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Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis

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The right to contribution among antitrust defendants is a controversial issue in antitrust litigation. Because a plaintiff can choose to recover all his damages from a single defendant, notwithstanding the possible existence of other, perhaps more culpable defendants, the absence of a contribution rule means that the sued defendant may pay damage judgments far in excess of his responsibility, while other responsible parties escape liability. The enactment of a contribution rule would remedy this unfairness by permitting the paying defendant to distribute a portion of his liability among his coconspirators. A claim reduction rule would extend this result to settlements in multidefendant cases. The outstanding damage claim would be reduced by a settling defendant’s contribution share so that this settlement


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1See, e.g., Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 8 (9th Cir. 1963).
would not leave the remaining defendants liable for more than their shares.

These arguments convinced the United States Court of Appeals for the Eighth Circuit to adopt a contribution rule in 1979. During the same year, Senator Birch Bayh (D-Ind.) introduced a pro-contribution provision as part of Senate Bill S. 390, entitled the "Antitrust Improvements Act of 1979." The contribution provision was withdrawn from S. 390 and later introduced as a separate contribution bill, S. 1468. While this proposal was being considered by the Senate, the Supreme Court held that no right of contribution existed under the antitrust laws. Congressional action therefore became the only available mechanism for the creation of a contribution right.

In response to the Supreme Court decision, the Senate Committee on the Judiciary held hearings in 1981 and early 1982, and a new pro-contribution bill, S. 995, was reported out of committee by a twelve to six vote on March 31, 1982. The Committee on the Judiciary of the House of Representatives also considered several bills concerning contribution and claim reduction, including bills that were very similar to S. 995. None of these bills were passed during the Ninety-seventh Congress, but S. 995 already has been reintroduced in the Ninety-eighth Congress as S. 380, and H.R. 2244 recently was introduced in the House Judiciary Committee.

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9For example, three bills were introduced in the House in the first session of the Ninety-seventh Congress: H.R. 1242, H.R. 4072, and H.R. 5794. As discussed in Section II, some of these bills represent ongoing efforts to gain passage of legislation like S. 1468 and S. 995, while other bills represent independent efforts to resolve legislatively critical issues concerning contribution and claim reduction in antitrust cases.
The premise of this Article is that the thoughtful consideration of the values underlying antitrust law and practice will dictate proper legislative choices in the composition of contribution and claim reduction legislation. Section I will summarize the courts' treatment of contribution rights in antitrust cases. The traditional rule holding that antitrust defendants had no right to contribution was challenged recently in the Eighth Circuit, but was reaffirmed by the Supreme Court. In Section II, the legislative proposals offered in the current and prior Congresses will be examined. Section III will develop the concerns underlying antitrust law—deterrence, compensation, complexity, and fairness—in the contribution context. Section IV will analyze the legislative proposals discussed in Section II. Specifically, the authors will discuss the provisions of the bills that concern the coverage of the contribution right, the computation of contribution shares, claim reduction, the jury trial right, and the retroactive applicability of the statute. The conclusion will present the authors' resolution of these issues and a model statute.

I. Case Law Developments

The first federal court to consider contribution between antitrust tortfeasors was the United States Court of Appeals for the Third Circuit in *Goldlawr, Inc. v. Shubert*.

Shubert filed a third-party complaint which alleged that the third-party defendant was responsible for the damages suffered by Goldlawr. The court ruled that the two conspiracies were separate and distinct and concluded that Shubert and the impleaded third-party defendant were not joint tortfeasors. In reaching this decision, the court opined in dictum that the federal common law did not provide a right of contribution between antitrust tortfeasors.

The first United States court of appeals to hold that a right to contribution did exist under the antitrust laws was the Eighth Circuit in *Professional Beauty Supply v. National Beauty Supply*. Several district courts previously had decided the issue

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11276 F.2d 614 (3d Cir. 1960).
12Id. at 616. But compare *Goldlawr, Inc. v. Shubert* with *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968), a personal injury action predicated on a negligence theory, where the Third Circuit adopted a comparative fault contribution rule. The *Goldlawr* court observed that there was "no longer a legitimate place in our system, if indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss." Id. at 467.
13594 F.2d 1179 (8th Cir. 1979).
directly to the contrary.\textsuperscript{14} The defendants in \textit{Professional Beauty} filed a third-party complaint seeking contribution. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. On appeal, the Eighth Circuit reversed and required contribution by the third-party antitrust defendant. The court, in a two to one decision, reasoned that both deterrence and fairness dictated the adoption of a contribution rule.\textsuperscript{15}

The \textit{Professional Beauty} court was persuaded that a no-contribution rule could reduce the deterrent effect of the antitrust laws by allowing violators to escape liability. The possibility of escaping liability was perceived by the court to be greatest in situations where a plaintiff is so dependent on a violator that the plaintiff chooses not to sue that potential defendant for fear of retaliation by the violator, and instead sues other, relatively less powerful defendants.\textsuperscript{16} This is likely to arise when the parties are in a vertical relationship. Apart from its concern about the deterrent effect of the existing law, the court objected to the misallocation of damages caused by the absence of a contribution rule.\textsuperscript{17}

While noting the significance of the deterrence and fairness concerns in the case before it, the court conceded that such equitable considerations would not exist in every case. Accordingly, it left the decision on whether to use the contribution rule to the discretion of the trier of fact.\textsuperscript{18} This discretion was to be exercised in light of the relative bargaining power of the wrongdoers and the extent of their participation in the illegal conduct.\textsuperscript{19} Each defendant's contribution portion was to be calculated on a pro rata basis, with each violator bearing an equal share of the damage liability.\textsuperscript{20}


\textsuperscript{15}Professional Beauty, 594 F.2d at 1185-86.

\textsuperscript{16}During depositions in \textit{Professional Beauty}, the principal shareholders of plaintiff “stated that they were persuaded not to name [an additional defendant] because of [its] decision to renew Professional's franchise.” \textit{Id.} at 1185.

\textsuperscript{17}\textit{Id.} at 1185-86.

\textsuperscript{18}\textit{Id.} at 1186. The court did not specify whether the determination was to be made by the judge or by the jury.

\textsuperscript{19}\textit{Id.} at 1186.

\textsuperscript{20}\textit{Id.} at 1182 & n.4.
The discretionary contribution approach of *Professional Beauty* was rejected by every other court that considered the issue. The principal argument against a contribution approach was articulated by the Fifth Circuit in *Wilson P. Abraham Construction Corp. v. Texas Industries*. That court concluded that a contribution rule would dilute the deterrent effect of the antitrust law. Support for this conclusion was drawn from the economic theory of risk aversion. This theory suggests that business decisionmakers "are deterred more by the slight prospect of a large loss than by the prospect of a small loss." The court, therefore, reasoned that a no-contribution approach, because it increases the size of the potential liability, would produce greater deterrence. The fairness issue arose in the context of a claim that a no-contribution rule violated the Equal Protection Clause by making the sued defendant responsible for the damages caused by others. The court rejected this argument, finding the no-contribution rule rationally related to the deterrent purposes of the antitrust law.

The question concerning the existence of a right of contribution was resolved by the Supreme Court in 1981. In an appeal from *Abraham Construction*, the Court unanimously held in *Texas Industries v. Radcliff Materials* that Congress, in adopting the Sherman and Clayton Acts, did not intend to create contribution rights, and that the federal courts were without power to fashion common law rules sanctioning contribution in antitrust litigation. The Court supported its first conclusion by examining the legislative history of the antitrust laws and concluded that Congress did not provide for contribution either explicitly or implicitly. Reasoning that Congress enacted the antitrust treble-damage provision as a means to "punish past,
and to deter future, unlawful conduct,"27 the Court found no evidence that Congress intended to "ameliorate the liability of wrongdoers."28

In evaluating the federal common law as a potential source of the right, the Court confirmed that the formulation of a federal common law is limited to protecting "uniquely federal interests" and "those areas in which Congress has given the courts the power to develop substantive law."29 Although the Court recognized that federal interests are at stake under the congressionally enacted antitrust laws, it stated:

Contribution among antitrust wrongdoers does not involve the duties of the federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority . . . . In short, contribution does not implicate "uniquely federal interests" of the kind that obligate courts to formulate federal common law.30

The Court similarly distinguished between its authority to develop substantive law principles within the broad mandate of the statutes and its power to formulate remedies for violations of the statutes.31 Because Congress explicitly provided for specific remedies, in contrast to the open-endedness of the substantive provisions, the Court held that it was without authority to expand the remedial provisions to include contribution among defendants.32 The Court invited Congress to consider the competing policies, values, and interests at stake, but it did not signal its own views on how those interests should be weighed.33

The Texas Industries decision was extended to claim reduction by the Fourth Circuit in Burlington Industries v. Milliken & Co.34 The plaintiff (Burlington) had settled with one defendant before bringing its suit. The trial judge found for the plaintiff, but reduced its damage judgment by treble the settlement fig-

27Id. at 639.
28Id.
29Id. at 640.
30Id. at 642.
31Id. at 643 (emphasis added).
32Id. at 646 (citing Northwest Airlines v. Transport Workers Union, 451 U.S 77, 97 (1981)).
33Id. at 646–47. In light of the Court's statement that "treble damages reveal an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers", Congress will be called upon to balance this punishment/deterrence rationale with the difficult equity issues created by the present status of the law. See generally Sullivan, supra note 5.
3460 F.2d 380 (4th Cir. 1982).
The Fourth Circuit overturned the trial judge's damage determination when it reaffirmed the prevailing rule that any amount received in settlement should be deducted from plaintiffs' damages after trebling, and not before. The court reasoned that claim reduction was analogous to contribution and that, in the absence of a clear legislative indication otherwise, a district court does not have the inherent discretionary power to order claim reduction. Finally, the court stated that claim reduction would retard the beneficial effects of partial settlements in antitrust cases.

Following the Supreme Court's decision in Texas Industries, interested congressional representatives proposed legislation that would create a federal right of action for contribution. This legislation is the subject of the next section.

II. LEGISLATIVE PROPOSALS

This Section briefly describes the various legislative proposals considered by Congress during the Ninety-seventh and Ninety-eighth sessions. Although there is considerable variation in the scope of the proposals, they seem to fall into three categories.

