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Apportioning Contribution Shares Under the Federal Securities Acts: A Suggested Approach for an Unsettled Area

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APPORTIONING CONTRIBUTION SHARES UNDER THE FEDERAL SECURITIES ACTS: A SUGGESTED APPROACH FOR AN UNSETTLED AREA

INTRODUCTION

The federal securities acts[1] were designed to produce and enforce a market system in which there is adequate disclosure of all factual information that is material to a securities transaction.[2] An issuer that desires to raise money through a sale of securities must file a registration statement with the Securities Exchange Commission (SEC), disclosing all pertinent information.[3] To ensure the accuracy

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1. Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (1976); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976).

2. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976); Touche Ross & Co. v. SEC, 609 F.2d 570, 580 (2d Cir. 1979); Wasson v. SEC, 558 F.2d 879, 886 (8th Cir. 1977); Felts v. National Account Sys. Ass'n, 469 F. Supp. 54, 63 (N.D. Miss. 1978); Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 563 (E.D.N.Y. 1971); Globus v. Law Research Serv., 287 F. Supp. 188, 199 (S.D.N.Y. 1968), *aff'd in part, rev'd in part on other grounds*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933); Folk, *Civil Liabilities Under the Federal Securities Acts: The* BarChris *Case*, 55 Va. L. Rev. 1, 17 (1969); Knauss, *A Reappraisal of the Role of Disclosure*, 62 Mich. L. Rev. 607, 607 (1964).

3. A registration statement is a disclosure document which the issuer must prepare and submit to the SEC as a prerequisite to a public offering of securities. The registration statement contains financial and other information about the issuer and is intended to provide investors with a factual background for making informed investment decisions. The information which the issuer must disclose in a registration statement is set forth in the Securities Act of 1933, Schedule A, 15 U.S.C. § 77aa (1976). The 1933 Act makes it illegal to perform certain acts in connection with a public sale of securities without a registration statement. *Id.* § 5(c), 15 U.S.C. § 77e(c) (1976). Section 5(c) provides that "[i]t shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title." *Id.* The registration statement filed pursuant to § 5(c) must become effective before the securities may be sold in interstate commerce. *Id.* § 5(a), 15 U.S.C. § 77e(a) (1976). "Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly— (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale." *Id.* Ordinarily, a registration statement automatically becomes effective twenty days after filing unless the SEC finds it to be inadequate. *Id.* § 8(a), 15 U.S.C. § 77h(a) (1976). The SEC, however, has the power to accelerate the effective date of the registration statement if, in its discretion, it determines that an adequate disclosure has been made. *Id.*

of such information and to deter fraud, civil liability is imposed for material misrepresentations or omissions of material facts.[4] Section 11(a) of the Securities Act of 1933 (1933 Act)[5] expressly creates a private cause of action specifically for misrepresentations in registration statements.[6] The purchaser may also have an overlapping cause of action[7] under the general anti-fraud provision of the Securities Exchange Act of 1934 (1934 Act),[8] section 10(b),[9] if he can prove that

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4. Securities Act of 1933, § 11(a), 15 U.S.C. § 77k(a) (1976). If the misrepresentation appears in the prospectus, the plaintiff will have an action under § 12 of the 1933 Act, 15 U.S.C. § 77*l* (1976), as well. Section 12 imposes civil liability upon the purchaser's immediate seller for material misrepresentations or omissions in prospectuses and oral communications transmitted in interstate commerce for the purpose of offering or selling securities. Collins v. Signetics Corp., 605 F.2d 110, 113 (3d Cir. 1979); Turner v. First Wis. Mtge. Trust, 454 F. Supp. 899, 912 (E.D. Wis. 1978); Unicorn Field, Inc. v. Cannon Group, 60 F.R.D. 217, 222-23 (S.D.N.Y. 1973). Under the scheme of liability imposed by § 12, there is no right to contribution; instead, liability is apportioned "by allowing each purchaser in the chain of distribution to pursue an action against his seller." Lawler v. Gilliam, 569 F.2d 1283, 1294 (4th Cir. 1978).

5. 15 U.S.C. § 77k(a) (1976).

6. *Id.* Section 11(a) of the 1933 Act provides that "[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue— (1) every person who signed the registration statement; (2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted; (3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner; (4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him; (5) every underwriter with respect to such security." *Id.*

7. *See* Huddleston v. Herman & MacLean, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,919, at 90,661 (5th Cir. Mar. 9, 1981).

8. 15 U.S.C. §§ 78a-78kk (1976).

9. *Id.* § 78j(b). Section 10(b) makes it unlawful to employ any manipulative or deceptive device in connection with the purchase or sale of securities in contravention of the rules prescribed by the SEC as necessary for the protection of investors. *Id.* Rule 10b-5, 17 C.F.R. § 240.10b-5 (1981), promulgated pursuant to the rulemaking authority granted to the SEC under § 10(b), provides that "[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in

the defendants acted with scienter.[10]

In the typical corporate offering of securities, the broad net of liability fashioned by these two sections falls upon two categories of defendants: (1) insiders—the issuer and those persons who direct the issuer's operations;[11] and (2) outsiders—the underwriters and experts, such as accountants, retained by the issuer to facilitate the sale of the securities to the investing public.[12] In the ordinary course of an offering, these two groups work together closely and have a common interest in the offering's success.[13] Liability under sections 11 and

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order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." *Id.* Although § 10(b) and rule 10b-5 do not expressly create a private cause of action, the federal courts have consistently implied such a cause of action since the decision in Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946). The Supreme Court expressly recognized the private right of action. Superintendent of Ins. v. Banker's Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

10. *See infra* note 105.

11. Section 11 of the 1933 Act expressly provides for liability on the part of every person who was, or was about to become, a director or partner or person performing similar functions in the issuer. Securities Act of 1933, § 11(a)(2), (3), 15 U.S.C. § 77k(a)(2), (3) (1976). In addition, specific sections in both the 1933 Act and the 1934 Act make persons who directly or indirectly control the issuer jointly and severally liable with the issuer. *Id.* § 15, 15 U.S.C. § 77o (1976); Securities Exchange Act of 1934, § 20, 15 U.S.C. § 78t (1976).

12. Securities Act of 1933, § 11(a)(4), (5), 15 U.S.C. § 77k(a)(4), (5) (1976). A sale of registered securities to the public involves a number of different parties. The issuer, desiring to raise capital through a sale of securities, contacts an underwriting firm and secures its willingness to participate in the offering. This underwriting firm, known as the "managing underwriter," conducts a thorough investigation of the issuer and participates in the preparation of the registration statement covering the securities to be offered along with the issuer's counsel and independent accounting firm. The managing underwriter also contacts other underwriting firms who agree to participate in the underwriting syndicate. Typically, these agreements are embodied in letters of intent, which are not binding on the parties. Once the registration becomes effective, the underwriting agreement is signed between the underwriters and the issuer. This agreement is binding and commits the underwriters to the issue. Several days later the closing takes place and the underwriters actually purchase the securities from the issuer. In the actual offering, an underwriter acts as either a retailer or a wholesaler, depending on the type of underwriting. In a "firm commitment" underwriting the underwriter acts as a wholesaler, actually purchasing the securities from the issuer and assuming the risk of sale to the investing public. In a "best efforts" underwriting the underwriter acts as a retailer, agreeing to use his best efforts to sell the securities for the issuer but not agreeing to purchase any unsold portion of the issue. For a general discussion of the mechanics of a public offering and the various types of underwriting arrangements, see Freund & Hacker, *Cutting Up the Humble Pie: A Practical Approach to Apportioning Litigation Risks Among Underwriters*, 48 St. John's L. Rev. 461, 464-68 (1974).

13. Underwriters make their profit from the "gross spread," which is the difference between the price they pay to the issuer for the securities and the price at which they sell the securities to the public. The more successful the offering, the more

10(b) is joint and several,[14] however, and once the possibility of civil liability under these sections is raised, the groups' interests become sharply antithetical. Damages awarded in federal securities cases can be substantial,[15] and even crushing.[16] Frequently, therefore, outside

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assured the profit. *See* Freund & Hacker, *supra* note 12, at 466; Comment, *Section 11 of the Securities Act: The Unresolved Dilemma of Participating Underwriters*, 40 Fordham L. Rev. 869, 874-78 (1972).

14. Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1976) ("All or any one or more of the persons specified in [section 11(a)] shall be jointly and severally liable . . . ."). Invoking the language of § 11, courts have judicially mandated joint and several liability under § 10(b). *See, e.g., In re* Home-Stake Prod. Co. Sec. Litig., 76 F.R.D. 351, 375 (N.D. Okla. 1977); deHaas v. Empire Petroleum Co., 286 F. Supp. 809, 815-16 (D. Colo. 1968), *aff'd in part, vacated in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

15. A plaintiff's damages for misrepresentation are measured according to the "out-of-pocket rule." Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 168 & n.24 (2d Cir. 1980) (action under § 10(b)) (citing Affiliated Ute Citizens v. United States, 406 U.S. 128, 155 (1972)); Fershtman v. Schectman, 450 F.2d 1357, 1361 (2d Cir. 1971) (actions under §§ 12 and 17(a) of the 1933 Act), *cert. denied*, 405 U.S. 1066 (1972); Levine v. Seilon, Inc., 439 F.2d 328, 334 (2d Cir. 1971) (action under § 10(b)); *In re* Gap Stores Sec. Litig., 79 F.R.D. 283, 298 (N.D. Cal. 1978) (action under § 11 of the 1933 Act); Tucker v. Arthur Andersen & Co., 67 F.R.D. 468, 482 (S.D.N.Y. 1975) (action under § 10(b)); Mullaney, *Theories of Measuring Damages in Security Cases and the Effects of Damages on Liability*, 46 Fordham L. Rev. 277, 281 (1977); Note, *The Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities*, 26 Stan. L. Rev. 371, 383-84 & n.65 (1974) [hereinafter cited as *Measure of Damages*]. Out-of-pocket damages are measured as the difference between the price paid for the securities and the actual value of the securities at the time of the suit, or the resale price of the securities if they have been resold by the plaintiff prior to his suit. Reyos v. United States, 431 F.2d 1337, 1348 (10th Cir. 1970); Sarlie v. E.L. Bruce Co., 265 F. Supp. 371, 376 (S.D.N.Y. 1967); Securities Act of 1933, § 11(e), 15 U.S.C. § 77k(e) (1976). Punitive damages are not recoverable under either the 1933 Act or the 1934 Act. Section 28(a) of the 1934 Act provides that "no person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of his actual damages." 15 U.S.C. § 78bb(a) (1976). This section has been interpreted as barring punitive damages under both acts. Byrnes v. Faulkner, Dawkins & Sullivan, 550 F.2d 1303, 1313 (2d Cir. 1977) (1934 Act); Globus v. Law Research Serv., 418 F.2d 1276, 1283-87 (2d Cir. 1969) (1933 Act), *cert. denied*, 397 U.S. 913 (1970). Consequential damages, however, are available. Foster v. Financial Technology Inc., 517 F.2d 1068, 1071 (9th Cir. 1975) (a plaintiff seeking consequential damages in an action under § 10(b) of the 1934 Act can recover them if he establishes a causal nexus between the amounts claimed as consequential damages and the defendant's wrongdoing with reasonable certainty); Madigan, Inc. v. Goodman, 498 F.2d 233, 238-40 (7th Cir. 1974) ("good deal" of certainty); Zeller v. Bogue Elec. Mfg. Corp., 476 F.2d 795, 803 (2d Cir.) (same), *cert. denied*, 414 U.S. 908 (1973). The concept of consequential damages has been used to recover outlays of capital which are directly attributable to the defendant's fraudulent conduct. Madigan, Inc. v. Goodman, 498 F.2d at 238-39.

16. Mullaney, *supra* note 15, at 290-94; *Measure of Damages, supra* note 15, at 376-77. The problem of potentially crushing liability is obviated somewhat in suits brought under § 11 of the 1933 Act. Section 11(e) provides, *inter alia*, that "[i]n no event shall any underwriter . . . be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price

defendants who are held liable in securities cases seek to shift their liability for the plaintiff's damages to the inside defendants through claims for contribution.[17]

Although a right to contribution clearly exists under sections 11[18] and 10(b),[19] the method of apportioning the contribution shares among defendants is unsettled.[20] Traditionally, contribution shares

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at which the securities underwritten by him and distributed to the public were offered to the public." 15 U.S.C. § 77k(e) (1976).

17. *See infra* notes 30, 34-37 and accompanying text. Section 11(f) of the 1933 Act precludes a defendant guilty of fraudulent misrepresentation from recovering contribution from less culpable defendants. 15 U.S.C. § 77k(f) (1976).

18. Section 11(f) of the 1933 Act, 15 U.S.C. § 77k(f) (1976), expressly provides a right of contribution for defendants in suits brought under that section. At early common law, there was a prohibition against contribution among joint tortfeasors dating from the English case of Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799). The English courts limited this prohibition to intentional tortfeasors, W. Prosser, Handbook of the Law of Torts § 50, at 306 (4th ed. 1971), but the American courts extended the ban on contribution to non-intentional tortfeasors as well. Union Stock Yards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217, 227-28 (1905); Public Serv. Ry. v. Matteucci, 105 N.J.L. 114, 115-16, 143 A. 221, 221 (1928); Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy,* In Pari Delicto, *Indemnification, and Contribution,* 120 U. Pa. L. Rev. 597, 648 (1972); Comment, *Contribution and the Distribution of Loss Among Tortfeasors,* 25 Am. U. L. Rev. 203, 204-07 (1975) [hereinafter cited as *Contribution*]; Comment, *Indemnity and Contribution Among Joint Tortfeasors,* 15 Hous. L. Rev. 1004, 1005 (1978) [hereinafter cited as *Indemnity*]. By the middle of this century, the early common-law rule against contribution among joint tortfeasors had been abolished by statute or decisional law in many states. Restatement (Second) of Torts § 886A comment a, at 338 (1979). In those states, the courts followed the maxim "Equality is equity" and apportioned the contribution shares on a pro rata basis. *Id.* comment h, at 340; *e.g.*, Warner v. Capital Transit Co., 162 F. Supp. 253, 255 (D.D.C. 1958); Russell v. United States, 113 F. Supp. 353, 356 (M.D. Pa. 1953); Early Settlers Ins. Co. v. Schweid, 221 A.2d 920, 923 (D.C. 1966); Reynolds v. Illinois Bell Tel. Co., 51 Ill. App. 2d 334, 339, 201 N.E.2d 322, 324-25 (1964); Scammon v. City of Saco, 247 A.2d 108, 112 (Me. 1968); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 94, 110 A.2d 24, 37 (1954); W. Prosser, *supra*, § 50, at 310.

19. The courts permit contribution in suits brought under § 10(b) of the 1934 Act, although such a right is not expressly provided in the section. *E.g.*, Huddleston v. Herman & MacLean, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,919, at 90,677 (5th Cir. Mar. 9, 1981); Heizer Corp. v. Ross, 601 F.2d 330, 334 (7th Cir. 1979); Madigan, Inc. v. Goodman, 498 F.2d 233, 238 (7th Cir. 1974); Marrero v. Abraham, 473 F. Supp. 1271, 1277-78 (E.D. La. 1979); Note, Globus: *A Prolific Generator of Nice Questions,* 33 Ohio St. L.J. 898, 912-13 (1972).

