2082 gives the definition "two or more persons jointly or severally liable in tort for the same injury to persons or property. . . ." Here the alleged injury caused plaintiff by the defendants preventing the [theatre] . . . from presenting legitimate attractions, was not the separate and distinct injury said to have been caused by the third party defendants' refusal to permit plaintiff to show first run movies.<sup>52</sup>

The case is, accordingly, no more conclusive on the question than the *Zell* case. On the contrary, it rather serves to emphasize just how inconclusive the law with respect to antitrust contribution remains. The court in *Goldlawr* would apparently disagree with the court in *Zell* on the threshold question of whether or not federal law would apply to the issue of contribution. Though the language cited above might be considered somewhat authoritative as dicta, it cannot be regarded as a considered statement of the law, particularly since the court gave no reasons for its assumption that federal common law would deny contribution.

One other case which has at least limited pertinence here is *Flintkote*

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50. 276 F.2d 614 (3d Cir. 1960).

51. Pa. Stat. Ann. tit. 12, §§ 2082-89 (Supp. 1961).

52. 276 F.2d at 616-17.

*Co. v. Lysfjord*,<sup>53</sup> in which suit was originally instituted for treble damages against Flintkote and several other defendants as coconspirators. At the trial it was brought out that \$20,000 had been paid to the plaintiffs in exchange for a covenant not to sue running in favor of all defendants except Flintkote. A verdict was brought against Flintkote for \$50,000 and was trebled by the court to a total of \$150,000, plus costs and attorney's fees, minus \$20,000 already received by the plaintiff in exchange for the covenant not to sue. Flintkote appealed on several grounds, one being that there was error in the method of crediting the \$20,000 payment. Flintkote wanted that sum subtracted from the jury verdict before the verdict was trebled so that the ultimate damages would be \$90,000 instead of \$130,000. The court refused to accept that argument, holding that the covenant was not intended to constitute full compensation and did not, therefore, operate to release all the joint tort-feasors. It went on to point out that, while this was a case of first impression, its resolution lay in the application of firmly rooted principles of joint liability in conjunction with the manifest objectives of the treble damage provision. The court stated:

Flintkote, if a co-conspirator, would be jointly and severally liable under well-settled principles of law for the entire amount if (1) the plaintiffs had successfully prosecuted any or all of the other co-conspirators, or (2) no jurisdiction could be acquired over the other alleged offenders and consequently only Flintkote was sued. Accordingly, the settlement does not impose an additional burden on Flintkote, but rather serves only to militate against its liability. . . . [S]atisfaction would not be achieved by the award of any sum, which added to the settlement sum, did not total \$150,000. . . . In the case of punitive damages joint tortfeasors are liable for the entire amount, not merely the compensatory part.<sup>54</sup>

Unfortunately, again, the court did not go into the question of contribution between defendants. The case is significant, however, in two respects. The first is the emphasis placed by the court upon the nature of joint liability, and its added deterrent effect in the treble damage context, which seems to militate against the possibility of a right of contribution. Secondly, it is interesting to note that the court made no reference to any particular body of law from which the "well-settled principles" described might be drawn. There is certainly no allusion to state law, and one can only assume that the court accepted these principles as prevailing federal rules, irrespective of any modifications imposed by the laws of a particular state or states.

In the face of this meager background of judicial consideration, to which legal writers appear to have made no supplementary contribution

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53. 246 F.2d 368 (9th Cir. 1957).

54. *Id.* at 397-98.

as yet,<sup>55</sup> the question of the liability *inter se* of antitrust coconspirators becomes one of speculation. The problems which must, or at least should be resolved by a court faced with an action for contribution between treble damage defendants, are: (1) what law to apply in determining whether or not contribution may be had; and, (2) if it is not to be derived from the law of any state, then what rule is to be adopted.

### B. *Applicable Law*

It is clear, of course, that the choice lies between state law and federal law. The federal law can exist as either federal common law, irrespective of statute, or as that interstitial lawmaking so often involved where federal statutes are concerned.

It might be concluded from the dicta in the *Zell* case<sup>56</sup> that state law should apply. In fact, although the court there cited no authority, its view that contribution would be available by virtue of the Maryland statute appears, in effect, to be a precise application of the rule of *Erie R.R. v. Tompkins*.<sup>57</sup> There the Supreme Court established the general principle that federal courts in diversity cases may not, as to nonfederal questions, disregard state law in matters of substantive rights.

If the court in *Zell* was unconsciously following the *Erie* rule, it would necessarily arrive at the conclusion it did—that contribution would be allowed by virtue of the Maryland law. The right of one joint tort-feasor to recover contribution from another has been held to be a substantive, not a remedial right,<sup>58</sup> and is therefore governed, in accordance with the recognized conflict of laws rule, by the law of the place of the wrong.<sup>59</sup> The cause of action for treble damages arose in Maryland and contribution would therefore be allowed under the Maryland statute. Similarly, had the cause of action arisen in another state, the *Erie* doctrine would require the court to search for and apply, if ascertainable, the conflict rule of the forum for purposes of finding the law governing the rights and liabilities of the parties.<sup>60</sup>

This presupposes, however, that the *Erie* doctrine is applicable and

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55. As previously noted, the probable frequency with which treble damage codefendants settle their respective obligations between themselves may explain this almost total lack of authority.

56. 234 F.2d 616 (4th Cir. 1956).

57. 304 U.S. 64 (1933).

58. *Charnock v. Taylor*, 223 N.C. 360, 26 S.E.2d 911 (1943). See also 1 Moore, *Federal Practice* ¶ 0.6 [4] at 237 (2d ed. 1961).

59. *Baltimore & O.R.R. v. Hughes*, 278 F.2d 324 (6th Cir. 1960); *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418 (2d Cir. 1959).

