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Contribution between Joint Tortfeasors May be Enforced in a Federal Antitrust Action.

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CASE NOTES

ANTITRUST—Damages—Contribution Between Joint Tortfeasors May Be Enforced in a Federal Antitrust Action

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 584 F.2d 1179 (8th Cir. 1979).

Professional Beauty Supply, Inc. (Professional) brought suit in federal district court alleging National Beauty Supply, Inc. (National) had conspired to monopolize in violation of federal and state antitrust statutes. In its complaint Professional alleged National had obtained from La Maur, Inc. an exclusive-dealing agreement for distributorship of La Maur's products. Professional contended La Maur terminated Professional's distributorship as a result of National's actions. During initial discovery proceedings National filed a third-party complaint against La Maur alleging wrongdoing by La Maur, and requesting contribution from La Maur if National were ultimately found liable to Professional. Holding no right of contribution exists between violators of federal antitrust law, the district court dismissed the complaint.[1] National appealed to the Eighth Circuit Court of Appeals. Held—*Affirmed in part, reversed in part.* Under certain circumstances, contribution may be enforced among joint tortfeasors in an antitrust action.[2]

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1. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1181 (8th Cir. 1979).

2. *Id.* at 1188. The court held federal law was controlling in antitrust actions and affirmed the lower court's decision that indemnity should not be available to antitrust violators due to the dilution of the deterrent capability of the treble damages provisions. *See id.* at 1186. Further, the court adopted pro rata rather than comparative contribution. *See id.* at 1182 n.4. While the circumstances under which contribution should be made available were not defined, the court recommended the factors specified by Justice White in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (governing rejection of the *in pari delicto* defense in antitrust cases) would be appropriate. When, for example, one party was guilty of fraudulent misrepresentation and the other was not, contribution would not be allowed. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1186 (8th Cir. 1979). The court accepts, without discussion, the concept of antitrust violators as tortfeasors. *See id.* at 1182; *cf.* Williamson v. Columbia Gas & Elec. Corp., 110 F.2d 15, 17-18 (3d Cir. 1939) (private antitrust suit closely resembles tort action of wrongful interference), *cert. denied*, 310 U.S. 639 (1940). *But cf.* Note, *Contribution in Pri-*

Although now defined by statute, the prohibition of unreasonable restraints of trade began at common law.[3] Competition was favored for several reasons but chiefly on the ground that it ensured fair prices.[4] Thus at common law, courts refused to enforce contracts which so restrained trade that a detriment was experienced in the market place.[5] The restraint, however, was not actionable; the only remedy was to declare the contract void.[6] These common law principles formed the basis of the Sherman Antitrust Act of 1890 (Sherman Act).[7] The Sherman Act was intended to be a comprehensive proscription of illegal combinations, agreements, or conspiracies in restraint of trade or in the creation of monopoly power.[8] Early applications of the Act, however, revealed the language of the Act so inclusive that courts construed it narrowly for fear that contracts ordinary and necessary to commerce might be declared illegal.[9] In response to this restrictive view of the Sherman Act, the Clay-

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vate Antitrust Suits, 63 CORNELL L.Q. 682, 692-97 (1978) (violators of antitrust laws not necessarily tortfeasors).

3. *See* Shotkin v. General Elec. Co., 171 F.2d 236, 238 (10th Cir. 1948); Sunbeam Corp. v. Payless Drug Stores, 113 F. Supp. 31, 41 (N.D. Cal. 1953); Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 759 (1955).

4. *See* Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911). Contracts in restraint of trade injure the parties who make them by foreclosing future opportunities in favor of present gain, deprive the public of the best use of labor and materials, reduce the incentive to innovate, eliminate pressure to improve quality and reduce prices, and expose the public to the effects of unrestrained market power. United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898) (quoting Alger v. Thatcher, 19 Pick, 51, 54), *aff'd*, 175 U.S. 211 (1899).

5. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 497 (1940); Standard Oil Co. v. United States, 221 U.S. 1, 87-88 (1911); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 344-46 (1897) (White, J., dissenting). Not all restraints of trade were illegal. Viewed absolutely, every contract restrains trade because parties forego certain options in order to obtain the desired end. The courts, therefore, refused to enforce only those contracts that imposed an unreasonable restraint. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 344-46 (1897) (White, J., dissenting). An agreement was unreasonable if injurious to the public or if it imposed restrictions greater than were necessary for the protection of the writer of the agreement. *See* 1 H. TOULMIN, ANTITRUST LAWS § 2.14 (1949).

6. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 497 (1940); Standard Oil Co. v. United States, 221 U.S. 1, 87-88 (1911); United States v. Addyston Pipe & Steel Co., 85 F. 271, 286 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

7. *See* Sherman Antitrust Act of 1890, ch. 647, § 1, 26 Stat. 209 (current version at 15 U.S.C. §§ 1-7 (1976)).

8. *See* Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198-99 (9th Cir. 1973). The focus of the Sherman Act was upon public and private remedies for the harmful effects of restraints of trade or monopolies. Prohibited activities retained their common law definitions and were extended to include combinations or conspiracies as well as contracts. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 497-80 (1940).

9. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312 (1897) ("every

ton Act[10] was passed in 1914[11] to proscribe certain activities held to be unreachable by the Sherman Act but nonetheless considered by Congress to be injurious to the public.[12] Both Acts were adopted to protect the public from harm caused by a decrease in competition in the market place.[13] To effectuate this purpose, a bifurcated enforcement system of private and public prosecution was established.[14] The Clayton Act was enacted to allow private antitrust suits for two reasons: to serve as a deterrent to monopolies and restraints of trade[15] and to compensate the vic-

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contract" too broad a condemnation); United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895) (manufacturers not involved in commerce hence unaffected by Sherman Act).

10. Clayton Act, ch. 323, § 1, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27, 44 (1976)).

11. *See* Fortner Enterprises, Inc., v. United States Steel Corp., 293 F. Supp. 762, 766 (W.D. Ky. 1966), *aff'd*, 404 F.2d 936 (6th Cir. 1968), *rev'd on other grounds*, 394 U.S. 495 (1969). In 1914 the Federal Trade Commission Act (FTCA) was also passed. Federal Trade Commission Act, ch. 311, § 38 Stat. 717 (1914) (current version at 15 U.S.C. § 41 (1976)). The FTCA did not create a cause of action but enabled the Federal Trade Commission to enforce by decree both the Sherman and Clayton Act. *See* Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922).

12. *See* United States v. Columbia Steel Co., 334 U.S. 495, 507 n.7 (1948); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 351 n.6 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965). The Sherman Act attacked only monopolies and agreements in being while the Clayton Act sought to arrest illegal practices at their inception. *See* New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 351 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965). Offenses specifically made illegal by the Clayton Act were price discrimination, tying arrangements and exclusive dealings, certain corporate mergers, and interlocking directorates. *See* Clayton Act, ch. 323, §§ 2, 6, 7, 8, 38 Stat. 730-34 (1914) (current version at 15 U.S.C. §§ 13, 14, 18, 19 (1976)).

13. *See, e.g.*, Radovich v. National Football League, 352 U.S. 445, 453-54 (1957); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922); Standard Oil Co. v. United States, 221 U.S. 1, 53-56 (1911). *See generally* Clayton Act, ch. 323, § 1, 38 Stat. 730 (1890) (current version at 15 U.S.C. § 12 (1976)); Sherman Antitrust Act of 1890, ch. 647, § 1, 26 Stat. 209.

14. *See, e.g.*, United States v. Borden Co., 347 U.S. 514, 518-19 (1954) (public enforcement under Sherman Act); Federal Trade Comm'n v. Cement Inst., 333 U.S. 683, 694 (1948) (intended to be cumulative); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148-49 (6th Cir. 1975) (private action under Clayton Act). *See generally* Sherman Antitrust Act of 1890, ch. 647, §§ 1-3 (criminal actions), 4 (civil actions), 26 Stat. 209 (current version at 15 U.S.C. §§ 1-4 (1976)). The Sherman Act originally authorized private actions, but its provision was rendered unnecessary by the passage of the Clayton Act in 1914. *See* 15 U.S.C. § 15 (1976); 1 H. TOULMIN, ANTITRUST LAWS § 20.1, at 330 n.1 (1949).

