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# Unfinished Business on the Taxpayer Rights Agenda: Achieving Fairness in Transferee Liability Cases

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## I. INTRODUCTION

The taxpayer rights movement has been a driving force of tax legislation and administration for over a decade. It has produced the Taxpayer Bill of Rights (TBOR) in 1988,[1] the Taxpayer Bill of Rights 2 (TBOR2) in 1996,[2] the Taxpayer Bill of Rights 3 (TBOR3) in 1998,[3] lesser statutory initiatives,[4] and an array of important

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[1] TBOR was included as Title VI, subtitle J, of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3730 (codified as amended in scattered sections of 26 U.S.C.).

[2] Pub. L. No. 104-168, 110 Stat. 1452 (1996) (codified as amended in scattered sections of 26 U.S.C.).

[3] TBOR3 was included as Title III of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (codified as amended in scattered

administrative changes by the Service.[5] While the future of the movement can be debated,[6] it is clear that, for now, it remains a force to be reckoned with in tax policy.[7]

This article advances a proposal to extend and complete one thrust of the taxpayer rights movement – reforming joint-and-several liability for federal taxes. The Internal Revenue Code (Code) imposes such liability in a number of situations, of which three are of principal importance: (1) liability of "responsible persons" when trust-fund employment taxes are unpaid;[8] (2) liability of spouses who elect to file joint income tax returns;[9] and (3) liability of transferees of property for the unpaid taxes of their transferor.

Joint-and-several liability is an important, sometimes indispensable, device to preserve the integrity of tax collection, but it can lead to unfair results. Unfairness can arise when disproportionate collection is effected from one of the liable parties and that party lacks effective means to compel the other liable parties to make appropriation contribution. Congress addressed this problem, albeit in different ways, as to responsible person liability in TBOR2[10] and as to spousal liability in TBOR3.[11] The

sections of 26 U.S.C.).

4 *See, e.g.*, Taxpayer Browsing Protection Act, Pub. L. No. 105-35, 111 Stat. 1104 (1997) (codified as amended in scattered sections of 26 U.S.C.).

5 *See, e.g.*, Charles O. Rossotti, *Modernizing America's Tax Agency*, 83 TAX NOTES (TA) 1191 (1999) (describing administrative changes underway or recommended by the Commissioner of the IRS).

6 For one view, see Marvin A. Chirelstein, *Taxes and Public Understanding*, 29 CONN. L. REV. 9, 9 (1996), stating that public hostility to the income tax system — a fueling factor in the taxpayer rights movement — "appears to go very deep at the present time and may be irreversible."

7 The legislation including TBOR3 passed both chambers of Congress by overwhelming majorities: 402 to 8 in the House and 96 to 2 in the Senate. Such a large consensus may not rapidly disappear.

8 The liability of such persons arises under § 6672 of the Code. The joint-and-several character of such liability is settled under the case law. *See infra* notes 102-05 and accompanying text.

9 The joint-and-several character of such liability is prescribed by statute. *See* I.R.C. § 6013(d)(3). *See infra* notes 82-84 and accompanying text.

10 *See infra* notes 214-18 and accompanying text.

11 *See infra* notes 85-92 and accompanying text.

task, however, remains incomplete. Congress should now address the unfairness problem in the transferee liability context.

The transferee liability rules are triggered when a person who owes federal taxes transfers his or her assets to others without paying those taxes. These rules allow the Internal Revenue Service (Service), under certain circumstances, to seek such payment from the transferees who received the assets. When multiple transferees are present, the Service is not constrained to collect strictly on a pro-rata basis. Instead, it may collect disproportionately — indeed, it may collect exclusively from a single transferee. I do not propose that the Service be prohibited from engaging in disproportionate collection in multiple-transferee cases. Rather, I submit that an effective "right of contribution" remedy be enacted. This would allow the "selected" transferee to surcharge the luckier transferees, thus spreading the burden fairly among all the transferees.

Part II of this article describes transferee liability and explains how unfairness can result from the principle of joint-and-several liability in multiple-transferee cases. Part III examines alternative solutions to the problem, with particular emphasis on the TBOR2 and TBOR3 precedents. It concludes that a reliable right of contribution would be the best antidote to unfairness in multiple-transferee cases. Part IV considers whether such a right exists now. It concludes that neither federal law nor state law currently provides satisfactory contribution remedies. Part V proposes creation of a federal statutory right of contribution for transferee liability cases and describes the appropriate elements and complementary rules of such a right.

## II. THE PROBLEM

The Code imposes joint-and-several liability in a number of situations in addition to the three previously mentioned. These include particular situations with respect to the income tax,[12] gift

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[12] *See* I.R.C. § 412(c)(11)(B) (multiemployer pension plans when employer is a member of a controlled group).

tax,[13] penalty excise taxes,[14] regular excise taxes,[15] and civil penalties.[16] As the case law develops, additional situations of joint-and-several liability likely will materialize.[17] However, in terms of frequency of assertion and potential for unfairness, those additional situations are less significant than the section 6672, spousal, and transferee liability contexts. As noted, Congress has addressed the unfairness problem with respect to section 6672 liability and spousal liability. This Part explains why the problem needs attention with respect to transferee liability as well.

### A. *Transferee Liability*

Assume that Albert is validly indebted to Bernice as a result of a commercial undertaking, tort litigation, or other obligation imposed by law. Further assume that Albert transfers his assets to someone else (presumably a related person) and lacks the resources to pay his debt to Bernice. To safeguard the integrity of

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[13] *See* I.R.C. § 2513(d) (nontransferring spouse who consents to split gifts undertakes joint-and-several liability for the entire gift tax liability of the transferring spouse for the year as to which gifts are split).

[14] *See* I.R.C. §§ 4912(d)(3) (tax on disqualifying lobbying expenditures); 4941(c)(1) (taxes on self-dealing); 4944(d)(1) (taxes on investments which jeopardize charitable purpose); 4945(c)(1) (taxes on taxable expenditures by foundations); 4951(c) (taxes on self-dealing); 4952(c) (taxes on taxable expenditures by § 501(c)(21) trusts); 4955(c)(1) (taxes on political expenditures by § 501(c)(3) organizations); 4958(d)(1) (taxes on excess benefit transactions); 4971(e)(2) (taxes on failure to meet minimum funding standards); 4976(f)(1) (tax on prohibited transactions).

[15] *See* United States v. Wainer, 240 F.2d 595, 599 (7th Cir. 1957) (excise tax on distilled spirits), *cert. denied*, 355 U.S. 815 (1957).

[16] *See* I.R.C. §§ 6652(c)(4)(B) (failure to file information return or statement); 6715 (dyed fuel used in taxable use).

[17] For instance, I.R.C. section 3505 imposes secondary liability for unpaid employment taxes on lenders and sureties under certain circumstances. If there are multiple lenders or sureties, it could be argued forcefully that they should be jointly and severally liable. However, this issue has not yet been settled by the case law. *See* In re Ace Fin. Co., 59 B.R. 667 (Bankr. N.D. Ohio 1986) (this issue is potentially present on the facts but not addressed).

A bar group, while supporting the establishment of a § 6672 contribution or right, opposed the creation of a contribution right with respect to § 3505 liability. *See* Committee on Personal Income Taxation, *Proposal to Create a Federal Right of Contribution Among "Responsible Persons" under Section 6672 of the Internal Revenue Code*, 47 REC. ASS'N B. CITY N.Y. 306, 311 n.22 (1992). This presupposes that § 3505 liability is joint and several.

business and legal arrangements, a legal system must develop remedies against such circumventions. The non-tax law for centuries has had such features as: (1) fraudulent conveyance statutes; (2) bulk sales acts; (3) corporation laws dealing with the effect of mergers, consolidations, and liquidations on unpaid corporate debts; and (4) rules dealing with creditors' rights as to insurance policies.[18]

An equal necessity exists for finding ways to prevent asset transfers from defeating the collection of taxes owed to the federal government. From the earliest days of federal taxation, the revenue authority has had remedies against such transfers.[19] In contemporary practice, the devices available to the Service include special liens on property transferred to donees, heirs, and legatees in support of the gift tax and estate tax;[20] the ability to sue under either federal[21] or state[22] fraudulent conveyance law to invalidate the transfer (thus returning the property to the transferor whereupon it will be seized by the Service); and levying on the property directly when it can be shown that the transferee is a mere alter ego of the transferor,[23] or is holding the property for the transferor as a nominee.[24]

Frequently, however, the Service proceeds under an alternative remedy – transferee liability.[25] If successful, the Service can

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[18] *See, e.g.*, MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 17.01 (1991).

[19] For discussion of such remedies, see WILLIAM D. ELLIOTT, FEDERAL TAX COLLECTIONS, LIENS, AND LEVIES ¶ 18.02 (1995).

[20] *See* I.R.C. §§ 6324(a)(2) and 6324(b).

[21] The federal government enacted a fraudulent conveyance statute in 1990. Federal Debt Collection Procedures Act, included as Title XXXVI of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4933 (codified as amended in scattered sections of 28 U.S.C.).

[22] These are of ancient device, originally modeled on an English statute: the Statute of 13 Elizabeth, ch. 5 (1571). More modernly, see Uniform Fraudulent Conveyance Act § 1, 7A U.L.A. 6 (1999); Uniform Fraudulent Transfer Act, 7A U.L.A. 266 (1999).

[23] *See, e.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338, 350-51 (1977); Avco Delta Corp. Canada Ltd. v. United States, 540 F.2d 258 (7th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

[24] *See, e.g.*, United States v. Williams, 581 F. Supp. 756 (N.D. Ga. 1982); Gordon v. United States, 649 F.2d 837 (Cl. Ct. 1981).

[25] For discussions of transferee liability, see generally Jerome Borison, Comment, *Section 6901: Transferee Liability*, 30 TAX LAW. 433 (1977); and Ronald S. Rizzo, *Transferee Liability*, 21 TAX LAW. 223 (1967).

collect from the transferee, the transferor's unpaid taxes[26] up to the value of the assets transferred to that transferee plus interest.[27] To successfully invoke transferee liability, the Service must comply with the procedural requirements of section 6901[28] and also establish that some substantive ground of liability exists.[29] That substantive basis may be either an "at law"[30] or an "in equity"[31] theory. In the great majority of cases, the Service proceeds "in equity," under an applicable fraudulent conveyance statute. Given the former absence of a federal fraudulent conveyance statute, substantive transferee liability was previously considered a matter of state law.[32] Since the enactment of the Federal Debt Collection Procedures Act in 1990,[33] a federal basis

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[26] The transferor's liability includes any amount shown on a return and any deficiency or underpayment. *See* I.R.C. § 6901(b). Unpaid taxes for both the year of transfer and preceding years are subject to this rule, regardless of when they are assessed. *See, e.g.*, Yagoda v. Commissioner, 331 F.2d 485, 492 (2d Cir. 1962), *cert. denied*, 379 U.S. 842 (1964). Interest and penalties, as well as the principal amount of tax due, are collectible. *See, e.g.*, Ruderman v. United States, 355 F.2d 995, 998 (2d Cir. 1966) (addressing penalties); Robinette v. Commissioner, 139 F.2d 285, 288 (6th Cir. 1943), *cert. denied*, 322 U.S. 745 (1944) (addressing interest).

[27] *See, e.g.*, Benoit v. Commissioner, 238 F.2d 485, 493 (1st Cir. 1956); Pallister v. United States, 182 F. Supp. 720 (S.D.N.Y. 1960).

[28] Section 6901 sets out procedural rules to govern two distinct types of secondary liability. In addition to transferee liability, the § 6901 rules apply to fiduciary liability, i.e., cases in which the Service asserts that fiduciaries are personally liable because they paid or distributed to others with lower priority instead of paying federal tax liabilities. *See, e.g.*, Grieb v. Commissioner, 36 T.C. 156, 161-69 (1961). For a comparison of transferee and fiduciary liability, see Douglas Kniskern, *When Will Transferees and Executors Be Personably Liable for Estate and Gift Taxes?*, 14 ESTATE PLANNING 106 (1987). Also, § 6902 sets out additional procedural rules for transferee and fiduciary liability cases.

[29] It is settled that § 6901 is procedural only. To prevail, the Service must locate some rule of law, external to § 6901, under which the transferee is made liable for the unpaid taxes of the transferor. If such a basis of substantive liability exists, the procedures under which that liability is asserted are given by § 6901. *See* Commissioner v. Stern, 357 U.S. 39, 42 (1958).

[30] Either a contract under which one agrees to be liable for the debts of another or a federal or state statute that imposes such liability. *See, e.g.*, Sample Furniture Shops v. Commissioner, 123 F.2d 90 (4th Cir. 1941).

[31] Pursuant to a fraudulent conveyance statute. *See generally* ELLIOTT, *supra* note 19, ¶ 18.05.

[32] *See* Commissioner v. Stern, 357 U.S. 39, 45 (1958).