60. *Stentor Elec. Mfg. Co. v. Klaxon Co.*, 125 F.2d 820 (3d Cir.), cert. denied, 316 U.S. 685 (1942).

that state law would govern the question of contribution. But there is another side to the coin, namely, that

insofar as *Erie* represents authority for the required application of state law by federal courts, it is not controlling on problems implicated in the operation of a congressional program. . . . As to such questions, state law cannot govern of its own force; there must be competence in the federal judiciary to declare the governing law.<sup>61</sup>

Any doubts regarding this principle were laid to rest by the Supreme Court in *Clearfield Trust Co. v. United States*.<sup>62</sup> This case involved an intercepted Works Progress Administration check, cashed by the forger, and endorsed over to the Clearfield Trust Company. The intended payee notified the Government of nonreceipt twelve days later, but Clearfield was not notified of the forgery for six weeks, and the Government did not disclose its intention of seeking reimbursement for nearly six months. Under Pennsylvania law, delay in notification constituted a complete defense. There was no related congressional provision. In rejecting the state rule, the Court stated that it agreed with the court of appeals that the *Erie* rule did not apply to the action. Federal law rather than local law governed the rights and duties of the United States on the commercial paper it issued. The disbursement of funds or the payment of debts by the United States is a constitutional function, and the authority to issue the checks was in no way dependent on any state laws. Accordingly, "in the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."<sup>63</sup> Here the reasons making state law at times the appropriate federal rule were inappropriate:

The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several States. The desirability of a uniform rule is plain.<sup>64</sup>

Although the language of the opinion speaks directly only of the United States, plaintiff in the action, the basic rationale underlying the decision would seem equally apposite to any issue bearing a substantial relation to an established function of the national government.<sup>65</sup>

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61. Mishkin, *The Variosness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 799 (1957).

62. 318 U.S. 363 (1943).

63. *Id.* at 367.

64. *Ibid.*

65. Cf. Mishkin, *supra* note 61, at 801-02 n.19: "The line of argument used in *Clearfield* is based upon the federal nature of the function involved, rather than upon the fact of the Government being a party to the specific litigation. That this must be its rationale is in-

The independent judgment left to the federal courts by the *Clearfield* case may, of course, be exercised by adopting state law as governing, by incorporating local rules of decision as the "federal law" for this purpose.<sup>66</sup> Even the *Clearfield* opinion recognized this,<sup>67</sup> but the Court proceeded to determine expressly that, in the situation before it, a single nationwide substantive rule should be applied. There is no infallible test by which the courts have been guided in this respect, but it may be said generally, that state law is often chosen in the determination of federal questions only because of a special difficulty in the judicial framing of a definite federal rule on a specific issue in an area otherwise truly national.<sup>68</sup> Indeed, this may have been the unarticulated rationale underlying the dicta in the *Zell* case. As will be seen, however, the question of contribution under the antitrust laws should not fall into this area of special difficulty.

It has been stated that the *Erie* doctrine requires the federal courts to follow state law in diversity cases, but has no application in actions based on some other jurisdictional ground, for example, a federal question.<sup>69</sup> While this is true in the vast majority of cases, it is not a completely accurate statement of the law.<sup>70</sup> The law to be applied is keyed to

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dictated by (a) the fact that the Court did not rely at all on the grant of federal jurisdiction over litigation brought by the United States . . . (b) the impossibility of limiting any such rule solely in terms of parties to the litigation . . . and (c) the Court's citation of an earlier case [*Deitrick v. Greaney*, 309 U.S. 190 (1940)] in which a similar approach had been used though the Government was not directly involved. . . ."

66. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

67. "In our choice of the applicable federal rule we have occasionally selected state law." 318 U.S. at 367.

68. See *Mishkin*, supra note 61, at 803. Even in cases involving federal matters state law determines many questions which affect the ultimate decision: (1) because Congress has not provided a rule; (2) because the federal law makes a reference to state law, as it often does in bankruptcy; or, (3) because a particular matter, related to the question at bar, is not strictly within the federal domain. See 1 Moore, *Federal Practice* ¶ 0.6 [4] at 237 (2d ed. 1961).

69. See, *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). In nondiversity cases, federal courts are controlled by the law of the United States, not by state law regardless of how persuasive it may be. Federal law does not change with the jurisdiction in order to comply with the various procedural and substantive laws of the state. It is the implementation of the federal constitution and statutes, and is conditioned solely by them. Guided by these standards, the federal courts are free to draw upon all sources of the common law and to apply traditional techniques of decision in such cases. *Id.* at 471-72 (*Jackson, J.*, concurring).

70. At least one writer has seen *Clearfield* as a judicial attempt to avoid the expansion of the Rules of Decision Act occasioned by the *Erie* decision. See Note, *Clearfield: Clouded Field of Federal Common Law*, 53 *Colum. L. Rev.* 991 (1953). The same writer concludes that "the present trend is to reduce the Act to an island of diversity, not by limiting its scope but by broadly reading its exception." *Id.* at 1007. His conclusion is reinforced by Mr. Justice Frankfurter's remarks in *Levinson v. Deupree*, 345 U.S. 648, 651 (1953): "Its



the nature of the issue before the court: if nonfederal, state substantive law is applied; if a federal matter is before the court, federal law is to be applied. These distinctions help to explain the discrepancy between Mr. Justice Brandeis' statement in *Erie* that "there is no federal general common law . . ." <sup>71</sup> and the conclusion of a unanimous Supreme Court ten years later that "there remains . . . an area of 'federal common law' . . ." <sup>72</sup>

Apart from the *Zell* and *Goldlawr* cases the question of contribution between antitrust codefendants has not been before the federal courts, even indirectly. As has been noted, the court in *Zell* may have been following the *Erie* doctrine or may simply have selected Maryland law in its exercise of the right of independent choice in federal matters. As one of the only two judicial authorities in point, the dicta there would undoubtedly be persuasive. On the other hand, the *Goldlawr* court leaned towards federal law as controlling. Whether *Zell* or *Goldlawr* is correct on this point depends largely upon the analogies that can be drawn from other cases, in line with the principles outlined. It is submitted, however, that the question of contribution between treble damage defendants is not subject to the *Erie* doctrine.