15. Clayton Act, ch. 323, § 1, 38 Stat. 730 (1890) (current version of 15 U.S.C. § 12 (1976)); *see* Pfizer Inc. v. Government of India, 434 U.S. 308, 314 (1978); Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974); United States v. American Bakeries Co., 284 F. Supp. 864, 867 (W.D. Mich. 1968); Loevinger, *Private Action-The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168-69 (1958).

tims of these illegal combinations.[16]

Under the present law, an action for treble damages may be brought in federal district court if business or property has been injured by conduct violating the antitrust statutes.[17] The Act's provision for treble damages and attorney's fees creates "an ancillary force of private attorney's general" so the marketplace can police itself.[18] To potential plaintiffs, the treble damages provision provides compensation for losses and an additional award of twice the actual damages as an incentive to bring an action.[19] To potential defendants, the provision raises the spectre of confiscation of all profits made in the illegal activity and double that amount in penalties.[20] Since illegal antitrust activities may confront several defen-

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16. Clayton Act, ch. 323, § 16, 38 Stat. 737 (1890) (current version at 15 U.S.C. § 15 (1976)); *see* Illinois Brick Co. v. Illinois, 431 U.S. 720, 748 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977); Theophil v. Sheller-Globe Corp., 446 F. Supp. 131, 135 (E.D. N.Y. 1978).

17. *See* Clayton Act, 15 U.S.C. § 15 (1976). Section 15 of the Act provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. § 15.

18. Weinberg v. Sinclair Ref. Co., 48 F. Supp. 203, 205 (E.D. N.Y. 1942); *see* Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

19. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 486 n.10 (1977); Lindy Bros. Builders, Inc. v. American Radiator & Sanitary Corp., 382 F. Supp. 999, 1026 (E.D. Pa. 1974); *cf.* F.D. Rich Co. v. United States, 417 U.S. 116, 129-30 (1974) (fee shifting effective mechanism to induce private enforcement of public policy.); Alpine Pharmacy, Inc. v. Charles Pfizer & Co., 481 F.2d 1045, 1050 (2d Cir. 1973) (incentives for private litigants to pursue public goals). *See generally* Buckeye Powder Co. v. E. I. duPont de Nemours Powder Co., 248 U.S. 55, 62 (1918); Shumate & Co. v. National Ass'n of Sec. Dealers, Inc., 509 F.2d 147, 151 (5th Cir.), *cert. denied,* 423 U.S. 868 (1975); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 590 (10th Cir. 1961). Proof of damage or injury to plaintiff's business or property is essential to recovery of treble damages. *See* Buckeye Powder Co. v. E. I. duPont de Nemour Powder Co., 248 U.S. 55, 65 (1918); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690, 694 (5th Cir. 1975); Locklin v. Day-Glo Color Corp., 429 F.2d 873, 879-90 (7th Cir. 1970), *cert. denied,* 400 U.S. 1020 (1971).

20. *See* P.W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55, 60 (S.D. N.Y. 1961); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 171 (S.D. N.Y. 1955); *cf.* Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50,54 (S.D. N.Y. 1971) (private action against securities fraud as deterrent). *But cf.* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?* 61 CALIF. L. REV. 1319, 1323-30 (1973). Wheeler maintains treble damage awards are, in practice, not as punitive as had been hoped. Due to the difficulty of proving actual damages, the ability to partially deduct from federal taxes the judgment ultimately paid, and the absence of interest, Wheeler suggests the net loss to coconspirators may be less than the illegal profits. *See* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?* 61 CALIF. L. REV. 1319, 1330 (1973).