[33] *See* Federal Debt Collections Procedures Act, *supra* note 21.

of substantive liability is available to the Service in virtually every case.[34]

Early on, the courts considered how the Service could collect in situations in which the tax debtor transferred assets to multiple transferees. The issue reached the Supreme Court in 1931 in *Phillips v. Commissioner.*[35] In that case, a corporation distributed all its assets to its shareholders then dissolved, all within a single year, 1919. Subsequently, the Service[36] assessed income and profits tax deficiencies against the corporation for its 1918 and 1919 tax years. After collecting a small part of the assessments, the Service notified Phillips, a 25% shareholder of the corporation, that it intended to collect the entire balance from him. The Service sent no notices to, and instituted no suits or collection proceedings against, the other shareholder-transferees.[37]

In a unanimous opinion authored by Justice Brandeis, the Supreme Court emphatically affirmed the right of the Service to collect all of the corporation's unpaid tax liability from a single shareholder:

> One who receives corporate assets upon dissolution is severally liable, to the extent of assets received, for the payment of taxes of the corporation. . . . [T]he government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders. There is nothing in section 280[38] to indicate that Congress intended to limit the

[34] *See, e.g.*, Selbe v. United States, 912 F. Supp. 202 (W.D. Va. 1995). The federal fraudulent conveyance statute does not limit other remedies available to the government. *See* 28 U.S.C.§ 3003(b)(1); *see also* United States v. Maryans, 73 A.F.T.R.2d (RIA) 94-2064, at 94-2066 (N.D. Ind. 1994); United States v. Carney, 796 F. Supp. 700, 703 (E.D.N.Y. 1992). Thus, the government sometimes asserts federal and state fraudulent conveyance laws in the alternative.

[35] 283 U.S. 589 (1931).

[36] Actually, the Internal Revenue Board, the predecessor of the IRS.

[37] *Id.* at 591-92.

[38] Section 280 of the Revenue Act of 1926, ch. 27, 44 Stat. 9, 61. Section 280 was later codified as § 311 of the Internal Revenue Code of 1939, which evolved into § 6901 of the present Code.

> [transferee liability] procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided.[39]

This is the settled rule. After *Phillips*, both the Supreme Court[40] and lower federal courts[41] have emphasized that multiple transferees are jointly and severally liable for the unpaid taxes of the transferor. Concomitantly, the Service is not required to join any of the other transferees to an action brought against one of them;[42] the sued transferee cannot implead or otherwise add the other transferees to the suit;[43] and the government is not bound by any agreements among the transferees as to how liability will be apportioned among them.[44]

### B. *Unfairness in Multiple-Transferee Cases*

Unless its impact is cushioned by some other rule, joint and several liability among transferees can produce unfairness when assets have been disbursed to multiple transferees. For example, Tad Taxdebtor, who holds $180,000 in assets, owes the federal

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39 283 U.S. at 603-04.

40 *See* Phillips-Jones Corp. v. Parmley, 302 U.S. 233, 236 (1937).

41 *See, e.g.*, Davis v. Birdsong, 275 F.2d 113, 117 (5th Cir. 1960); Benoit v. Commissioner, 238 F.2d 485, 493 (1st Cir. 1956); United States v. Lansing, 272 F. Supp. 170, 175 (N.D. Cal. 1967); Drew v. United States, 367 F.2d 828, 833 (Ct. Cl. 1966); Estate of Cury v. Commissioner, 23 T.C. 305, 339 (1954); Quirk v. Commissioner, 15 T.C. 709, 715-16 (1951), *aff'd per curiam*, 196 F.2d 1022 (5th Cir. 1952); Mann v. Commissioner, 35 T.C.M. 342, 344 (1976), *aff'd without opinion*, 546 F.2d 414 (1st Cir. 1976); Newsome v. Commissioner, 35 T.C.M. 335, 337 (1976); Foster v. Commissioner, 26 T.C.M. 1143, 1147 (1967); Richardson v. Commissioner, 17 T.C.M. 297, 299 (1958), *remanded on other grounds*, 264 F.2d 400 (4th Cir. 1959).

42 *See* Phillips-Jones Corp., 302 U.S. at 236; *see also* Phillips v. Commissioner, 283 U.S. at 603, 604 n.16 (citing cases).

43 *See, e.g.*, Ringer v. United States, 153 F.R.D. 594 (N.D. Tex. 1993); DiBenedetto v. United States, 1974 WL 791, at *4 (D.R.I. 1974); Coca-Cola Bottling Co. of Tucson v. Commissioner, 37 T.C. 1006, 1013 (1962).

44 *See, e.g.*, Bellin v. Commissioner, 65 T.C. 676, 686 (1975); Alexander v. Commissioner, 61 T.C. 278, 295 (1973); Estate of Glass v. Commissioner, 55 T.C. 543, 575 (1970), *aff'd*, 453 F.2d 1375 (5th Cir. 1972); Estate of Cury v. Commissioner, 23 T.C. 305, 339 ("[Transferee] liability cannot be contracted away. The rights of the various transferees inter sese are irrelevant when transferee liability is asserted against one of them.").

government $60,000 in taxes, interest, and penalties. Rather than pay his tax bill, Tad transfers all of the $180,000, in amounts of $60,000 to each of his three children: Amy (who lives in Amarillo), Barbara (who lives in Bakersfield), and Cicely (who lives in Cincinnati), rendering Tad insolvent.[45] The Service agent working Tad's case is stationed in Cincinnati, where Tad also lives. The agent learns of the transfers, and finding it more convenient to keep the case local than to broaden it to Texas and California, the agent pursues only Cicely as a transferee. Assuming the predicates of transferee liability are present, the Service will be successful. It will collect the full $60,000 from Cicely, taking all she received, but leaving Amy and Barbara in undisturbed possession of their windfalls. Because transferee liability is joint and several, such an outcome would be entirely legal.[46]

This example is not fanciful. The Service has collected disproportionately among multiple transferees in numerous reported cases.[47] Moreover, the reported cases do not fully index this practice. Courts sometimes fail to note in their opinions objections raised by transferees to disproportionate collection,[48] presumably because the matter is too settled to require discussion. And, of course, most transferee liability cases, like most cases generally, are resolved short of litigation, whether by default by the taxpayer, concession, or settlement. One may reasonably

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[45] Tad reasons that it would be better if the money remains in his family. He intends to give his money to his children eventually, and he expects that gratitude and filial piety will prompt his children to support him.

[46] "Although a theoretical right to a writ of mandamus may exist, as a practical matter an administrative decision by the Service not to assess is unassailable by a taxpayer." Stuart Levine & Peter Driscoll, *Is There a Right of Contribution Among Responsible Persons?*, 78 J. TAX'N 30, 34 (1993).

[47] In addition to cases cited above, see, for example, Benoit v. Commissioner, 25 T.C. 656, 667 (1955) (calling the Service's transferee target decision "somewhat puzzling"), *rev'd & remanded on other grounds*, 238 F.2d 485 (1st Cir. 1956); Estate of Harrison v. Commissioner, 16 T.C. 727, 731 (1951); Durkin v. Commissioner, 67 T.C.M. 1932, 1933-34 (1994); Hunt v. Commissioner, 55 T.C.M. 1508, 1509-10 (1988).

[48] For instance, such objections were raised in several of the cases in which the author (before entering academia) was trial counsel for the Service, but the courts' opinions resolved the cases in favor of the Service without addressing these objections. *See* Harper v. United States, 769 F. Supp. 362 (M.D. Fla. 1991); *see also* Harper v. Commissioner, 65 T.C.M. 2216 (1993); LeBeau v. Commissioner, 63 T.C.M. 3177 (1992).

assume that disproportionate collection occurs in many of the non-litigated multiple-transferee cases.

As stated above, the disproportionate collection outcome in our example would be entirely legal. This does not mean it would be entirely satisfying. Although some might dismiss Cicely's plight as a case of "easy come, easy go," many, including me, find the result too harsh, indeed unfair. I support this conclusion both theoretically and by consensus.

*1. Theory*

Fairness is one of the fundamental goals of our tax system.[49] Of course, fairness is indeterminate in significant measure; what is fair in a given situation has an "eye of the beholder" quality.[50] Nonetheless, some aspects or criteria of tax fairness can be articulated. Two widely accepted criteria are "horizontal equity" and "vertical equity," meaning, respectively, that the tax system should treat similarly situated taxpayers the same[51] and differently situated taxpayers differently.[52]

The essence of applying both horizontal and vertical equity is elaboration, in the particular case, of relevant criteria — criteria by which to decide whether persons are similarly or differently

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[49] *See, e.g.*, JOSEPH A. PECHMAN, FEDERAL TAX POLICY (5th ed. 1987); Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568, 580 (1965) (identifying equity as one of the "seven paramount purposes . . . by which the income tax structure as a whole, as well as its individual parts, can be measured" and stating that it has been "more powerful than other criteria in shaping the outlines of gross income").

[50] *See, e.g.*, Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WISC. L. REV. 1267, 1280-81.

[51] Much of the theoretical elaboration of horizontal equity as a goal was performed by Richard Musgrave. *See, e.g.*, THE THEORY OF PUBLIC FINANCE 160-61 (1959); *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113 (1990); *ET, OT and SBT*, 6 J. PUB. ECON. 3 (1976). *But see* Louis Kaplow, *A Note on Horizontal Equity*, 1 FLA. TAX REV. 191 (1992); Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989) (both criticizing Musgrave's work).

[52] *See, e.g.*, JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 22-25 (2d ed. 1999).

situated and, if the latter, the degree of the difference(s) between or among them.[53] From that perspective, disproportionate collection in multiple-transferee cases is likely to be unfair.

When multiple persons could be held liable as transferees, they all have been gratuitously[54] enriched by the same transferor, occasioning nonpayment of the same underlying tax liability. The presumption should be that they are similarly situated and should thus wind up contributing proportionally to satisfying the tax debt. To justify disproportionate collection as fair, it would be necessary to: (1) identify some criterion, relevant to tax collection and the transferees' situations, that renders the transferees differently situated; and (2) demonstrate that disproportionate collection is likely to recognize and reflect that criterion. Neither of these requisites is likely to be satisfied.

First, fairness norms generate no relevant principle of difference among transferees. In fact they may confirm the transferees' similarity. Dodge, Fleming, and Geier identify "four commonly invoked norms of tax justice" whose dynamic tension shapes fairness debate:[55] (1) the equal-sacrifice principle, which "would tax people in equal amounts and is premised on the idea that persons benefit from government equally";[56] (2) the benefit principle, which "asserts that individuals should pay tax in proportion to the varying benefits they receive from government";[57] (3) the standard-of-living principle, which "would tax people according to their standard of living, as evidenced by their level of personal consumption";[58] and (4) the ability-to-pay principle, under which persons should support the government "according to the

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[53] *See id.* at 22-23. Some doubt the feasibility of such an enterprise. *See, e.g.*, JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 56-59 (1985) (concluding that, because the terms horizontal and vertical equity "have multiple meanings and because they are applied to complex situations, it is virtually impossible to utilize them as general norms that can be operationalized when policy choices need to be made").

[54] Typically, if a recipient gives full consideration for the assets received, she will not be liable as a transferee. *See, e.g.*, Kreps v. Commissioner, 351 F.2d 1, 8 (2d Cir. 1965); United States v. Floersch, 276 F.2d 714, 717 (10th Cir. 1960).

[55] DODGE ET AL., *supra* note 52, at 23 (emphasis deleted).

[56] *Id.* (emphasis deleted).

[57] *Id.* (emphasis deleted).

[58] *Id.* at 24 (emphasis deleted).

economic resources, including both current income and accumulated wealth, under their control."[59]

How do these four norms apply to our context? Both the equal sacrifice principle and the benefit principle are limited as explanatory devices. The former is compromised by the fact that, beyond a basic level, people do not gain equally from government — those with much to protect, for instance, gain more than those with little to protect.[60] The latter explains measures like gasoline excise taxes, highway and bridge tolls, and the like, but has little to offer with respect to general taxes like the income, estate, and gift taxes.[61]

Moreover, context needs to be taken into account when applying these principles. As traditionally used, the equal sacrifice and benefit principles advert to primary tax liability. In that context, it makes sense to compare the benefit received from government to the burden imposed in supporting government. In the transferee liability context, however, the more immediate benefit is that bestowed on the transferee by the transferor. There, the relevant relationship is between benefit received from the transferor and burden imposed in defraying the transferor's liabilities. Reformulated for context, therefore, the idea underlying these principles supports proportionality in transferee liability burden allocation.

The standard-of-living and ability-to-pay principles have their principal play in the debate over whether consumption or income should define the income tax base.[62] But that issue relates to primary tax liability. We are past that issue when dealing with transferee liability; the Code has already answered the question of how much tax the transferor should pay. When the Service

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[59] *Id.* (emphasis deleted).

[60] *See id.* at 23.

[61] *See id.* at 24 ("It would be virtually impossible. . . to determine accurately how much benefit particular individuals receive in cases where they are not the direct objects of the government activity.").

[62] *See, e.g.*, HENRY SIMONS, PERSONAL INCOME TAXATION 18-19 (1938); Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1, 65 (1998).

successfully asserts transferee liability, it is the transferor's liabilities that are being collected out of (or based on) what originally were the transferor's assets. Had the transferor used them as he should have, to pay his tax debts, those assets never would have reached the transferees. Some may argue that we can rationally distinguish among transferees based on how much total wealth they possess, but the fact that transferee liability is posterior to the level at which standard-of-living and ability-to-pay typically are discussed would undercut such an argument.[63]

Thus, these traditional four norms do not provide useful yardsticks by which to measure differences among transferees in order to justify, on fairness grounds, differing treatment between or among the transferees. Perhaps, though, there are other criteria, more situationally relevant to the transferee liability context, that could serve to distinguish transferees from each other, thus justifying disproportionate collection outcomes. One candidate is culpability. For example, if one of the transferees planned or conspired with the transferor, or facilitated the transfers more than the other transferees did, that would be a reason why the one and the others are differently situated. And, that reason would be topically relevant: the transferee's wrongdoing delayed collection of taxes and forced the Service into the additional expenses of pursuing its transferee remedy.