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36Burlington Indus. v. Milliken & Co., 690 F.2d at 391.
37Id. at 392-95.
38Id. at 394.
39Of the bills considered by Congress during the Ninety-seventh session, only S. 995, 97th Cong., 2d Sess. (1982), had been reintroduced in the Ninety-eighth Congress as of the time that this Article was written. S. 380, 98th Cong., 1st Sess. (1983). This bill will henceforth be referred to as S. 380. The House Committee on the Judiciary also considered a number of bills during the Ninety-seventh session, but a substantially different bill recently has been introduced in committee. H.R. 2244, 98th Cong., 1st Sess. § 3 (1983), reprinted in 44 ANTITRUST & TRADE REG. REP. (BNA) No. 1107, at 673 (Mar. 24, 1983).

The authors' opinion is that because the final version of the contribution legislation probably will incorporate provisions from a number of different bills, a discussion of the relevant bills introduced in the Ninety-Seventh Congress will be helpful to our readers and also will provide a comparative perspective.

The two Senate bills provide as follows:

Clayton Act (15 U.S.C. §§ 12-27 (1976)) is amended by inserting after section 4H the following new section:

Sec. 4H. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been
A. The Price-Fixing Bills

Three legislative provisions share close similarities in substance and procedure and differ only in their application to pending antitrust cases. H.R. 4072[40] and H.R. 1242[41] were considered by the House Judiciary Committee last session, and S. 380[42] is presently before the Senate.

The House bills were expressly applicable only to horizontal price-fixing agreements, while S. 380 is cast in terms of price-fixing, and thus possibly covers resale price maintenance. All three bills provide a right of contribution according to the dam-

(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person’s sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

(e) This section shall apply to all actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.

(f)(1) The claim reduction principle of subsection (b) of this section shall also apply to actions alleging an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act, which are pending on the date of enactment of this section, if upon proof by any party subject to liability for damages in such an action, the court determines that it would be inequitable, in light of all the circumstances and notwithstanding subsection (f)(2), not to apply the principle in that action. In ruling on a request to apply claim reduction, the court shall find the facts specially.

(f)(2) No agreement to settle, compromise, or release a claim under section 4, 4A, or 4C of this Act which has been signed by the parties prior to the date of enactment of this section may be rescinded, disapproved, reformed, or modified by the parties or by the court because of the application of the claim reduction principle, except upon the written consent of all the parties thereto.

(g) Each subsection of this section is severable from all other subsections, and the invalidity of any subsection for any reason shall not affect the validity of the remaining subsections: Provided, that subsections (f)(1) and (f)(2) are not severable from each other, and the invalidity of any provision of those subsections as applied in an action shall render the remainder of those subsections inapplicable in that action.”

ages attributable to each firm’s sales or purchases of goods and services. The bills also permit the assertion of contribution claims via a number of procedures.43

Where the plaintiff settles with one or more defendants, all three bills would require the reduction of a plaintiff’s claim for damages by the greatest of: (1) the amount stipulated in the settlement agreement, (2) the actual settlement figure paid by the settling party or parties, or (3) treble the actual damages attributable to the settling party’s sales or purchases. Obviously, it seems probable that the third provision will be invoked most frequently.44

The bills all provide that any defendant who settles in good faith would not be liable for contribution to any other person concerning the claim that was settled. In the Senate bill this provision is intended to encourage settlements by ensuring that any settling defendants would not be liable in contribution claims asserted by nonsettling defendants.45

Finally, the bills differ somewhat with respect to their retroactive effect. H.R. 1242 would apply only to actions filed after the bill was enacted, while S. 380 and H.R. 4072 are expressly applicable to pending cases. The claim reduction features of H.R. 4072 would be applicable to pending cases except where they “would result in manifest injustice.”46 S. 380 has a more elaborate retroactivity provision that would permit application of the claim reduction provision to pending cases if “the court determines that it would be inequitable, in light of all the circumstances . . . , not to apply the principle in that action.”47 A closely related provision of S. 380 conditions the validity of the retroactivity provision on a paragraph of the bill that protects settlement agreements signed before the effective date of the act.48

43These proposals, like most of the contribution and claim reduction legislation considered by the Congress, provide that a party seeking contribution may assert a claim by counterclaim, cross-claim, third-party action, or a separate lawsuit. Although the proposals do not articulate the circumstances in which severance or joinder of claims is appropriate, it has been argued that the federal district courts have ample authority to dictate the appropriate procedure. See Jacobson, supra note 5, at 235, 239-40.
45Id. at 29-30.
48According to the committee report on S. 995, subsection 41(g) of S. 380 makes the dual retroactivity provisions of subsection 41(f) unseverable from one another in the event either section is struck down. S. REP. NO. 359, 97th Cong., 2d Sess. 15, 30-31
B. Vertical and Horizontal Conspiracy Bills

The Justice Department submitted one bill, H.R. 5794\textsuperscript{49}, to the House, and the House Committee on the Judiciary prepared two additional bills that modified the Justice Department bill in significant ways. A fourth bill, H.R. 2244, recently has been introduced in the House Judiciary Committee. These four bills would be applicable to both vertical and horizontal antitrust activity.

1. H.R. 5794. This bill is significantly different from the three preceding bills, both in substance and procedure. First, this bill expressly reaches any antitrust activity, not just horizontal price-fixing.\textsuperscript{50} Second, the bill sets forth a definite statute of limitations of six months following final judgment in the litigation for which contribution is sought.\textsuperscript{51} Third, the bill provides a bar against contribution claims by or against a settling defendant.\textsuperscript{52}

With respect to claim reduction, H.R. 5794 requires a reduction of the plaintiff’s claim by the greatest of: (1) the stipulated amount, (2) the actual consideration paid, or (3) the contribution share of the settling party.\textsuperscript{53} The bill further provides that contribution and claim reduction must, “to the extent consistent with the fair and expeditious conduct of litigation,” be determined by the court, and not a jury, after trial of the antitrust case.\textsuperscript{54}

In establishing contribution and claim reduction shares and rights, the proposed bill distinguishes horizontal price-fixing from other antitrust violations. Contribution shares in price-fixing cases are determined “on the basis of the relative magnitude in the affected market of each such competitor’s sales or purchases.”\textsuperscript{55} Contribution shares in other claims shall be determined by the court according to the “relative responsibility of each party for the origination or perpetration of the

\textsuperscript{49}H.R. 5794, 97th Cong., 2d Sess. (1982).
\textsuperscript{50}Id. § 41(a).
\textsuperscript{51}Id. § 41(c).
\textsuperscript{52}Id. § 41(d).
\textsuperscript{53}Id. § 41(e).
\textsuperscript{54}Id. § 41(f)(2).
\textsuperscript{55}Id. § 41(f)(1).

(1982). This unseverability feature apparently serves the purpose of ensuring that if the retroactive claim reduction provision of subsection 41(f)(1) is declared unconstitutional, then subsection 41(f)(2), which protects settlements previously reached in pending cases, will also be severed. Id. at 30–31; see also G. Bell, Antitrust Contribution and Claim Reduction: An Objective Assessment 19 (1982).
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violation” for which the plaintiff has been harmed or the defendants unjustly enriched.

2. Discussion Draft No. 1. This bill is a modified version of H.R. 5794, and materially differs from H.R. 5794 only with respect to the liability of a settling defendant to contribution claims. It provides that a settling defendant may not claim contribution, and it gives a settling plaintiff and defendant a choice. First, the parties may, as part of the settlement, agree that the plaintiff waives any claim against other defendants for the settling defendant’s contribution share. The settling defendant would not be subject to any contribution claims by other defendants. Alternatively, the plaintiff could withhold the waiver and the settling defendant could be subject to contribution claims by other defendants. However, the bill further provides that the total damages collectible from nonsettling defendants shall be reduced by the greater of the stipulated settlement amount or the consideration paid for release. In all other respects, the bill is identical to H.R. 5794.

3. Discussion Draft No. 2. This bill is also a modification of H.R. 5794, and differs from H.R. 5794 by its specification of contribution shares in vertical agreement cases. Significantly, the proposed language states that in vertical agreement cases contribution shares shall be allocated by “dividing the total damages equally between the functional levels and allocating shares within each level in accordance with the relative magnitude in the affected market of each person’s sales or purchases . . . .” This draft also permits the court to allocate liability among different levels in any just proportion, when necessary to avoid an unjust result. The bill apportions contribution claims in horizontal agreement cases on the basis of each defendant’s relative magnitude and defines the term “relative magnitude” as

36Id. § 41(f)(3).
37The text of this proposed bill is set forth in a letter by Congressman Peter Rodino, Chairman of the House Comm. on the Judiciary, to Att'y Gen. William French Smith, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1056, at 601–02 (1982) [hereinafter cited as Discussion Draft No. 1].
38Id. at 601.
39Discussion Draft No. 1, supra note 57, § 41(f).
40The text of this proposed bill is set forth in a letter by Congressman Peter Rodino, Chairman of the House Comm. on the Judiciary, to Att'y Gen. William French Smith, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1056, at 603–04 (1982) [hereinafter cited as Discussion Draft No. 2].
41Id. at 601.
42Discussion Draft No. 2, supra note 60, § 41(f)(1).
relative market shares in the relevant market. In all other respects, this bill is identical to H.R. 5794.

4. H.R. 2244. This bill, which recently was introduced in the House Judiciary Committee, applies to any antitrust action, but is significantly different from the other bills in several respects. This bill permits claim reduction or contribution of damages among defendants only if the district court, after determining the amount of damages, concludes that failure to reallocate or reduce damages "would be substantially unjust with respect to a defendant." However, the bill also provides that claim reduction or contribution is permissible only where the plaintiff's conduct in the lawsuit "significantly contributed to the substantial injustice." Finally, the bill establishes a floor on the amount of defendant's damages equal to the minimum of its relative fault or to its sales or purchases, which serves to limit the reduction or reallocation of damages.

III. AN ANALYTIC APPROACH TO CONTRIBUTION LEGISLATION

A contribution rule, as a matter of antitrust procedure, is relevant to the process of allocating damages, and, as a matter of policy, is relevant to the fundamental values underlying private antitrust actions. These procedural concerns and policy norms have been repeatedly considered and articulated by legal commentators and the United States Supreme Court, and they include the deterrent effect of private actions, judicial economy and litigation complexity, compensation for plaintiffs, and fairness to litigants. Because these considerations and values may be implicated by legislative proposals for contribution and claim reduction, it is necessary to consider the nature and effect of the proposed rules on private antitrust litigation.