20. *Compare* Wassel v. Eglowsky, 399 F. Supp. 1330, 1370 (D. Md. 1975) (pro rata apportionment after grouping defendants by entity), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976), *and* Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 (S.D.N.Y. 1974) (pro rata apportionment), *aff'd in part, rev'd in part on other grounds*, 540 F.2d 27 (2d Cir. 1976), *with* McLean v. Alexander, 449 F. Supp. 1251, 1276-77 (D. Del. 1978) (relative fault apportionment), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979), *and* Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 170-71 (D. Del. 1974) (same, in dictum), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

were apportioned on a pro rata basis—that is, equally among the defendants without regard to individual fault.[21] Recently, however, some courts have moved away from the traditional rule toward apportionment based upon the relative fault of the various defendants.[22] This Note proposes a method for the apportionment of contribution shares in federal securities cases which synthesizes the pro rata and relative fault approaches.[23] After briefly reviewing the mechanics of a securities offering, Part I examines the judicial treatment of contribution and indemnification under the federal securities acts. Part II concludes that section 10(b) of the 1934 Act and section 11 of the 1933 Act require different methods for the apportionment of contribution shares in order to effectuate the deterrent policies that are central to the two Acts.

I. Shifting the Burden Under the Federal Securities Laws

With respect to the preparation of a registration statement for an offering, the 1933 Act requires the underwriter and experts to conduct a thorough investigation of the issuer's business affairs and makes the underwriter or expert liable for any misrepresentations in the registration statement.[24] Even though the threat of civil liability encourages the outsider to make a thorough investigation,[25] the issuer is in a position to conceal information from the underwriter or expert if it has something to hide. The outsider may thus be actively prevented by the issuer's duplicity from ensuring sufficiently accurate disclosure.[26]

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21. Wassel v. Eglowsky, 399 F. Supp. 1330, 1370 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); *e.g.*, Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds*, 540 F.2d 27 (2d Cir. 1976); Globus, Inc. v. Law Research Serv., 318 F. Supp. 955, 957 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

22. McLean v. Alexander, 449 F. Supp. 1251, 1268-77 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *see* Wassel v. Eglowsky, 399 F. Supp. 1330, 1366-70 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 168-72 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 588 (E.D.N.Y. 1971).

23. Commentators in this field have assumed that one general rule on the apportionment of contribution shares under the federal securities acts is appropriate in all circumstances and have not attempted to draw distinctions in apportioning contribution shares under the various provisions of the federal securities acts which impose civil liability. 3 L. Loss, Securities Regulation 1738 (2d ed. 1961); Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 557-58 (1981); Ruder, *supra* note 18, at 650.

24. *See supra* note 6. Outside defendants can avoid this liability by proving their "due diligence." *See infra* notes 121-23 and accompanying text.

25. *See supra* note 2 and accompanying text.

26. *See* McLean v. Alexander, 449 F. Supp. 1250, 1257-60 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

An outside defendant who is found liable for such misrepresentation will, quite naturally, seek to shift the burden onto the inside defendants.[27] Indeed, securities defendants in a variety of contexts have consistently sought to shift their liability to other parties in the litigation through claims for indemnification or contribution.[28]

The availability of either contribution or indemnification in a federal securities case is a matter to be determined under federal rather than state law.[29] These doctrines are equitable devices developed to mitigate the harshness of joint and several liability.[30] Indemnification permits a jointly liable defendant to shift all his liability to another joint tortfeasor.[31] It is available in situations involving vicarious liability[32] or an express agreement of indemnification between the parties.[33] Contribution, on the other hand, permits a jointly liable defendant to shift a portion, but not all, of his liability to another.[34] The right to contribution is not founded upon contract but is based on principles of fundamental justice that require all jointly

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27. *Id.* at 1265.

28. *E.g.*, Heizer Corp. v. Ross, 601 F.2d 330, 331 (7th Cir. 1979) (corporate shareholder defendant sought indemnification or contribution from its former president, chief executive officer and director); Stratton Group v. Sprayregen, 466 F. Supp. 1180, 1183 (S.D.N.Y. 1979) (corporate defendant sought contribution against a partnership engaged in the practice of law which acted as legal counsel to the corporation); Globus, Inc. v. Law Research Serv., 318 F. Supp. 955, 956 (S.D.N.Y. 1970) (underwriter sought contribution from issuing corporation), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

29. Heizer Corp. v. Ross, 601 F.2d 330, 331 (7th Cir. 1979). The common-law rules on contribution are therefore inapposite. *See supra* note 18.

30. Restatement (Second) of Torts § 886A comment c, at 338-39 (1979); *see id.* § 886B comment c, at 345-46. *See generally* W. Prosser, *supra* note 18, § 50 (contribution); *id.* § 51 (indemnification). Joint tortfeasors are jointly and severally liable for the plaintiff's loss. Each individual tortfeasor is therefore liable for the entire amount of the plaintiff's damages. *See* W. Prosser, *supra* note 18, § 47, at 297. Contribution and indemnification are remedies which joint and severally liable defendants have *inter se*. They do not affect the plaintiff's substantive right to sue any tortfeasor he chooses and to seek execution from any tortfeasor against whom he obtains a judgment. *Contribution, supra* note 18, at 203-04.

31. McLean v. Alexander, 449 F. Supp. 1251, 1256 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); W. Prosser, *supra* note 18, § 51, at 310; *see* Globus v. Law Research Serv., 287 F. Supp. 188, 199 (S.D.N.Y. 1968), *aff'd in part, rev'd in part on other grounds*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

32. W. Prosser, *supra* note 18, § 51, at 311.

33. *Id.* at 310.

34. Restatement (Second) of Torts § 886A comment *l*, at 342 (1979); W. Prosser, *supra* note 18, § 50, at 310; 2 S. Williston, Treatise on the Law of Contracts § 345, at 767 (3d ed. 1959). The defendant seeking contribution must establish that the party from whom he seeks it is liable in tort to the same person for the same harm. Wassel v. Eglowsky, 399 F. Supp. 1330, 1367 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); W. Prosser, *supra* note 18, § 50, at 309.

liable parties to bear a portion of the common liability.[35] The defendant who has been forced to discharge more than his share of the liability may bring a claim for contribution against any other jointly liable parties to compel reimbursement.[36] The losses arising out of the joint liability are thus more evenly distributed among the responsible defendants.[37]

A. *Indemnification*

An outside defendant could at one time completely escape liability for a violation of the federal securities acts through an indemnification agreement.[38] In the typical agreement, the inside and outside parties agreed to indemnify each other for any acts or omissions giving rise to liability.[39] Despite scholarly criticism,[40] this practice was the rule in

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35. Newport Air Park, Inc. v. United States, 419 F.2d 342, 346 (1st Cir. 1969); Miller v. Miller, 62 Misc. 2d 755, 757, 310 N.Y.S.2d 18, 21 (Civ. Ct. 1970); Newman v. Lefkowitz, 60 Misc. 2d 104, 107, 301 N.Y.S.2d 738, 741 (Dist. Ct. 1969); Nationwide Mut. Ins. Co. v. Minnifield, 213 Va. 797, 800, 196 S.E.2d 75, 77-78 (1973).

36. 2 S. Williston, *supra* note 34, § 345, at 772, 775. Contribution is an inchoate right which ripens into a cause of action when one party pays more than his share of the common liability. *Id.* at 775; *accord* Prisbrey v. Noble, 505 F.2d 170, 176 (10th Cir. 1974); Southern Ry. v. State Farm Mut. Auto Ins. Co., 357 F. Supp. 810, 812 (N.D. Ga. 1972), *aff'd*, 477 F.2d 49 (5th Cir. 1973); Kantlehner v. United States, 279 F. Supp. 122, 128 (E.D.N.Y. 1967). The federal rules of civil procedure, however, permit contribution claims to be brought before one party has been proven liable to another for contribution. Fed. R. Civ. P. 13(g), 14(a); *see infra* note 52 and accompanying text.

37. Of course, the parties who are potentially liable could agree among themselves in advance of litigation to apportion contribution shares in the event of liability. 2 S. Williston, *supra* note 34, § 345, at 769; Douglas & Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 178-79 (1933). This private agreement is enforceable if it is not contrary to public policy. *See* 2 S. Williston, *supra* note 34, § 345, at 769-70. Several commentators have suggested this approach to the problem of apportioning contribution shares under the federal securities acts. Freund & Hacker, *supra* note 12, 480-95; Comment, *Section 11 of the Securities Act—A Proposal For Allocating Liability*, 45 Wash. L. Rev. 95, 116-28 (1970). This Note is concerned with the apportionment of contribution shares in the absence of such a private agreement on the matter.

