

**Written Testimony of Michael Hausfeld for the Antitrust
Modernization Committee Panel, “Civil Remedies: Joint & Several
Liability, Contribution, and Claim Reduction”**

Executive Summary

The Antitrust Modernization Committee (AMC) has asked whether Congress and/or the courts should change the current antitrust rules regarding joint and several liability, contribution, and claim reduction. The answer is a simple and unequivocal no. Participants in an antitrust conspiracy currently face joint and several liability, are barred from bringing contribution actions against co-conspirators, and receive only an actual dollar settlement claim reduction or judgment credit to account for the liability payments of co-conspirators. These rules deter conspiratorial activities, increase the likelihood of full compensation for losses incurred as a result of violations of the antitrust laws, and, critically, encourage private enforcement of the antitrust laws. As a consequence, any changes to these rules likely would significantly weaken civil enforcement of the antitrust laws and increase participation in price-fixing and market-sharing cartels.

Joint and several liability and the rules against contribution and claim reduction are more important now, when Congressional concern with antitrust has led it to increase criminal sanctions for antitrust violations and to statutorily encourage conspirators to come forward, admit their illegal activities, and name their co-conspirators. These interdependent elements of the current antitrust regime should all be maintained.

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I. Introduction

The twenty-first century has ushered in an era of tremendous growth in domestic, foreign and transnational corporations, unprecedented international commerce, and an increasing level of concentration in key industries. In response to this new business environment and its consequent risk of antitrust violations, Congress has increased criminal penalties for violations of the antitrust laws.¹ The “number of individuals jailed and the time served in jail” for antitrust violations over the past five years has grown correspondingly.² The renewed vigor devoted to criminal pursuit of antitrust violators has not been confined to domestic businesses and activities, with some commentators pointing to the Antitrust Division of the United States Department of Justice’s “aggressive prosecution of international cartels” as a primary reason why criminal prosecutions, generally, have increased.³ Foreign nationals also have been pursued as never before, with many foreign nationals jailed in the U.S. as a result of antitrust convictions.⁴ An important example of Congressional efforts to engender compliance with federal antitrust laws is the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increases the penalties for antitrust violations.⁵

At a time when the federal government recognizes the need to maintain and indeed increase the criminal sanctions for antitrust violations, it is essential that the civil antitrust laws be designed to maximize the likelihood that antitrust violations are punished and deterred. The Antitrust Criminal Penalty Enhancement and Reform Act of

¹ See generally Kylie Cooper & Adrienne C. Dedjinou, *Antitrust Violations*, 42 AM. CRIM. L. REV. 179 (2005) (discussing these penalties). For an example of a recent law that increases criminal penalties for antitrust violations, see Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004).

² Cooper & Dedjinou, *supra* note 1, at 217–18.

³ *Id.* at 207–08.

⁴ *Id.* at 218.

⁵ Antitrust Criminal Penalty Enhancement and Reform Act of 2004 § 215.

2004 responds to this need by “enhanc[ing] the incentives for participation [by parties to a conspiracy] in the Corporate Leniency Program established by the Antitrust Division.”⁶ Under the Act’s provisions, a participant in the “amnesty program” may have its liability reduced to single damages in a civil lawsuit related to a conspiracy uncovered through its participation.⁷ However, joint and several liability for treble damages for non-participating co-conspirators remains.⁸ This maintains the strong deterrent effect of the antitrust laws.

With these Congressional actions and other indicators of the need to maintain a vigilant stance against antitrust activities as an illustrative backdrop, the Antitrust Modernization Committee (AMC) has asked whether Congress and/or the courts should change the current antitrust rules regarding joint and several liability, contribution, and claim reduction. The answer is a simple and unequivocal no. Participants in an antitrust conspiracy currently face joint and several liability, are barred from bringing contribution actions against co-conspirators, and receive only an actual dollar settlement claim reduction or judgment credit to account for the liability payments of co-conspirators. These rules deter conspiratorial activities,⁹ increase the likelihood of full compensation for losses incurred as a result of violations of the antitrust laws, and, critically, encourage private enforcement of the antitrust laws.¹⁰ As a consequence, any changes to these rules

⁶ J. Anthony Chavez, *Antitrust Enforcement: Use of the Carrot and the Stick* in Practising Law Institute, Corporate Law and Practice Course Handbook Series, PLI Order No. 6223, at 883 (May, 2005).