dants with the prospect of an enormous treble damages judgment, some defendants have begun to seek contribution from their coconspirators.[21]

Contribution is an equitable doctrine permitting division of damages between joint tortfeasors.[22] At common law contribution was not allowed between joint tortfeasors even though only one tortfeasor had paid the entire amount of damages.[23] Common law courts refused to permit contribution, leaving wrongdoers where they were found in order to deter future misconduct and to punish past wrongful behavior.[24] The common law rule has eroded so contribution is now available to all but intentional, malicious, or willful tortfeasors.[25] Current rules of contribution, created by courts and by statute, are based upon fairness between unintentional or merely negligent joint tortfeasors.[26] Federal courts have now clearly

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21. *See, e.g.*, Olson Farms, Inc. v. Safeway Stores, Inc., [1977-2] TRADE REG. REP. (CCH) ¶ 61,698, at 72,861 (D. Utah 1977); El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1343 (S.D. N.Y. 1969).

22. *See* Brown v. Brown, 119 P.2d 938, 939 (Ariz. 1941); Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 102 A.2d 587, 593 (N.J. 1954); Kanzler v. Smith, 61 A.2d 170, 176 (N.J. Ch. 1948).

23. *See* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952); Union Stock Yards Co. v. Chicago, B. & Q. R.R., 196 U.S. 217, 224 (1905); W. PROSSER, LAW OF TORTS § 50, at 305 (4th ed. 1971). The leading case on contribution at common law ruled that contribution could not be enforced by one who had committed a tort. Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799). The facts of the case indicated a "tort" in the opinion was an intentional act, but the case was widely quoted as authority for cases in which the act was not intentional. W. PROSSER, LAW OF TORTS § 50, at 306 (4th ed. 1971).

24. *See* Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 557-60 (1936); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 131-46 (1932); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 588 (1973).

25. *See, e.g.*, Murray v. Reliance Ins. Co., 60 F.R.D. 390, 392 (D. Minn. 1973); Dennis v. Walker, 284 F. Supp. 413, 417-18 (D.D.C. 1968); Cage v. New York Cent. R.R., 276 F. Supp. 779, 789-90 (W.D. Pa.), *aff'd*, 386 F.2d 998 (3d Cir. 1967). *See generally* Comment, *Denying Contribution Between Tortfeasors in Arizona: A Call for Change*, 1977 ARIZ. ST. L.J. 673, 683-85. Federal securities statutes have gone further allowing contribution between even intentional violators. *See* Security Act of 1933, 15 U.S.C. § 77k(f) (1976); Federal Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78l (1976).

26. *See* Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); Skaja v. Andrews Hotel Co., 161 N.W.2d 657, 660-61 (Minn. 1968); Royal Indemnity Co. v. Aetna Cas. & Sur. Co., 229 N.W.2d 183, 189 (Neb. 1975); N.J. STAT. ANN. §§ 2A: 53A-1 to 53A-5 (West 1952); TEX. REV. CIV. STAT. ANN. art. 2212a, § 2 (Vernon Supp. 1980); UTAH CODE ANN. §§ 78-27-39 to 78-27-43 (1977). *See generally* W. PROSSER, LAW OF TORTS § 50, at 307 (4th ed. 1971). "There is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, . . . while the latter goes scot free." W. PROSSER, LAW OF TORTS § 50, at 307 (4th ed. 1971).

adopted a rule allowing contribution when equitable in non-statutory actions.[27] In recognition of the trend, federal courts have begun to extend the right of contribution to various federal statutes that have no specific provision for contribution.[28]

Contribution has traditionally been unavailable in federal antitrust actions.[29] Of the four district court cases that have addressed this issue, only two of the courts fully explained the competing policies involved.[30] A federal district court in *Sabre Shipping Corp. v. American President Lines, Ltd.*[31] refused to allow contribution holding that federal law precluded contribution even between unintentional joint tortfeasors.[32] The cases upon which the *Sabre* court relied, however, have now been significantly limited.[33] Relying heavily on the *Sabre* decision, the court in *El Camino Glass v. Sunglo Glass Co.*[34] also refused contribution in an antitrust action.[35] Despite the defendant's contentions that the violations in

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27. *See, e.g.*, Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 110 (1974) (contribution in admiralty actions); Gomes v. Brodhurst, 394 F.2d 465, 468-69 (3d. Cir. 1967) (tort action in Virgin Islands); Knell v. Feltman, 174 F.2d 662, 666 (D.C. Cir. 1949) (negligence actions in District of Columbia).