In *Deitrick v. Greaney*, <sup>73</sup> a national bank acquired shares of its own stock in violation of the National Bank Act of 1864. <sup>74</sup> To conceal the acquisition, a director of the bank gave his personal note to be carried on the books instead of the stock, on the understanding that it was not to be paid. Upon insolvency of the bank, the receiver sued the director on his note. The question before the Supreme Court was whether the defenses of illegality and want of consideration were available. Further, since the federal statute provided criminal sanctions, should the question of civil liability be left to state law? The Court rejected state law, which might have estopped the plaintiff, and held that recovery could be had as a matter of federal law, saying:

A point much discussed in brief and argument, upon the assumption that local law will guide our decision . . . is whether, by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by

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[the Court's] jurisdiction did not derive from diversity of citizenship; indeed there was no such diversity. *Erie R. Co. v. Tompkins* . . . is irrelevant."

71. 304 U.S. at 78.

72. *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). The statements become less contradictory when it is noted that the Standard Oil Court preferred to describe the "federal common law" as the "law of independent federal judicial decision." *Id.* at 308. See also *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

73. 309 U.S. 190 (1940).

74. Rev. Stat. § 5201 (1875), 12 U.S.C. § 83 (1958).

the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted. . . .<sup>75</sup>

If the rationale indicated by the foregoing language is somewhat insufficient to determine the question of antitrust contribution in favor of federal law, there are other analogies that may be drawn upon in the context of the antitrust laws themselves.

It is an established premise that, even where diversity of citizenship exists, the jurisdiction of a federal court over an antitrust treble damage action is not based on that diversity, but on the fact that the action arises under a law of the United States.<sup>76</sup> There is no obligation upon the court, therefore, to follow the *Erie* rule as to incidental questions not specifically covered by the antitrust statutes. These matters should be settled in accordance with the principles outlined above. There are, of course, no cases in which the question of contribution between antitrust codefendants has been decided in this manner, although the *Goldlawr* case is a tentative indication of its propriety.<sup>77</sup> There are, however, a number of decisions regarding the survival and assignability of treble damage actions, in which the reasoning appears to be equally pertinent to the question of contribution.

In *Barnes Coal Corp. v. Retail Coal Merchants Ass'n*,<sup>78</sup> the court had to determine whether or not a cause of action for treble damages under the Sherman Act survives the death of the person by or against whom it might have been brought. Before holding that it does, the court of appeals decided that the survival of a cause of action created by an act of Congress depends on the substantive, not the procedural, aspects of the case. Unless Congress intends it to survive, it will not survive by reason of state law; therefore, survival of an action for damages created by the Sherman Act is to be determined by statutory interpretation in the light of the common law, and not by state survival statutes or decisions. The court found *Erie R.R. v. Tompkins*<sup>79</sup> to have no application, inasmuch as the question did not concern a state common-law rule but "the interpretation of a federal statute and the consequences which flow from it."<sup>80</sup>

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75. 309 U.S. at 200-01.

76. See, e.g., *Christian v. International Ass'n of Machinists*, 7 F.2d 431 (E.D. Ky. 1925); *Wogan Bros. v. American Sugar Ref. Co.*, 215 Fed. 273 (E.D. La. 1914).

77. It is submitted that the remarks of the court in *Webster Motor Car Co. v. Zell Motor Car Co.*, 234 F.2d at 619, cannot be taken as authoritative on this question. They were, in the first place, dicta, and secondly, without any expressly reasoned basis. Furthermore, the dicta in the *Goldlawr* case is diametrically opposed.

78. 128 F.2d 645 (4th Cir. 1942).

79. 304 U.S. 64 (1938).

80. 128 F.2d at 648. See also *Moore v. Backus*, 78 F.2d 571 (7th Cir.), cert. denied, 296 U.S. 640 (1935); *Momand v. Twentieth-Century Fox Film Corp.*, 37 F. Supp. 649 (W.D.

It appears that the question of contribution between antitrust defendants meets all the criteria necessary for the application of federal law. If it is a question of substance for purposes of the *Erie* doctrine, then, like the issue of survival, it must also be such a question for purposes of either the *Clearfield*<sup>81</sup> or the *Deitrick*<sup>82</sup> rules. As with survival, it is an issue relating to the "consequences which flow from" a federal statute. Although it pertains to the rights of defendants rather than the remedies of plaintiffs, there is nothing in the relevant cases to indicate that this would preclude the application of federal law. On the contrary, both the *Clearfield* and *Deitrick* cases were concerned with defenses available to the respective defendants, the latter, in particular, being concerned with the extent of liability. Since the rights of the defendants *inter se* have a direct bearing on the measure of their individual liabilities, the existence or nonexistence of such rights is, therefore, a question of "the extent and nature of the legal consequences" of acts condemned by a federal statute.

To contend that the *Erie* rule is applicable not only ignores pertinent precedents in favor of federal law, but subjects the question of contribution to the myriad complexities involved in the ascertainment of the appropriate state law—an inquiry which might often have to resolve (on what must necessarily be a pragmatic rather than a logical basis), what state law would apply in the case of a multistate conspiracy. In applying federal law, the courts could do so either in the exercise of that interstitial lawmaking function necessary to the interpretation of federal statutes, as illustrated by *Deitrick v. Greaney*, or, if the question of contribution is found to be beyond the legitimate scope of interpretation of the antitrust statutes, by virtue of the right of independent federal decision as exemplified by the *Clearfield* case.<sup>83</sup>

#### IV. DETERMINATION OF A RULE OF CONTRIBUTION

The problem remaining, of course, is that of determining what the rule of common law, as found by a federal court, would be with respect to contribution between antitrust conspirators. Is it the old English rule against contribution supposedly established in *Merryweather v. Nixan*,<sup>84</sup>

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Okla. 1941) (treble damage action assignable and state common law not applicable); *Cailouet v. American Sugar Ref. Co.*, 250 Fed. 639, 640 (E.D. La. 1917), where the court said: "The Sherman Law is silent as to the survival of the right of action. As there is no other statute of the United States in point, whether the action survives or not must be determined by the principles of the common law, regardless of the law of Louisiana."