A. Deterrence

The first factor concerns the deterrent effect of private antitrust actions. The Supreme Court has repeatedly stated that

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63 Id. § 41(f)(2).
65 Id. § 41(a)(1).
66 Id. § 41(a)(2)(A).
67 Id. § 41(a)(2)(B).
private antitrust actions serve as a powerful deterrent to anticompetitive conduct. In the Court's recent antitrust decision, *American Society of Mechanical Engineers v. Hydrolevel Corp.*, Justice Blackmun stated that "[a] principal purpose of the antitrust private cause of action... is, of course, to deter anticompetitive practices." In that case, the Court extended the scope of antitrust liability to nonprofit corporations when their voluntary agents engage in anticompetitive conduct. The Court made it clear that its decision to impose liability on such organizations was based largely on "the congressional intent that the private right of action deter antitrust violations." Supporters of the contribution rule argue that it would ensure that all violators would be subject to liability, and that this added certainty would enhance the deterrent effect of the antitrust laws. The contrary argument is that allowing a defendant to redistribute liability reduces the consequences of a violation, and that this reduction in liability lessens deterrence. The resolution of this question depends upon the attitude of the potential violator toward the risks involved. If a corporation prefers risking a low probability of a large penalty to a high probability of a small penalty, then a contribution rule should be favored, and vice versa. The absence of empirical data prevents a more definitive resolution of this issue.
B. Complexity

The second factor concerns complexity. The enactment of a contribution rule would add complications to court proceedings that already are intricate and expensive. The existing complexity in private antitrust actions may be attributable to the number of parties in the lawsuit, their difficulties in explaining and supporting their claims, and the courts’ difficulties in deciding on appropriate relief. The pressures on the courts resulting from these and other issues have caused the Supreme Court to express concern over the “feasibility and consequences” of various damage theories and to redefine traditional standards of statutory standing, remoteness, and causation in private antitrust action. These cases, which strongly reflect growing judicial concern over litigation complexity, speculative proof of damages, and the unfairness of duplicative recoveries, counsel caution in adding new rights of action and novel approaches to the computation of damages to a litigation system already known for its complexity and delay.

The effects on the judicial system of the creation of contribution rights can perhaps best be understood within the analytical framework of transaction costs. If contribution legislation

punishment is a greater deterrent than severity of the penalty. See, e.g., Staff of the Subcomm. on Monopolies and Commercial Law, House Comm. on the Judiciary, 98th Cong., 1st Sess., Proposed Legislation to Allocate Damages Among Defendants in Private Antitrust Litigation, reprinted in 44 Antitrust & Trade Reg. Rep. (BNA) No. 1101, at 280, 288 (Feb. 10, 1983) [hereinafter cited as Staff Report]. Notwithstanding the equivocal nature of the theoretical work and the lack of empirical work, certain tentative observations can be drawn concerning the effect of contribution and claim reduction legislation on deterrence objectives.

Blue Shield v. McCready, 102 S. Ct. 2540, 2546 n.11 (1982).


The term “transaction cost” is capable of many meanings. See Polinsky, Economic Analysis as a Potentially Defective Product: A Buyer’s Guide to Posner’s Economic Analysis of Law, 87 Harv. L. Rev. 1655, 1667–68, 1671–74 (1974). This is especially true in the contribution and claim reduction context. As a general matter, transaction costs are incurred whenever a group of people get together to bargain or settle. Types of transaction costs include process costs that are associated with the incremental expenses of administering a rule, such as additional judge or jury time; coordination costs associated with additional efforts at generating consensus among many parties to a transaction; insurance costs associated, for example, with the need to prevent cheating on a negotiated agreement; and error costs associated with the greater prospect of incorrect outcomes as complexity of coordination and the number of parties increase. See R. Posner, Economic Analysis of Law 45–47, 423, 458 (2d ed. 1977); Calabresi, Transaction Costs, Resource Allocation and Liability Rules--A Comment, 11 J.L. &
is enacted, a new set of “rights” will be created, and the working out of these “rights” at different levels of the system will entail additional costs. To the extent that many of the issues associated with contribution and claim reduction are already raised in antitrust litigation, however, the consequences to the judicial system are reduced. Nevertheless, the addition of this right of action could have significant repercussions on both in-court and out-of-court costs.

A contribution rule will increase the complexity of antitrust lawsuits by bringing additional parties into the litigation. Under the traditional rule, the plaintiff could sue one coconspirator, litigate his case, and either win or lose. After a contribution rule is enacted, however, a defendant will be able to implead other coconspirators as third-party defendants. Merely having additional parties in the litigation will increase costs to some degree. Costs and complexity will increase further to the extent that impleaded parties raise defenses or claims not raised by the original defendant. However, joinder may not significantly increase discovery costs because the antitrust discovery net generally is broadly cast to encompass nondefendants that have knowledge leading to relevant information regarding the alleged violation.

Additional complexities may arise in the course of allocating damages among defendants. If some or all of the impleaded third-party defendants were to be found liable, a hearing would be required to determine each defendant’s contribution share. If a method other than the easily applied pro rata formula were to be chosen for the allocation of damages, this proceeding would become quite complex. Moreover, if contribution were sought through the filing of an independent action, rather than through joinder of parties in the main action, duplication of effort would result.

A final consideration with regard to complexity is the effect of a proposed contribution rule on settlements. The existence


For example, if the plaintiff has decided to use market share analysis to prove his damages, the addition of a contribution rule that uses market share analysis to determine contribution shares would not significantly increase litigation costs. See infra note 106.

Of course, if the plaintiff named all antitrust violators in the original complaint, a contribution rule would result in no additional costs. See Note, Contribution in Private Antitrust Actions, 93 Harv. L. Rev. 1540, 1549 (1980).

Jacobson, supra note 5, at 235.
of additional defendants means that more settlements will have to be reached, and the relationship between the defendants may create uncertainties in the minds of both plaintiff and defendant that will make settlements harder to reach. A contribution rule also will affect the parties' incentives to settle. It is frequently stated that private antitrust actions and the prospect of treble damage recoveries provide a substantial incentive to settle litigation. If a defendant is permitted to shift a portion of liability to another, then there is less incentive to settle before liability is established, and to the degree one is permitted to decrease damages owed, the incentive to settle is decreased correspondingly. Any decrease in the settlement rate could have a severe impact on the efficiency of the courts, given the large number of antitrust filings and the scarcity of judicial resources.

It should be noted that despite the fact that a contribution rule may increase the complexity of the litigation, federal trial courts have had substantial experience with contribution rules. Since 1933, the courts have successfully applied contribution

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79 See supra note 75.
80 See, e.g., Easterbrook, Landes & Posner, supra note 5, at 365.
81 Id. at 365-67; Note, A Case Against Contribution in Antitrust, 58 Tex. L. Rev. 961, 980–82 (1980).

Because a plaintiff can choose to settle with each defendant sequentially or with them all together, the analysis of settlement incentives becomes complicated. An important issue is whether a contribution rule will result in a higher rate of terminated litigation than a no-contribution rule, and this requires a consideration of incentives and disincentives in partial, global, and sequential settlements strategies.

Some tentative observations are possible. A policy favoring partial settlements might result in more settlements than a policy favoring global settlements. The first reason is that coordination costs are quite high in a global settlement. Second, there is a greater inducement to settle when one alleged coconspirator has settled and the remaining defendants may have to ante up an amount greater than their aliquot portion of the gains from illegal conduct. Moreover, it would seem that the effect of the sequential settlement strategy has been quite positive. See Withrow and Larm, The "Big" Antitrust Case: 25 Years of Sisyphean Labor, 62 Cornell L. Rev. 1 (1976). Former Attorney General Griffin Bell has contended that contribution and claim reduction favor "global" settlements because they remove the plaintiff's incentive to enter into partial settlements by eliminating market share "uncertainty" in plaintiff's negotiation and settlement. See G. BELL, supra note 48, at 14–15; see also Polinsky & Shavell, supra note 5, at 457–62. However, at this point there is no clear indication of the effect of contribution and claim reduction legislation on attaining global settlements, and there is no demonstrable indication that a rule favoring global settlements would be more effective in increasing pretrial settlements than the current sequential settlement strategy.

Finally, the Fourth Circuit expressly rejected Bell's arguments, concluding that antitrust law and policy favored partial settlements. Burlington Indus. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982).
rules under the federal securities laws. Securities litigation is not significantly more complex than antitrust litigation. Both types of cases generally raise complicated economic, factual, and theoretical issues in a multiparty setting. In addition, courts, while exercising diversity jurisdiction, are experienced in applying contribution rules under state law, and various procedural rules have assisted trial courts in the management of complex cases.

C. Compensation for Plaintiffs

A primary concern of antitrust plaintiffs is undoubtedly the recovery of damages. The Supreme Court has consistently found that a congressional purpose to compensate victims is manifest within the antitrust laws. Though this objective recently has come under attack, it is clear that any congressional action that threatens plaintiffs' ability to recover their damages will be intensely scrutinized by the Court.

D. Fairness to the Litigants

The final factor to be considered is perhaps the most difficult one: fairness to the parties. Fairness issues are encountered in the analysis of a contribution and claim reduction statute when there is either a transfer of part of the plaintiffs' control over the litigation to the defendants, or a shift of monetary liability among defendants, or a change in relative strengths in the negotiation of settlements. For example, and as discussed more fully below, permitting defendants to allocate monetary liability

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8See Sullivan, supra note 5, at 398–401.
8Fed. R. Civ. P. 42(b) specifically permits the courts to provide for separate trials on “any claim, crossclaim, counterclaim or third-party claims or issues” to further convenience or avoid prejudice. Fed. R. Civ. P. 21 establishes trial court discretion to drop parties or to sever claims and proceed separately. In addition, the rules permit the submission of special verdict forms or interrogatories to the jury in complex cases. See Fed. R. Civ. P. 52.
8See, e.g., Schwartz, An Overview of the Economics of Antitrust Enforcement, 68 Geo. L.J. 1075, 1091–96 (1980) (Compensation in antitrust cases should be viewed as an incentive to vindicate anticompetitive conduct rather than as compensation for injuries suffered.).
on the basis of relative fault may be fair to the defendants inter se; but reducing a victim's damage entitlement by some multiple of settlement may not be just as between the victim and the defendants.