However, on closer analysis, this culpability criterion is less promising. First, not all transfer situations are nefarious; sometimes none of the transferees will have a "guilty mind."[64] Second, when such wrongdoing is present, it often will be

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[63] Transposing such principles of primary liability to the secondary liability context would involve at least some tension with the case law. *See, e.g.*, Estate of Cury v. Commissioner, 23 T.C. 305, 339 (1954) (rejecting the propositions that the amount of transferee liability should depend on what the transferees did with the assets received or on how much they got when they sold them).

[64] When asserting liability "in equity," the Service may argue either actual fraud (the transferor actually intended, through the transfers, to defeat her creditors) or constructive fraud (irrespective of intent, the transfers had the effect of rendering the transferor financially incapable of paying her creditors). *See, e.g.*, ELLIOTT, *supra* note 19, ¶ 17.04[1]. The Service often relies primarily on the constructive fraud theory. *See, e.g.*, Don v. Commissioner, 30 T.C.M. 565 (1971). If the transferor did not have a "guilty mind," presumably the transferees did not either.

generalized among the transferees, giving little or no ground for differentiation. Third, experience under state law is not promising. Some states condition indemnity or contribution among joint tortfeasors on their respective degrees of fault,[65] but this approach has proved to be "of limited value," in part because "the distinctions are too vague" and are not easily applied in actual cases.[66] In sum, the results that would be produced by distinguishing among transferees on the basis of fault probably are not worth the effort and expense that fact-finding on the issue would entail.

Thus, we have the first reason why transferees should be viewed as similarly situated among themselves, rather than differently situated. Possible applicable norms either support similar situation, or are of dubious applicability in the transferee liability context, or just are not worth the candle to attempt to use in actual cases.

There is a second, and at least equally powerful, reason. Even if one believes that there can be relevant differences among transferees, the present joint-and-several liability regime is unlikely to recognize and implement them. Such liability means that the Service may select among the transferees on any basis it chooses. Typically, the Service will pursue first (and, if successful, only) that transferee who is the most convenient target (as long as he or she has collectible assets).[67]

Convenience includes things like having one's identity and whereabouts known to the Service (it costs time and money to seek out others) and proximity to the Service district working the case.[68] This approach is entirely sensible from the perspective of the Service because it lowers administration costs. However, factors

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[65] *See infra* note 202 and accompanying text.

[66] Ron Kilgard, *Cleaning Up After Multiple Tortfeasors: Part Three: The Liability of Multiple Tortfeasors to Each Other*, ARIZ. ATTY., Mar. 1999, at 38, 40.

[67] *Cf.* Committee on Personal Income Taxation, *supra* note 17, at 307, 313 (noting same pattern as to collection of § 6672 liabilities).

[68] The Service is in the process of reorganizing and substituting functional for territorial jurisdiction. *See, e.g.*, Rossotti, *supra* note 5, at 1213-17. However, the proximity principle will continue to determine Service behavior as long as particular officers handle particular cases.

so adventitious cannot support a claim that the present system operates fairly. Visibility and proximity cannot be relevant criteria on the basis of which transferees can be said to be differently situated for fairness purposes.

The "as long as he or she has collectible assets" qualifier does not improve matters much. At first blush, this sounds like an "ability to pay" approach. But the Service, in asserting transferee liability, does not rank-order the transferees by total wealth and go after the richest first. It will pursue any readily accessible transferee who has enough money and property to defray a substantial portion of the transferor's unpaid taxes.[69] This could be the poorest of the transferees as easily as the richest of the transferees.

In summary, it should be presumed that transferees are similarly situated, thus proportional burden-sharing among them is the fair result. A relevant criterion of distinction must exist to justify treating the transferees as differently situated. No such principle operates with force in our context. Even if it did, the present system is not set up to implement such a principle; a favorable result in this regard would be aleatory. Thus, from the standpoint of tax theory, the disproportionate collection that frequently occurs in multiple-transferee cases, is unfair.

### 2. *Consensus*

Theory is not the only aspect of the fairness inquiry. We have noted that, conceptually, "fairness" is not well elaborated in the tax context, perhaps inevitably.[70] Often, though, such theoretical imprecision is undisturbing because, as a matter of the socially

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[69] This will include any transferee who retains an appreciable portion of the property received from the transferor as well as any transferee who disposed of those assets but has other assets. *See, e.g.*, Estate of Cury v. Commissioner, 23 T.C. 305, 339 (1954) (transferee liability gives the Service a money judgment collectible from any of the transferee's assets; thus, the fact that the transferee "promptly sold the assets thus transferred to [her] is an immaterial consideration").

[70] *See supra* note 50 and accompanying text.

conditioned moral impulse, consensus exists as to whether a particular state of affairs is fair or unfair.[71]

One can fairly say that a consensus exists that disproportionate collection is unfair. In the transferee liability context, note the view expressed in *Phillips-Jones Corp. v. Parmley*,[72] a sequel to the seminal *Phillips* case.[73] In *Phillips-Jones Corp.*, Justice Brandeis, writing for a unanimous Court, remarked: "The injustice of allowing [transferees not being pursued by the Service] to escape contribution [when other transferees do pay the Service] is obvious."[74] Moreover, numerous subsequent decisions have answered charges of the unfairness of disproportionate collection by suggesting that the burdened transferee has a right of contribution against the other transferees.[75] This may imply a concern about unfairness if such rights are inadequate, as I maintain they are.[76]

The consensus also emerges when one takes into account other areas involving joint-and-several liability. One such area is state tort law and the unfairness of joint-and-several liability there, if unabated by some ameliorative doctrine, has been widely noted.[77] Closer to home is a provision enacted in 1996. The Code has long provided that "responsible persons" are jointly and severally liable for certain employment taxes not paid by their companies.[78] In

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[71] As the saying goes, "I know it when I see it." *See* McCaffery, *supra* note 50, at 1280 (such conceptual imprecision "is not fatal to the use of equity in developing tax policy: many of our most cherished social goals elude precise definition").

[72] 302 U.S. 233 (1937).

[73] Phillips v. Commissioner, 283 U.S. 589 (1931). *See also supra* notes 36-40 and accompanying text.

[74] 302 U.S. at 235.

[75] *See infra* notes 110-11 and accompanying text.

[76] *See infra* Part III.

[77] *See, e.g.*, Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 88 (1981); Dobson v. Camden, 705 F.2d 759, 767 (5th Cir. 1983), *rev'd on other grounds*, 725 F.2d 1003 (5th Cir. 1984) (*en banc*); W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS at 337-38 (5th ed. 1984) (referring, in the torts context, to the "obvious lack of sense and justice in a rule which permits the entire burden of a loss . . . to be shouldered onto one [unintentional tortfeasor] alone, according to the accident of a successful levy of execution, [or] . . . the plaintiff's whim or spite . . . while the [other tortfeasor] goes scot free.") (citations omitted); Kilgard, *supra* note 66, at 38 (referring to "the obvious unfairness of that harsh doctrine").

[78] *See infra* notes 102-05 and accompanying text.

TBOR2, Congress created a new federal statutory right of contribution for cases in which such liability is asserted disproportionately among multiple responsible persons.[79] Congress took this step expressly because it believed unameliorated disproportionality to be unfair.[80]

In summary, joint-and-several transferee liability is a necessary device of tax administration, but the disproportionate burdens it often imposes compromise fairness in taxation. In Part III of this article, we explore how that problem is best addressed.

## III. DESIRABILITY OF A RELIABLE CONTRIBUTION REMEDY

Conceptually, there are three possible responses to the unfairness problem identified in Part II: (1) prohibiting the Service from effecting disproportionate collection; (2) affording a right of indemnity; or (3) affording a right of contribution. An indemnity right or a contribution right could be sourced in either federal or state law, in either statute or common law. In my view, a statutory contribution right is the best of these alternatives.

### A. *Undesirability of Proportionate-Collection Alternative*

In theory, the Service could be prohibited from effecting more than proportionate collection from any transferee. In our example, the Service could be permitted to collect no more than $20,000 from each of Amy, Barbara, and Cicely. A comparable approach has been taken by many states in the tort context.[81]

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[79] *See* I.R.C. § 6672(d).

[80] *See* H. R. Rep. No. 506, 104th Cong., 2d Sess., 40 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1143, 1163 (1996) ("It would accordingly promote fairness in the administration of the tax laws to establish a right of contribution among multiple responsible parties."). Before TBOR2, commentators had taken the same view. *See* Levine & Driscoll, *supra* note 46, at 30; Committee on Personal Income Taxation, *supra* note 17, at 310, 313 (stating that "it could be considered irrational to allow the burden of the tax to fall, through fortuitous circumstances, on just one person.").

[81] Most states have abrogated joint-and-several liability in many or most tort contexts, applying instead a form of several liability in which damages are apportioned among the defendants based on their percentage of the total fault. *See* Note, *Alabama's Wrongful Death Act: A Time for Change*, 21 AM. J. TRIAL ADVOC. 617, 617 (1998); *see also* John J.

In addition, there is precedent in taxpayer rights legislation for limitations on collection. Married taxpayers may elect to file joint income tax returns,[82] reducing the tax rates imposed on their income.[83] In return for this privilege, the spouses become jointly and severally liable for the tax reported on the return, plus any deficiency, interest, and penalties with respect thereto.[84] Perceiving, however, that such liability can produce inequity in particular cases,[85] Congress has, since 1971,[86] provided some type of relief, although the particulars of such relief have varied over the years.[87]

Congress substantially revised these relief rules in TBOR3.[88] The new relief rules contain three main portions:[89] (1) divorced or separated taxpayers may elect to separate their liabilities;[90] (2) all taxpayers, whether or not still married, may attempt to qualify for relief under a liberalized version of pre-TBOR3 § 6013(e);[91] and (3) all taxpayers may be considered for equitable relief within the discretion of the Service.[92]

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Lynch, et al., *Third-Party Practice — Contribution and Indemnity*, I ILLINOIS CIVIL PRACTICE § 10.2 (1997) (describing that change in one state).

[82] *See* I.R.C. § 6013(a).

[83] Married-filing-jointly rates are lower than married-filing-separately rates, *compare* I.R.C. § 1(a) *with* § 1(d), although statutory income thresholds for deductions and credits, combined with unusual expenditure patterns, occasionally make separate filing advisable. Married taxpayers may do better or worse than single taxpayers depending on the incomes of the partners. *See* Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771, 1777-78 (1998).

[84] *See* I.R.C. § 6013(d)(3).

[85] *See* S. Rep. No. 1537, 91st Cong., 2d Sess. 2 (1971).

[86] For the original provision, see Innocent Spouse Act of 1971, Pub. L. No. 91-679, 84 Stat. 2063.

[87] For the version immediately preceding enactment of TBOR3, see former I.R.C. § 6013(e).

[88] TBOR3 § 3201, codified at I.R.C. § 6015.

[89] For discussion of these and associated procedural changes, see Jennifer A. Bourgoin, *Expanded Relief from Spousal Liability on Joint Returns: An Analysis of the New Innocent Spouse Rules and Section 6015*, 25 MICH. TAX LAW. 17 (1999); *see also* Toni Robinson & Mary Ferrari, *The New Innocent Spouse Provision: 'Reason and Law Walking Hand in Hand'?*, 80 TAX NOTES (TA) 835 (Aug. 17, 1998); R.S. Steinberg, *New Law Expands Innocent-Spouse Relief and Creates Election*, 61 PRACTICAL TAX STRATEGIES 280 (1998).

[90] *See* I.R.C. § 6015(c) and 6015(d).

[91] *See* I.R.C. § 6015(b).

[92] *See* I.R.C. § 6015(f).

This scheme for relief from spousal liability bears relation to our first alternative. A taxpayer qualifying for relief under any of the above alternatives is absolved of liability in part or in whole — the Service simply cannot collect the unpaid taxes from her. The first alternative is particularly interesting for our purposes because it is a proportionate liability regime.[93]

Nonetheless, the approach limiting the Service to only proportionate collection would be an inferior answer to the unfairness problem. As discussed in greater detail later,[94] both indemnity and contribution would continue the Service's present ability to collect fully from one or some of the transferees. However, they would, in different ways, allow the transferee against whom disproportionate collection had been effected (the Burdened Transferee) to seek recompense from the other transferees (the Windfall Transferees).

Thus, in practical effect, there are two main differences between the "proportionate collection" approach and the indemnity and contribution approaches. One difference relates to the burden of effort: who, the Service or the Burdened Transferee, should be required to undertake the effort to find, and seek payment from, the Windfall Transferees? The other difference relates to the risk of noncollection: who — the Service or the Burdened Transferee — should lose out when proportionate payment cannot be obtained from one or some of the Windfall Transferees? The indemnity and contribution approaches are superior to the proportionate collection approach at both of these levels.

Transferors do not shower property on strangers. They know their transferees; indeed, they usually are tied to them by blood, marriage, intimate friendship, or a close business relationship. Because circles of affinity tend to overlap, the transferees often

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93 The electing former spouse's liability for any deficiency may not exceed "the portion of such deficiency properly allocable to [her]." I.R.C. § 6015(c)(1). Under the allocation rules in § 6015(d), "tax liability will be determined in much the same manner as if separate returns had been filed." Marie B. Morris & Thomas B. Ripy, *CRS Report Examines Taxpayer Bill of Rights 3*, TAX NOTES TODAY (Apr. 21, 1999) (LEXIS, FEDTAX lib., TNT file, elec. cit. 1999 TNT 76-13, ¶ 35).