81. 318 U.S. 363 (1943).

82. 309 U.S. 190 (1940).

83. Unless, of course, there is some special difficulty in framing a federal rule, this question will be resolved in the following inquiry into the applicable rule of law.

84. 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

and applied today by a majority of American jurisdictions without modifying legislation? Or is it the modified English rule, excluding only intentional tort-feasors, as applied in six states and the District of Columbia?<sup>85</sup> Should the state contribution statutes and the Uniform Contribution Among Tort-Feasors Act be considered?<sup>86</sup> What bearing should questions of policy and uniformity have? Finally, if contribution is permissible, should it be limited to joint-judgment defendants? In the absence of any controlling authority, surely all of these factors must be considered.

#### A. *Majority Common-Law Rule*

The immediate inclination of a court would probably be to seize upon the rule against contribution as applied by the majority of states in the absence of modifying legislation. The temptation would be strengthened by the fact that the Supreme Court, at least in nonfederal question cases, has followed the same rule.<sup>87</sup> Moreover, the reasoning of the court might well be directed by an important Supreme Court decision, handed down in the exercise of its maritime jurisdiction. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,<sup>88</sup> a contractor's employee, while making repairs aboard a ship, was injured through the negligence of both the shipowner and the contractor. The shipowner paid a \$65,000 judgment rendered for the employee and claimed contribution from the contractor. Reversing the lower courts, the Supreme Court refused to extend to noncollision cases the admiralty doctrine of equal division of damages between two vessels at fault,<sup>89</sup> reasoning as follows:

In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. This judicial attitude has provoked protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. To some extent courts exercising jurisdiction in maritime

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85. See Prosser, *Torts* 248 (2d ed. 1955); note 39 supra.

86. See notes 9-11 supra.

87. See notes 39 & 40 supra.

88. 342 U.S. 282 (1952).

89. In the district court, the judge allowed the introduction of evidence tending to show the relative degree of fault, but disallowed a jury verdict dividing the damages 75-25% in favor of Halcyon. He entered judgment in accordance with his conclusion that there was a general rule governing maritime torts whereby each tort-feasor must pay half the damages. *Baccile v. Halcyon Lines*, 89 F. Supp. 765 (E.D. Pa. 1950), rev'd, 187 F.2d 403 (3d Cir. 1951), rev'd sub nom. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). The court of appeals agreed that a right of contribution existed, 187 F.2d 403 (3d Cir. 1951), but held that it could not exceed the amount Haenn, as an employer, would have been compelled to pay under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424-46 (1927), as amended, 33 U.S.C. §§ 901-50 (1958).

affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action.<sup>90</sup>

The reasoning of the *Halcyon* Court is not particularly convincing and, in any event, should not be controlling. There is, of course, no foundation in logic either for the proposition that the courts cannot create an enforceable right, or for that schizophrenia of principle which establishes one rule for maritime and another for terrestrial torts. That the judicial mind should feel more constrained in the exercise of non-admiralty jurisdiction is an historical anomaly that no Holmesian aphorism can explain away. Granting, however, that logic does not always prevail, even in the interest of justice, the *Halcyon* Court's failure to face the issue before it, was predicated almost entirely upon the premise that the multitude of federal maritime statutes dealing with rights and liabilities constituted a detailed statutory scheme of compensation requiring legislative rather than judicial integration.<sup>91</sup> This avenue of escape would not appear to be available with respect to the antitrust statutes, since the courts have already freely exercised that interstitial lawmaking function incidental to the enforcement of legislation which does not purport to be comprehensive.<sup>92</sup> The "wait for Congress to act" argument has been conspicuous by its absence in judicial consideration of rights and liabilities arising under the antitrust laws.

Given then, that a court faced with the question should endeavor to ascertain the correct rule of law without vacating its function in favor of Congress, the question arises whether the sources on which the court is to draw permit the establishment of a federal rule of contribution in antitrust damage actions.

The cases on survival and assignment provide a point of beginning.<sup>93</sup>

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90. 342 U.S. at 285. (Emphasis added.)

91. After giving most unjudicial consideration to the possibly conflicting interests of the pressure groups (e.g., insurance companies) concerned with the administration of these statutes, the Court concluded with the remarkable non sequitur that "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." *Id.* at 287.

92. The cases already discussed dealing with the many questions left unresolved by the antitrust statutes—e.g., nature of the cause of action, apportionment of judgments, assignment, survival, and limitations—strongly indicate that antitrust is not a field in which the courts are prone to await congressional action. For what they are worth, the dicta in *Webster Motor Car Co. v. Zell Motor Car Co.*, 234 F.2d 619 (4th Cir. 1956) and *Goldlawr, Inc. v. Shubert*, 276 F.2d 614 (3d Cir. 1960) support anticipation of the same attitude with respect to contribution.

93. *Barnes Coal Corp. v. Retail Coal Merchants Ass'n*, 128 F.2d 645 (4th Cir. 1942);

In *Momand v. Twentieth-Century Fox Film Corp.*,<sup>94</sup> the court outlined the application of the "general jurisprudence"<sup>95</sup> of the federal courts to the question of assignability as follows:

Under the broad common law rule, causes of action for torts, or sounding in tort, did not survive and were, therefore, not assignable. The maximum *actio personalis moritur cum persona* . . . originally applied to most every form of action, whether arising out of contract or tort, but the common law was modified by the Statute of 4 Edward the III.