Supreme Court decisions, although not entirely consistent, have articulated a need to consider issues of fairness presented by legislative enactments. For example, in *United States v. Reliable Transfer Co.*, the Court held that the mere fact that contribution may complicate litigation, because of difficulty in determining degrees of fault, does not justify the unjust results caused by an equal division of damages. The Court observed that “congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodation.” Clearly, then, contribution legislation will require a balancing of economic realities and judicial constraints against “unjust results” in particular cases.

The adoption of contribution legislation would resolve the perceived unfairness resulting from the “joint and several liability” rule of antitrust common law. A single defendant, under such legislation, no longer would be held liable for the plaintiff's entire damage claim while coconspirators went free. A number of other fairness questions would remain to be considered in the legislation, however. First, in designing a rule that affects both antitrust plaintiffs and defendants, Congress should be concerned with unduly restrictive procedures that limit the parties' ability to advance the action. Second, in large part antitrust liability follows intentional and avoidable conduct, and notions of fairness are stronger for innocent victims than for intentional wrongdoers. Third, antitrust violations and antitrust litigation impose costs on society and Congress should consider carefully the fairness of any rule that increases those costs, even though the rule seems fair to the litigants. Fourth, notions of fairness in the allocation of liability among defendants are stronger where a reallocation is necessary to achieve some broader public objective, such as preservation of small busi-

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85Reliable Transfer, 421 U.S. at 408.

86See Schwartz, supra note 86, at 1077 (the possibility of an error is a “process cost”). See generally R. Posner, supra note 57, at § 21.2.

87Easterbrook, Landes & Posner, supra note 5, at 339–44.

necessities. Such public objectives, however, should be clearly articulated and closely related to the statutory alteration.

Ultimately, serious consideration of contribution legislation requires a sensitive balancing of procedural difficulties and policy norms. This effort, in an imperfect world, should attempt to achieve equitable ends without disproportionately increasing transaction costs, and should involve a search for the best procedural mechanism to implement antitrust values in an efficient and fair manner.

IV. CONTRIBUTION LEGISLATION: AN ANALYSIS

The legislative proposals surveyed in Section II will have various effects on antitrust policy. As the Supreme Court's decisions implicitly recognize, there is no commonly recognized hierarchy of values—only an array of factors, differing in weights and importance, from which decisions may be made. It is therefore difficult to assign specific values or weights to factors that are implicated by a legislative proposal for contribution rights. However, there may be value to the decision-maker in the identification of the complexities and incongruities created by a statute, as well as an assessment of a statute's probable likelihood of achieving its intended results. This Section analyzes the contribution proposals in light of certain characteristics that bring into question the ability of the statutes to fairly and efficiently advance the goals of antitrust law.

A. Coverage of the Right to Contribution

Several proposed bills extend the right to obtain contribution only to defendants in horizontal price-fixing cases. This narrow coverage seems counterintuitive, for price-fixers receive little sympathy from the courts. For example, in Arizona v. Maricopa County Medical Society, a case involving allegations of

97102 S. Ct. 2466 (1982).
horizontal price-fixing among physicians, the Court reiterated its longstanding position that horizontal price-fixing lacks any redeeming value and should receive the most stringent antitrust scrutiny. Price-fixing defendants therefore may be unworthy of any special consideration with regard to the distribution of damages, and to the extent that a contribution rule reduces deterrence, it is most unjustifiable here.\textsuperscript{98}

The limitation of a right to contribution to price-fixers excludes several classes of defendants that deserve more favorable treatment. For example, in dealer termination cases,\textsuperscript{99} where a vertically related party (e.g., manufacturer or supplier) may be the most culpable actor, the defendant may not be permitted to assert contribution rights against the unnamed manufacturer or supplier.\textsuperscript{100} Moreover, vertical and horizontal arrangements should be distinguished, as they are in large part in standards of antitrust liability,\textsuperscript{101} because beneficial effects often accompany vertical nonprice restrictions, and the harshness of the no-contribution rule may unnecessarily inhibit otherwise procompetitive conduct.\textsuperscript{102}

\textsuperscript{98}Note, supra note 81, at 971–77 (1980).

Former Attorney General Griffin Bell, a principal proponent of legislation like S. 380, has failed to address the rather perverse set of priorities seemingly established by the legislation. See G. BELL, supra note 48, at 11–12. He first makes the theoretical argument that a contribution and claim reduction regime may reduce price-fixing because the current no-contribution scheme may encourage price-fixing by letting some coconspirators enter into cheap settlement agreements, with the implicit encouragement of price-fixing activity. \textit{Id.} at 11. Bell then dismisses "economic theorists" who conclude to the contrary, as not providing "any useful guidance on the question of deterrence." \textit{Id.} at 12. Bell then suggests that deterrence may not be an appropriate objective of private actions because a great deal of price-fixing is perpetrated by "low-level employees" who, by a single conversation about prices with a competitor, can make an employer liable for the total damages caused by a large conspiracy. \textit{Id.}

Bell's analysis is reminiscent of the "tail-wagging-the-dog" metaphor because the purpose of a deterrence function to an enactment is to compel an employer to take a more active and meaningful supervisory role over employees to prevent violation of public laws. See American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 102 S. Ct. 1935 (1982). Moreover, it suggests that some proponents of contribution and claim reduction legislation are more interested in changing standards of liability, particularly the per se rule, than in serious consideration of the antitrust implications of the legislation.

\textsuperscript{99}This term refers to a situation where a manufacturer has refused to sell to a dealer because the dealer did not act in accordance with the manufacturer's wishes with respect to the product.

\textsuperscript{100}The factual situation in Professional Beauty Supply v. National Beauty Supply, 594 F.2d 1179 (8th Cir. 1979), presents a classic illustration of an unfair or unjust result where contribution or claim reduction is not permitted in a vertical restriction case. See \textit{S. REP. No. 359, 97th Cong., 2d Sess. 42} (1982) (supplemental views of Sens. Metzenbaum and Kennedy); Sullivan, supra note 5, at 418–19.

\textsuperscript{101}Sullivan, supra note 5, at 418–19.

\textsuperscript{102}Easterbrook, Landes & Posner, supra note 5, at 367–68; Sullivan, supra note 5, at 418–19.
Finally, providing contribution rights to price-fixing cartel members may provide a strong incentive for refining the cartel agreement for prospective apportionment of damages in the event of detection. This form of transaction cost associated with maintenance of a cartel agreement is an additional cost borne by consumers and other cartel victims.

B. Computation of Contribution Shares

One critical aspect of several contribution and claim reduction bills is the reliance on market share analysis to compute contribution shares and reduced claims. For example, H.R. 5794 requires contribution shares to be computed “on the basis of the relative magnitude in the affected market of each competitor’s sales or purchases of goods or services,” while H.R. 1242 requires computation “according to the damages attributable to each [price-fixer’s] sales or purchases of goods or services.”

The use of market share analysis as an integral part of a right to contribution or a defense of claim reduction is inappropriate for at least two reasons. First, a plaintiff may choose not to prove damages by market share analysis, but rather may select...
some other method of computing damages in an antitrust case.  

If a plaintiff chooses to prove damages by a “before and after” method, for example, but settles with one defendant before trial, the plaintiff may find his total claim reduced by “treble the actual damages attributable to the settling person’s sales or purchases of goods or services.”  

It seems perverse to grant plaintiffs a choice of damage remedies and then remove that choice by reducing claims according to market share.

Second, the use of market share as the method of determining contribution shares injects a great deal of complexity into antitrust actions. The relevant product market must first be defined, which requires a showing as to the existence and effectiveness of substitutes. A delineation of the appropriate geographic market may then be necessary. Evidence then

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106 Hoyt, Dahl & Gibson, Comprehensive Models for Assessing Lost Profits to Antitrust Plaintiffs, 60 MINN. L. REV. 1233 (1976).

There are essentially four methods of computing damages in a private antitrust case: “before and after” profits, see, e.g., Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1976); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); a “yardstick” theory, see, e.g., Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); foregone profits or loss of going concern value, see, e.g., Farmington Dowel Prods. v. Forster Mfg., 421 F.2d 61 (1st Cir. 1970); and a market share theory, see, e.g., Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969). See generally Parker, Measure of Damages in Federal Treble Damage Actions, 17 ANTITRUST BULL. 497 (1972); Note, Measure of Damages for Destruction of All or Part of A Business, 80 HARV. L. REV. 1566 (1967).


108 The imposition of market share analysis in a case where the plaintiff contemplates proof of damages by some other method presents the equitable problem of the plaintiff’s potential loss of control over negotiation and settlement strategy and over the methods of discovery and proof of damages. There also may be concerns by antitrust plaintiffs that market share contribution and claim reduction computations may permit more numerous and well-financed defendants to overwhelm the plaintiff in the pretrial and trial process.

There are also transaction cost issues. A mandatory computation method may increase the possibility of error by plaintiffs in negotiating settlements, and it may increase discovery costs by the requiring additional efforts to determine relative market shares. Finally, process costs may be increased because a district court may have to sever the main antitrust case, in which damages and injury are demonstrated by one method, from the contribution case, in which damages must be reexamined using a market share methodology for allocation of damages.

To some extent, the establishment of a separate hearing on the computation of market shares, to the extent they are not determined in the main antitrust action, may ameliorate some of the transaction costs facing antitrust plaintiffs. For example, H.R. 5794 requires such a post-trial hearing by the courts. Such a hearing, however, would not clearly address the problems of ascertaining settlement options and could very likely increase process costs by the court in conducting two trials with two sets of evidence and methods of proving damages.


must be gathered which pinpoints each defendant's involvement in each market.

The legislative proposals do little to resolve these questions. Only one proposal, Discussion Draft No. 2, defines "goods" and "purchases," and it appears that even those definitions cannot remove the fairly substantial problems left for judicial resolution. It also seems probable that victims of antitrust conspiracies will be forced to address the definitional issues in the main antitrust action and that the courts will be faced with resolution of definitional disputes in adjudicating contribution shares.

