

TESTIMONY OF LLOYD CONSTANTINE

ANTITRUST MODERNIZATION COMMISSION

**“CIVIL REMEDIES: JOINT & SEVERAL LIABILITY,
CONTRIBUTION, AND CLAIM REDUCTION”**

AT

**FEDERAL TRADE COMMISSION
CONFERENCE CENTER
Washington, D.C.**

July 28, 2005

SUMMARY OF TESTIMONY

The long-standing rule of untempered joint and several liability should remain unchanged. This antitrust rule, along with automatic trebling of adjudicated damages, is integral to antitrust law's positive force in our society.

Joint and several liability and automatic trebling were attacked during the 1980s, as part of the Reagan Administration's multi-pronged effort to substantially eliminate public and private enforcement of federal antitrust law. Two decades later, the primary motivation for the Commission, as distinguished from the motivation of any particular Commissioner, again is to substantially eliminate federal antitrust law enforcement. However, this time the proposed "Modernizations" would also preclude substantial enforcement of State antitrust law.

The arguments for and against the current rule are almost entirely anecdotal. No significant learning on the issue has occurred since the 1980s.

Twenty-five years of practice as a government antitrust prosecutor, private counsel for both defendants and plaintiffs, and as an antitrust counselor, confirms my belief that the current rule is beneficial and should not be changed.

TESTIMONY

I am honored by the Antitrust Modernization Commission's invitation for me to provide oral and written testimony focusing on Civil Remedies and, in particular, the issues of joint and several liability, contribution and claim reduction.

After eight years of representing poor people in civil rights and civil liberties litigation, I became an antitrust lawyer. For the last 25 years I have practiced, taught, lectured and written about antitrust, and viewed that work as logically flowing from my civil rights and civil liberties practice. Personal freedom and market freedom go hand-in-hand, and neither can thrive without the other.

The issues addressed to this panel were the subject of several legislative proposals in the 1980s, and most prominently, in 1986. Back then, I testified frequently before the United States Senate and the House of Representatives on these proposals. Although, as requested by the Commission's staff, I have separately directed the Commission to that testimony as well as articles and lectures where I discussed those legislative initiatives, I will make reference to those proposals and ancient events today.

The Reagan Administration's 1986 antitrust proposals, styled the "Antitrust Improvement Act," the "Merger Modernization Act," and the "Promoting Competition in Distressed Industries Act" were designed to substantially eliminate federal antitrust law. They included *de facto* repeal of Section 7 of the Clayton Act, antitrust immunity for firms in industries allegedly harmed by foreign competition, the substantial elimination of treble damages and two proposals to eliminate joint and several liability. This would have been accomplished directly by S.1300 and indirectly under the claim reduction provisions of S.2162.

The motivation for these proposals was clear. Malcolm Baldrige, the Reagan Administration's Secretary of Commerce, had called for repeal of Section 7 and observed that the antitrust laws had outlived their usefulness and were reducing our "competitiveness." To mollify him, Paul McGrath, the Reagan Assistant Attorney General for Antitrust, noted that the Division did not interpret Clayton Section 7 as having reach or force any greater than Section 1 of the Sherman Act.

To top that, the next Reagan Antitrust Chief, Doug Ginsburg, drafted the bill which effectively would have repealed Section 7. He pointed out that under the Reagan Administration's interpretation, the law was not a problem, but legislation was necessary to prevent backsliding from future administrations.¹

Most pertinently, addressing the entirety of antitrust law, Bill Baxter, the first Reagan Antitrust Chief, derisively predicted that by 1996 the Federal government would be substantially out of the business of enforcing antitrust law, having ceded that role back to the States.²

Lest we forget, the Administration's legislative proposals had the backing of the Business Roundtable, whose Antitrust Committee was headed by Tom Leary, and the ABA Antitrust Law Section headed by Jim Halverson, who "delivered the Section's" support for these proposals in response to a personal request made by Attorney General Ed Meese. At some of the Congressional hearings, I was the only government witness opposing these proposals. And when they were ultimately defeated, I and my colleagues in the States became the primary enforcers of the antitrust laws in the United States, until the rule of law was restored in the Federal Agencies of the early 1990s.³ Among the documents I commend to the Commission is a report prepared by the General Services Administration after investigating the Reagan Administration's alleged efforts to destroy antitrust through non-enforcement, intervention to obstruct private and State Attorney General enforcement and the 1986 Modernization and Reform Proposals.

In taking that experience as a backdrop, and in thinking how best to address today's topic, an example of candor set for me by my co-panelist Judge Frank Easterbrook back in 1989, recommended itself as the best -- and indeed only proper -- approach.