38. Note, *Indemnification of Underwriters and Section 11 of the Securities Act of 1933*, 72 Yale L.J. 406, 407 (1962) [hereinafter cited as *Indemnification of Underwriters*].

39. For the text of a typical indemnification agreement, see Globus v. Law Research Serv., 418 F.2d 1276, 1287 n.14 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

40. 3 L. Loss, *supra* note 23, at 1831 ("Indemnification defeats *pro tanto* the statutory provision on contribution. And it is hostile to the *in terrorem* effect intended for § 11; negligence in the preparation of the registration statement was made a basis of civil liability largely in order to promote careful adherence to the statutory requirements." (footnote omitted)).

the securities industry[41] prior to the 1968 decision in *Globus v. Law Research Service.*[42]

In *Globus,* the district court refused to enforce an indemnification agreement between two defendants on the ground that an agreement that absolved a defendant guilty of a knowing violation of the federal securities acts was contrary to public policy and therefore unenforceable.[43] The court reasoned that the threat of civil liability that could not be avoided by contract was necessary in order to encourage outside defendants to adhere to the statutory requirements of thorough investigation and disclosure.[44] The Second Circuit affirmed, but it stopped short of propounding a general rule barring indemnification in all circumstances, noting that it was only considering a situation in which the defendant seeking indemnification was himself guilty of more than mere negligence.[45]

The Second Circuit's decision in *Globus* thus left open the possibility that a merely negligent party could obtain indemnification from one significantly more culpable.[46] This possibility proved to be illusory, however, as courts applying the *Globus* rule in subsequent indemnification cases routinely held that the party seeking indemnifica-

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41. *Id.* at 1834-35.

42. 287 F. Supp. 188 (S.D.N.Y. 1968), *aff'd in part, rev'd in part on other grounds,* 418 F.2d 1276 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970). The defendants in *Globus* were the issuer, its president and the underwriter involved in an offering of one hundred thousand shares of Law Research Service, Inc. They were all found liable for having circulated in connection with the stock sale an advertisement that contained a misrepresentation in volation of § 10(b) of the 1934 Act and § 17(a) of the 1933 Act. *Id.* at 191. The underwriter had entered into a standard indemnification agreement with the issuer and sought by way of a cross-claim to enforce this agreement and shift its liability for the plaintiff's losses onto the issuer and its president. *Id.* at 198-99.

43. *Id.* at 199.

44. *Id.* ("The purpose of the federal securities acts is to insure that the public investor, including particularly small investors such as the plaintiffs here, will obtain the benefit of a thorough investigation of the facts set forth in a prospectus or offering circular, not only by the issuer but also by the underwriter, so that prospective investors will have access to the truth. If an underwriter were to be permitted to escape liability for its own misconduct by obtaining indemnity from the issuers, it would have less of an incentive to conduct a thorough investigation and to be truthful in the prospectus distributed under its name, than it would be if the indemnity was unenforceable under such circumstances."); *accord* State Mut. Life Assurance Co. v. Peat, Marwick, Mitchell & Co., 49 F.R.D. 202, 213 (S.D.N.Y. 1969).

45. 418 F.2d at 1287-88.

46. *See* Wassel v. Eglowsky, 399 F. Supp. 1330, 1366 (D. Md. 1975), *aff'd per curiam,* 542 F.2d 1235 (4th Cir. 1976) (dictum); Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 167 (D. Del. 1974) (same), *vacated on other grounds,* 535 F.2d 761 (3d Cir. 1976); Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 135 (S.D.N.Y. 1974) (same), *aff'd in part, rev'd in part on other grounds,* 540 F.2d 27 (2d Cir. 1976); Ruder, *supra* note 18, at 651-59.

tion was guilty of more than ordinary negligence.[47] Adopting a stricter approach, another line of cases concluded that indemnification would not be permitted under the federal securities acts as a matter of law, regardless of the culpability of the party seeking it.[48] The rule denying indemnification as a matter of law is consistent with the policies underlying the federal securities acts.[49] Enforcing an indemnification agreement in favor of a negligent outside defendant would tend to encourage a less thorough investigation of the issuer, and consequently less than satisfactory disclosure, by removing the penalty for a negligent investigation.[50] Deprived of indemnification by *Globus* and its progeny, outside defendants in federal securities lawsuits may nevertheless obtain the benefits of contribution.[51]

B. *Contribution*

An express right to contribution[52] is granted in section 11 of the

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47. *E.g.*, McLean v. Alexander, 449 F. Supp. 1251, 1267 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); Wassel v. Eglowsky, 399 F. Supp. 1330, 1366 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); Tucker v. Arthur Andersen & Co., [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,544, at 95,868 (S.D.N.Y. Apr. 25, 1974); Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 135 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds*, 540 F.2d 27 (2d Cir. 1976).

48. *E.g.*, Laventhol, Krekstein, Horwath & Horwath v. Horwitch, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,810, at 90,062 (9th Cir. Dec. 22, 1980); Heizer Corp. v. Ross, 601 F.2d 330, 334-35 (7th Cir. 1979); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 956-57 (S.D.N.Y. 1975); Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 168 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230, 237-38 (S.D.N.Y. 1974).

49. The commentators generally agree that indemnification is undesirable in a federal securities lawsuit. 3 L. Loss, *supra* note 23, at 1831-32; Ruder, *supra* note 18, at 651-59; *Indemnification of Underwriters*, *supra* note 38, at 411-12.

50. *See supra* note 44.

51. *E.g.*, Laventhol, Krekstein, Horwath & Horwath v. Horwitch, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,810, at 90,060 (9th Cir. Dec. 22, 1980); Heizer Corp. v. Ross, 601 F.2d 330, 331 (7th Cir. 1979); McLean v. Alexander, 449 F. Supp. 1251, 1255 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); Wassel v. Eglowsky, 399 F. Supp. 1330, 1335 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 957-58 (S.D.N.Y. 1975); Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 166 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230, 233 (S.D.N.Y. 1974); Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 132-33 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds*, 540 F.2d 27 (2d Cir. 1976).

52. There are three situations in which a claim for contribution may be asserted in the context of a federal securities lawsuit. A defendant may bring a cross-claim for contribution against another defendant in the action when the plaintiff has sued both. *E.g.*, Sherlee Land v. Commonwealth United Corp., [1972-1973 Transfer

1933 Act.[53] In addition, the courts have implied a right to contribution in actions brought under section 10(b) of the 1934 Act.[54] Unlike indemnification, which drastically reduced the incentives to investigate,[55] contribution enhances the deterrent effect of civil liability under the federal securities acts. Because every party involved in an offering may be liable for contribution claims, each has an incentive

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Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,749, at 93,274-75 (S.D.N.Y. Jan. 16, 1973); Johns Hopkins Univ. v. Hutton, [1966-1967 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,810, at 95,761 (D. Md. May 2, 1966); Fed. R. Civ. P. 13(g). A defendant in the original action may assert a third-party claim for contribution against an outside party who was not named in the plaintiff's complaint. *E.g.*, B & B Inv. Club v. Kleinert's Inc., 391 F. Supp. 720, 724 (E.D. Pa. 1975); Liggett & Myers, Inc. v. Bloomfield, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); Getter v. R.G. Dickinson & Co., 366 F. Supp. 559, 569 (S.D. Iowa 1973); Union Paving Co. v. Thomas, 9 F.R.D. 612, 613 (E.D. Pa. 1949); Fed. R. Civ. P. 14(a). Finally, a non-settling defendant who has paid a judgment may assert a claim for contribution against those defendants who have settled with the plaintiff prior to the judgment. *E.g.*, Laventhol, Krekstein, Horwath & Horwath v. Horwitch, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,810, at 90,060 (9th Cir. Dec. 22, 1980); Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27, 29 (2d Cir. 1976); McLean v. Alexander, 449 F. Supp. 1251, 1274 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); Muth v. Dechert, Price & Rhoads, 391 F. Supp. 935, 939 (E.D. Pa. 1975); Altman v. Liberty Equities Corp., 54 F.R.D. 620, 624-25 (S.D.N.Y. 1972). A settlement does not extinguish the settling defendant's liability for contribution to a non-settling defendant in the event that an adverse judgment is procured against the non-settling defendant. Laventhol, Krekstein, Horwath & Horwath v. Horwitch, [1981 Transfer Binder] Fed. Sec. L. Rep. at 90,061; McLean v. Alexander, 449 F. Supp. at 1267; Muth v. Dechert, Price & Rhoads, 391 F. Supp. at 939; Altman v. Liberty Equities Corp., 54 F.R.D. at 624; Note, *Contribution Under the Federal Securities Laws*, 1975 Wash. U. L.Q. 1256, 1292-303 [hereinafter cited as *Federal Contribution*]. This rule is criticized in Adamski, *supra* note 23, at 542-44.

53. Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1976). Section 11(f) provides in pertinent part: "All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment . . . ." *Id.* Express contribution provisions containing language similar to that of § 11(f) are also found in § 9(e) and § 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), r(b) (1976).

54. *E.g.*, Heizer Corp. v. Ross, 601 F.2d 330, 334 (7th Cir. 1979); Madigan, Inc. v. Goodman, 498 F.2d 233, 237-38 (7th Cir. 1974); Marrero v. Abraham, 473 F. Supp. 1271, 1277-78 (W.D. La. 1979); Stratton Group v. Sprayregen, 466 F. Supp. 1180, 1185 (S.D.N.Y. 1979); McLean v. Alexander, 449 F. Supp. 1251, 1274 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 954 (S.D.N.Y. 1975); B & B Inv. Club v. Kleinert's Inc., 391 F. Supp. 720, 724 (E.D. Pa. 1975); Getter v. R.G. Dickinson & Co., 366 F. Supp. 559, 569 (S.D. Iowa 1973); Globus, Inc. v. Law Research Serv., 318 F. Supp. 955, 957 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir), *cert. denied*, 404 U.S. 941 (1971); deHaas v. Empire Petroleum Co., 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

55. *See supra* note 44.

to comply with the requirements of investigation and accurate disclosure.[56]

Once a right to contribution has been established, the problem of apportioning the total liability among the defendants must be addressed.[57] Contribution shares may be apportioned among the defendants either equally, on a pro rata basis,[58] or unequally, on the basis of relative fault.[59] Under the pro rata method of apportionment, the total liability to the plaintiff is divided by the number of defendants, and equal shares are apportioned to each defendant.[60] Under relative fault apportionment, each defendant's share of the

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56. Laventhol, Krekstein, Horwath & Horwath v. Horwitch, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,810, at 90,061 (9th Cir. Dec. 22, 1980); Heizer Corp. v. Ross, 601 F.2d 330, 332 (7th Cir. 1979); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 958 (S.D.N.Y. 1975); Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 169 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230, 238 (S.D.N.Y. 1974).

57. Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 169 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

58. Restatement (Second) of Torts § 886A comment h, at 340 (1979); *see supra* note 18.

59. Restatement (Second) of Torts § 886A comment h, at 340 (1979). Today, the general rule of pro rata apportionment of contribution shares among tortfeasors is rapidly being supplanted by a rule of contribution based upon the relative fault of the defendants. *Id.* Although the roots of the relative fault movement can be traced back to 1939 when the National Conference on Uniform State Laws drafted the first Uniform Contribution Among Tortfeasors Act, authorizing consideration of the relative degrees of fault among the defendants in determining their shares of the common liability, the statute was largely ignored by the states and the trend did not begin in earnest until Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Restatement (Second) of Torts § 886A comment h, at 340 (1979). Administratively, this method of apportionment is more difficult to apply because degrees of fault must be quantified, but in appropriate circumstances it undoubtedly yields more equitable results. *Id.* This evolution of the law toward a rule of relative fault apportionment has been the subject of considerable scholarly attention. Appel & Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation*, 10 Loy. Chi. L.J. 169 (1979) (Illinois law); Comment, Dole v. Dow Chemical Co.: *A Leading Decision—But Where*, 39 Brooklyn L. Rev. 330 (1972) (same); Comment, *Relative Contribution Among Tortfeasors: Time for Judicial Change of the Washington Rule?*, 11 Gonz. L. Rev. 179 (1975) (Washington law); *Indemnity*, *supra* note 18 (Texas law); Comment, *The Case for Comparative Contribution in Florida*, 30 U. Miami L. Rev. 713 (1976) (Florida law); Note, *The New Right of Relative Contribution:* Dole v. Dow Chemical Co., 37 Alb. L. Rev. 154 (1972) (New York law); Note, *Contribution Among Joint Tortfeasors*, 12 Ga. L. Rev. 553 (1978) (Georgia law); Note, *Contribution Among Negligent Tortfeasors: The New Rule and Beyond*, 55 Neb. L. Rev. 383 (1976) (Nebraska law); Note, *A Judicial Rule of Contribution Among Tortfeasors in Illinois*, 1978 U. Ill. L.F. 633 (Illinois law).

60. Wassel v. Eglowsky, 399 F. Supp. 1330, 1370 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); W. Prosser, *supra* note 18, § 50, at 310.

total liability is dependent upon its respective responsibility for bringing about the plaintiff's injury.[61]

1. Pro Rata Apportionment

The pro rata method is the traditional approach for apportioning contribution shares among defendants under the federal securities acts.[62] When the issue of contribution was first addressed in federal securities cases, comparative fault was considered in tort law to be an unworkable mechanism for apportioning liability among defendants.[63] Pro rata apportionment, on the other hand, had the advantages of predictability of results and ease of application.[64] As a result, the earliest federal securities contribution case[65] applied the pro rata rule as a matter of course, without an extended discussion.[66]

Moreover, the language in the express contribution provision of section 11 of the 1933 Act could be read to indicate that Congress had intended contribution in federal securities cases to be apportioned on a pro rata basis. Section 11 provides that "every person who becomes liable to make any payment under this section may recover contribution as in cases of contract."[67] Commentators advocating pro rata apportionment have argued that this language was intended to engraft the common-law rule of pro rata contribution in contract cases onto federal securities law.[68]

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61. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972); Restatement (Second) of Torts § 886A comment h, at 340 (1979).

62. Wassel v. Eglowsky, 399 F. Supp. 1330, 1370 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds*, 540 F.2d 27 (2d Cir. 1976); Globus, Inc. v. Law Research Serv., 318 F. Supp. 955, 957 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

63. Note, *Contribution and Indemnity Among Tortfeasors*, 31 Mont. L. Rev. 69, 71 (1969); *see* Warner v. Capital Transit Co., 162 F. Supp. 253, 255 (D.D.C. 1958); Consolidated Coach Corp. v. Burge, 245 Ky. 631, 635-36, 54 S.W.2d 16, 18-19 (1932).

64. Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds*, 540 F.2d 27 (2d Cir. 1976); 3 L. Loss, *supra* note 23, at 1738 (quoting with approval Douglas & Bates, *supra* note 37, at 178-81).

65. Globus, Inc. v. Law Research Serv., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

66. *Id.* at 957-58.

67. Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1976); *see supra* note 53.