28. *See, e.g.*, Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 403 (7th Cir. 1974) (contribution under Federal Aviation Act of 1958), *cert. denied*, 421 U.S. 978 (1975); Zontelli Bros. v. Northern Pac. Ry., 263 F.2d 194, 198 (8th Cir. 1959) (contribution under Federal Employers Liability Act); Grogg v. General Motors Corp., 72 F.R.D. 523, 527-28 (S.D. N.Y. 1969) (contribution in sex discrimination cases). In *Kohr v. Allegheny Airlines, Inc.* the Seventh Circuit rejected the old rule of no contribution basing its decision upon fairness between parties equal in complicity. Finding an "obvious lack of sense and justice" in forcing one tortfeasor to pay the entire damages occassioned by several unintentional wrongdoers, the court permitted contribution among violators of the Federal Aviation Act of 1958. *See* Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974) (quoting W. PROSSER, LAW OF TORTS § 50, at 307 (4th ed. 1971)), *cert. denied*, 421 U.S. 978 (1975).

29. *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1977-2] TRADE REG. REP. (CCH) ¶ 61,698, at 72,861 (D. Utah 1977) (dicta); El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D. N.Y. 1969).

30. *See* El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976) (reasons given for decision); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1343 (S.D. N.Y. 1969) (reasons given for decision).

31. 298 F. Supp. 1339 (S.D. N.Y. 1969).

32. *Id.* at 1345; *see* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 290 (1952); Union Stock Yards Co. v. Chicago, B. & Q. R.R., 196 U.S. 217, 224 (1905).

33. *See* Cohen v. United States, 35 AFTR 2d 73-1445, -1446 to -1447 (E.D. Mich. 1975); 35 LA. L. REV. 689, 792 (1975) *(Halcyon* limited to its facts). *Compare* Cooper Stevedoring Co. v. Fritz Kopke, Inc. 417 U.S. 106, 110 (1974) (contribution equitable right to joint unintentional tortfeasors) *with* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 290 (1952) (contribution never available).

34. [1977-1] TRADE REG. REP. (CCH) ¶ 61,533, (N.D. Cal. 1976).

35. *See* El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶

question were unintentional,[36] the court held the purpose of the antitrust laws would best be served by refusing to allow contribution.[37] Thus, no federal court has granted a right of contribution in a federal antitrust case.[38]

In determining whether a common law defense not made available by statute should be allowed by the courts, the inquiry should focus upon fulfillment of the legislative intent.[39] In *Perma Life Mufflers, Inc. v. International Parts Corp.*,[40] the Supreme Court considered both the public policy of the antitrust laws and the nature of a common law right sought to be invoked, and held in favor of the legislative goal.[41] Though a common law doctrine of *in pari delicto* normally barred suits among coconspirators, the Court rejected the rule in private antitrust suits in furtherance of the legislative desire for vigorous antitrust enforcement.[42]

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,[43] the Eighth Circuit became the first court to allow antitrust coconspirators to seek contribution when it adopted the rule that under certain circumstances contribution may be allowed in antitrust actions.[44] Noting that antitrust statutes do not provide for contribution, the court recognized the trend of allowing contribution under other federal statutes without legislative authorization.[45] The court reasoned fairness required contribution be available to antitrust defendants if its availability would not frustrate the legislative intent of the antitrust laws.[46] The majority concluded

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61,533, at 72,112 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1343-44 (S.D. N.Y. 1969).

36. *See* El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976).