In May 1989, the Judge, I and many others, addressed an antitrust conference in Lawrence, Kansas, which commemorated the centennial of codified antitrust law in the United States, one hundred years after the passage of the Kansas Act of 1889. Judge Easterbrook and I debated on the topics of "Antitrust Federalism" and the proper focus of antitrust enforcement.⁴ When I challenged him with the observation that his neo-classical consumer welfare orientation was, in fact, just a post-hoc rationalization, which had nothing to do with the reasons Congress enacted the Sherman Act, he said "Of course it's nothing but a post-hoc rationalization, but it happens to be the one I like." Left unsaid by Judge Easterbrook, but well understood, was that

¹ *Merger Law Reform: Hearings on S.2022 & S.2160 Before the Comm. on the Judiciary*, 99th Cong., 2d Sess. 45 (1986) (statement of the Hon. Douglas Ginsberg).

² William Baxter, *What Will Be the State of Antitrust in the Year 1996?* ANTITRUST, Fall 1986, at 32.

³ Lloyd Constantine, *The Mission and Agenda for State Antitrust Enforcement*, 36 ANTITRUST BULL. 835 (1991); Lloyd Constantine, Address at the 21st New England Antitrust Conference, American Law Institute & American Bar Association (Nov. 14, 1987).

⁴ See Lloyd Constantine, *Antitrust Federalism*, WASHBURN L.J. 163 (1990).

from his position on the bench he had the ability to make his preferences stick. That is, subject only to Supreme Court review.

Taking an example from Judge Easterbrook's refreshing candor, I will plainly say that I believe the motivation for the Modernization Commission and, in particular, the inquiries it is making into eliminating or limiting treble damages and joint and several liability, is not modernization but virtual destruction of the antitrust laws. The proposals being considered by the Commission are by and large the same as those rejected in 1986. I draw a clear distinction between the motivation for the Commission and the motivation of the Commissioners themselves, whom I know to be distinguished professionals who will evaluate all the testimony and evidence presented to them with open minds.

Reasonable and honorable people can and do certainly differ on whether the antitrust laws help or hurt the United States. But there is no doubt that if the 1986 package had been enacted, Bill Baxter's prophecy and goal of federal antitrust enforcement disappearing would have come to pass. I think there is little doubt today that if the same proposals, merely dusted off, were enacted now, they would reduce the scope and power of antitrust even more radically than the 1986 proposals. Among the additional "modernizations" under consideration now are proposals to pre-empt State antitrust enforcement. For example, by legislatively nullifying State "Illinois Brick" repealers and overruling *California v. Arc America Corp.*, 490 U.S. 93 (1989). Again, honest and well intentioned people may think that is a good idea, but we should not lose sight of precisely what the idea is.

More specifically, with regard to joint and several liability, contribution and claim reduction, nothing useful has been contributed in the last twenty years to enlighten the debate. My co-panelist, Don Hibner, relies upon his testimony from the 1970s and early 1980s. I substantially rely upon mine from that same era. In lieu of written testimony, Judge Easterbrook offers his excellent 1980 article, co-authored with Landes and Posner.⁵ Harry Reasoner masterfully summons the arguments on both sides, before concluding that any change in untempered joint and several liability is unwise at this time. Harry reaches this conclusion in substantial part because he finds that there is no empirical support for any change or for the positions pro and con, and because he concludes, as we all do, that nothing substantial has enlightened this debate since it raged 20 years ago. Two decades ago the proponents of change staged a national roadshow to state and local bar associations, spearheaded by Griffin Bell and Ira Milstein, two defense bar Democrats who carried the Reagan Administration's water on the elimination of joint and several liability.

For me, the issue was and is simple. Joint and several liability without contribution or claim reduction is part, and an important part, of the positive force of the antitrust laws.

My belief in this regard has not changed since 1986, but the experience that informs that belief has broadened significantly. In 1986, I was a State antitrust law enforcer who could only speculate about the deterrent effect of antitrust and the credibility of antitrust counselors seeking to inhibit questionable or even felonious anticompetitive conduct. For the last fourteen years

⁵ Frank H. Easterbrook, William M. Landes and Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331 (1980).

while engaged in private law practice, I have examined these issues first-hand. I have defended large firms in antitrust matters as frequently as I have been plaintiffs' counsel, and have spent almost as much time in antitrust counseling as in litigation. The antitrust laws have very little *in terrorem* effect today, either individually or cumulatively. Mr. Hibner has done a masterful job in pointing to the proliferation of myriad antitrust laws enforced by States and foreign nations. The businesses I counsel and defend are respectful and mindful of all these antitrust sanctions – but I have yet to see any substantial business initiative die on the vine because of antitrust concerns, let alone the threat of joint and several liability for treble damages. If a price-fixing or market allocation scheme has been suppressed, that was fortunate for everyone in our society.

My observations are merely anecdotal. Harry Reasoner correctly states that anecdote forms the basis of most opinions on the efficacy and deterrent value of various antitrust remedies. My anecdotal observations from the plaintiffs' side of my practice further inform my opinion on these issues. In case after case, litigation discovery from defendants reveals a keen awareness of potential antitrust exposure from both private and public enforcers. However, it also shows little moderation of conduct in response to the potential exposure. I will be pleased to provide the Commission unsealed documents, illustrating this point, including one with a "pithy retort" "to F___ the DOJ." The firms that my clients have sued are large and sophisticated businesses with eminent in-house and outside antitrust counsel. The quick settlement by the hypothetical "innocent" company under the threat of onerous antitrust penalties is the rare exception, and one unknown to me. Three times in the last several years, my biggest plaintiffs' cases have settled, but each time on the first day of trial, and only after we won summary judgment motions.