There are some difficulties associated with use of the relative responsibility or comparative fault concept employed by H.R. 5794 and Discussion Draft No. 1. Those provisions advocate a relative responsibility method in all except horizontal price-fixing cases. The principal difficulty involves discerning each firm's complicity in a multimarket, vertical, national antitrust violation. Although a very strong case can be made for a comparative fault method of computing contribution shares, it also appears that the method could increase complexity in the main antitrust case by requiring the parties, conceivably including the plaintiff, to litigate difficult issues of fault in a contribution hearing. It seems equally clear, however, that use of a relative fault method may be the fairest of all methods with respect to an allocation of responsibility among defendants, may achieve the greatest deterrence effect of all contribution proposals, and may be the most familiar methodology because it is premised on traditional concepts of proof.

One proposal, Discussion Draft No. 2, uses a pro rata contribution method in vertical agreement cases, but goes on to accord the district court latitude to allocate contribution shares in some other fashion where a pro rata method proves "man-
festly unjust." Some commentators on contribution legislation advocate pro rata contribution for the reason that such a rule is least expensive for the courts and the parties to administer and minimizes transaction costs. A pro rata rule also may enhance the deterrent effect of the antitrust laws. If we assume that firms are risk averse, the possibility that each will be forced to pay damages in excess of its responsibility will reduce the likelihood that it will violate the law. On the other hand, the use of a pro rata method raises the issue of fairness among defendants, as each defendant must share liability equally, irrespective of culpability.

H.R. 2244 advocates the use of relative magnitude and comparative fault methodologies to determine the floor on the amount of reduction or reallocation of damages. However, before these methods will be used, a culpable defendant must demonstrate that there is substantial injustice because he is paying a disproportionate amount of the awarded damages and that the plaintiff was somehow responsible for the injustice.

C. Claim Reduction

Closely associated with the problems of computing contribution shares are problems of mandatory claim reduction. First, anything that reduces the absolute amount of liability facing each defendant may reduce the disincentive to engage in the proscribed conduct. Therefore, the deterrence objective of the antitrust laws will be affected by any claim reduction legislation. Second, as the complexity of computing contribution shares increases, there may be a proportional increase in the complexity of negotiating and settling antitrust cases.

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Transaction costs, under a pro rata computation method, are lower because individual market shares need not be ascertained, the judgment instead being shared in equal parts by the defendants. Nor would the fact finder need to make allocations of responsibility, as would be the case with a relative responsibility method. The court, after a finding of joint liability, would merely apportion the individual liability in equal shares.


117 See supra notes 68–74 and accompanying text.


119 See supra notes 68–72 and accompanying text.

120 See supra notes 73–84 and accompanying text.
Virtually all the contribution proposals provide that a settling defendant cannot be sued for contribution, but instead require a reduction in the plaintiff’s claim against the remaining, non-settling defendants. The provision forbidding contribution claims against settling defendants should facilitate the negotiation and settlement of antitrust claims by providing some finality to the prospective liability of a settling defendant, and therefore seems beneficial to antitrust legislation.\textsuperscript{121}

Some difficulties are presented by the waiver or release provision contained in Discussion Draft No. 1.\textsuperscript{122} That provision provides that the plaintiff may elect to release the settling defendant from future contribution claims by the amount of the settling defendant’s contribution share. In that case, the amount of the settlement must equal or exceed the settling defendant’s contribution share. Conversely, the plaintiff can withhold the waiver, which would permit nonsettling defendants to assert claims against the settling defendant for his contribution share. This provision obviously accords the plaintiff and settling defendant some latitude in negotiating settlements and accords some fairness among the defendants, but it also seems to inject potential impediments into the negotiation and settlement process. It appears that much of the impetus for contribution legislation stems from a few examples of plaintiffs extorting seriatim settlements from defendants.\textsuperscript{123} Although these situations seem infrequent, it is apparent that the burden of accurately assessing a settlement strategy, and trading off the settlement price against the prospect of significant liability, is currently on antitrust defendants. The waiver principle in Discussion Draft No. 1 may shift the coercive impact onto the plaintiffs and may, as a practical matter, require a plaintiff to receive less in settle-

\textsuperscript{121}A statutory release in an antitrust case bars subsequent recovery against a settling defendant, and it seems to accord with the common law rule. See Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 342–49 (1971). Obviously, such a rule is necessary in the context of contribution and claim reduction legislation where promotion of settlements and finality of litigation are important objectives. See generally Easterbrook, Landes & Posner, supra note 5, at 333–34.

\textsuperscript{122}Discussion Draft No. 1, supra note 57, § 4(f)(e).

ment because a settling defendant wants to limit his exposure to a set sum, the settlement amount. It therefore seems that the waiver or release provision does not really add anything in resolving complexity and settlement problems; defendants will demand a full release and the plaintiff's recoverable damages will be reduced by the settling defendant's contribution share.

On the other hand, it may also be true that the waiver or release provision gives the plaintiff and settling defendant some flexibility in settlement decisions. Depending upon the strength of the plaintiff's case, the defendant's desire to avoid litigation, and the plaintiff’s need for funds to advance the litigation, the choices may be freely exercised. Similarly, the waiver provision may allow the plaintiff to move the settlement price closer to the settling defendant’s contribution share.124

The “substantial injustice” standard advocated in H.R. 2244, which reposes great discretion in the district court to reduce the plaintiff's damage award or to require contribution among defendants (the bill speaks in terms of “rereallocation,” but because “rereallocation” and “contribution” are synonymous in this context, the latter will be used to maintain consistency) presents several problems. First, the House Subcommittee Report provides little guidance on how the substantial injustice standard is to be applied.125 Furthermore, application of the standard may involve a separate procedural phase and thus may increase process costs in antitrust cases.126 Insofar as the bill permits a

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124Cf. G. Bell, supra note 48, at 13 (suggesting that the presence or absence of contribution and claim reduction rights may have less to do with the decision to settle than various other subjective factors).

125The House Subcommittee report accompanying the introduction of H.R. 2244 interprets the term “substantial injustice” to mean several “policy considerations” including:
the amount of the judgment in relation to the role of the defendant, the strength of the evidence against the defendant, the seriousness of the violation, the degree of intent involved, the cooperation of the defendant in furnishing evidence and expediting the proceedings, [and] the amount of damages necessary to compensate the plaintiff.

STAFF REPORT, supra note 72, at 297.

126The Subcommittee Staff Report suggests that the court can make a finding of substantial injustice on the record after the determination of damages, and that no additional procedures will be necessary. Id. The report goes on to recognize that the defendant, in establishing a case of harm from disproportionate liability, could allege several factual matters, such as “relative size, lack of intent, weak evidence, [and] unclear legal standards.” Id. at 298. The defendant, however, has the burden to make the necessary showing of disproportionality and injustice. Id. Such an difficult factual showing by defendants would necessitate a separate phase or proceeding to a concluded antitrust case, because parties may be reluctant to place these matters before the jury in the main action.
reduction in plaintiff’s recovery below actual damages where plaintiff’s conduct in the action significantly contributes to the substantial injustice, it injects greater uncertainty into the litigation. This provision seemingly serves the laudable goal of ameliorating situations of disproportionate liability when the plaintiff enters into “sweetheart” settlements with powerful, more culpable defendants and thereafter seeks to recover the full judgment from weaker defendants.\(^1\) However, even the House Subcommittee Staff recognizes that instances of disproportionate damage awards are “rare,” and this conclusion raises concerns about the applicability of the bill’s contribution and claim reduction provisions in other antitrust cases.\(^2\) Finally, H.R. 2244 provides that contribution or claim reduction may not decrease an individual defendant’s liability below its relative culpability or market share, which grants power to the district court to alter the rule of joint and several liability in individual cases.\(^3\) While the exercise of this provision may well affect the victim compensation objectives of the antitrust law, it may nevertheless advance its deterrence and fairness objectives. In the absence of a clearer demonstration of the bill’s ramifications for antitrust litigation, and a better articulation of legislative objectives, it is difficult to assess the impact of H.R. 2244 on antitrust law and policy.

D. The Right to a Jury Trial in Determining Contribution Shares

Of the contribution proposals discussed in Section II, only H.R. 5794 and H.R. 2244 have special provisions regarding the use of jury trials in the apportionment of contribution shares. An earlier version of H.R. 5794 left the determination of the

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\(^1\) See id. Indeed, according to the Subcommittee Staff Report, the entire impetus of the bill is to protect defendants against inequitable and unfair results occasioned by settlement threats by allowing them to vindicate their innocence without coercion or fear of inordinate liability. Id. at 287–88.

\(^2\) Id. at 288.

\(^3\) The Subcommittee Staff Report recognized the conflicting aspects of the rule of joint and several liability. Initially, this rule threatens small defendants with damages judgments many times greater than their shares of the liability, while larger defendants face potential damage judgments only a few times greater than their actual liability. Id. at 288. However, any scheme that reduces damage judgments and increases litigation costs decreases the plaintiff’s ability to obtain compensation. Id. at 298.
contribution issue to the judge alone.130 Because of "possible Seventh Amendment problems,"131 the following language was added to H.R. 5794: "[u]nless inconsistent with the just and expeditious conduct of litigation, contribution and claim reduction rights shall be determined by the court sitting without a jury."132 H.R. 2244 adopts the same limitation on jury rights as H.R. 5794.133

Consistent with the Seventh Amendment's command that the right to a jury trial be "preserved,"134 the courts decide whether or not to grant a jury trial on the basis of the common law practice as of 1791.135 Intervening changes in our legal system have forced the courts to respond flexibly to new situations. Specifically, the merger of law and equity have forced the Court to reexamine the bases underlying the jury trial right. Under prior practice, for example, the "clean-up" doctrine allowed a chancellor to resolve legal issues in the process of resolving an equitable claim. In a pair of famous decisions, the Court disallowed this practice and held that legal issues should be determined by the jury, and that equitable issues should be resolved by the judge.136

The standard for determining whether a legal issue is presented was decided by the Supreme Court in Ross v. Bernhard.137 The Court opined that "the 'legal' nature of an issue is determined by considering, first, the pre-merger [of law and

131Id. at 23–24. Mr. Baxter further stated, "[Since] the submission of our original draft, we have made additional efforts to satisfy ourselves on the constitutionality of eliminating jury trials for contribution issues. Unfortunately, we have not been able to reach a firm conclusion."
134U.S. CONST. amend. VII.
136Dairy Queen v. Wood, 369 U.S. 469 (1962); Beacon Theatres v. Westover, 359 U.S. 500 (1959). In Beacon Theatres, the Court rejected the so-called "clean-up" doctrine which permitted the court to hear legal claims without a jury when necessary in adjudicating equitable claims. 359 U.S. at 510–11. In Dairy Queen, the Court went further in establishing a nondiscretionary interpretation of the Seventh Amendment by holding that the issues need not be predominantly legal in nature before the jury right could be invoked. Dairy Queen, 369 U.S. at 473. If the claim was legal, regardless of its substantiality in relation to equitable claims, the right to a jury trial was recognized.
American courts seeking common law analogies for antitrust actions have looked to the law of torts. The inquiry, therefore, is directed to the availability of a jury trial to determine contribution rights in a tort case in England in 1791.