94 *See infra* notes 98-106 and accompanying text.

know each other, usually in some non-casual way. Thus, the Burdened Transferee often will be in a better position than the Service to find the Windfall Transferees, and to determine whether pursuing them is likely to be fruitful.[95] Moreover, there may be a greater chance of accord, of settlement and voluntary resolution, when the discussion is between friends or relatives than between transferee and the Service.[96] On the odds, greater efficiency would ensue by placing the onus of pursuing the Windfall Transferees on the Burdened Transferee.

The case is even stronger at the second level. Assume in our example, that, because of Barbara's insolvency or another reason, none of her $20,000 share could be obtained her. Under the "only proportionate collection" alternative, the Service would be "out" the $20,000; under the contribution alternative, Amy would be. The Service is a legitimate creditor; any part of Tad's liability that goes unpaid will have to be defrayed, one way or another, by the other taxpayers of the United States.[97] Amy received a windfall; if she loses part or all of it, she will be no worse off than before the transfer. Thus, Amy, not the federal fisc, should bear the risk of nonpayment by one or some of the transferees.

### B. *Preferability of Right of Contribution Over Right of Indemnity*

Contribution and indemnity are similar in that neither would restrict Service collection efforts, but instead would have the Burdened Transferee seek recourse against the Windfall

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[95] To supplement the Burdened Transferee's independent information, it would be sensible to provide him or her access to IRS information as to the Windfall Transferees. *See infra* notes 234-37 and accompanying text.

[96] *Cf.* Committee on Personal Income Taxation, *supra* note 17, at 311 (suggesting that existence of a § 6672 contribution right might lead responsible persons to negotiate among themselves to apportion the total liability).

[97] "[U]nlike the ordinary tort or contract case, the other real party in interest [in a tax controversy] is the taxpaying public. If the taxpayer gets off the hook for what he really should be required to pay, the pockets of all have been depleted." Theodore Tannenwald, Jr., *Tax Court Trials: A View from the Bench*, 59 A.B.A. J. 295, 295 (1973).

Transferees.[98] They differ principally in the following two respects:[99] (1) a right of indemnity would permit the Burdened Transferee to recover from other transferees *all* of his payment to the Service, while a right of contribution would permit him to recover only part of such payment;[100] and (2) a right of contribution would base recovery on ratios of amounts paid by the transferees to the Service, while a right of indemnity would be triggered by respective degrees of fault or by some other principle or difference among the transferees.[101]

To illustrate a right of contribution in our example, the Service would be permitted to collect from Amy the full $60,000 owed by Tad, but Amy could then obtain $20,000 from Barbara and $20,000 from Cicely, so that, at the end of the day, Tad's three equal transferees would bear equally the burden of defraying his unpaid taxes. To illustrate a right of indemnity, assume that Barbara had conspired with Tad to set up the series of transfers in order to defeat Service collection, but neither Amy nor Cicely had played a role in such planning. Under a fault-based indemnity remedy, Amy would be allowed to recover the full $60,000 from Barbara. The entire burden of defraying Tad's unpaid taxes would be borne by Barbara, none by either Amy or Cicely.

There are no close precedents for indemnification in joint-and-several tax collection. There *is* precedent for contribution, as seen in the employment tax regime.[102] Under certain circumstances, so

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[98] A formal legal remedy, such as a right of contribution or indemnity, is necessary only if one or some of the Windfall Transferees refuse voluntarily to recompense the Burdened Transferee. But, given human nature, such refusal is not unheard of. *See, e.g.*, Commissioner v. Switlik, 184 F.2d 299, 302 n.5 (3d Cir. 1950) (several transferees agreed to bear the transferor's tax bill among themselves in proportion to the transfers they received, but one of the transferees refused to participate in the agreement).

[99] For discussion of differences between indemnity and contribution in the tort context, see PROSSER & KEETON, *supra* note 77, §§ 50-51.

[100] *See, e.g.*, Highway Constr. Co. v. Moses, 483 F.2d 812, 817 (8th Cir. 1973); Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 439 (Ill. 1978) (citations omitted).

[101] Hybrid approaches also are possible. For instance, a right of contribution (part, not full recovery) could be established in which percentages are calculated by reference to the indemnity principle of degrees of fault among the transferees rather than the contribution principle of amounts paid by them to the Service.

[102] *See* I.R.C. Subtitle C.

called "responsible persons"[103] can be secondarily liable under section 6672 for employment taxes left unpaid by their company.[104] It is settled that the various responsible persons are jointly and severally liable under section 6672.[105] Concerned that disproportionate collection of section 6672 liabilities would create unfairness, Congress acted in TBOR2, providing that each person paying under section 6672 "shall be entitled to recover from other [responsible] persons . . . an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty."[106]

A right of contribution would be superior to a right of indemnity as the solution to unfairness in multiple-transferee cases. First, contribution would involve simpler fact-finding, thus would be easier and less costly to apply in actual cases. To decide whether contribution is appropriate and, if so, the appropriate amount to be paid, one need look only at how much each of the transferees has paid the Service. This is a simple determination and presents few problems of proof.[107] In contrast, the trigger of an indemnity right would be the respective degrees of culpability or bad conduct by the various transferees. This complicates matters, since it entails more contention, expense, and risk of decisional error.[108]

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[103] Such persons can include officers and employees of the company and others with control over company affairs. *See, e.g.*, I.R.C. § 6671(b); Rev. Rul. 84-83, 1984-1 C.B. 264.

[104] Such liability can exist as to the "trust fund" portion of employment taxes. *See, e.g.*, I.R.C. § 7501(a); Slodov v. United States, 436 U.S. 238, 243 (1978).

[105] *See, e.g.*, USLIFE Title Ins. Co. v. Harbison, 784 F.2d 1238, 1243 (5th Cir. 1986); Spivak v. United States, 370 F.2d 612, 615 (2d Cir. 1967); *cert. denied*, 387 U.S. 908 (1967).

[106] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 903, 110 Stat. 1452, 1466 (codified at I.R.C. § 6672(d)). This right of contribution was buttressed by several ancillary provisions. *See infra* notes 214-18 and accompanying text.

[107] The easiest case would be when payments are made, or Service collection is effected, in cash. Still, no real difficulty would be presented if the Service levied on non-cash property pursuant to a transferee liability assessment. The rule already prevailing is that the amount of the "payment" in such cases is the net amount the Service realizes from selling the seized asset, not some other possible measure (such as the property's fair market value). *See* I.R.C. § 6342(a). That same rule should be followed in computing the payments that have been made to the Service by the various transferees.

[108] *Cf.* Kilgard, *supra* note 66, at 40 (making this point as to state tort indemnity rules based on distinctions between active and passive, reckless and negligent, initial cause and continuing cause, direct and vicarious, and tort and contract).

Second, contribution would provide more measured relief. Under contribution, all the transferees would wind up bearing some part of the burden of the transferor's unpaid taxes. This is fair since each of the transferees received something from the transferor. In contrast, indemnity is an all-or-nothing approach. If the Burdened Transferee had 51% of the fault and the Windfall Transferee only 49%, the indemnity action would fail and the Burdened Transferee would be solely and entirely responsible to the Service. If these percentages were reversed, the Windfall Transferee would be solely accountable. A right of contribution provides a finer calibration of fairness, therefore is superior to a right of indemnity.[109]

In summary, the worst solution to unfairness in multiple-transferee cases would be to constrain the Service to only proportionate collection. Comparing the remaining possible approaches, the better solution would be establishing an effective right of contribution so that the transferee bearing the brunt of Service collection could recover appropriate amounts from the other transferees.

## IV. INADEQUACY OF CURRENT CONTRIBUTION RIGHTS

Having concluded that a right of contribution best addresses unfairness in the multiple-transferee context, we must determine whether present law adequately provides for such a right. From the start of the joint-and-several regime as to transferee liability, judicial opinions have offered a ray of hope to Burdened Transferees: the possibility that they may sue the other transferees for contribution under "the general [non-tax] law."[110] Throughout the ensuing decades, the courts have continued to repeat this solace.[111] Unfortunately, the ray of hope too often is a

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[109] *Cf. id.* (observing that, if a state action for indemnity between joint tortfeasors is successful, "all of the blame is shifted. One injustice is to a certain extent replaced by another, albeit a lesser one.").

[110] Phillips-Jones Corp. v. Parmley, 302 U.S. 233, 236 (1937).

[111] *See, e.g.*, Commissioner v. Switlik, 184 F.2d 299, 302 n.5 (3d Cir. 1950); United States v. Genviva, 1993 U.S. Dist. LEXIS 10433, at *8 n.7 (W.D. Pa. 1993); Benoit v.

mirage.[112] Neither federal nor state law provides a reliable right of contribution. In developing this conclusion, we will consider general law, transferee liability cases, and an analogous body of cases dealing with section 6672 liability.

### A. *Federal Law*

Federal law does not currently provide a right of contribution in the multiple-transferee context. Whether federal law provides a right of contribution has been considered by the courts in numerous contexts,[113] and a reasonably clear analytical framework has been established. The most important cases are *Texas Industries, Inc. v. Radcliff Materials, Inc.*[114] and *Northwest Airlines, Inc. v. Transport Workers Union,*[115] both decided by the Supreme Court in 1981.[116] Under these and related cases, a right of contribution exists under federal law only in three situations: (1) if it is expressly provided for in a federal statute; (2) if Congress' intent to create it can be "fairly . . . inferred" from a federal statute; or (3) if it has "become a part of the federal common law through the exercise of judicial power to fashion appropriate

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Commissioner, 25 T.C. 656, 667 (1955), *rev'd & remanded on other grounds*, 238 F.2d 485 (1st Cir. 1956); Estate of Harrison v. Commissioner, 16 T.C. 727, 731 (1951); Durkin v. Commissioner, 67 T.C.M. 1932, 1934 (1994).

[112] The careful statement is that a Burdened Transferee may obtain contribution "*if* local law or contractual rights justify such result." Estate of Cury v. Commissioner, 23 T.C. 305, 339 (1954) (emphasis added). Unfortunately, this predicate usually is absent.

[113] Examples include: (1) Rule 10b-5 violations, *see* Musick, Peeler & Garrett v. Employers Ins., 508 U.S. 286 (1993); (2) antitrust, *see* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); (3) Equal Pay Act and Title VII, *see* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981); (4) admiralty, *see* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952); (5) Fair Labor Standards Act, *see* Herman v. RSR Sec. Services, Ltd., 172 F.3d 132 (2d Cir. 1999); (6) bankruptcy automatic stay, *see* In re Walker, 51 F.3d 562 (5th Cir. 1995); (7) Section 1983, *see* Dobson v. Camden, 705 F.2d 759 (5th Cir. 1983), *rev'd on other grounds*, 725 F.2d 1003 (5th Cir. 1984) (*en banc*); and (8) Indian Arts and Crafts Act, *see* Ho-Chunk Nation v. J.C. Penny Co., Inc., 1999 WL 495899 (N.D. Ill. 1999).

[114] 451 U.S. 630 (1981).

[115] 451 U.S. 77 (1981).

[116] For discussion of these cases, see Paul James Hunt, *Bucking the Trend: An Argument in Favor of a Fiduciary's Implied Right to Contribution under ERISA*, 76 VA. L. REV. 1377, 1379-85 (1990).

remedies for unlawful conduct."[117]

The first of these three bases clearly does not exist as to transferee liability. Neither section 6901 nor related statutes[118] expressly provide for a right of contribution.[119] The other two bases require more detailed discussion.[120]

### *1. Statutory Implication*

In testing for the second possible basis, the court's job is one of statutory construction: determining whether Congress intended to create the right of contribution.[121] "Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the

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[117] Northwest Airlines, 451 U.S. at 90.

[118] *See supra* notes 28-34 and accompanying text.

[119] Although not a right of contribution, one may note the apportionment rules of I.R.C. §§ 2205-2207B. These sections empower an executor to charge an appropriate share of estate tax (and sometimes gift tax) against nonprobate assets included in the decedent's gross estate, in specified circumstances. Typically, this power can be negated by the decedent's will. If the will is silent and the above provisions do not apply, state law will control apportionment of the estate tax burden. *See, e.g.,* Riggs v. Del Drago, 317 U.S. 95 (1942). In effect, these sections "create a private 'right of recovery' as between the executor . . . and certain beneficiaries so as to assure that these persons each bear an appropriate portion of the taxes paid." Committee on Personal Income Taxation, *supra* note 17, at 312. *See generally* United States v. Gilmore, 222 F.2d 167 (5th Cir. 1955); Jeromer v. United States, 155 F. Supp. 851, 854-55 (S.D.N.Y. 1957).

[120] Although it is convenient to discuss statutory implication separately from federal common law, there is analytical overlap between them. Thus, in actual cases, the two often bleed together at the borders. *See, e.g.,* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2265-66 (1998); Atherton v. Federal Deposit Ins. Corp., 519 U.S. 213, 218 (1997); Henry J. Friendly, *In Praise of Erie —And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 411-17 (1964).

[121] *See* Northwest Airlines, 451 U.S. at 91 (citing cases). Similar principles apply as in implied rights of action, the larger topic of which implied rights of contribution are a part. *See* Texas Indus., 451 U.S. at 639. A substantial literature exists as to implied causes of action. *See, e.g.,* Gregory R. Mowe, *Federal Statutes and Implied Private Actions*, 55 OR. L. REV. 3 (1976); John E. Noyes, *Implied Rights of Action and the Use and Misuse of Precedent*, 56 U. CIN. L. REV. 145 (1987); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861 (1996).

likelihood that Congress intended to supersede or to supplement existing state remedies."[122] Each of these factors is adverse to inferring a transferee right of contribution.