The one time in a long career that I used joint and several liability successfully as a weapon, was after a trial where we represented New York State in a highway bid-rigging case. After securing a multi-million dollar verdict from a federal jury against a bunch of companies who rigged the bids for paving roads on Long Island, the defendants appealed to the Second Circuit. I focused my attention on the bid-rigger with the deepest pocket, named Hendrickson Brothers. I told their counsel that the cost of their appeal was this: "Drop your appeal and you will pay only 50% of the trebled damages for the entire nine defendant conspiracy. If you lose your appeal your client will pay 80% of the trebled damages." I also told them that the cost of an unsuccessful *cert.* petition was the residual 20% of trebled damages (plus pre-judgment interest). I knew that collecting from the smaller bid-riggers would be difficult. After the appellants lost in the Second Circuit,⁶ I took the threatened 80% from Hendrickson and scrambled to collect the rest of New York's money from the other eight smaller defendants. That I had the power to do that was a good thing. Hendrickson's lawyer, the legendary Milton Gould of Shea Gould, complained to me and also to Attorney General Robert Abrams about how this was all so unfair. Bob and I both told him that we had both testified against the Administration's antitrust remedy bills and, specifically, against eliminating joint and several liability. We also told Gould that our experience with his client had reinforced our convictions about the soundness of our congressional testimony. Joint and several liability allowed us to properly punish bid-riggers like his client.

⁶ *State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988).

Then and now (with the additional benefit of experience defending those charged with price-fixing), I believed and believe that the arguments against joint and several liability and for contribution and claim reduction amount to legislating a code of honor among thieves. I oppose doing that and oppose it based upon significant relevant experience and without reservation.

Lloyd Constantine
Attorney at Law
212-350-2702
lconstantine@constantinecannon.com

July 25, 2005

BY FEDEX

Andrew J. Heimert, Esq.
Executive Director and General Counsel
ANTITRUST MODERNIZATION COMMISSION
1120 G Street, N.W., Suite 810
Washington, DC 20005

Dear Mr. Heimert:

I am honored by the Commission's invitation to testify on the Civil Remedies Panel concerning "Joint and Several Liability, Contribution and Claim Reduction" on July 28, 2005. As you directed, this letter lists my previous testimonies, lectures and articles, which discuss the subject of this Panel.

TESTIMONIES

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| 5/12/86
Wash., DC
[U.S. Senate] | Testimony Concerning "S. 2160 and S. 2162, The Merger Modernization and Antitrust Remedies Improvements Acts of 1986," Delivered to the United States Senate, Committee on the Judiciary. |
| 4/15/86
Wash., DC
[U.S. Senate] | Testimony Concerning "S. 1300 and S. 2162, The Individual Treble Damage Responsibility Act and the Antitrust Remedies Improvement Act of 1986," Delivered to the United States Senate, Committee on the Judiciary. |
| 3/5/86
Wash., DC
[House of Rep.] | Testimony Concerning "Oversight of the Antitrust Division of the United States Department of Justice," Delivered to the United States House of Representatives, Judiciary Committee, Subcommittee on Monopolies and Commercial Law. |

LECTURES & SPEECHES

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|------------------------|--|
| 6/22/04
Wash., D.C. | Acceptance Address, Antitrust Achievement Award, American Antitrust Institute Annual Program: "Buyer Power and Antitrust." |
| 1/23/03
N.Y., N.Y. | "Antitrust Federalism Revisited," Spitzer, Majoras, Denger & Constantine, Annual Meeting Program, Antitrust Law Section, New York State Bar Association. |

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5/24/89 “Antitrust Federalism,” An address delivered to the Antitrust Centennial
Lawrence, KS Symposium, NAAG.

11/14/87 “Antitrust In the Dark Ages,” an address delivered to the *21st New England*
Cambridge, MA *Antitrust Conference*, ALI-ABA.

4/2/87 “Current Trends in State Antitrust Enforcement,” an address delivered to the
N.Y., NY *35th Annual Antitrust Law Section Spring Meeting*, ABA.

ARTICLES

Antitrust Federalism, 29 Washburn L.J. 163 (1990).

Current Antitrust Enforcement Initiatives by State Attorneys General, 56 Antitrust L.J. 99
(1987); *reprinted* in 18 J. Reprints Antitrust L & Econ. No. 2 at 69 (1988).

These and other testimonies, lectures and articles which more generally address the issue
of civil remedies are listed in my CV, which is enclosed with this letter.

I look forward to seeing you on July 28th.

Sincerely,


Lloyd Constantine

LC:mm
Enclosures