68. 3 L. Loss, *supra* note 23, at 1737-38; Douglas & Bates, *supra* note 37, at 178-80; Ruder, *supra* note 18, at 650. In contrast to joint tortfeasors, *see supra* note 18, at common law a co-obligor who paid more than his proportionate share of the joint liability was entitled to contribution. J. Calamari & J. Perillo, The Law of Contracts § 20-6, at 750 (2d ed. 1977). The general rule for apportionment in such

Pro rata contribution, however, did not always yield equitable results. Although it mitigated the common-law "no contribution" rule,[69] it required all liable defendants to bear an equal share of the burden.[70] In situations involving a significant disparity in the relative culpability of the defendants, a more equitable distribution of the liability can be achieved by apportioning contribution shares on the basis of culpability.[71]

The first assault on the equal apportionment rule was indirect, combining the pro rata rule with the so-called "entity" theory of liability.[72] In *Feit v. Leasco Data Processing Equipment Corp.*[73] and *Wassel v. Eglowsky*,[74] the courts recognized that certain defendants were significantly less culpable than the others.[75] One reading of the 1971 decision in *Feit* suggests that it may have been the first federal securities case to employ the entity approach. Four defendants, the issuer and three directors, were found liable for violating section 11 of the 1933 Act.[76] Instead of holding each defendant jointly and severally liable to the plaintiff, it appeared that the court split the defen-

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cases is that "all should contribute equally to the discharge of the common liability." 2 S. Williston, *supra* note 34, § 345, at 767 (quoting Thomas v. Malco Refineries, Inc., 214 F.2d 884, 885 (10th Cir. 1954)); *accord* 1 G. Palmer, The Law of Restitution § 1.5, at 29 (1978).

69. *See supra* note 18.

70. Restatement (Second) of Torts § 886A comment h, at 340 (1979).

71. Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 29, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854 (1972) ("To require a joint tort-feasor who is, for instance, 10% causally negligent to pay the same amount as a co-tort-feasor who is 90% causally negligent seems inequitable and unjust. The fairer rule, we believe, is to distribute the loss in proportion to the allocable concurring fault."); Bielski v. Schulze, 16 Wis. 2d 1, 9, 114 N.W.2d 105, 109 (1962) ("It is difficult to justify, either on a layman's sense of justice or on natural justice, why a joint tort-feasor who is five percent causally negligent should only recover 50 percent of the amount he paid to the plaintiff from a co-tort-feasor who is 95 percent causally negligent, and conversely why the defendant who is found five percent causally negligent should be required to pay 50 percent of the loss by way of reimbursement to the co-tort-feasor who is 95 percent negligent.").

72. Fischer, *Contribution in 10b-5 Actions*, 33 Bus. Law. 1821, 1838-40 (1978). State courts have occasionally relied on an entity theory to apportion liability. *E.g.*, Lutz v. Boas, 40 Del. Ch. 130, 136, 176 A.2d 853, 857-58 (1961); McCabe v. Century Theatres Inc., 25 A.D.2d 154, 158, 268 N.Y.S.2d 48, 52, *aff'd mem.*, 18 N.Y.2d 648, 219 N.E.2d 426, 273 N.Y.S.2d 74 (1966); Bundy v. New York, 23 A.D.2d 392, 395-96, 261 N.Y.S.2d 221, 224-25 (1965).

73. 332 F. Supp. 544 (E.D.N.Y. 1971).

74. 399 F. Supp. 1330 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976).

75. *Id.* at 1370; *see* Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. at 575, 588. The opinion in McLean v. Alexander, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979), indicates that the court in *Feit* followed the entity theory, although that is not explicit from the *Feit* opinion. *Id.* at 1275.

76. 332 F. Supp. at 588.

dants into two separate entities—one comprised only of the issuer and the other, the three directors. Each entity, as opposed to each individual, was then held jointly and severally liable for the plaintiff's losses.[77]

Wassel, decided four years later, was the first federal securities case to expressly adopt and explain the entity theory.[78] The defendants in *Wassel* were the two sellers and the former corporate counsel for the issuer.[79] The *Wassel* court, pursuant to an explicit recognition that one seller was less culpable than the other,[80] classified the sellers as one entity and the corporate counsel as another, and held each entity responsible for half the plaintiff's damages.[81]

The entity approach led to more equitable results in these two cases, but it was a half measure at best. Groping toward a rule of equitable apportionment, these courts adopted an expedient but did not elaborate on the rationale behind it. It was unlikely that courts which at least in theory were still following the pro rata rule of apportionment could have devised another way to prevent the inequity.

2. Relative Fault Apportionment

Apportionment on a relative fault basis has been accepted by many jurisdictions as a more equitable method of allocating liability among joint tortfeasors.[82] Although some courts predicted it would be too difficult to administer,[83] the states that have adopted relative fault have found it well worth the slight additional difficulty of taking the facts of each case into account.[84]

The growing acceptance of relative fault apportionment in general tort law by the mid-1970's sparked a concomitant trend away from strict pro rata contribution in federal securities law.[85] The first ex-

77. *Id.* In apportioning liability, the *Feit* court wrote, "[t]he issuer, Leasco, and these three directors are jointly and severally liable to the class." *Id.* To indicate that the four defendants had been made jointly and severally liable for all the damages, the sentence would arguably have had to read: "The issuer, Leasco, and these three directors are *each* jointly and severally liable to the class." *But see* McLean v. Alexander, 449 F. Supp. 1251, 1275 & n.82 (D. Del. 1978) (the court asserted that the less culpable defendants in *Feit* paid substantially less than an equal share of the liability, but there is no indication of this in the *Feit* decision), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

78. 399 F. Supp. at 1368-70.

79. *Id.* at 1336-37.

80. *Id.* at 1370 (one seller's fault was derivative of the other's).

81. *Id.*; *see id.* at 1366 (counsel's conduct may have posed greater danger).

82. *See supra* note 59.

83. *See, e.g.*, Warner v. Capital Transit Co., 162 F. Supp. 253, 255 (D.D.C. 1958); Consolidated Coach Corp. v. Burge, 245 Ky. 631, 635-36, 54 S.W.2d 16, 18 (1932).

84. *See supra* note 71.

85. *See supra* note 22 and accompanying text.

press recognition of relative fault apportionment in a securities case appeared in dictum in *Gould v. American-Hawaiian Steamship Co.*[86] The *Gould* court determined that the phrase "as in cases of contract" in the express contribution sections of the federal securities acts did not mandate pro rata apportionment.[87] As mentioned above, the phrase had been interpreted as requiring apportionment according to the pro rata rule, which was generally applied in contract cases at the time the federal securities acts were enacted.[88] The court in *Gould* noted, however, that the phrase was not defined in the legislative history,[89] and concluded that the contribution sections were intended to avoid the tort rule barring contribution among joint tortfeasors[90] rather than to preclude equitable considerations in awarding contribution in securities cases.[91]

The movement toward an equitable distribution of liability among securities defendants came of age with the express adoption of relative fault apportionment in *McLean v. Alexander*.[92] In *McLean*, an ac-

86. 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976). The plaintiff class in *Gould* alleged and proved a violation of § 14(a) of the 1934 Act, 15 U.S.C. § 78n(a) (1976), arising out of a false and misleading proxy solicitation issued in connection with a merger. 387 F. Supp. at 165. Each of three sets of defendants urged the court to adopt a different method for the apportionment of contribution shares. *Id.* at 169-70. Many of the defendants had settled with the plaintiffs prior to the trial. These defendants argued that contribution shares should be apportioned on the basis of relative fault. *Id.* The corporate defendants argued for contribution based on the benefits received by the individual defendants in the transaction. *Id.* The non-settling defendants were found liable and cross-claimed against the settling defendants for indemnity or in the alternative for contribution, *id.* at 165-66, to be apportioned by the pro rata method. *Id.* at 169-70. They argued that the phrase "as in cases of contract" found in the contribution sections of the 1933 Act and the 1934 Act was intended to codify the pro rata method of apportionment that was the rule for contract cases at common law. *Id.* at 170. The court denied the cross-claim for indemnity as contrary to the deterrent policy of the federal securities acts. *Id.* at 168; *see supra* note 4 and accompanying text. It held, however, that contribution was available under § 14(a) of the 1934 Act, citing the compatibility of a system of contribution and the policies behind § 14(a), 387 F. Supp. at 169, and the "recent trend in the law favoring contribution." *Id.* (citing Kohr v. Allegheny Airlines, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), and Globus, Inc. v. Law Research Serv., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971)).

87. 387 F. Supp. at 170.

88. *See supra* notes 67-68 and accompanying text.