*a. Statutory Language*

The omission of contribution language from section 6901 and other statutes is itself significant.[123] This is particularly so in light of the fact that Congress has provided contribution rights in another area of joint-and-several secondary tax liability – section 6672.[124]

An exception has been recognized when "the language of the statutes indicates that they were enacted for the special benefit of a class of which petitioner is a member."[125] This exception clearly does not apply here. The intended beneficiary of the transferee liability regime is the Service, its purpose is to assist the Service to collect taxes owed by, but not collectible from, the transferor herself. The Burdened Transferee is not within the intended class of beneficiaries, as the very fact that she is Burdened shows.[126]

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[122] Northwest Airlines, 451 U.S. at 91.

[123] *See id.*

[124] I.R.C. § 6672(d). A similar comparison was made by the Supreme Court in rejecting an implied right of contribution in another context. *See* Northwest Airlines, 451 U.S. at 91 n.24 ("Thus, at least in these instances, when Congress wanted to provide a right to contribution, it did so expressly.").

[125] Northwest Airlines, 451 U.S. at 91-92 (citing cases).

[126] *Cf.* Lyon v. Campbell, 324 Md. 178, 187 (1991) (making this point in noting that federal law provides no right of contribution for § 6672 liability).

*b. Legislative History*

The ancestor of present section 6901 was enacted in 1926.[127] The legislative history of the 1926 enactment[128] and the legislative history of all subsequent amendments are barren of any reference to a right of contribution.[129]

*c. Statutory Purpose and Structure*

As noted above, the purpose of the transferee liability rules is to help the Service, not transferees. The structure of section 6901 is also significant. That section and its associate, section 6902, set out detailed rules governing the assertion of transferee liability. The courts have repeatedly held that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."[130]

*d. Relation to State Law*

As noted in Part IV(B) below, some states provide contribution remedies, although they are too spotty and unreliable to afford a sufficient solution. Is it likely that Congress intended to supplant or supplement those state remedies? On the historical record, the answer is "no."

From the start, state law has loomed large in transferee liability. "The Congress was aware of the use of state statutes [as the substantive basis of liability] when the enactment of the

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[127] *See supra* note 38.

[128] *See, e.g.*, S. Rep. No. 52, 69th Cong., 1st Sess. 28-30 (1926); H.R. Rep. No. 356, 69th Cong., 1st Sess. 42-45 (1927).

[129] *Cf.* Herman v. RSR Sec. Services Ltd., 172 F.3d 132, 144 (2d Cir. 1999) (noting the silence of the legislative history as a factor adverse to an implied right of contribution in Fair Labor Standards Act case).

[130] Northwest Airlines, 431 U.S. at 97; *see, e.g.*, O'Melveny & Meyers v. Federal Deposit Ins. Corp., 512 U.S. 79, 85 (1994); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); Herman v. RSR Sec. Serv. Ltd., 172 F.3d 132, 143 (2d Cir. 1999).

predecessor section [to section 6901] was under consideration, for the Congress in disclaiming any intention 'to define or change existing liability' . . . identified 'existing liability' as liability ensuing 'by reason of the trust fund doctrine and various state provisions.'"[131]

Indeed, in a landmark transferee liability case, the Supreme Court held that, until Congress enacts applicable statutes, "the existence and extent of [transferee] liability should be determined by state law."[132] It remarked that "a federal decisional law in this field displacing state statutes as determinative of [substantive] liability would be a sharp break with the past."[133] In 1990, Congress enacted a federal fraudulent conveyance statute, which could serve as a federal basis of substantial transferee liability. However, neither the statutory text nor the legislative history suggests a desire to preempt use of state statutes.[134] It would be hard to argue that Congress intended to supersede state law as to contribution among transferees when Congress chose not to supersede state law in the more fundamental matter of defining the transferees' substantive liability.

### 2. *Federal Common Law*

The final chance for a federal right of contribution is "the Wonderland of federal common law."[135] We start by noting the narrow expanse of that realm. The landmark case *Erie Railroad Co. v. Tompkins* declared: "There is no federal general common

[131] Commissioner v. Stern, 357 U.S. 39, 44 (1958) (quoting S. Rep. No. 52, 69th Cong., 1st Sess. 30 (1926) and H.R. Rep. No. 356, 69th Cong., 1st Sess. 43 (1927)).

[132] Commissioner v. Stern, 357 U.S. 39, 45 (1958).

[133] *Id.* at 44.

[134] *See supra* authorities cited in note 34.

[135] Dobson v. Camden, 705 F.2d 759, 766 (5th Cir. 1983), *rev'd on other grounds*, 725 F.2d 1003 (5th Cir. 1984) (*en banc*).

law."[136] Subsequent cases have continued to stress that the authority to make federal common law exists only "in some limited areas,"[137] the instances of which are "few and restricted."[138]

The limited instances fall into essentially two categories. One, situations in which Congress has given the federal courts the power to develop substantive law,[139] clearly does not apply to transferee liability. The other, situations in which a federal rule of decision is "necessary to protect uniquely federal interests,"[140] merits fuller discussion.

The Code rests on a congressional power expressly enumerated in the Constitution[141] and, arguably, on pre-constitutional power inherent in sovereignty.[142] Moreover, there *is* a legitimate federal interest as to contribution. The Supreme Court has stated that our "tax system [is] designed to ensure as far as possible that similarly situated taxpayers pay the same tax,"[143] and numerous decisions have affirmed this value.[144] Indeed, for three Justices, this policy is so strong that they would have rested the substantive basis for transferee liability in federal law, not state law, in order to promote "uniformity in the imposition and collection of federal

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[136] 304 U.S. 64, 78 (1938); *see, e.g.,* O'Melveny & Meyers v. Federal Deposit Ins. Corp., 512 U.S. 79, 83 (1994).

[137] Texas Indus. v. Radcliff Materials, Inc. 451 U.S. 630, 640 (1980).

[138] Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963); *see also* O'Melveny & Meyers, 512 U.S. at 87 (1994); Northwest Airlines, 451 U.S. at 95 ("[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers."); Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966); United States v. Standard Oil Co., 332 U.S. 301, 313 (1947).

[139] *See* Wheeldin, 373 U.S. at 652. For instance, in Musick, Peeler & Garrett v. Employers Ins., 508 U.S. 286 (1993), the Supreme Court held that defendants in an action under SEC Rule 10b-5 have a right to seek contribution as a matter of federal law. The key rationale was that a private cause of action under Rule 10b-5 was created by the courts, not by Congress. "Having implied the underlying liability in the first place," the courts also had common law authority to create a right of contribution. *Id.* at 292.

[140] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

[141] U.S. Const. art I, § 7, cl. 1.

[142] *See, e.g.,* Society for Sav. v. Coite, 73 U.S. 594, 606 (1867); M'Culloch v. Maryland, 17 U.S. 316, 431 (1819); United States v. Alberts, 55 F. Supp. 217, 220 (E.D. Wash., 1994).

[143] Thor Power Tool Co. v. Commissioner, 439 U.S. 522, 544 (1979).

[144] *See, e.g.,* Commissioner v. Sunnen, 333 U.S. 591, 599 (1948); Burnet v. Harmel, 287 U.S. 103, 110 (1932); United States v. Pelzer, 312 U.S. 399, 402-03 (1941); Ogiony v. Commissioner, 617 F.2d 14, 18 (2d Cir. 1980) (Oakes, J., concurring); Bauman v. United States, 106 F. Supp. 384, 388 (E.D. Mo. 1952).

taxes" and to insure that persons are "treated equally without regard to the fortuity of residence."[145] Given the great variation in state contribution rules,[146] the same reasoning would support federalizing the right of contribution in order to achieve nationwide uniform treatment of transferees. Indeed, it was precisely for this reason that Congress, in TBOR2, created a federal right of contribution as to section 6672 liability.[147]

There is force in these considerations. However, they fall short of bringing us within the limited authority to make federal common law necessary to protect a uniquely federal interest. This authority exists "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[148] Even if the assertion of liability by the Service against the transferees could be said to involve "the rights and obligations of the United States," such rights and obligations clearly are not involved when transferees seek contribution from each other.[149]

The federal involvements and interests as to transferee liability do not rise to the level of this narrow exception. Specifically, (1) the fact that an Article I power is involved is insufficient;[150] (2) the vesting in the federal courts of jurisdiction to hear transferee liability cases is insufficient;[151] (3) the fact that federal law is the source of the transferees' joint-and-several liability is

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[145] Commissioner v. Stern, 357 U.S. 39, 48-49 (1958) (Black, J., dissenting, joined by Warren, C.J., and Whitaker, J.).

[146] *See infra* Part IV(B).

[147] *See* H.R. Rep. No. 506, 104th Cong., 2d Sess. 40 (1996), *reprinted in* 4 U.S.C.C.A.N. 1143, 1163 (1966).

[148] Texas Indus. v. Radcliff Materials, Inc. 451 U.S. 630, 641 (1980).

[149] *Cf.* Ho-Chunk Nation v. J.C. Penny Co., Inc., No. 98-C3924, 1999 WL 495899, at *5 (N.D. Ill. July 2, 1999) (making similar point in rejecting a federal contribution right under a statutory tort created by Congress).

[150] *See, e.g.*, Texas Indus., 451 U.S. at 641 ("nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts."); *cf.* In re Walker, 51 F.3d 562, 567 (5th Cir. 1995) (holding that another Art. I power, promulgation of uniform bankruptcy laws, does not create common-law authority for a federal right of contribution).

[151] *See, e.g.*, Texas Indus., 451 U.S. at 640-41; Rice v. Pearce, 574 F. Supp. 23, 26 (S.D. Iowa 1983).

insufficient;[152] and (4) the argument that contribution may enhance the effectiveness to the Service of its transferee liability remedy is insufficient.[153]

Needless to say, against this background, generalized equity concerns are also insufficient. Part II(B) showed that, unameliorated, disproportionate transferee collection is unfair, and Part IV(B) will show that state contribution rules are an insufficient amelioration. However, there is a long line of authority indicating that such fairness arguments should be addressed to Congress, not the courts, because of Congress' authority and institutional advantage in weighing competing policy concerns.[154]

Based on considerations like those above, "[i]n the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors."[155] The same approach seems compelled with respect to a federal common-law right of contribution among transferees.

*3. Federal Contribution Right Under Section 6672*

In *Phillips-Jones Corp.*, Justice Brandeis, writing for the Supreme Court, remarked that whatever right of contribution exists for Burdened Transferees "arises under the general law."[156] In elaborating this concept, *Phillips-Jones Corp.* cited only a state case.[157] Less than five months later, Justice Brandeis, again writing for the Court, disclaimed the existence of any "federal

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152 *See, e.g.*, Texas Indus., 451 U.S. at 646 (citing cases).

153 *See, e.g.*, *id.* at 642. *See infra* note 173 and accompanying text.

154 *See, e.g.*, O'Melveny & Meyers v. Federal Deposit Ins. Corp., 512 U.S. 79, 89 (1994); Texas Indus., 451 U.S. at 639, 646-47; Northwest Airlines, 451 U.S. at 98 n.41; United States v. Gilman, 347 U.S. 507, 511-13 (1954).

155 Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952).

156 Phillips-Jones Corp. v. Parmley, 302 U.S. 233, 236 (1937).

157 *See* 302 U.S. at 237 (citing Richter v. Blasingame, 42 P. 1077 (Cal. 1895) (per curiam) (right of contribution in favor of shareholder who had paid disproportionate share of his corporation's liability for federal distilled spirits excise tax)).

general common law."[158] Thus, from an early date, there was reason to think that whatever contribution right might exist did not arise under federal law. In any event, after *Phillips-Jones Corp.*, there is a paucity of decided cases as to whether a federal right of contribution exists with respect to transferee liability.

There are, however, many cases which consider whether, before creation of the statutory right by TBOR2, a federal right of contribution existed with respect to section 6672 liability. The essentially universal view was that no such right existed. Scores of cases supported this view,[159] and only one unpersuasive district court opinion was to the contrary.[160]

One wishing to argue for a federal contribution right for transferee liability might attempt to distinguish some of the section 6672 cases. Some of these cases offered policy arguments, including: (1) section 6672 is in the nature of a penalty and allowing contribution would subvert its penal purpose; (2) section 6672 liability can be imposed only on those who "willfully" fail to collect and pay over tax, and the equity courts traditionally are reluctant to extend contribution in favor of intentional wrongdoers; and (3) the possibility of being forced to bear 100% of the liability might give responsible persons incentive to see that the taxes are paid in the first place, an incentive that might be reduced by permitting contribution.[161]

These policy considerations operate with less force in the transferee liability context. Transferee liability has never been considered a penalty or penal in nature. No theory of substantive

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[158] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[159] *See, e.g.*, McDermitt v. United States, 954 F.2d 1245, 1252 (6th Cir. 1981); Sinder v. United States, 655 F.2d 729, 732 (6th Cir. 1981); Steffens v. United States, Civ. No. 3-94-1246, 1995 WL 459303 (D. Minn. May 19, 1995); Padalino v. United States, Civ. Nos. 88-1060, 88-3737, 1989 WL 154322, at *1-2 (D.N.J. Oct. 23, 1989); In re All Star Sports, Inc., 78 B.R. 281, 283-84 (Bankr. Nev. 1987).