Some American courts have disposed of the jury trial issue simply by stating that contribution is an equitable doctrine and therefore is not covered by the Seventh Amendment. This analysis is, at best, too cursory. Admittedly there is little doubt that the doctrine of contribution had its origins in equity. But in spite of its equitable origins, the doctrine of contribution also came to be recognized in the English law courts by the end of the eighteenth century. A form of contribution among negligent joint tortfeasors was recognized as early as 1622 in the case of Arundel v. Gardiner. Since tort cases in general, and contribution cases in particular, were decided by law courts, the historical analysis suggests that a jury trial would be available in contribution and claim reduction litigation.

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equity] custom; second, the remedy sought; and, third, the practical abilities and limitation of juries.”

Id. at 538 n.10.

See, e.g., Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804 (S.D. Cal.), mandamus denied, 393 F.2d 568 (9th Cir.), cert. denied, 393 U.S. 842 (1968). But see Note, Contribution in Private Antitrust Suits, 63 CORNELL L. REV. 682, 693, 696–97 (1978) (antitrust actions sound in quasi-contract rather than in tort). Technically, there was no premerger custom in the context of contribution and claim reduction rights in an antitrust case. Indeed, the adoption of H.R. 5794 would create such rights. The Supreme Court has rejected this purely historical method of analysis, however, and has made it clear that statutorily created rights are to be afforded Seventh Amendment protections, provided that the issues involved bear a close analogy to issues tried to English juries in 1791. Curtis v. Loether, 415 U.S. 189, 194 (1974).


The doctrine of contribution originated in the courts of equity . . . . [W]hen contribution is sought against a defendant who was not sued by plaintiff, as is permitted by our decisions, the claim sounds in equity and the court acts as finder of the fact to determine whether the second tortfeasor from whom contribution is sought was negligent, and therefore liable to the victim.


Cro. Jac. 652, 79 Eng. Rep. 563 (1622). Merryweather v. Nixon, 8 T.R. 186, 101 Eng. Rep. 1337 (1799), is often cited for the proposition that there was no contribution among joint tortfeasors under the common law. However, Merryweather was an intentional tort case, and the later case of Betts v. Gibbins distinguished Merryweather: “Merryweather seems to me to have been strained beyond what the decision will bear. The present case is an exception to the general rule. The general rule is, that between wrongdoers there is neither indemnity nor contribution: the exception is, where the act is not clearly illegal in itself . . . .” 2 Ad. & E. 57, 74–77, 111 Eng. Rep. 22, 29–30 (1834).
The premerger custom is, however, only the beginning of the judicial analysis. Inquiry must also be directed to the nature of the remedy sought. If the suit is one in which legal rights are to be ascertained and determined, the Seventh Amendment applies regardless of the procedure chosen to bring suit.\textsuperscript{144}

H.R. 5794 allows for considerable procedural flexibility in bringing the contribution action. The claim may be raised by cross-claim, counterclaim, or impleader, or in a separate action. Consider those situations where the plaintiff in the original antitrust suit chooses to proceed against some violators and the contribution issue is raised by cross-claim. The issue of joint liability must be litigated first because a contribution claim does not accrue until there has been a finding of joint or concurrent liability.\textsuperscript{145} But the joint liability issue is usually a major part of the plaintiff's case. To establish a violation of section 1 of the Sherman Act it must be shown that the defendant conspired to engage in anticompetitive conduct. Because this is a legal issue, defendants would be afforded the right to a jury determination.

Consider next the case where only one of the conspirators is sued by the plaintiff. Suppose neither party demands a jury and the court determines that there has been a violation of the antitrust laws. The defendant, after satisfying the judgment, brings suit against the coconspirators for contribution. In the second suit a finding of joint liability is a critical part of the plaintiff's case.\textsuperscript{146} Can the defending party in this second suit be denied a trial by jury on this issue? \textit{Ross v. Bernhard}\textsuperscript{147} instructs that the right to a jury should be determined according to the nature of the issue, irrespective of the procedure chosen. If the second defendant had a right to a jury trial in the case of a cross-claim, then he should not lose it simply because the original defendant chose not to implead additional defendants.

After a decision on joint liability is reached, the next issue for determination is the contribution shares.\textsuperscript{148} Although the

\textsuperscript{145}See, e.g. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(a) (1955).
\textsuperscript{146}In order to have a cause of action upon which relief can be granted, the plaintiff in the second suit must plead and prove that he is entitled to contribution from the defendant. Thus, the first determination to be made is whether the defendant is a tortfeasor at all.
\textsuperscript{147}396 U.S. 531 (1970).
\textsuperscript{148}Under H.R. 5794, the court, in fact, has very little discretion regarding the allocation method. Subsection 41(f) of the bill prescribes a market share method in price-fixing cases, and a comparative fault method in all other cases.
Antitrust Contribution Litigation

The method of allocating shares is a matter for the court to decide, the proportion attributable to each violator could be a jury question in some circumstances. The most likely situation is where the allocation method chosen is that of comparative fault. Fault determination has traditionally been a jury function. The issues involved in determining fault in the contribution case are identical to those tried in the main claim. The fact that the issues are cast in terms of contribution does not alter their basic nature. If the Ross “nature of the issue” test is interpreted literally, it would seem that the degree of comparative fault must be decided by a jury upon demand. With regard to the apportionment of contribution on a pro rata basis, there would be no need to convene a jury as the calculation would be a simple per capita division of damages. If the market share formula were used, structural issues such as product and geographic market definition would have to be determined. If these types of market structure issues existed at common law in England in 1791, they were determined by judges. To the extent that the market share division cannot be stipulated by the parties, the common-law tradition strongly indicates that there is no right to a jury trial on the determination of market shares.

Also relevant to the nature of the remedy is the type of relief sought. Contribution is a demand for a money judgment. Money damages are traditionally a remedy granted by common-law courts. Although money damages are the underlying relief sought, this is not a conclusive test of whether a jury trial is constitutionally required, though it does add support to the proposition.

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149This assertion is based upon a two-stage historical analysis of the right to a jury trial as proposed by Professor Jorde. See Jorde, The Seventh Amendment Right to Jury Trial of Antitrust Issues, 69 Calif. L. Rev. 1 (1981). The history is clear that contribution, as a method of allocating damages, was never a matter of choice for the judge or jury. If the plaintiff were successful, the defendant would be assessed a pro rata share or be forced to bear the entire judgment (depending on the time period under consideration).

150Subsection 41(f) of H.R. 5794 states in part: “In determining contribution shares with respect to all other claims, the court shall consider the relative responsibility of each party for the origination or perpetration of the violation for which damages have been awarded and the benefits derived therefrom.” For an argument favoring the fault standard, see Sullivan, supra note 5.

151For a persuasive argument of this point, see Jorde, supra note 149.

152See Curtis v. Loether, 415 U.S. 189, 196 (1974) (“More important, the relief sought there—actual and punitive damages—is the traditional form of relief offered in the courts of law.”).
The final factor to consider is complexity. The central inquiry is whether contribution issues add so much complexity to an antitrust case that a jury could not competently decide it. As to the finding of joint liability, there appears to be no element of additional complexity. As described above, these issues must be litigated in the first instance to a jury in order to establish liability of any of the defendants. Extending a right to contribution should not add significantly novel litigation issues or strategies. Similarly, if contribution is based on a pro rata or market share standard and is decided by the judge, as discussed above, no increased complexity is added to the jury’s burden.

The determination of contribution shares on a comparative fault basis could, however, add to the complexity. But before denying a jury trial on these grounds, the trial court should consider all the available procedural devices that might mitigate the complexity and weigh the possible results of such procedures against the likelihood that the remaining complexity would affect the jury’s competence to render a rational decision. By exercising its discretion to invoke the rules of procedure, which permit separate trials of “any claim, cross-claim, or counterclaim or third party claims on issues,” and which permit the court to isolate issues and claims by submitting special instructions, verdict forms, or interrogatories to the jury, the trial court could reduce the complexity of determining relative degrees of fault. Given judicial experience with comparative fault instructions and jury forms, the issue of contribution under a relative fault standard should not be unduly complicated.

E. Retroactive Effect

Two legislative provisions that have been considered by Congress expressly provide for retroactive application of contribution and claim reduction rights to those cases that are pending at the time of the bill’s enactment. The Senate bills permit application of its claim reduction features to pending litigation if the party asserting a contribution or claim reduction right

153 An extensive treatment of the Seventh Amendment problems in complex antitrust cases is beyond the scope of this Article. See, e.g., Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829 (1980); Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 Colum. L. Rev. 43 (1980).
154 Fed. R. Civ. P. 21, 42(b), 49(b).
demonstrates that it would be inequitable not to grant the right retroactively. The bills further require a special finding of fact by the trial court on the retroactive application, and state that settlements and release provisions in settlement agreements signed before the effective date of the legislation shall not be disturbed. H.R. 4072 simply provides that it shall apply to pending actions except where application "would result in manifest injustice." The remaining proposals do not contain any provisions concerning the retroactive or prospective application of contribution and claim reduction rights.

Before examining these bills to determine whether applying them retroactively would be unconstitutional, it may be helpful to consider discrete applications of the legislation. Initially, the claim reduction mechanism could reduce the total amount of damages that an antitrust plaintiff may recover against defendants. This situation would arise where the plaintiff settles with certain defendants, expecting to recover fully treble the actual damages proven at trial from the nonsettling defendants, and

157There are essentially two issues: the effect of the statutory language in S. 380 and H.R. 4072, and the absence of any legislative indication in the remaining provisions concerning retroactive or prospective application.