89. 387 F. Supp. at 170. The drafters of the federal securities acts were more concerned with imposing liability than with apportioning it. *See* H.R. Rep. No. 1838, 73d Cong., 2d Sess. 37 (1934); S. Doc. No. 185, 73d Cong., 2d Sess. 18 (1934); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 25 (1934); S. Rep. No. 792, 73d Cong., 2d Sess. 21 (1934); H.R. Rep. No. 152, 73d Cong., 1st Sess. 26 (1933); H.R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933); S. Rep. No. 47, 73d Cong., 1st Sess. 5 (1933).

90. *See supra* note 18.

91. 387 F. Supp. at 170.

92. 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979). The plaintiff in *McLean* brought an action under § 10(b) of the 1934 Act

counting firm, having been held liable for violation of section 10(b), moved for an apportionment of contribution shares on the basis of relative fault.[93] The firm argued that the issuer's fraudulent activities were chiefly responsible for the plaintiff's losses,[94] and therefore the issuer should bear the greater burden of liability.[95] The court concluded that the liability of the outside defendant was in a sense derivative because the inside sellers had supplied the outside defendant with false information and had then actively concealed the true nature of the transactions in question.[96] Determining that application of either the entity theory or pro rata apportionment would, under the circumstances, result in substantial inequity,[97] the court observed that "[i]n this case there was a vast difference between defendants in the degrees of their wrongdoing and the damages ought to reflect that fact."[98]

The trend toward the apportionment of contribution shares based upon relative fault has been generally well received by the commentators.[99] The exact state of the law, however, is difficult to assess. The

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against the inside sellers of a corporation that he had purchased and the accounting firm that had handled the transaction, claiming that the defendants had duped him into purchasing the corporation by supplying him with misleading information. *Id.* at 1255-56.

93. *Id.* at 1265. The inside sellers had settled with the plaintiff, *id.* at 1255, but the accounting firm was found liable at trial by reason of its failure to perform a thorough audit. *Id.* at 1276. They performed what amounted to a cursory audit and as a result certified the accounts receivable covering these purported sales as "considered fully collectible." *Id.* at 1256.

94. *Id.* at 1256-60. These inside sellers had induced both the plaintiff and the accounting firm to believe that certain purchase orders represented firm sales, when in fact the underlying transactions were merely consignments. *Id.* The inside sellers perpetuated their fraud during the audit by causing to be sent to the accountants telegrams which appeared to confirm purchases of the corporation's product, when in fact no such purchases existed. *Id.* 1259-60. In one instance a salesman forged a telegram purporting to confirm a sale. *Id.* at 1260.

95. *Id.* at 1256-60. The inside defendants in *McLean* argued for pro rata apportionment. *Id.* at 1271.

96. *Id.* at 1272, 1276-77; *see supra* note 94. The court held the accounting firm responsible for 10% of the plaintiff's losses and the inside sellers liable for the remainder. *Id.* at 1276-77.

97. *Id.* at 1272-74.

98. *Id.* at 1272.

99. Fischer, *supra* note 72, at 1829-30 (discussing *Gould* and *Wassel*); Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution*, 1980 U. Ill. L.F. 389, 398-401 (1980) (discussing *McLean*); Note, *A Comparative Fault Approach to the Due Diligence Requirement of Rule 10b-5*, 49 Fordham L. Rev. 561, 582-83 (1981) (discussing *McLean*); Note, *The Role of Contribution in Determining Underwriters' Liability Under Section 11 of the Securities Act of 1933*, 63 Va. L. Rev. 79, 96-100 (1977) (discussing *Feit* and *Gould*); *Federal Contribution*, *supra* note 52, at 1306-12 (discussing *Gould*); Brodsky, *Apportionment of Damages By Relative Fault In Securities Cases*, N.Y.L.J., Jul. 19, 1978, at 1, col. 1 (discussing *McLean, Gould,* and *Feit*). The American Law Institute has incorporated relative

Gould court endorsed the relative fault concept but did not actually apply it.[100] The "entity" theory of *Feit* and *Wassel* has not been followed in subsequent cases, and the *McLean* decision, apportioning contribution shares on the basis of relative fault, was reversed on other grounds by the Third Circuit.[101] The case law is thus in a state of transition; the strict pro rata rule is being abandoned, but the exact contours of the emerging alternative methods of apportionment have yet to be explored fully.

II. A Suggested Approach to Apportionment

Apportionment of contribution shares according to the relative fault of defendants is a desirable practice in many instances.[102] It ensures that a less culpable outside defendant will not be saddled with a disproportionate share of the total liability.[103] There are, however, certain situations in which the apportionment of contribution shares on an unequal basis would be inappropriate and ill-suited to the implementation of the deterrent policies of the 1933 Act and the 1934 Act.

A. *Section 10(b) of the 1934 Act*

An apportionment of contribution shares on the basis of proportionate fault presupposes the possibility of an appreciable disparity in the relative culpability of the defendants.[104] This method of apportionment is thus unsuited for actions brought under section 10(b) of the 1934 Act.

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fault apportionment into its proposed Federal Securities Code. Fed. Sec. Code § 1724(f) (Official Draft 1980). In another context, the Supreme Court, in United States v. Reliable Transfer Co., 421 U.S. 397 (1975), replaced the traditional admiralty rule of pro rata contribution with a rule of proportionate fault. *Id.* at 401-11.

100. Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 171-72 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

101. McLean v. Alexander, 599 F.2d 1190 (3d Cir. 1979). The circuit court held that the accounting firm had not acted recklessly in preparing the audit because the invoices pertaining to the transactions at issue appeared to be regular on their face and, in any event, they were not so irregular as to put the firm on further inquiry into the true nature of the underlying transactions. *Id.* at 1199-1201. The court acknowledged that the firm had been negligent in the preparation of the audit but added "negligence—whether gross, grave or inexcusable—cannot serve as substitute for scienter." *Id.* at 1198. Because it ruled that the accounting firm was not a joint tortfeasor under § 10(b) of the 1934 Act, the circuit court did not have occasion to pass upon the apportionment formula that the district court applied in the case. *Id.* at 1202.

102. *See supra* notes 59, 71.

103. *See supra* notes 84-86 and accompanying text.

104. *See* McLean v. Alexander, 449 F. Supp. 1251, 1274 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); Restatement (Second) of Torts § 886A comment h, at 340-41 (1979).

A section 11 plaintiff will have an overlapping section 10(b) cause of action if he can establish that each defendant acted with scienter.[105] This standard is satisfied upon a showing of intentional[106] or reckless misrepresentation,[107] but is not met by proof of mere negligence.[108] In the context of section 10(b), reckless conduct has been characterized by the courts as substantially equivalent to intentional conduct.[109] Reckless performance by an outside expert of the statutory duties of investigation constitutes an extreme departure from the standards of ordinary care.[110] The danger of misleading the public in such a situation is so obvious that the reckless outside defendant must either have intended to mislead the public or have known of the misrepresentation and chosen to ignore the consequences of its actions.[111] Any theoretical disparity in culpability that exists under section 10(b) between an inside defendant whose liability is predicated on intentional conduct and the outside defendant who acted

105. *See supra* note 9 and accompanying text. The term "scienter" refers to "a mental state embracing intent to deceive, manipulate, or defraud." Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976)); *accord* Mendelsohn v. Capital Underwriters, 490 F. Supp. 1069, 1079 (N.D. Cal. 1979).

106. *E.g.*, Aaron v. SEC, 446 U.S. 680, 691 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976); Franklin Sav. Bank v. Levy, 551 F.2d 521, 528 (2d Cir. 1977); SEC v. National Executive Planners Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980); Ross v. Warner, 480 F. Supp. 268, 271 (S.D.N.Y. 1979); Brick v. Dominion Mtge. & Realty Trust, 442 F. Supp. 283, 303 (W.D.N.Y. 1977).

107. *E.g.*, G.A. Thompson & Co. v. Partridge, 636 F.2d 945, 961 (5th Cir. 1981); McLean v. Alexander, 599 F.2d 1190, 1197-98 (3d Cir. 1979); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023 (6th Cir. 1979); Edward J. Mawod & Co. v. SEC, 591 F.2d 588, 596 (10th Cir. 1979); Hoffman v. Estabrook & Co., 587 F.2d 509, 516 (1st Cir. 1978); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44-47 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978).