[160] *See* Reid v. United States, 558 F. Supp. 686 (N.D. Miss. 1983). The Reid opinion does not cite, much less distinguish or criticize, the over half dozen prior decisions which held that no federal right of contribution existed. *See, e.g.,* Hanhauser v. United States, 85 F.R.D. 89, 92-93 (M.D. Pa. 1979); Geiger v. United States, Civ. No. HM76-1927, 1978 WL 1206 (D. Md. 1978); Cohen v. United States, 75-1 U.S.T.C. ¶ 9391 (E.D. Mich. 1975).

[161] *See, e.g.*, Rebelle v. United States, 588 F. Supp. 49, 51 (M.D. La. 1984); Cantlon v. Ernce, 76-1 U.S.T.C. ¶ 9362 (N.D. Tex. 1975).

liability, either at law or in equity, depends on the transferees having a bad motive or engaging intentionally in wrongdoing. Moreover, the incentive concern is weaker. Responsible persons usually do not get anything from the company on account of the unpaid taxes, so will "go negative" if they incur section 6672 liability. In general, however, transferees can incur no greater liability than the value of what they received from the transferor. They can lose the transferred assets, but they usually cannot "go negative."[162] Presumably for this reason, transferees fear transferee liability less than responsible persons fear section 6672 liability.

Despite possible attempts at distinguishment, the section 6672 case law does fortify the conviction that no federal right of contribution exists for Burdened Transferees. I say this for both legal and factual reasons.

*a. Legally*

Only some of the pre-TBOR2 section 6672 contribution cases advanced policy arguments like those above. Even in cases advancing them, the policy arguments were not essential to the conclusion that no contribution right existed. The proper analytical framework does not involve policy arguments but instead the principles established by *Texas Industries* and *Northwest Airlines*. These principles are the controlling law, and, as shown,[163] their application clearly is adverse to finding a federal right of contribution — either in the transferee liability context or the pre-TBOR2 section 6672 context. The policy arguments are interesting; they may even be reinforcing; but they are not necessary. The *Texas Industries / Northwest Airlines* analysis is clear, and it is controlling.[164]

Historical accident explains much here. The issue of whether a federal right of contribution existed for section 6672 purposes

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[162] For exceptions, see *infra* note 174 and accompanying text.

[163] *See supra* Part IV(A).

[164] For a well reasoned case in this regard, see In re Knapp, 124 B.R. 609 (M.D. Fla. 1991).

arose before 1981, the year in which *Texas Industries* and *Northwest Airlines* were decided. Absent the analytical framework established by these cases, courts looked for other guides, relying on policy factors as a result. The prime example of this is *DiBenedetto v. United States,*[165] which is viewed as the "seminal case" in this area.[166] Decided seven years before *Texas Industries* and *Northwest Airlines, DiBenedetto* looked (in part) to policy considerations, and this pattern was carried over, vestigially, into some of the later cases.

*b. Factually*

The above legal argument is, I think, dispositive. For completeness, however, it is worth examining the extent to which the section 6672 cases actually are distinguishable, on the basis of the above policy arguments, from the transferee context. In my view, the arguments apply more strongly to section 6672 but are not wholly foreign to transferee liability. Thus, any distinguishment of the section 6672 cases would be a matter of degree, not of kind.

The first of the policy arguments described above is that section 6672 is a penalty and that contribution would compromise its penal nature. It partakes somewhat of the flavor of the second policy argument. Standing on its own, the first argument has little weight. Although the word "penalty" appears in the statute,[167] the nature of an imposition as a penalty or, alternatively, a tax, should be determined by substance, not nomenclature.[168] True penalties are imposed on top of the amount of the underlying tax, but it is the policy of the Service to collect and keep, via section 6672, only amounts up to the unpaid trust-fund employment taxes.[169] Thus,

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[165] 75-1 U.S.T.C. ¶ 9503 (D.R.I. 1974).

[166] *See, e.g.*, Rebelle v. United States, 588 F. Supp. 49, 51 (M.D. La. 1984); Lyon v. Campbell, 596 A.2d 1012, 1016 (Md. Ct. App. 1991).

[167] *See, e.g.*, I.R.C. § 6672(a).

[168] *See, e.g.*, United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 220-21 (1996).

[169] *See. e.g.*, Kelly v. Lethert, 362 F.2d 629, 633 (8th Cir. 1966). There appear to be no

both the Service[170] and the majority of courts addressing the matter[171] treat section 6672, and properly so, not as a penalty but only as a device in aid of collection, a variety of secondary liability.

The significance of the second factor, as a way to distinguish between section 6672 and transferee liability, also can be overstated. Willfulness in the section 6672 context does not require a showing of a bad purpose.[172] Moreover, in at least some situations, Burdened Transferees, like Burdened Responsible Persons, will have hands too dirty to qualify for relief under an equitable remedy like contribution. The easy cases will be those in which the Burdened Transferee actively and knowingly assisted the transferor in a program designed to defeat Service collection. But other cases, too, might be seen by at least some courts as involving insufficient manual purity. Some courts may even disqualify transferees for merely accepting the transfer with knowledge of the existence of unpaid tax debts.[173]

It also is unclear how great the difference is between section 6672 and transferee liability in terms of the third policy argument – incentive effects. The section 6672 cases making this argument offer no empirical evidence that responsible persons actually do take section 6672 risks into account in their decisionmaking, or even that they are generally aware of section 6672's existence.

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cases in which the § 6672 "penalty" has been imposed in addition to the unpaid tax.

[170] *See* IRS Policy Statement P-5-60 (approved May 30, 1984). Reflecting this, the Service has restyled § 6672. It used to be known as the "100% penalty," but "trust fund recovery tax" is the moniker now favored in usage.

[171] *See, e.g.*, Hartman v. United States, 538 F.2d 1336, 1340 (8th Cir. 1976); Botta v. Scanlon, 314 F.2d 392, 393 (2d Cir. 1963); Feist v. United States, 607 F.2d 954, 957 (Ct. Cl. 1979).

[172] *See, e.g.*, Sherman v. United States, 490 F. Supp. 747, 754 (E.D. Mich. 1980). An intentional or reckless disregard of the duty to pay trust fund taxes over to the Service suffices, including ignoring an obvious and known risk that the taxes might not be remitted. *See, e.g.*, Teel v. United States, 529 F.2d 903, 905-06 (9th Cir. 1976). Mere negligence, however, does not constitute willfulness. *See, e.g.*, Bauer v. United States, 543 F.2d 142, 150 (Ct. Cl. 1976).

[173] *Cf.* Wynne v. Fischer, 809 S.W.2d 264, 267 (Tex. Ct. App. 1991) (in discussing the concept of injury in the "clean hands" context for § 6672 contribution purposes, holding that "[t]he payment of taxes is fundamental to the well-being of society. The severity of the wrong committed [non-payment of tax] negates any necessity for a showing of harm by [the responsible officer against whom contribution is sought].").

Since the argument is purely speculative, we may similarly speculate about incentives in the transferee liability context. A transferee can lose all she receives from the transferor if the unpaid taxes are large enough. Moreover, the transferee may ultimately suffer a net loss when interest[174] and attorney's fees are considered. An incentive-effects differential likely exists between the section 6672 and transferee liability contexts, but it is not absolute.

In summary, under the four criteria of the prevailing *Texas Industries / Northwest Airlines* standard, it is extremely difficult to argue that federal law provides a transferee right of contribution. The essentially unanimous decisions that pre-TBOR2 law provided no federal contribution right under section 6672 further support this view. An attempt to distinguish such case law would be only partly convincing factually and flatly unconvincing legally.

### B. *State Law*

Given the unavailability of a federal right of contribution for Burdened Transferees, their relief, if any, must come under state law. Although some Burdened Transferees may succeed, state contribution law is not consistently reliable. It is an insufficient antidote to the unfairness of disproportionate transferee collection. Below, I survey the applicable law, then explain its inadequacy to the task at hand.

#### 1. *The Law*

Whether state law provides a transferee right of contribution has been litigated a number of times. Although the existence of such a right, either as a theoretical possibility or on the actual facts of the case, sometimes has been declared,[175] many of the

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[174] As to the computation of interest, see *supra* ELLIOTT, note 19, ¶18.06[3].

[175] *See, e.g.*, Fillman v. United States, 90-2 U.S.T.C. ¶ 60,041 (S.D. Iowa 1990); *cf.* Soderberg v. Commissioner of Taxation, Nos. 1513-1518, 1971 WL 98 (Minn. Tax Ct. 1971) (upholding contribution right with respect to transferee liability asserted by the state, not the Service). *But cf.* Fidelity Union Trust Co. v. Anthony, 81 A.2d 191, 198 (N.J. Super. Ct.

cases are old,[176] and most American jurisdictions have yet to speak authoritatively on the issue.

That being so, one may, by way of analogy, consider state contribution case law in two other tax areas. First, contribution rights sometimes have been discussed with regard to spousal liability arising from joint income tax returns. Spouses paying more than their share of such joint liabilities sometimes have argued that (1) they had a state right of contribution from the other spouse for the excess; (2) the other spouse was insolvent, so the contribution right was worthless; therefore, (3) they are entitled to "bad debt" deductions under section 166.[177] As relevant to our inquiry, some of the cases have held or assumed that applicable state law does provide a right of contribution in disproportionate spousal liability situations.[178]

Second, many cases considered the availability of a state right of contribution, pre-TBOR2, when disproportionate collection of section 6672 liability occurred among responsible persons. While some cases held in favor of such a right,[179] most held against it.[180] Although there is also an independent rationale for the "no right"

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Ch. Div. 1951), *aff'd*, 86 A.2d 594 (N.J. Super. Ct. App. Div. 1952) (holding that donee who paid donor's federal gift tax liability is not entitled to reimbursement by donor).

[176] *See, e.g.*, Richter v. Blasingame, 42 P. 1077 (Cal. 1895) (per curiam); Nebel v. Nebel, 28 S.E.2d 207 (N.C. 1943); In re Mellon Estate, 32 A.2d 749 (Pa. 1943).

[177] *See* Rude v. Commissioner, 48 T.C. 165 (1967); *see also* Haynes v. Commissioner, 27 T.C.M. 1531 (1968). Or, if the spouse who paid was deceased, her estate sometimes argued for an estate tax deduction under § 2053(a). *See infra* note 178. There also has been litigation of the following issue: when a shareholder-transferee pays tax liabilities of his corporation-transferor, is his resultant income tax deduction ordinary or capital in nature? *See, e.g.*, Gersten v. Commissioner, 28 T.C. 756, 768-69 (1957), *aff'd in part & remanded in part as to other issues*, 267 F.2d 195 (9th Cir. 1959).

[178] *See* Johnson v. United States, 742 F.2d 137, 141-42 (4th Cir. 1984) (estate tax; Virginia law); Estate of McClure v. United States, 288 F.2d 190, 192 (estate tax; Maryland law).

[179] *See, e.g.*, Swift v. Levesque, 614 F. Supp. 172, 176-77 (D. Conn. 1985) (finding this a "close question" under Connecticut law); Goldhill v. Kramer, 176 S.E.2d 232, 234 (Ga. Ct. App. 1970); Ardema v. Fitch, 684 N.E.2d 884, 889 (Ill. App. Ct. 1997); Lyon v. Campbell, 596 A.2d 1012, 1017-18 (Md. 1991).

[180] *See, e.g.*, McDermitt v. United States, 954 F.2d 1245, 1252 (6th Cir. 1992) (Ohio law); Wright v. United States, 93-1 U.S.T.C. ¶ 50,056 (E.D.N.Y. 1992); Kamins v. Spyres, 540 P.2d 1208, 1212 (Okla. Ct. App. 1975); Wynne v. Fischer, 809 S.W.2d 264, 266-68 (Tex. Ct. App. 1991).

view,[181] some of the "no right" decisions adverted to policy arguments.[182] This raises the point discussed earlier as to whether such section 6672 decisions are meaningfully distinguishable from the transferee liability context.[183]

### 2. *The Problems*

State contribution remedies are an inadequate solution to the unfairness problem of disproportionate collection of transferee liabilities for three reasons: (1) categorically, the availability of such remedies is less than certain; (2) the remedies are non-uniform, undermining the horizontal equity of the tax system; and (3) state procedures are cumbersome and uncertain when transferees are scattered among various states.

#### a. *Uncertain Availability*

As noted above, decisions as to state contribution rights for transferees are not geographically comprehensive and, in some instances, are superannuated. Thus, the very availability of such rights should not be deemed secure on a general basis.

Analytically, a shortcoming of the jurisprudence to date has been the failure to integrate section 6672 contribution cases and transferee liability contribution cases. Although these cases have proceeded on separate tracks, they are not conceptually discrete. One of the rationales used to deny state contribution rights to responsible persons should be considered in our context.

Congress expressly left room for state remedies under other statutory schemes, such as Title VII section 1983 actions for violations of civil rights.[184] It did not do so under section 6672 or, our context, section 6901 and related sections. Thus, it has been reasoned:

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[181] *See infra* notes 184-89 and accompanying text.

[182] *See, e.g.*, Hanhauser v. United States, 85 F.R.D. 89, 92 (M.D. Pa. 1979).

[183] *See supra* notes 167-74 and accompanying text.

[184] *See* 42 U.S.C. § 1988(a) (implementational rules for § 1983 actions).