The general rules that appear to operate in this area of constitutional concern are relatively indeterminate and are merely presumptive guidelines. Congress can, for example, provide that its legislation shall be applicable to pending cases, and such a provision is entitled to considerable weight. Further, in the absence of a statement that the legislation shall be prospectively applied, a statute may be applied to pending cases. See Bradley v. School Bd., 416 U.S. 696 (1974); Eikenberry v. Callahan, 653 F.2d 632 (D.C. Cir. 1981). Notwithstanding the congressional determination, however, the federal courts must always review specific instances of retroactive application for "manifest injustice." Bradley, 416 U.S. at 717.

Although the condemnation of retroactively applied legislation is not specifically articulated in the Constitution, the Supreme Court has interpreted the Contract Clause of Article I, Section 10 and the Due Process Clauses of the Fifth and Fourteenth Amendments as prohibiting retroactive application of legislation in certain situations. See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 693–95 (1960). The Contract Clause, however, applies only to actions of the states.


In the recent case of Burlington Indus. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982), the court carefully examined the history of and justification for the rule that settlement payments are deducted after trebling actual damages. and concluded that the statutory history of section 4 of the Clayton Act and its underlying goals of deterrence and compensation for injured parties did not countenance claim reduction. Id. at 391–92.

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the court orders a reduction in the plaintiff's recovery by treble the settling defendants' market share. Because the plaintiff loses the amount of the 'carve out,' the plaintiff's expectations are defeated.

A second, although less likely, situation involving retroactivity problems concerns a disruption of settlement agreements where a plaintiff and some defendants settle for a stated figure and subsequently attempt to rescind the settlement agreement because the settlement figure was "inordinate" in light of the contribution legislation. Although the right to rescind a settlement agreement for this type of mistake is unclear, such a rescission would require judicial consideration of the settling parties' claim that the policy behind the amendatory legislation is more important than the narrow interests of the contracting parties. The requirement that settling defendants involve themselves in the contribution and claim reduction phase of the case when they clearly expected to be released from the litigation raises similar issues. Although some or all of the information necessary to determine market shares and carve outs may already be in the possession of nonsettling defendants at the time of the settlements, it seems probable that settling parties cannot avoid further involvement in the contribution phase.

159 The contribution and claim reduction legislation under study commonly provides that in the event of prelitigation settlement, the plaintiff's claim for damages shall be reduced by the greatest of the stipulated amount, the consideration paid for settlement, or treble the actual damages attributable to the settling party's market share. See S. 380, 98th Cong., 1st Sess. § 4(b) (1983); H.R. 4072, 97th Cong., 1st Sess. § 4(b) (1981).

160 For example, a defendant may enter into a settlement agreement for more than its proportionate share as determined under the market share or other formulas advanced by the contribution legislation. More frequently, however, a plaintiff may attempt to rescind a settlement agreement because of the effect of a subsequent carve out.

The drafters of S. 995, 97th Cong., 2d Sess. (1982), (now S. 380, 98th Cong., 1st Sess. (1983)), anticipated this problem and provided, in subsection 41(f)(2), that settlements reached in pending cases may not be overturned or disturbed in any way. S. Rep. No. 359, 97th Cong., 2d Sess. 26 (1982). It is clear that this provision is intended only to protect settling defendants against relitigation. The plaintiff still will suffer the effects of a reduction of his or her judgment, probably in the amount of treble the settlement amount. Id. at 51 (supplemental views of Sens. Metzenbaum and Kennedy); see also G. Bell, supra note 48, at 18-19.

161 See, e.g., G. Bell, supra note 48, at 18 (commercial frustration).

162 The degree of involvement in post-settlement proceedings by settling defendants will depend upon a number of factors, such as the type of goods bought or sold, the pricing methodology for the goods, the settling defendants' complicity in the cartel, and the duration and complexity of the conspiracy. See S. Rep. No. 359, 97th Cong., 2d Sess. 28 (1982). This is precisely the sort of situation that the drafters of S. 380 have attempted to consider in protecting settling defendants from the risk of relitigation. See supra note 160.
Finally, the courts may be presented with arguments from impleaded defendants in pending cases that the amendatory legislation created new rights of action against them.\(^{163}\) Although this argument has more particular reference to the statute of limitation feature of contribution legislation than to the right of action feature,\(^ {164}\) it appears that such impleaded defendants may claim that the effect of legislation is to permit the assertion of new causes of action in the pending litigation.

The principal flaw in the retroactive application of legislation is that it impinges upon fundamental notions of the primacy of private expectations—either in the marketplace or as it affects individual freedoms—and public fairness—the notion that the government will be impartial in its dealings with its citizens and will provide neutral processes to implement impartial norms.\(^ {165}\) It is equally clear, however, that there may be public norms and interests that transcend the more secular concerns of individual expectations in due process and economic liberty.\(^ {166}\) Therefore, the Supreme Court has held that civil legislation may be retrospectively applied unless to do so would result in a clear constitutional violation.\(^ {167}\)

In a recent examination of the due process constraints on retroactive application of legislation, the Court structured the balancing analysis by requiring consideration of three factors: "(a) the nature and identity of the parties, (b) the nature of their

\(^{163}\) For example, suppose a plaintiff files an antitrust action in 1979 against some coconspirators in a cartel. The plaintiff recovers a judgment against the named conspirators, but, prior to satisfaction of the judgment, a contribution and claim reduction bill is passed giving the named conspirators a right of action against the unnamed parties. In such a situation the named defendants would be entitled to file an action against the unnamed coconspirators seeking contribution. Cf. Professional Beauty Supply v. National Beauty Supply, 594 F.2d 1179 (8th Cir. 1979).

\(^{164}\) For example, suppose a contribution and claim reduction bill is enacted one year after the defendant pays the judgment. The issue is whether or not the antitrust defendant may file a new action against a coconspirator who avoided the earlier litigation and assert a right to contribution.

Only three contribution proposals, H.R. 5794, 97th Cong., 2d Sess. (1982), Discussion Draft No. 1, supra note 57, and Discussion Draft No. 2, supra note 60, articulate a statute of limitations for asserting a contribution claim. The absence of statutory limitation provisions in the remaining bills presents substantive and procedural questions concerning the applicability of state law analogues to contribution claims and repose in antitrust cases. See Jacobson, supra note 5, at 240–41. Clearly, responsible legislative action would include a clear and short statute of limitations for the assertion of contribution claims.

\(^{165}\) Hochman, supra note 157, at 692–97.

\(^{166}\) L. Tribe, AMERICAN CONSTITUTIONAL LAW § 10-1 (1978).

rights, and (c) the nature of the impact of the change in law upon those rights.\textsuperscript{168} The nature of the parties, according to the Court, contemplates an assessment of the parties’ status, incentives and ability to litigate, and, if they are private parties, whether or not they are attempting to vindicate public policies.\textsuperscript{169} Thus, for example, where private parties attempt to vindicate rights under statutes proclaimed for their “great national concern,” considerable weight should be placed on the side of retrospective application of the statute.\textsuperscript{170}

In considering the nature of the preenactment rights, the Court has indicated its reluctance to retroactively apply statutory provisions where it would deprive parties of rights that had “matured or become unconditional.”\textsuperscript{171} Although this seems to contemplate the attachment of analytic importance to largely archaic notions of vested property rights, this inquiry looks both to whether or not the legislation in question attempts to fulfill or deny the parties’ expectations and to the degree to which the parties’ expectations have been realized.\textsuperscript{172} For example, in \textit{Bradley v. School Board},\textsuperscript{173} the plaintiff class of school children sued the local school board to compel desegregation of the public school system, and requested attorneys’ fees under a federal statute. After pointing out that the plaintiffs were vindicating important matters of national policy, the Court stated


\textsuperscript{169}\textit{Bradley}, 416 U.S. at 717–18.

\textsuperscript{170}\textit{Id.} at 719 (citing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).

\textsuperscript{171}\textit{Id.} at 720.

\textsuperscript{172}\textit{Id.; see also} Hochman, supra note 157, at 717–26.

In \textit{Usery v. Turner Elkhorn Mining Co.}, 428 U.S. 1 (1976), the Supreme Court considered a due process attack on federal black lung legislation that would have imposed certain financial responsibilities on coal mining firms for black lung benefits claimed by former employees. The mine operators complained that imposition of liability was impermissible because they could not have anticipated the imposition of liability at the time of employment. \textit{Id.} at 15. The Court held that notwithstanding the possible reliance on the existing state of the law by the mine operators, retroactive application of legislation was “justified as a rational measure to spread the costs of the employees’ disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.” \textit{Id.} at 18.

A similar method of analysis is used under the Contract Clause. U.S. CONST. art. I, \S\ 10. Contracting parties, as a general rule, are entitled to rely on the law as it exists at the time of contracting. \textit{Home Bldg. & Loan Ass’n v. Blaisdell}, 290 U.S. 398, 429–30 (1934). However, the legislature may vary or otherwise impair the substantive or remedial provisions of law that are relied upon by contracting parties where the legislative modification serves a legitimate public purpose. \textit{United States Trust Co. v. New Jersey}, 431 U.S. 1, 21–22 (1977).

\textsuperscript{173}416 U.S. 696, 720 (1974).
that the school board, which was appealing the retroactive application of the federal statute, had no "matured or unconditional right" in the fund provided by taxpayers.\footnote{Id.} According to the Court, the funds from which the attorneys' fees would be paid "were essentially held in trust for the public" and the school board "was subject to such conditions or instructions on the use of the funds as the public wished to make through its duly elected representatives."\footnote{Id. at 720-21; see also Hochman, supra note 157, at 711-17.}

The third consideration, the influence of the change of law upon existing rights, concerns the degree to which retroactive application affects the parties' expectations and obligations, their opportunities for notice and a hearing, and the likelihood that the parties relied to their detriment on the preenactment state of affairs.\footnote{Hochman, supra note 157, at 712.} The closer the statutory provision comes to extinguishing the substance of a preexisting right, the less likely the statute is to be constitutional.\footnote{Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481 (1968).} The contribution bills that apply to pending cases present challenging questions of constitutionality. First, the plaintiffs are vindicating important governmental concerns by serving as private attorneys general.\footnote{Cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17-18 (1976).} Plaintiffs also will lose preexisting rights concerning the management of the litigation and the amount of the recovery. To the extent that settling defendants and newly impleaded defendants contend that retroactive application of contribution rights impair their rights under preenactment law, it seems that neither their status as antitrust wrongdoers nor their asserted interests provide compelling justifications for refusing retrospective application.\footnote{Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17-18 (1976).} Similarly,
an impleaded defendant cannot readily demonstrate any matured rights or expectations of immunity from suit for its complicity in an antitrust violation.