Under the interpretation of the common law, as modified by the Statute of 4 Edward the III, it has been generally held that a cause of action created by Section 7 of the Sherman Anti-Trust Act was assignable, on the theory that although the action was for a wrongful act and therefore tortious, the acts declared to be unlawful did not affect the person but the business or property of the assignor and it was, therefore, not *ex delicto* and came within the exception of the general rule forbidding the assignment of a thing in action, arising out of a tort. More accurately, this rule is limited to torts in the nature of personal wrongs.<sup>96</sup>

Identical reasoning was followed in *Moore v. Backus*<sup>97</sup> and the *Barnes Coal*<sup>98</sup> case with respect to the survival of a cause of action for treble damages. Of course, it would be difficult to persuade any American court that on the question of contribution it is bound to follow the English common law, as modified by the Law Reform Act of 1935,<sup>99</sup> which established rules of contribution between all joint tort-feasors. Nor would such a task be lightened by the observation that neither the common-law rule against contribution nor the modifying statute was in existence at the time the English common law was adopted by the American states.<sup>100</sup>

This is not to say, however, that the historical evolution of the principles and rules of contribution and their present application in both England and the United States are not persuasive. The court in *Barnes* pointed out that it had no doubt the cause of action survived when it interpreted the statute creating the action in light of the common law. The court stated that this kind of question should involve consideration

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*Moore v. Backus*, 78 F.2d 571 (7th Cir. 1935); *Momand v. Twentieth-Century Fox Film Corp.*, 37 F. Supp. 649 (W.D. Okla. 1941).

94. 37 F. Supp. 649 (W.D. Okla. 1941).

95. *Moore v. Backus*, 78 F.2d at 575.

96. 37 F. Supp. at 651-52.

97. 78 F.2d 571 (7th Cir. 1935).

98. 128 F.2d 645 (4th Cir. 1942).

99. Law Reform (Married Women and Tort-feasors) Act, 1935, 25 & 26 Geo. 5, c. 30, § 6 provides in part: "(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) . . . (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise. . . ."

100. The leading case of *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), was decided some years after the American Revolution.

not merely of ancient decisions and the state of the common law at the time of the American Revolution, but subsequent developments and rulings interpreting that law. In arriving at its decision in favor of survival, the court concluded that

to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation . . . at a particular time, is to deny to the common law . . . [its] "flexibility and capacity for growth and adaptation. . . ." <sup>101</sup>

### B. *The Minority Common-Law Rule and the Intentional Tort*

The correct rule with respect to contribution, as applied in English and early American decisions, limited its denial to cases of willful and conscious wrongdoing.<sup>102</sup> That this is still the law in seven, and possibly eight jurisdictions<sup>103</sup> goes far to negate the argument that the common-law courts are somehow incapable of fashioning rules of contribution. The courts of Louisiana,<sup>104</sup> Minnesota,<sup>105</sup> Pennsylvania,<sup>106</sup> Tennessee,<sup>107</sup> Wisconsin,<sup>108</sup> and the District of Columbia<sup>109</sup> have encountered little difficulty in permitting one negligent defendant to recover contribution from his cotort-feasor, even in the absence of statute. As the Pennsylvania Supreme Court has pointed out:

We are not determining that contributionship always exists between joint tortfeasors; we are deciding only that, in this particular instance, if that be the result, we do not look upon it as one that is improper, or unjust, or without sanction in law. There may be cases in which such outcome should not be sanctioned; they will be disposed of in the future when they are brought before us for determination.<sup>110</sup>

The fact that the District of Columbia Court of Appeals has found itself able to master the complexities of judicially created contribution<sup>111</sup>

101. 128 F.2d at 649.

102. *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799); *Bailey v. Bussing*, 28 Conn. 455 (1859); *Nickerson v. Wheeler*, 118 Mass. 295 (1875).

103. See note 8 *supra* and notes 104-109 *infra*.

104. *Quatray v. Wicker*, 178 La. 289, 151 So. 208 (1933).

105. *Duluth, M. & N. Ry. v. McCarthy*, 183 Minn. 414, 236 N.W. 766 (1931).

106. *Goldman v. Mitchell-Fletcher Co.*, 292 Pa. 354, 141 Atl. 231 (1928).

107. *Davis v. Broad St. Garage*, 191 Tenn. 320, 232 S.W.2d 355 (1950).

108. *Mitchell v. Raymond*, 181 Wis. 591, 195 N.W. 855 (1923).

109. *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949).

110. *Goldman v. Mitchell-Fletcher Co.*, 292 Pa. 354, 365-66, 141 Atl. 231, 235 (1928).

111. *Knell v. Feltman*, 174 F.2d 662, 664 (D.C. Cir. 1949), citing *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 223 (D.C. Cir. 1942). "[W]e adopt for the District of Columbia the rule that when the parties are not intentional and wilful wrongdoers, but are made so by legal inference or intendment, contribution may be enforced." *Knell* adopted this rule for the District of Columbia, "without exception or reservation. . ." 174 F.2d at 666. The rule was first established in *Herr v. Barber*, 2 Mackey 545 (Sup. Ct. D.C. 1883). The

should carry additional weight in favor of its application to cases arising under a federal statute.

There is, of course, the counterargument that, even assuming the validity of the minority rule, its operation is limited to nonintentional wrongs, occasionally even to mere passive negligence, so that it would not extend to the deliberate violation of the antitrust laws.<sup>112</sup> This may be true in the case of knowing individual violators, but is a corporation violating the law through the acts of employees, other than corporate officers, guilty of more than unintentional wrongdoing? Surely the wrong in such a case consists in neglect to exercise due control over the actions of subordinates rather than in any willful infliction of injury by the corporation acting through its principal officers. Whatever the reasons for the rule of criminal and civil corporate liability in antitrust cases, such corporate responsibility arises, not from an imputation of intent, but by virtue of an extension of the doctrine of *respondet superior*, and the corporation would in all probability be entitled to indemnity from the employees concerned.<sup>113</sup> Since a finding of corporate negligence is one often made by the courts in such cases to impose liability for the illegal acts involved,<sup>114</sup> it would not seem unwarranted for the same factor to operate in favor of a defendant corporation for the purposes of contribution.