> If Congress intended for state law to provide a right of contribution, it could have included a section which allows state law remedies to fill gaps left by the federal law as it did . . . for federal civil rights actions. . . . Congress chose not to, and accordingly, this Court holds that when a § 6672 remedy is sought, a party may not seek a state law right to contribution.[185]

Is this argument dispositive? No. Inference from congressional silence is always tricky.[186] Although the underlying liabilities arise from federal law, that does not inevitably mean that state procedures are ousted, particularly after the federal government has satisfied its revenue interest. Nonetheless, the argument cannot be dismissed out of hand. It has been advanced by many courts, both state courts and federal courts applying state law, as a reason why state contribution remedies are unavailable in disproportionate collection section 6672 cases.[187] Testifying in favor of the proposal enacted as part of TBOR2, the chair-elect of the American Bar Association (ABA) Section of Taxation told Congress:

> Unfortunately, state law does not always provide a remedy. Even states that permit joint tortfeasors to obtain contribution from one another do not permit a right of contribution in Section 6672 cases. These states believe that this is a Federal matter and defer to the uniform rule in the Federal courts against contribution by other responsible persons.[188]

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[185] Conley v. United States, 773 F. Supp. 1176, 1177 (S.D. Ind. 1991) (citations omitted).

[186] *See, e.g.*, Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

[187] *See, e.g.*, Cline v. United States, No. 89-CV-73312-DT, 1991 U.S. Dist. LEXIS 11036 (E.D. Mich. 1991); Seachrist v. Riggs, 91-1 U.S.T.C. ¶ 50,019, at 87,097 (N.D. W. Va. 1990); Marine Bank v. United States, 739 F. Supp. 1257, 1259 (C.D. Ill. 1990); Rebelle v. United States, 588 F. Supp. 49, 52 (M.D. La. 1984); DiBenedetto v. United States, Civ. No. 74-19, 1974 WL 791, at *2 (D.R.I. 1974); Plato v. State Bank, 555 N.W.2d 365, 366-68 (S.D. 1996); Wynne v. Fischer, 809 S.W.2d 264, 266-68 (Tex. App. 1991).

[188] Exploring the Development of Taxpayer Bill of Rights II Legislation: Hearing before

This rationale is probably stronger in the transferee context now than it was in the section 6672 context when those cases were decided. In 1996, in TBOR2, Congress created a statutory right of contribution for section 6672, a secondary liability tax mechanism. This makes it harder to argue that its failure to create a similar federal right for transferee liability cases, or to authorize recourse outside of federal procedures to gap-filling state remedies, is the product of mere congressional inattention or inadvertence.[189] If the above arguments are skillfully pressed by counsel, the availability of state contribution rights for transferees will not be certain in future litigation.

*b. Lack of Uniformity*

Given the hostility of the courts to contribution in section 6672 cases, Burdened Responsible Persons sometimes resorted to a "grab bag" of alternative theories in their attempts to shift onto other responsible persons all or part of the burden of Service collection. Such theories included breach of contract, breach of fiduciary duty, accounting malpractice, unjust enrichment, fraud, and suretyship.[190] Such claims typically were unsuccessful, the

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the Subcommittee on Oversight of the Committee on Ways and Means, 104th Cong., 1st Sess. 167 (1995) (Statement of N. Jerold Cohen) [hereinafter Cohen]. To similar effect, see Committee on Personal Income Taxation, *supra* note 17, at 308.

[189] The significance of the TBOR2 change may not be lost on the courts. One state court remarked that, via, TBOR2, "Congress has drastically changed the pre-existing court-made federal policy in this regard." Lostocco v. D'Eramo, No. A99A0253, 1999 WL 330313, at *5 (Ga. Ct. App. 1999).

[190] *See, e.g.*, Alten v. Ellin & Tucker, Chartered, 854 F. Supp. 283, 288 (D. Del. 1994); United States v. Amerson, 808 F. Supp. 695 (W.D. Mo. 1992); Continental Illinois Nat'l Bank & Trust Co. v. United States, No. 86 C 5335, 1987 WL 12206 (N.D. Ill. 1987); Spivak v. United States, 254 F. Supp. 517, 524 n.9 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 612 (2d Cir. 1967), *cert. denied*, 387 U.S. 908 (1967); In re Windsor Communications Group, Inc., 45 B.R. 770, 774-76 (Bankr. E.D. Pa. 1985).

courts seeing them as masked attempts to circumvent the "no contribution" case law.[191] One court, in dicta, did seem to be receptive,[192] but that case has been sharply criticized.[193]

The more exotic blooms having been culled from the garden, Burdened Transferees' hopes for a state remedy rest squarely on contribution remedies. Such remedies have developed in two contexts: contribution among joint tortfeasors[194] and contribution among joint obligors and others.[195] Although now often codified, contribution rights have their roots in equity and typically are construed according to equitable principles.[196]

Diversity of approach is one of the benefits of reliance on state regulation,[197] but such diversity can be a drawback too. We previously identified the value of horizontal equity, the goal of treating similarly situated persons similarly for tax purposes regardless of where in the country they are located. We described this as a legitimate federal interest, although it falls short of authorizing a transferee contribution right as a matter of federal common law.[198]

Reliance on state law to supply a transferee with the right of contribution would undercut this value. State contribution rules vary greatly as to general availability, major requirements, and

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[191] *See, e.g.*, Bellovin v. United States, 983 F. Supp. 344, 348 (E.D.N.Y. 1997); Alten v. Ellin & Tucker, Chartered, 854 F. Supp. 283, 287-88 (D. Del. 1994); Continental Illinois Nat'l Bank & Trust Co. v. United States, No. 86 C 5335, 1987 WL 12206, at *2 (N.D. Ill. 1987).

[192] Garity v. United States, 80-1 U.S.T.C. ¶ 9407 (E.D. Mich. 1980) (memorandum opinion).

[193] *See, e.g.*, Schoot v. United States, 664 F. Supp. 293, 297 (N.D. Ill. 1987); Rebelle v. United States, 588 F. Supp. 49, 52 (M.D. La. 1984); Moats v. United States, 564 F. Supp. 1330, 1341 (W.D. Mo. 1983), *aff'd sub nom.* United States v. O'Crowley, 786 F.2d 1171 (8th Cir. 1986).

[194] *See generally* PROSSER & KEETON, *supra* note 77, § 50; Comment Note, *Contribution Between Negligent Tortfeasors at Common Law*, 60 A.L.R.2d 1366 (1997).

[195] *See, e.g.*, Aardema v. Fitch, 684 N.E.2d 884, 889-90 (Ill. App. Ct. 1997); In re Mellon Estate, 32 A.2d 749, 756-57 (1943); Esstman v. Boyd, 605 S.W.2d 237, 241-42 (Tenn. Ct. App. 1979).

[196] *See, e.g.*, Huggins v. Graves, 337 F.2d 486, 489 (6th Cir. 1964); Ocean Accident & Guar. Corp. v. United States Fidelity & Guar. Co., 162 P.2d 609, 612 (Ariz. 1945).

[197] This is the "laboratories of democracy" rationale for federalism.

[198] *See supra* notes 141-45 and accompanying text.

technical details.[199] There are some uniform laws as to contribution.[200] Most states, however, have not adopted them, and some states have adopted only with variations.[201]

Consider some examples of non-uniformity.[202] First, states (now the minority) which follow the original common-law rule do not permit contribution among joint tortfeasors; in other states, persons can come within the ambit of a relief statute only by being joint tortfeasors.[203] Second, many states will not compel proportionality if the liable persons were not equally at fault or otherwise were "not in equal right."[204] Third, some states will not enforce contribution unless an agreement or understanding to share liabilities is found or implied.[205]

The mere existence of a cause of action for contribution in a state does not, of course, mean that disproportionality can be evened out. Even *Phillips-Jones Corp.*, after referring to the possibility of contribution, noted several generic requirements, then added: "Every defendant may, of course, set up any defense personal to him."[206] The problem is that such requirements and defenses vary, often substantially, among the states. Thus, a Burdened Transferee in one state might succeed in obtaining contribution even when an otherwise identically situated Burdened Transferee in another state would not.

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199 As to contribution rules regarding joint tortfeasors, "there is so much variation [among the states] in the terms of the statutes, in decisions on issues not explicitly addressed by the statutes, and even in the decisions in states having no statutes." PROSSER & KEETON, *supra* note 77, at 338; *see also* Kilgard, *supra* note 66, at 43 ("[T]he substantive law on multiple tortfeasors varies so greatly from state to state"); Annotation, *What Law Governs Right to Contribution or Indemnity Between Tortfeasors*, 95 A.L.R.2d 1096, 1097 (1964).

200 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955 Revised Act), 12 U.L.A. 185 (1996); UNIFORM LAW COMMISSIONERS' MODEL JOINT OBLIGATIONS ACT (1925 Act).

201 *See, e.g.*, Annotation, *Uniform Contribution Among Tortfeasors Act*, 34 A.L.R.2d 1107, 1107-08 (1954 & Supp.).

202 These are illustrative, not exhaustive. For additional discussion, see PROSSER & KEETON, *supra* note 77, at 338-41. In its project RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, the American Law Institute identified five separate tracks for the liability of multiple defendants. *See* Kilgard, *supra* note 66, at 43.

203 *See, e.g.*, Swift v. Levesque, 614 F. Supp. 172, 175-76 (D. Conn. 1985).

204 *Cf.* Ocean Accident & Guar. Corp. v. United States Fidelity & Guar. Co., 162 P.2d 609, 612 (Ariz. 1945).

205 *See, e.g.*, Proff v. Maley, 128 P.2d 330, 331 (Wash. 1942).

206 Phillips-Jones Corp. v. Parmley, 302 U.S. 233, 236 (1937).

This lack of uniformity is unacceptable. In creating a federal statutory contribution right under section 6672, Congress noted that Burdened Responsible Persons had to "pursue [their] claims for contribution under state law (to the extent state law permits such claims). The variations in state law sometimes make it difficult or impossible to press successful suits in state courts to force a contribution from other responsible persons."[207] This same perception should prompt Congress to create a federal statutory contribution right for transferee liability.

*c. Interstate Coordination*

In most instances, the transferor and transferees live in the same state. In our highly mobile society, however, there are times when the relevant actors are scattered across state lines.[208] If the transferees reside in two, three, or more states, in what forum should the Burdened Transferee bring her contribution suit against the Windfall Transferees?

A state tribunal might find it difficult to assert personal jurisdiction over the out-of-state transferees.[209] What is the jurisdictionally significant event: Where the transferor resided? Where the transferred property was located? Where the transfer is deemed to have occurred? Where the tax was paid to the Service? Where the refusal to contribute occurred? And, assuming that the jurisdictionally significant event is deemed to have occurred in the forum jurisdiction, is the foreign Windfall Transferee sufficiently connected to that jurisdiction so that a constitutionally sufficient nexus exists?[210]

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207 H.R. Rep. No. 506, 10th Cong., 2d Sess. at 40 (1996), *reprinted in* 4 U.S.C.C.A.N. 1163 (1996); *see also* Levine & Driscoll, *supra* note 46, at 30 ("The cases are extraordinarily divergent both in approach and in result.").

208 For example, in one controversy in which the author was counsel for the Service, the transferor and one of her transferees lived in Florida while the other transferee lived in Virginia. Ripley v. Commissioner, 102 T.C. 654 (1994) (Florida case); Ripley v. Commissioner, 105 T.C. 358 (1995) *rev'd*, 103 F.3d 332 (4th Cir.1996) (Virginia case).

209 *See generally* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988).

210 *See generally* JOHN J. COUND, ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 65-177

Bringing a contribution action based on state law in federal court would not be an effective alternative. Subject-matter jurisdiction would be hard to demonstrate. The cause of action would sound in state, not federal law. The fact that federal tax collection started the controversy would be insufficient to establish either federal-question or supplemental jurisdiction.[211] Diversity jurisdiction usually would be unavailable, either because of the "complete diversity" rule[212] or the $75,000 "amount in controversy" threshold.[213] The experience of section 6672 contribution litigation suggests that the courts will apply such limits rigorously in order to deny jurisdiction.[214] In addition, federal litigation also would be hobbled by limitations on personal jurisdiction.[215]

### C. *Summary*

No fully satisfactory right of contribution currently exists for disproportionate collection transferee liability cases. No transferee right of contribution exists at the federal level. A number of decisions have held that state contribution rights exist. However, (1) most jurisdictions have not spoken authoritatively on the issue; (2) analytically, it is less than certain that such rights exist; (3) reliance on state remedies would invite non-uniform results, eroding the horizontal equity of the tax system; and (4) state remedies are cumbersome to apply in multi-state transferee situations.

(6th ed. 1993). Similar sorts of questions might have to be asked in deciding which state's law governs the case. *See, e.g.*, Alten v. Ellin & Tucker, Chartered, 854 F. Supp. 283, 287 (D. Del. 1994) (choice-of-law issues in state contribution cases involving § 6672 liabilities); *cf.* Annotation, *What Law Governs Right to Contribution or Indemnity Between Tortfeasors*, 95 A.L.R.2d 1096 (1997).

211 *Cf.* Laub v. Ross, 818 F. Supp. 340 (S.D. Fla. 1993); Carlucci v. United States, 793 F. Supp. 482 (S.D.N.Y. 1992) (rejecting jurisdiction over § 6672 state-law contribution claims; considering, respectively, 28 U.S.C. § 1331 and 28 U.S.C. § 1367).

212 *See, e.g.*, City of Indianapolis v. Chase National Bank, 314 U.S. 63, 69 (1941).