37. *See id.* at 72,112. The court considered contribution a method of distributing the burden of antitrust violations to all participants and concluded deterrence would be enhanced. To disallow contribution, the court reasoned, would encourage violators to take the risk since they might escape punishment. *Id.* at 72,112.

38. *See* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 Sw. L.J. 779, 792 (1979).

39. *See* Simpson v. Union Oil Co., 377 U.S. 13, 16 (1964); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 215 (1951).

40. 392 U.S. 134 (1968).

41. *See id.* at 138-40.

42. *See id.* at 139-40.

43. 594 F.2d 1179 (8th Cir. 1979).

44. *See id.* at 1182.

45. *See id.* at 1183-84.

46. *See id.* at 1185. The *Professional* court states fairness is the "deciding factor" in the decision but relies principally upon two authorities not urging that conclusion; Prosser's argument on fairness was limited to unintentional torts, and the Securities Acts cases granted the right in the interest of deterrence rather than fairness. *See* Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111, 136-37 (1962). *Compare* W. PROSSER, LAW OF TORTS § 50,

the deterrent effect of the antitrust laws might be increased by the availability of contribution, legislative intent would not be frustrated, and therefore the right should be extended to antitrust defendants.[47]

The dissent argued the defendant had no right to contribution since it was an intentional tortfeasor and the right to contribution was generally recognized only for unintentional wrongdoers.[48] Furthermore, allowing contribution might weaken the deterrent effect of treble damages since, once convicted, a defendant would be able to distribute the cost of his wrongdoing.[49] The dissent also feared private plaintiffs would be less likely to bring actions when faced with joinder of corporate coconspirators whose financial resources they could not match.[50]

The *Professional* holding extended the right of contribution to an intentional antitrust violator.[51] Contribution is by nature an equitable right that should not be invoked at the request of a willful or malicious wrongdoer.[52] While courts are permitted to fashion rules of contribution in the absence of a specific legislative direction, such rules must be consistent

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at 309 (4th ed. 1971) *with* Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230, 238 (S.D. N.Y. 1974).

47. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979). Considering the arguments against contribution: reduced control over parties to the suit, lessened incentive to defendants to settle, and greater complexity at trial, the majority found the adverse consequences to be negligible. *See id.* at 1184-85; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 133 (1932) (contribution results in punishment of all parties).

48. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting). *See generally* Comment, *Denying Contribution Between Tortfeasors in Arizona: A Call for Change*, 1977 ARIZ. ST. L.J. 673, 690-95. Only 11 states continue to follow the common law rule denying recovery to all tortfeasors; however, the availability of contribution in the other states is generally restricted to unintentional torts. *See* Comment, *Denying Contribution Between Joint Tortfeasors in Arizona: A Call for Change*, 1977 ARIZ. ST. L.J. 673, 693.

49. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting); *see* El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976).

50. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189-90 (8th Cir. 1979) (Hanson, J., dissenting).

51. *See id.* at 1188-89 (Hanson, J., dissenting). National was alleged to have violated section 2 of the Sherman Act. *Id.* at 1188. In order to recover under section 2, National must be found an intentional tortfeasor. *Id.* at 1188; *see, e.g.*, United States v. Griffith, 334 U.S. 100, 105 (1948); Stifel, Nicolaus & Co., Inc. v. Dain, Kalman & Quail, Inc., 578 F.2d 1256, 1262 (8th Cir. 1978); International Rys. of Cent. America v. United Brands Co., 532 F.2d 231, 239 (2d Cir.), *cert. denied*, 249 U.S. 835 (1976).