A recent case, *United States v. Jerrold Electronics Corp.*,<sup>115</sup> appears to lend at least indirect support to this thesis. One of the Government's contentions against several affiliated corporations was that a vice-president of Jerrold's subsidiary, Jerrold Northwest, had conducted a campaign to force customers to purchase Jerrold equipment, thereby indicating an intent on the part of all the defendants to achieve a monopoly in the field. In refusing to impute this intent so as to impose liability

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Knell court emphasized the misinterpretation of *Merryweather v. Nixan* as "due to the brevity of the report and a misleading headnote . . ." and said, "in formulating a definite contribution rule, we desire to use the utmost care and to reexamine meticulously the general subject of contribution." 174 F.2d at 666.

112. See *Linkenhoger v. Owens*, 181 F.2d 97 (5th Cir. 1950).

113. The right of indemnity exists at common law, being based in contract, on a representation or warranty by the employee of care and skill in the duties for which he is hired. See *Harmer v. Cornelius*, 5 C.B. (n.s.) 236, 141 Eng. Rep. 94 (1858) (leading case); *Lister v. Romford Ice & Cold Storage Co.*, [1957] A.C. 555. Its enforcement is of course limited by practical considerations, but there seems to be no reason to preclude its application to cases of knowing violations of the law. See *Simon v. Socony-Vacuum Oil Co.*, 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1st Dep't 1944).

114. See, e.g., *United States v. Armour & Co.*, 168 F.2d 342 (3d Cir. 1948); *CIT Corp. v. United States*, 150 F.2d 85 (9th Cir. 1945); *Zito v. United States*, 64 F.2d 772 (7th Cir. 1933).

115. 187 F. Supp. 545 (E.D. Pa. 1960), rehearing denied, 365 U.S. 567 (1961) (*per curiam*).



on all corporate defendants, the court stated that, since the vice-president must have intended the natural consequences of his actions, and since he was acting as an officer of Jerrold Northwest, his intent could be attributed to that corporation. However, this intent could not be imputed to Jerrold, because, although "Jerrold Northwest was an agent of Jerrold and the latter was responsible for its wrongs under the doctrine of *respondeat superior*, the agent's intent is not imputed to its principal."<sup>116</sup>

While the language of the court is not entirely clear, it seems to contain the implication that, whatever the criminal and civil liability of a corporation for the intentional acts of its employees under the doctrine of *respondeat superior*, wrongful intent is not to be imputed under that doctrine unless the action is taken by a corporate officer.

### C. *The Modifying Statutes and the Intentional Tort*

Suppose a court does not adopt the minority common-law rule or finds that intentional wrongdoing should nevertheless be imputed to individual and corporate defendants alike. Would it then be free to adopt the negative rule prevailing in the majority of states which have not passed modifying legislation? It is submitted that it would not because the common law of the states, individually or collectively, is not the only source of general common law for the federal courts.

In *Whitin Mach. Works v. United States*,<sup>117</sup> the Government brought an action for breach of implied warranty under a contract of manufacture and sale by the defendant of certain generator sets. In determining the applicable law, and its scope, the court reasoned that, in the absence of a controlling act of Congress, the law to be applied in cases involving rights and liabilities under a contract with the United States may be a "general federal common law of sales" rather than the law of a particular state. Such a common law would not imply warranties more extensive than those spelled out in the Uniform Sales Act.<sup>118</sup> Similarly, in another case Judge Learned Hand had occasion to decide "whether the [Uniform Negotiable Instruments Act] is 'federal', as well as state, law . . ."<sup>119</sup> with respect to its application to the rights and liabilities of a federal agency. In holding that the federal law should apply, in accordance with *Deitrick v. Greaney*,<sup>120</sup> *D'Oench, Duhme & Co. v. FDIC*,<sup>121</sup> and *United States v. Standard Oil Co.*,<sup>122</sup> the court stated that government corpora-

116. *Id.* at 569.

117. 175 F.2d 504 (1st Cir. 1949).

118. *Id.* at 507.

119. *New York, N.H. & H. R.R. v. RFC*, 180 F.2d 241, 244 (2d Cir. 1950).

120. 309 U.S. 190 (1940).

121. 315 U.S. 447 (1942).

122. 332 U.S. 301 (1947).

tions, national in their scope, are not subject to state law, and should not be forced to shape their transactions to conform to the varying state laws where they occur or are to be carried out. Deciding the issue in favor of uniformity, Judge Hand pointed out that

the Negotiable Instruments Law has been enacted in every state of the Union, as well as the District of Columbia; it is a source of "federal law"—however that phrase may be construed—more complete and more certain than any other which can conceivably be drawn from those sources of "general law" to which we were accustomed to resort in the days of *Swift v. Tyson*.<sup>123</sup>

The Uniform Contribution Among Tort-Feasors Act has not, of course, been enacted in every state of the Union. However, its adoption in nine jurisdictions, together with the existence of similar legislation in fourteen others and the minority rule of judicial contribution in at least seven more, should surely provide a more compelling source of federal common law than the misconceived and vigorously denounced rule against contribution<sup>124</sup> which prevails in the remainder of the states. It is true that the common-law contribution jurisdictions deny contribution in cases of intentional torts, and the revised Uniform Act does so in cases of willful or wanton torts.<sup>125</sup> As noted previously, however, this limitation ignores the principle that damages in tort are, broadly speaking compensatory rather than punitive. Even James, who does not appear to be wholly in favor of contribution, questions the desirability of thus restricting the right once it is recognized.<sup>126</sup> As another writer has pointed out:

Despite the literal interpretation of a "wrongdoer", to apply [the rule against contribution] . . . to the case of joint tort-feasors works an injustice. Most joint and several tort liability results from inadvertently caused damage, although it is almost impossible to draw a practical line between torts of inadvertence and others. It is ironic to note that at common law contribution is denied among all tort-feasors, yet it is allowed as a matter of course to one who has deliberately chosen to violate a contractual obligation undertaken with others.<sup>127</sup>

Moreover, the revised Uniform Act has been adopted by only one state, North Dakota,<sup>128</sup> while the 1939 Uniform Act<sup>129</sup> and most other contribu-

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123. 180 F.2d at 244.