108. *E.g.*, Oleck v. Fischer, 623 F.2d 791, 795 (2d Cir. 1980); Wertheim & Co. v. Codding Embryological Sciences, Inc., 620 F.2d 764, 766-67 (10th Cir. 1980); Sanders v. John Nuveen & Co., 554 F.2d 790, 792 (7th Cir. 1977).

109. *E.g.*, Wertheim & Co. v. Codding Embryological Sciences, Inc., 620 F.2d 764, 766-67 (10th Cir. 1980) (recklessness in the context of a 10(b) action is tantamount to scienter and is defined as a frame of mind closer to a lesser form of intent than to a greater degree of ordinary negligence); Broad v. Rockwell Int'l Corp., 614 F.2d 418, 440 (5th Cir. 1980) (same), *aff'd on rehearing*, 642 F.2d 929 (5th Cir.), *petition for cert. filed*, 50 U.S.L.W. 3046 (U.S. Jul. 16, 1981) (No. 81-239); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir.) (same), *cert. denied*, 439 U.S. 1039 (1978); Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977) (same); Marbury Management v. Kohn, 470 F. Supp. 509, 516 n.12 (S.D.N.Y. 1979) (same), *aff'd in part, rev'd in part on other grounds*, 629 F.2d 705 (2d Cir.), *cert. denied*, 449 U.S. 1011 (1980).

110. Broad v. Rockwell Int'l Corp., 614 F.2d 418, 440 (5th Cir. 1980), *aff'd on rehearing*, 642 F.2d 929 (5th Cir.), *petition for cert. filed*, 50 U.S.L.W. 3046 (U.S. Jul. 16, 1981) (No. 81-239); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977).

111. Healey v. Catalyst Recovery, Inc., 616 F.2d 641, 649 (3d Cir. 1980).

recklessly will not be of sufficient magnitude to warrant an unequal distribution of the liability through relative fault apportionment.[112] The overriding deterrent policy of section 10(b) demands invoking the pro rata rule in these cases.

The function of an outside expert in a corporate offering is to investigate and thereby insure the accuracy of the information in the registration statement.[113] When the expert intentionally or recklessly fails to make an adequate investigation, it commits an egregious breach of its statutory duties, jeopardizing the interests of the investing public. The threat of civil liability encourages outside experts to make a thorough investigation of the issuer.[114] Contribution among defendants enhances the deterrent effect of this policy by exposing every defendant to liability.[115] A rule of pro rata apportionment maximizes this deterrent effect by ensuring that an outside defendant found liable in a section 10(b) action will bear an equal share of the total, potentially onerous[116] liability with the other defendants.

B. *Section 11 of the 1933 Act*

In contrast to the scienter requirement of liability under section 10(b) of the 1934 Act, the range of conduct that is actionable under section 11 of the 1933 Act encompasses negligence, recklessness and intentional misrepresentation.[117] For example, if an inside defendant knowingly inserted a misrepresentation in the registration statement, the outside defendants would be jointly and severally liable to the purchasers if they negligently failed to uncover and expose the misrepresentation.[118] To be sure, the outside defendants have breached their statutory duty of investigation in such a situation and are properly accountable for a portion of the plaintiff's losses.[119] Because their

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112. Marrero v. Abraham, 473 F. Supp. 1271, 1278 (E.D. La. 1979); *see* Broad v. Rockwell Int'l Corp., 614 F.2d 418, 440 (5th Cir. 1980), *aff'd on rehearing*, 642 F.2d 929 (5th Cir.), *petition for cert. filed*, 50 U.S.L.W. 3046 (U.S. Jul. 16, 1981) (No. 81-239); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977).

113. Globus v. Law Research Serv., 287 F. Supp. 188, 199 (S.D.N.Y. 1968), *aff'd in part, rev'd in part on other grounds*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *see supra* notes 24-26 and accompanying text.

114. Globus v. Law Research Serv., 287 F. Supp. 188, 199 (S.D.N.Y. 1968), *aff'd in part, rev'd in part on other grounds*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

115. *See supra* note 56 and accompanying text.

116. *See supra* notes 15-16 and accompanying text.

117. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 208 (1976); Straus v. Holiday Inns, 460 F. Supp. 729, 732 (S.D.N.Y. 1978); *see* 3 L. Loss, *supra* note 23, at 1721-25.

118. *But see infra* notes 121-23 and accompanying text.

119. *See supra* notes 5-6 and accompanying text.

breach was the result of negligence, however, rather than an intentional design, it would not merit the severe sanctions that will potentially flow from pro rata apportionment of liability.[120] Assignment of contribution shares on the basis of relative fault ensures that every defendant will bear the liability in proportion to the degree to which it was responsible for the misrepresentation.

The deterrent effect of civil liability under section 11 is not weakened by relative fault apportionment. Section 11 expressly provides all defendants other than the issuer with the defense of due diligence.[121] To establish this defense, the defendant must affirmatively demonstrate that it undertook a thorough investigation of the issuer.[122] A due diligence defense totally absolves a defendant of liability.[123] The availability of this complete defense serves the deterrent policy of civil liability by encouraging outside defendants to comply with the statutory requirement of a thorough independent investigation. Any further incentive to comply, such as the threat of an equal apportionment of the liability for a misrepresentation, is therefore unnecessary.

Moreover, it is submitted that relative fault apportionment implements the deterrent policy of section 11 better than pro rata apportionment could. A knowing wrongdoer under section 11 would be

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120. *See* 3 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud § 8.5(585), at 208.52 (1981).

121. Securities Act of 1933, § 11(b), 15 U.S.C. § 77k(b) (1976). The elements of a due diligence defense vary according to which part of the registration statement contains the misrepresentation or omission. As to any part of the registration statement not purporting to be made on the authority of any expert, the outside defendant must show that "after [a] reasonable investigation, [he had] reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading." *Id.* § 11(b)(3)(A), 15 U.S.C. § 77k(b)(3)(A) (1976). With respect to any portion of the registration statement purporting to be made on the authority of an expert, such as the certified financial statements, a due diligence defense is somewhat easier to establish. The outside defendant need not establish a reasonable investigation. Instead, he need only show that "he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . ." *Id.* § 11(b)(3)(C), 15 U.S.C. § 77k(b)(3)(C) (1976). The requirements of the due diligence defense to § 11 liability are exhaustively detailed in the leading case of Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 682-84 (S.D.N.Y. 1968), and thoroughly discussed and explained in Folk, *supra* note 2, at 19-82. The standard of reasonable investigation and reasonable ground for belief under § 11(c) is that of a "prudent man in the management of his own property." 15 U.S.C. § 77k(c) (1976).

122. Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 682-83 (S.D.N.Y. 1968); Securities Act of 1933, § 11(b)(3), 15 U.S.C. § 77k(b)(3) (1976).

123. Securities Act of 1933, § 11(b), 15 U.S.C. § 77k(b) (1976). The issuer can only avoid § 11 liability by establishing that the plaintiff was aware of the misrepresentation or omission at the time of his purchase. *Id.* § 11(a), 15 U.S.C. § 77k(a) (1976).

more deterred by a rule that required him to bear most of the liability than by a rule of apportionment that permitted him to share the liability equally with another. At the same time, negligent defendants will be neither over-burdened nor absolved by such a rule.

CONCLUSION

The contraction of the strict pro rata rule for the apportionment of contribution shares in federal securities actions is a favorable development. As the *McLean* court stated, the rule was often "characterized by more mathematical than judicial integrity."[124] Apportionment based on proportionate fault offers the attractive possibility of more fairly distributing the plaintiff's losses among the responsible defendants. In the context of section 10(b) of the 1934 Act, however, the pro rata method of apportionment continues to serve an important deterrent function and should be retained. Apportionment of contribution shares based on the relative fault of the parties should be reserved for actions brought under section 11 of the 1933 Act.

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124. McLean v. Alexander, 449 F. Supp. 1251, 1273 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).