Settling parties, however, such as antitrust plaintiffs and defendants, may well have legitimate expectations as a result of a negotiated settlement, and more particularly, those parties may rely on the state of the law at the time they entered into their agreement. It is further likely that retrospective application of the contribution bill will disrupt settled contractual and substantive obligations where a claim reduction provision requires a diminution of a plaintiff’s prospect for damages and requires further involvement by settling parties in the contribution phase of the case. In balancing the effects of a carve out on plaintiffs’ expectations and on disruptions of settlement agreements against legislative purposes, it is clear that application of the claim reduction provisions to pending cases will not advance the deterrence function of the statute because the illegal conduct already has occurred. Moreover, retrospective application will frustrate legitimate compensatory interests of antitrust plaintiffs and endanger expectancy interests in settlement agreements.

Therefore, retroactive application of the contribution provisions to newly impleaded defendants will not present any substantial questions of unconstitutionality. Settling defendants who claim that the claim reduction provision is unconstitutional because it requires their additional effort in the contribution

successful litigation to this petitioner. Congress has determined the causes of action that arise from antitrust violations; and there has been an adjudication that a cause of action against respondent has been established.” Id.

As previously discussed, the reasonableness of plaintiffs’ reliance is directly related to the permissibility of their expectations, the duration of the belief, and the legitimate government objective. See supra notes 172 & 179. In the case of contribution legislation, the objectives of the antitrust laws militate against retroactive application of the contribution legislation where such an application will disrupt previously negotiated settlements and will require settling defendants to participate in the relitigation of issues concerning contribution rights and shares. See supra notes 79–84 and accompanying text.

S. 380, 98th Cong., 1st Sess. (1983), attempts to ameliorate some of the impact of the claim reduction provision on settling plaintiffs by providing procedural requirements in a claim reduction hearing and by imposing the burden of demonstrating the propriety and fairness of claim reduction on the nonsettling defendant requesting claim reduction. S. 380, § 4(f)(1). The provision of hearing rights and due process standards is important in considering the constitutionality of retroactively applied legislation. L. Tribe, supra note 166, § 10-1, at 476. However, in many situations, if not most, the effect of retroactive application will be to deprive antitrust plaintiffs of damages which they expected to receive and which provided the statutory incentive to litigate, as contemplated by the private right of action in section 4 of the Clayton Act. In the face of such a blatant infringement on the substantive rights accorded under preenactment law, the right to a hearing is small solace.
phase of the case may be successful if they demonstrate that their further involvement in the case was unanticipated and will be substantial. However, the claim reduction provisions will be unconstitutional where plaintiffs suffer carve outs from their damages, or where previously negotiated settlement agreements are substantially impaired by claim reduction principles. The rather intricate provisions in S. 380, particularly those creating a right to a hearing, cannot remedy the unconstitutionality of applying claim reduction to these situations.\textsuperscript{182}

V. CONCLUSION

This Article considers the form that contribution and claim reduction legislation is taking and various implications of that form; it has not considered the propriety of a contribution rule.\textsuperscript{183} The conclusion is that Congress, in considering any proposal for contribution and claim reduction, must give careful thought to the effect of the legislation on antitrust policy and practice, including fairness, deterrence, and transaction costs. These fundamental antitrust objectives and economic consequences are implicated in each of the pending proposals. When these considerations are evaluated in the context of each of the proposals, substantial flaws are discovered. The relative weights assigned and importance given to these values have varied throughout the judicial decisionmaking process. As Congress contemplates the pending legislation, it must resolve the conflicts between these goals. In balancing the values and competitive effects of the legislation, Congress can bring clarity to the law.

It is our firm conviction that if Congress adopts a position favoring contribution, then it should recognize distinctions in the severity of the proscribed activity and the actors' conduct in the conspiracy. The preferable approach of adopting a contribution rule should be recognized in cases involving rule of reason analysis, where there are no "bright line" demarcations.

\textsuperscript{182}Cf. G. Bell, supra note 48, at 23 (concluding that "a better solution would be to leave the proposed legislation silent with respect to its applicability"),\textsuperscript{183} The authors have reached different conclusions concerning the merits of a contribution rule vis-à-vis a no-contribution rule. See Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 142 (1979) (statement of Donald J. Polden); Sullivan, supra note 5.
between acceptable and proscribed conduct and where the anticompetitive nature of the challenged conduct is equivocal. 184

Contribution rights should not be accorded in traditional per se offenses, such as horizontal price-fixing. Denying the right of contribution in such cases would best serve the deterrence objectives of the law. Little justification exists for allowing an antitrust violator to recover contribution from others where his conduct is anticompetitive. Similarly, the invocation of contribution should be within the trial court’s discretion so that an economically influential violator cannot escape liability through coercion, collusion, or the plaintiff’s caprice. The relative bargaining power of the wrongdoers and the extent of their participation in the illegal conduct are highly relevant in determining the propriety of contribution on a case-by-case basis. In these respects, the bills considered by the House are flawed, particularly those recognizing a right to contribution only in horizontal price-fixing cases.

Should Congress adopt a procontribution approach, it will need to resolve the method of apportioning liability and of determining the respective contribution shares. A pro rata basis, while clearly the easiest to administer, suffers from the same unfairness that results from a no-contribution rule, in that each violator would bear an equal share of the damages without regard to its relative participation in or benefits from the proscribed conduct. In this respect, deterrence also would be diluted, because the severity of the punishment would be apportioned equally. For the same reasons, a “market share” standard does not advance deterrence objectives, because the market share data are not necessarily related to complicity in the antitrust violation and are likely to raise problems of complexity.

Contribution on the basis of relative responsibility may be the most appropriate method of computing contribution rights and claim reduction, though it is perhaps the most complicated method proposed. Its value lies in elimination of the inequities caused by the no-contribution approach, while at the same time it recognizes distinctions in the severity of proscribed behavior and the relative culpability of each antitrust violator. In contrast to pro rata or market share standards, it may protect less culpable defendants with relatively slight economic power from dam-

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age exposure that does not correspond to the extent of participation in the illegal conduct. It also furthers the policy of the antitrust laws by predicing severity of liability on the extent of the responsibility for the proscribed activity. In doing so, it adds a measure of certainty and predictability to the application of a contribution rule. Although it may significantly affect litigation strategies, counseling methods, and settlement negotiation, a comparative contribution rule may best advance the policies underlying the law. The deterrent goals of certainty and severity of punishment will be advanced within the context of contribution, while some unfairness caused by the no-contribution tradition will be eliminated.

Before Congress adopts a position against the right to a jury trial on the contribution issue, it needs to consider the premerger custom, the remedy sought, and the ability of juries to rationally decide contribution issues. Historical research on these issues does not suggest a clear resolution, although it would seem to favor a discretionary approach by the trial court in weighing the relevant factors in each instance. The historical development of the Seventh Amendment right indicates that in determining contribution shares the right to a jury trial lacks historical precedent when the means used to reallocate the liability is based on a pro rata or market share determination. Stronger arguments are available for the invocation of jury trials when the damage distribution is based on relative degrees of fault.

Finally, the bills present real issues of constitutional adequacy with respect to attempts to make claim reduction principles applicable to pending antitrust cases. Current constitutional analysis strongly suggests that retrospective application of the claim reduction features will be unconstitutional under the Due Process Clause where settlements entered into before the effective date of the legislation are disrupted and where settlement carve outs reduce plaintiffs’ settlement expectations, as conditioned by preenactment law. More important, however, is the notion that the primary objectives of the proposed legislation—enhanced deterrence and greater fairness and balance in compensatory goals—will be fairly and efficiently advanced by prospective application, and not by retrospective windfalls to defendants in a few pending cases.

The model legislation that follows addresses the concerns expressed in this Article. It attempts to advance the antitrust
objectives of deterrence, compensation, and fairness, in the context of traditional concepts of proof, and weighs those factors against transaction costs and complexity. It rejects a right of contribution in horizontal price-fixing cases, as envisioned under H.R. 4072, H.R. 1242, H.R. 5794, S. 995, and Discussion Drafts Nos. 1 and 2. Contribution, moreover, is not permitted under the proposal for antitrust conduct that is per se unlawful, as in classic cartel-like conduct, but rather only where the conduct is scrutinized under a rule of reason analysis. A further limitation places discretion in the trial court as to the invocation of the right to contribution. Finally, should the trial court invoke its discretion in the apportionment of damages, the model legislation would require contribution shares to be determined on a relative fault standard. In no event is the model legislation intended to alter the substantive antitrust law.

A BILL

To amend the Clayton Act to establish a right of contribution with respect to damages in certain actions brought under such Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the Clayton Act (15 U.S.C. §§ 12–27 (1980)) is amended by inserting after section 4H the following new section:

"SEC. 41. (a) Any person who is liable for damages in an action brought under section 4, 4A, or 4C of this Act may claim contribution, in accordance with this section, from any other person jointly liable for such damages.

(b) A claim for contribution may be asserted by crossclaim, counterclaim, or third-party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action, whether an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

(c) A claim for contribution shall be forever barred unless filed within six months after the entry of the final judgment for which contribution is sought.

(d) Contribution may not be claimed by or from a person who, pursuant to a settlement agreement entered into in good faith with a plaintiff in the action in respect of which contribution rights are claimed, has been released from liability or potential liability for the underlying claim.

(e) Rights to contribution granted under subsection (a) shall be within the discretion of the trial court."
“(f) In any action under section 4, 4A, or 4C of this Act, the court shall reduce the claim of any person releasing any person from liability or potential liability for damages by the greatest of—

“(1) any amount stipulated for this purpose;

“(2) the amount of the consideration paid for the release; or

“(3) the contribution share of the person released.

“(g) (1) With respect to claims based upon horizontal per se violations, or price-fixing, contribution within this section shall not be permitted.

“(2) In determining contribution shares with respect to all other claims, the court shall consider the relative responsibility of each party for the origination or perpetration of and participation in the violation for which damages have been awarded and the benefits derived therefrom.

“(h) Nothing in this section should be construed to deny any person the right to a jury trial otherwise permitted for a claim asserted under subsection (a).

“(i) Nothing in this section shall affect the joint and several liability of any person.

“(j) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.

“(k) The enactment of this section shall not invalidate any settlement entered before the date of this section’s enactment, whether or not approved by the court.”