124. For an example of vigorous denunciation, see Prosser, *Torts* 248 (2d ed. 1955). Prosser points out that "the only kind word said by any writer for the rule denying contribution is in James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, [54 Harv. L. Rev. 1156 (1941)] contending that there should be no contribution in favor of an insured tortfeasor." *Id.* at 248 n.65.

125. See Commissioner's Prefatory Note, 9 Uniform Laws Ann. 230 (1957).

126. 1 Harper & James, *Torts* 720-21 (1956).

127. Silver, *Aspects of the Right of Contribution Among Tort-Feasors*, 33 *Temp. L.Q.* 432 (1960).

128. N.D. Cent. Code § 32-38-01 (1960).

129. Uniform Contribution Among Tort-Feasors Act, 9 Uniform Laws Ann. 233 (1957).

tion statutes including the English,<sup>130</sup> make no distinction between intentional and inadvertent torts.

#### D. *The Case for Contribution*

The desirability of uniformity in the antitrust field, while an effective argument to preclude the application of state law,<sup>131</sup> would have a limited effect in supporting a federal rule of contribution, since uniformity is achieved whether or not contribution is allowed under federal law. However, it would seem reasonable to point out that the federal rule should be with, and not against, the clear trend in favor of contribution.<sup>132</sup> In facing the question of contribution in antitrust damage actions, the courts will not be attempting to divine the intent of Congress, since it is clear that Congress never adverted to the matter. Accordingly, those sources of federal common law on which they should draw ought

130. Law Reform (Married Women and Tort-feasors) Act, 1935, 25 & 26 Geo. 5, c. 30, § 6.

131. See *Moore v. Backus*, 78 F.2d 571 (7th Cir. 1935). "The [Sherman] Act is quite general in its nature, and its successful enforcement would seem to require a uniform interpretation in its application . . ." *Id.* at 575.

132. The intricacies of the question of contribution in the federal versus state law context are further compounded by a consideration of the question under other federal statutes. The Federal Tort Claims Act, 28 U.S.C. § 2674 (1958), expressly provides for the application of the law of the place of the tort. It would at best, therefore, afford an extremely remote inference that state law, as a matter of policy, should apply where federal statutes are silent. The Jones Act, 41 Stat. 988 (1920) (codified in scattered sections of 46 U.S.C.), on the other hand, has been held to require the application of federal law, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). However, this instance of denial of contribution as a matter of federal law can be readily distinguished on the basis that the Court felt bound not to interfere with what it regarded as a detailed statutory scheme of compensation, a consideration which has no place in the interpretation of broad, general statutes such as the antitrust laws. Most confusing of all is the Federal Employers' Liability Act, 34 Stat. 232 (1906) (codified in scattered sections of 45 U.S.C.). While claims thereunder have been held to be governed by federal law, *Woodington v. Pa. R.R.*, 236 F.2d 760 (2d Cir. 1956), it has also been decided, without explanation, that contribution between defendants is governed by state law. *Zontelli Bros. v. Northern Pac. R.R.*, 263 F.2d 194 (8th Cir. 1959); *Fort Worth & Denver Ry. v. Threadgill*, 228 F.2d 307 (5th Cir. 1955). Again, however, it can be pointed out that the FELA is concerned not so much with the creation of new rights of action and with national policy, but with providing injured plaintiffs with convenient forums and procedures. The question of contribution under FELA, therefore, is less of a bona fide federal question than one which state law, common or statutory, should more appropriately be left to handle as in the case of the typical common-law tort. In addition, it should be borne in mind that the factor of insurance is involved in FELA and Jones Act claims, while insurance against antitrust violation liability would not only be impractical in terms of cost but probably against public policy. It is submitted, therefore, that while these statutes and the decisions under them might be cited both for and against the application of state or federal law and the existence of contribution, the difference in the objectives involved is such as to preclude their having significance as reliable guides to a correct resolution of the question of antitrust contribution.

to compel the conclusion that the right of contribution exists. On the other hand, for the courts to fall back on the well-worn and fallacious argument that the fashioning of rules of contribution is beyond judicial capability would involve not only a vacating of their function, but the imputation of an intention on the part of Congress to deny contribution. If, therefore, the courts feel that, because of the very lack of an indication of congressional intent the choice is not one they can fairly make, they should at least treat the question as one of those involving special difficulty and take state law as the federal rule for purposes of contribution. This would still be shifting the responsibility to Congress, with much less justification than, for example, in the case of the antitrust limitation period. Such a compromise would, however, avoid closing the judicial door against contribution, an action for which there would be little sanction in law or logic, and still leave the states free to assist in a solution to the question.<sup>133</sup>

There remains the implication in the *Flintkote* opinion<sup>134</sup> that the deterrent aspects of the antitrust laws are enhanced by an unrestricted principle of joint and several liability. Combined with the consideration that treble damages are punitive as well as compensatory in nature, this appears to militate strongly against dilution of the penalties through contribution. These arguments lose much of their force, however, in the face of the realization that the absence of contribution can operate to the advantage of equally guilty conspirators by permitting them to go "scot-free." What the punitive burden loses in terms of the risk of its concentration on a few larger coconspirators, it would certainly gain through diffusion over a larger number of violators. Not only would the existence of rights of contribution remove to a great extent the possibility of escaping liability entirely, making it less attractive for smaller companies, particularly, to join in any concerted violation, but it would, in a sense, add vigor to the enforcement of the antitrust laws by allowing the conspirators themselves to ensure that all those participating in the unlawful action are appropriately penalized.

Therefore, it is concluded that while the initial inclination of the courts may be to follow the so-called rule against contribution, there are sound bases for effective persuasion in favor of a right of contribution between antitrust coconspirators.