213 *See* 28 U.S.C. § 1332(a).

214 *See, e.g.*, Cook v. United States, 765 F. Supp. 217, 223-24 (M.D. Pa. 1991).

215 *See* FED. R. CIV. P. 4(f) (territorial limits on effective service of process in district court cases).

## V. PROPOSAL

We have seen that disproportionate collection can be unfair, that the best solution is an effective right of contribution, and that neither federal law nor state law currently provides effective contribution remedies. The solution to disproportionate transferee collection is to create a federal statutory right of contribution. As shown in Part III, a right of contribution is a superior approach to its two alternatives: (1) limiting the Service to proportional collection or (2) creating a right of indemnity. That right must be federal because, as shown in Part IVB, state contribution remedies are unreliable and non-uniform. That right must be statutory because, as shown in Part IVA, the federal courts are unable to supply a contribution remedy via either implication from present law or exercise of common-law authority.

In forging the specifics of such a measure, we have the precedent of the TBOR2 changes with respect to section 6672.[216] TBOR2 provided three main changes:[217] (1) TBOR2 section 901 is a notice requirement: it generally prohibits the Service from asserting section 6672 liability until 60 days after the Service notifies the target that it intends to assess the penalty against him;[218] (2) TBOR2 section 902 requires the Service, if requested in writing, to disclose to a responsible person the identities of other persons viewed by the Service as responsible for the same liability;[219] and (3) TBOR2 section 903 creates a contribution right

[216] Before TBOR2 was enacted in 1996, there were bar association proposals to similar effect. *See* A.B.A. Sec. of Taxation, *Tax Section Recommendation 1981-6*, 34 TAX LAW. 1409 (1981) [hereinafter ABA Proposal]; *see also* Committee on Personal Income Taxation, *supra* note 17. There also are precedents outside the tax context. *See* 15 U.S.C. §§ 77k(f), 78i(e), 78r(b) (contribution rights under the federal securities laws).

[217] There also were changes to ease the threat of § 6672 liability for volunteer board members of tax-exempt organizations. *See* TBOR2 § 904 (partially codified at I.R.C. § 6672(e)).

[218] Codified at I.R.C. § 6672(b).

[219] Codified at I.R.C. § 6103(a)(9).

for each responsible person with respect to "the excess of the amount paid by such person over such person's proportionate share of the [section 6672 liability]."[220]

I propose enactment of a transferee contribution right similar to that established by TBOR2 for section 6672 but with several differences. To enhance the efficacy of that new right, I also propose several complementary rules. The proposed right and its complements are described below.

### A. *Transferee Right of Contribution*

Federal tax cases are litigated in four trial forums: the Tax Court, Court of Federal Claims, Bankruptcy Court, and District Court.[221] However, the Tax Court and the Court of Federal Claims only hear cases in which the government is a litigant (in the role of defendant), and there is no good reason to alter that profile. Thus, jurisdiction to hear the new contribution suits should be lodged in the district courts, and when proper, contribution claims could be litigated in the bankruptcy courts.[222]

In either event, the contribution suit would be separate from any action in which the merits of the Service's transferee liability assertion against the Burdened Transferee is at issue. Theoretically, judicial economy might be fostered by having contribution issues resolved in the same proceeding as the underlying liability issue. However, transferee liability almost always is litigated in the Tax Court, so different forums would be involved. Moreover, joining the matters would produce a more complex case, so the Service's ability to assess and collect the

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[220] I.R.C. § 6672(d).

[221] *See* Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 238-42 (1998).

[222] Two instances come to mind. First, if a Windfall Transferee is the debtor in a bankruptcy case, a Burdened Transferee could assert his contribution right as a claim against the estate. *See* 11 U.S.C. § 501(a). Second, if the Burdened Transferee is the debtor, the bankruptcy trustee could assert her contribution right against a Windfall Transferee as part of the process of marshaling the assets of the estate. *See* 11 U.S.C. §§ 542(b), 544(a).

transferee liability could be delayed. As argued in Part III(A), contribution should be a matter among the transferees only and should not impede collection of taxes due but unpaid. There is a parallel for this approach. Even those courts which allowed section 6672 contribution suits before TBOR2 required unanimously, in order to avoid impeding tax collection, that such suits be brought separately from the case involving the merits of the underlying section 6672 liability.[223]

Venue presents an interesting question. The venue statute dealing with "collection of internal revenue taxes"[224] should not apply since the contribution action would be collateral to the Service's assertion of the transferee liability. The general venue statute for "federal question" cases permits suit: (1) where the defendants reside if they all reside in the same state; (2) where "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;" or (3) as a last resort, where any defendant may be found.[225]

Potentially, three problems could arise under this general statute. First, arguments could arise regarding the substantiality and relative significance of the various "events and omissions," including location of the transferred property, where the transfer is deemed to have occurred, where tax was paid, and where refusal to contribute occurred.[226] Such arguments, however, are unlikely to be intractable.

Second, application of the general statute sometimes will produce a venue convenient for one litigant but inconvenient for another. However, this possibility always exists. The problem would be no greater for contribution cases than other classes of cases, and the remedy lies in general relief mechanisms.[227] At

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[223] *See, e.g.*, Conley v. United States, 773 F. Supp. 1176, 1177 (S.D. Ind. 1991); Padalino v. United States, 89-2 U.S.T.C. ¶ 9632 (D.N.J. 1989).

[224] 28 U.S.C. § 1396.

[225] 28 U.S.C. § 1391(b).

[226] For discussion of such factors in another context, see *supra* note 209 and accompanying text.

[227] *See, e.g.*, 28 U.S.C. § 1404 (change of venue).

least, the hardship would be randomized. Neither Burdened Transferees as a class nor Windfall Transferees as a class would be consistently disadvantaged relative to the other class.

Third, a related concern could exist. Assume that the general statute produced a venue convenient for the alleged Burdened Transferee but remote from and inconvenient for one or more Windfall Transferees. A temptation might arise to bring a contribution action, not because the plaintiff has a sound position, but because he hopes the distant defendant will settle to avoid inconvenience or will be handicapped in mounting his defense. The ABA was sufficiently concerned about this possibility in the section 6672 context that it suggested that successful defendants be allowed to recover attorney's fees and costs from the unsuccessful plaintiffs.[228]

Congress, however, rejected that suggestion in TBOR2, and was correct in doing so. Again, this kind of problem would not be unique in either kind or degree to contribution actions. The remedy for such abuses is sanctions under Federal Rule of Civil Procedure 11, not departing from the usual "American rule" against cost-shifting. Any residual potential for harassment would be, "on balance, outweighed by the salutary effects of a contribution remedy."[229]

The statute of limitations also presents an interesting question. Since the Service would not be involved in the contribution action, the normal statute-of-limitations period under the Code[230] would not apply. There is a five-year "catch all" limitations rule in the U.S. Code for civil fines and forfeitures.[231] Even if, as is dubious, that rule were topically relevant, the five-year duration is excessive to the need at hand. No elaborate discovery should be necessary; the only issues would be how much each transferee received from the transferor after the transferor's tax debts arose and how much each transferee paid to the Service. Further, the

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228 *See* Cohen, *supra* note 188, at *13.
229 ABA Proposal, *supra* note 216, at 1412.
230 I.R.C. §§ 6501, 6511.
231 28 U.S.C. § 2462.

more time that passes between the original transfers and the contribution action, the greater the possibility that the Windfall Transferees have consumed or dissipated the property they received. If the Burdened Transferee is to receive more than theoretical solace, her contribution judgement must be collectible. The Code prescribes some limitations periods of less than one year.[232] A limitations period of one year beginning with the date the Burdened Transferee makes payment to the Service would suffice.[233]

### *B. Complementary Rules*

The effectiveness of the new contribution right could be maximized by correlative procedures. TBOR2 took this approach with respect to the section 6672 contribution right. One of the TBOR2 complements, the pre-assessment notice requirement created by TBOR2 section 901, is unnecessary in our context. Transferee liabilities are "assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred."[234] Typically, income, gift, and estate tax deficiencies and excise penalty taxes cannot be assessed until the Service issues a notice of deficiency and judicial review options have been run their course.[235] Thus, notice requirements already are operative in the transferee liability context.

Four other complements would be helpful, though. First, a nationwide service of process rule should be adopted for transferee

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[232] *See, e.g.*, I.R.C. §§ 6532(c) (nine-month period for wrongful levy suits by persons other than the taxpayer), 7429(a)(2), (b)(1) (taxpayer challenging jeopardy or termination assessment must file request for administrative review within thirty days of being notified of the assessment and must bring suit within ninety days after actual or constructive conclusion of administrative review).

[233] The American Bar Association proposed a one-year limitations period with respect to § 6672 contribution actions. *See* ABA Proposal, *supra* note 216, at 1413, § 1(c)(2). The Association of the Bar of the City of New York suggested a two-year statute of limitations. *See* Committee on Personal Income Taxation, *supra* note 17, at 312.

[234] I.R.C. § 6901(a).

[235] *See* I.R.C. §§ 6212(a), 6213(a). This enumeration substantially overlaps with the types of taxes covered by § 6901. *See* I.R.C. § 6901(a).

liability contribution actions. We saw that whatever contribution rights may exist now can be cumbersome when transferees are located in widely separated states.[236] There is precedent for nationwide service of process,[237] and its application to the transferee contribution context would be salutary.

Second, transferees sometimes enter into agreements among themselves as to how any ensuing liabilities will be apportioned.[238] Such consensual arrangements should be encouraged, and a Burdened Transferee should be held to his bargain. Thus, an inconsistent agreement should be a defense against proportional contribution rights otherwise available under the statute.

Third, the thrust of TBOR2 section 902 should be embraced. The confidentiality rules of the Code usually preclude the release by the Service of tax return information,[239] which includes a taxpayer's identity, amounts paid, and many other types of information.[240] Section 902 of TBOR2 modified these rules, permitting the Service to respond to a responsible person's request for information as to who the other responsible persons are and what collection has been effected against them.[241] The confidentiality rules should similarly be modified to permit Burdened Transferees to obtain from the Service identity and collection information as to Windfall Transferees. This change would permit a Burdened Transferee to decide faster and more accurately whether she should bring a contribution action and, if so, against whom and for how much. It also would reduce the need for formal judicial discovery after the contribution suit is filed. Thus, this change would contribute to efficiency as well as fairness.[242]

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236 *See supra* notes 208-15 and accompanying text.

237 *See* 28 U.S.C. § 2361 (interpleader suits).

238 *See, e.g.*, Southern Arizona Bank & Trust Co. v. United States, 386 F.2d 1002, 1004 (Ct. Cl. 1967).

239 I.R.C. § 6103(a).

240 I.R.C. § 6103(b)(2).

241 *See supra* note 219 and accompanying text.

242 In spirit, this rule would be compatible with another provision already part of the Code. *See* I.R.C. § 6902(b) (giving the transferee special discovery rights as to the "books, papers, documents, correspondence and other evidence of the taxpayer or a preceding

Fourth, many transferees have no legal counsel or are represented by lawyers who do not specialize in tax. Such persons may be unaware of whatever state contribution rights exist now[243] and could be similarly unaware of the new federal statutory contribution right. Congress could alleviate this problem by directing the Service to inform persons against whom it makes transferee liability assessments of the existence of the separate contribution remedy and the opportunity to request from the Service information as to other transferees of the transferor. This would impose some administrative burden on the Service, but that price would not be excessive compared to the gain in fairness of the tax system. Indeed, this would only be an extension of a well precedented approach. Congress has written many such "notification of rights" provisions into taxpayer rights legislation.[244]

## VI. CONCLUSION

Joint-and-several liability is an important device to secure collection of taxes legitimately owed to the federal government. However, it can, and often does, lead to unfairness when the Service collects disproportionately from one of several liable persons.

Congress, as part of the current taxpayer rights movement, has addressed this problem in recent years as to two of the three major areas of joint-and-several liability: section 6672 and joint spousal

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transferee" to enable the transferee to determine and litigate whether the transferor was liable for additional taxes).

[243] It is likely that more transferee contribution cases would be brought — though not necessarily won — in state court but for such lack of knowledge. *Cf.* Levine & Driscoll, *supra* note 46, at 36 (citing lack of adequate advice as one reason why responsible persons fail to protect themselves via indemnification agreements against § 6672 liability).

[244] *See, e.g.*, TBOR § 6227 (disclosure of rights of taxpayers); TBOR2 § 403 (disclosure of collection activities); TBOR3 §§ 1102(b) (codified at I.R.C. § 6212(a)) (notification of right to contact Taxpayer Advocate's Office), 3401(a) (codified at I.R.C. § 6320(a)(3)) (explanation of rights upon filing of tax lien), 3401(b) (codified at 6330(a)(3)) (explanation of rights before levy), 3463(b) (codified at I.R.C. § 6213(a)) (statement in deficiency notice of last date for filing of Tax Court petition), 3501(b) (explanation of right to spousal relief under I.R.C. § 6015), 3502 (explanation of taxpayer's rights in interviews with Service), 3504 (explanation of administrative appeal and collection process).

liability. This aspect of the taxpayer rights agenda will remain incomplete, however, until the third area, transferee liability, is addressed as well.

The best solution to unfairness as to disproportionate collection of transferee liabilities would be establishing a federal statutory right of contribution. This article has offered suggestions as to how that right should be structured. Adoption of this approach would create symmetrical treatment of section 6672 liabilities and transferee liabilities and would alleviate the unfairness that still occurs in the latter context.