52. *See* Dawson v. Contractors Trans. Corp., 467 F.2d 727, 731 (D.C. Cir. 1972); Cohen v. United States, 35 AFTR 2d 75-1445,-1447 (E.D. Mich. 1975); Gould v. American-Hawaiian Steamship Co., 387 F. Supp. 163, 168 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

with the general principles of contribution.[53] When a violation is unintentional or negligent, the general trend of expanding the right to contribution offers compelling reason to grant that right to antitrust defendants.[54] Allowing Professional to seek contribution in this case, however, was inappropriate and inconsistent with the nature of the right for intentional tortfeasors.[55]

The court should have centered its inquiry on the effect of contribution upon antitrust laws.[56] Difficulties of proof and the availability of a tax deduction have led some authorities to conclude that even full imposition of treble damages does not make antitrust violations unprofitable.[57] In light of these uncertainties, the principal concern of any court in an antitrust suit should be upon furthering the goals of antitrust statutes and

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53. *See* Knell v. Feltman, 174 F.2d 662, 666 (D.C. Cir. 1949); George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219, 221 (D.C. Cir. 1942); Wright v. Haskins, 260 N.W.2d 536, 538-39 (Iowa 1977). The rule of no contribution between intentional tortfeasors is founded on public policy considerations. The general rule is that no conscious wrongdoer should base a cause of action on his own misconduct, and, therefore, the courts should leave such a tortfeasor where they find him. W. PROSSER, LAW OF TORTS § 50, at 308 (4th ed. 1971); Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L. Q. 552, 557-60 (1936). *See generally* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130; 131-46 (1932).

54. *See* Wilson P. Abraham Const. Co. v. Texas Indus., Inc., 604 F.2d 897, 908 (5th Cir. 1979) (Morgan, J., dissenting). Logically, the fear of punishment can only deter those who actually contemplate a violation. *See id.* at 908 (Morgan, J., dissenting). "Clearly deterrence is a valid reason for denying contribution only among those who intentionally violate the antitrust laws." *Id.* at 908 (Morgan J., dissenting). It is possible to violate the antitrust laws unintentionally since intent provisions refer to the acts of the defendant rather than the results achieved. *See* Rex Chainbelt, Inc. v. Harco Prods., Inc., 512 F.2d 993, 1003 (9th Cir. 1975); Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 683 (D. S.C. 1977); El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶ 61,533, at 72,111 (N.D. Cal. 1976); Note, *Contribution in Antitrust Suits*, 63 CORNELL L.Q. 682, 702 (1978). *But see* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L.J. 779, 792 (1979) (no such thing as unintentional violation).

55. *See* Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111 (1974); Cohen v. United States, 35 AFTR 2d 75-1445, -1446 to -1447 (E.D. Mich. 1975). Cohen sought contribution under a tax statute requiring intent; the court considered *Halcyon* and *Cooper Stevedoring* and noted the change in federal common law. The court, however, refused to permit contribution because the violation required intent. *See* Cohen v. United States, 35 AFTR 2d 75-1445, -1446 to -1447 (E.D. Mich. 1975).

56. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting); El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976).

57. *See* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1322-32 (1973); *cf.* Parker, *Treble Damage Actions - A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483, 505 (1971) (impact of treble damages questioned).

protecting the public from illegal restraints of trade.[58] In *Professional* the court admitted research on deterrence was inconclusive and implied distribution of treble damages could weaken the prohibitive value of the antitrust laws.[59] Permitting antitrust defendants to share the burden of a treble damage judgment could undermine the legislative goal of preventing anticompetitive behavior and, therefore, should not be extended without proof to the contrary.[60]

Contribution between coconspirators could curtail the bringing of private suits.[61] The complexity and expense of a private antitrust action causes potential plaintiffs to be influenced considerably by the likelihood of success.[62] Absent contribution, plaintiffs may select which defendants to sue and thus exercise control over the size and scope of the lawsuit.[63] When contribution is possible, an intended defendant may implead a corporate coconspirator and diminish the plaintiff's chance of success.[64] An impleaded coconspirator could overwhelm and exhaust the plaintiff's le-

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58. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968).

59. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979).

60. *See id.* at 1189 (Hanson, J., dissenting). The traditional rationale for denying contribution is that the threat of one tortfeasor paying the entire treble damage judgment offers a greater deterrent to illegal conduct. *See* El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP.(CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D. N.Y., 1969); Note, *Contribution in Private Antitrust Suits,* 63 CORNELL L.Q. 682, 702-03 (1978) (small risk of large fine makes management more risk-aversive). Conversely, another rationale suggests a rule of no contribution might make potential wrongdoers more willing to participate in illegal activity by giving them a "sporting chance" to avoid all liability. Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 133-34 (1932).

61. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting); Wheeler, *Antitrust Treble-Damage Actions: Do They Work?,* 61 CALIF. L. REV. 1319, 1330 (1973). Wheeler suggests several factors that would tend to discourage private suits, such as length of suits, extreme complexity which entails high costs, low overall success rate, and attorneys who must take the cases on contingent fees but cannot keep up with the rest of their practice because of the time consuming nature of antitrust suits. Wheeler, *Antitrust Treble-Damages Actions: Do They Work?,* 61 CALIF. L. REV. 1319, 1330-32 (1973).

62. *See* Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D. N.Y. 1969); Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement,* 40 A.B.A. J. 1061, 1062 (1954); Wheeler, *Antitrust Treble-Damage Actions: Do They Work?,* 61 CALIF. L. REV. 1319, 1330-31 (1973).

63. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1190 (8th Cir. 1979) (Hanson, J., dissenting); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D. N.Y. 1969).

64. *See* Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D. N.Y. 1969); James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism,* 54 HARV. L. REV. 1156, 1164 (1941); Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement,* 40 A.B.A. J. 1061, 1061-62 (1954).

gal resources, could enjoy popularity as a major employer in the area of suit, or could have aided the plaintiff as a witness against the original defendant.[65] The *Professional* court recognized the importance of private suits as a means of enforcing the antitrust laws.[66] Consequently, if contribution inhibits private action it may ultimately have an adverse impact on the deterrent effect of the antitrust laws.

Although *Professional* offers the potential for extending the right of contribution to antitrust coconspirators, it is unlikely to have a significant effect. In *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*,[67] the Fifth Circuit was presented with the question of contribution and refused to follow *Professional*.[68] In deciding the availability of contribution, the court tested each of defendant's arguments against the deterrent effect of no contribution and concluded a rule of no contribution offered a superior deterrent.[69] Since the effect of contribution on deterrence is inconclusive, the wiser policy is to favor the public interest and require individuals seeking contribution to give affirmative proof of undiminished deterrent effect.[70] Lower courts faced with the issue of contribution have also limited the scope of *Professional*.[71] Settlement is favored by the courts in the interest of judicial economy and has been used as a ground for distinguishing *Professional* by at least two district courts.[72] Since a majority of antitrust cases are settled or partially settled before trial, there are not likely to be many instances in which *Professional* will be applied.[73]

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65. *See* Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A. J. 1061, 1061-62 (1954); *cf.* James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1164-65 (1941) (discussing contribution generally).

66. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979); Loevinger, *Private Action - The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168 (1958).

67. 604 F.2d 897 (5th Cir. 1979).

68. *See id.* at 900.

69. *See id.* at 901-02.

70. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (Hanson, J., dissenting); *cf.* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) (new right must not hamper antitrust enforcement).

71. *See, e.g., In re* Corrugated Container Antitrust Litigation, 919 ANTITRUST & TRADE REG. REP. (BNA), at E-1 (S.D. Tex. May 30, 1979); *In re* Ampicillin Antitrust Litigation, 917 ANTITRUST & TRADE REG. REP. (BNA), at E-1 (D.D.C. May 21, 1979).

72. *See, e.g., In re* Corrugated Container Antitrust Litigation, 919 ANTITRUST & TRADE REG. REP. (BNA), at E-1 (S.D. Tex. May 30, 1979) (14 non-settling defendants sought contribution from four other defendants who had settled); *In re* Ampicillin Antitrust Litigation, 917 ANTITRUST & TRADE REG. REP. (BNA), at E-1 (D.D.C. May 21, 1979) (contribution unavailable when defendants make good faith offer to settle).

73. *See* Loevinger, *Defending Antitrust Lawsuits*, in 24 AM. JUR. TRIALS 1, 138-39