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133. "[A] decision that a given matter is governed by federal law operates to preclude both state courts and state legislation from contributing to a solution of the problems involved. If the federal courts woodenly shift the responsibility to Congress, the consequence is that creative development by the judicial process is wholly prevented in the area in question." Hart & Wechsler, *The Federal Courts and the Federal System* 703 (1953). See also *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) for an analysis of federal judicial responsibility in such cases.

134. *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957).

### E. *Defects of the Joint-Judgment Rule*

Six states which now have contribution statutes have expressly limited the right to joint-judgment defendants.<sup>135</sup> The undesirability of this condition precedent is well demonstrated by James, who describes it as an "unnecessary limitation":

When one defendant has no right against a co-defendant until a joint judgment has been rendered against them both, the decision of the plaintiff whether or not there will be a joint judgment and who will be included therein also determines what right, if any, there will be to contribution. This permits the plaintiff to make his own selection and, insofar as he exercises it, the policy of the statute may be defeated. The reasons for allowing contribution, however, apply as strongly to those cases in which the plaintiff sues only one tort-feasor as to those in which there is a joint judgment.<sup>136</sup>

The joint-judgment rule is a statutory anomaly without rational foundation. Moreover, the Uniform Contribution Among Tort-Feasors Act expressly avoids the limitation.<sup>137</sup> It is submitted, therefore, that, in framing a federal rule of contribution, the courts should not subject it to any such restriction, but leave tort-feasors who are willing to assume the greater burden of proof necessary for judgment against those not sued by the plaintiff, free to do so.

### F. *Basis of Contribution*

Since only three states have retained the optional provision<sup>138</sup> of the 1939 Uniform Act for distribution according to degrees of fault where equal distribution would be inequitable,<sup>139</sup> and since the courts do not appear to have taken any steps on their own initiative toward implementing this notion, it would be unlikely to find application in an antitrust case of first impression. In addition, a court would be faced with an almost impossible task in trying to ascertain a basis for assigning relative degrees of fault. While undoubtedly a suitable device in the joint negligence case, such a test is not necessarily satisfactory for antitrust torts. Arbitrary tests such as total sales values or profits derived might have little relation to the extent of participation or corporate negligence involved. By the same token, estimated degrees of guilt or fault, even if the antitrust laws lent themselves to such a concept, might not correspond at all with the illegal benefits derived which, after all, reflect

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135. See note 10 *supra*. They are Michigan, Mississippi, Missouri, New York, Texas, and West Virginia.

136. 1 Harper & James, *Torts* 720 (1956).

137. Uniform Contribution Among Tort-Feasors Act, 9 Uniform Laws Ann. 233 (1957).

138. Uniform Contribution Among Tort-Feasors Act, 9 Uniform Laws Ann. 235 (1957).

139. See Uniform Contribution Among Tort-Feasors Act, 9 Uniform Laws Ann. 237 (1957) (Supp. 1961).

the damage inflicted upon the plaintiff. The argument can, of course, be made, but there is little authoritative support for contribution on a relative basis.

Assuming that contribution, if allowed at all, would be limited to recovery of the excess paid by any joint tort-feasor over his pro rata share of the common liability (as most of the state statutes now provide), there remains the question of the effect of insolvency of some of the joint defendants. Since the question of contribution itself, as a matter of substantive federal law, has not been decided, there is of course no federal rule with respect to insolvency. However, in two related opinions, the New Jersey Supreme Court has considered this problem and has attempted to fill the interstices of the New Jersey statute.<sup>140</sup> In *Judson v. Peoples Bank & Trust Co.*,<sup>141</sup> the plaintiffs charged that they had been induced by fraud to sell their shares of stock in a New Jersey corporation and sought recovery of the difference between the price received and the actual value of the shares. The court found four tort-feasors jointly liable but by the conclusion of the second trial, two had settled for small amounts and a third had become insolvent.

The first *Judson*<sup>142</sup> case established the rule that determination of a pro rata share is made by dividing the number of available tort-feasors within the jurisdiction into the amount of the verdict received by the plaintiff in his suit against any one of them. In a dictum, the court announced the standard equity rule that the number of pro rata shares is to be determined on the basis of the number of tort-feasors commonly liable who are available *and solvent*. However, in the second case the court, faced with two settlements for less than the respective pro rata shares, concluded that the plaintiff could collect both remaining shares from the solvent tort-feasor. It reasoned that the plaintiff should not suffer a further loss because of one tort-feasor's insolvency, where plaintiff neither knew of it at the time of the settlement nor meant to prejudice a remaining defendant.<sup>143</sup> Hence, the insolvent's share was included in determining the total number of shares, and the solvent defendant could attempt to recover contribution only from the insolvent, since the remaining two had settled.

This latter rule, however, would seem to be limited in application to cases in which some pro rata shares have been compromised by settlement. Where no settlements have been made, the clear intimation is that the equity rule of the first *Judson* case would apply and the pro rata shares be determined by dividing the damages between available

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140. N.J. Stat. Ann. § 2A:53A-3 (1952).

141. 25 N.J. 17, 134 A.2d 761 (1957).

142. 17 N.J. 67, 110 A.2d 24 (1954).

143. 25 N.J. at 38, 134 A.2d at 772.

and solvent defendants. If contribution is allowed, therefore, the pro rata shares would most probably be calculated on the above basis. A court would hardly be likely to let a plaintiff lose any part of the recovery to which he might be entitled because of such a fortuitous circumstance as the insolvency of one or more of the joint defendants.

#### V. CONCLUSION

On balance, therefore, it seems that, despite the indisputable and highly practical deterrent objective of the treble damage provision, both logic and the law compel the conclusion that one of several coconspirators should not be called upon to shoulder the entire damage burden while his more fortunate fellows, who may not even have been joined in the action, go "scot-free." The availability of contribution on a pro rata basis would not only be equitable as among the conspirators, but should insure a fuller enforcement of the antitrust laws without appreciably lessening the punitive effect of treble damage liability.