⁷ Antitrust Criminal Penalty Enhancement and Reform Act of 2004 § 213.

⁸ *Id.* at § 214.

⁹ The importance of joint and several liability and the rules precluding contribution and claim reduction to the deterrent effect of the federal antitrust laws has been noted by the courts. For example, in *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 633 (7th Cir. 2002), litigated at the appellate level by my partner at Cohen Milstein, Daniel Small, Judge Easterbrook emphasized that joint and several liability was a “vital instrument for maximizing deterrence.” In *Burlington Indus., Inc. v. Milliken & Co.*, 690 F.2d 380, 392–94 (1982) the Fourth Circuit cited the deterrent effect of the rule against claim reduction as a reason not to allow defendants to use it as a defense in an antitrust suit. In *Nippon*, Judge Easterbrook pointed out that improving deterrence has consistently been a goal of the Supreme Court’s antitrust jurisprudence. See 281 F.3d at 633 (citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990) for this proposition).

¹⁰ The rules also increase the likelihood that antitrust conspirators will be punished, which is consistent with the punitive objective of the antitrust laws. See *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 639 (1981) (“The very idea of treble damages [in antitrust] reveals an intent to punish past” antitrust violations.).

likely would significantly weaken civil enforcement of the antitrust laws and increase participation in price-fixing and market-sharing cartels.

Private actions are critical to effective antitrust enforcement. Private investigations have exposed substantial antitrust conspiracies, including the well-publicized international vitamin price-fixing conspiracy, which was pursued “before any grand jury investigation or federal cooperation agreements became public, any guilty pleas were entered, or any Defendants confessed to wrongdoing. Indeed, [the] investigatory and early litigation efforts aided the official investigations”¹¹ Without such aggressive private enforcement, antitrust deterrence would be severely weakened.

II. Joint and Several Liability

Overview

Participants in an antitrust conspiracy face joint and several liability for the damages caused by their illegal actions. As a result, plaintiffs may recover their entire damages from a single defendant in a multi-defendant antitrust suit.¹² Joint and several liability strongly deters participation in antitrust conspiracies and encourages those harmed by a conspiracy to seek recovery. Additionally, joint and several liability promotes settlement and judicial economy in antitrust litigation, and it appropriately holds co-conspirators jointly responsible for their illegal actions. It also rightly places the burden for lapses in liability on co-conspirators as opposed to victims of cartel activity.

After the passage of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which limited the civil liability of participants in the Antitrust Division’s corporate leniency program, maintenance of joint and several liability is especially critical because it encourages application to the program and maintains the strong deterrent effect of the antitrust laws on non-participants.

¹¹ *In re Vitamins Antitrust Litig.*, Misc. No. 99-197, at 3 (D.C.C. 2004) (mem. op.).

¹² *See, e.g., City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *aff’d*, 203 U.S. 390 (1906).

Joint & Several Liability and Deterrence

Joint and several liability in the antitrust context maximizes deterrence by increasing the likelihood that “a violation [will] be detected and pursued” because it increases the “expected recoveries of potential plaintiffs.”¹³ “Under an individual liability system, plaintiffs would have to name and successfully collect damages from each co-conspirator, and bear increased litigation costs if they lose. Given a reduction in expected recoveries, potential plaintiffs would put fewer resources into detecting and prosecuting violations.”¹⁴

Prospective antitrust conspirators know that parties damaged as a result of a conspiracy will more vigorously pursue antitrust actions under a joint and several liability system than under an individual liability system. They also know that they may be held liable for treble the entire amount of damages sustained by a plaintiff.¹⁵ Therefore, joint and several liability is a strong *ex ante* deterrent to potential conspirators.¹⁶

¹³ W. Stephon Cannon, *The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 ANTITRUST L.J. 103, 120 (1986).

¹⁴ *Id.*

¹⁵ Throughout this testimony, the deterrent effect of the treble damages remedy is frequently commended. However, it should be noted that “[b]ecause of various practical impediments, private plaintiffs have rarely if ever attained treble damages. Historically, what has been observed for domestic price-fixing cases is that direct purchasers have recouped on average less than single damages.” Brief of Amici Curiae Professor Darren Bush et al. in Support of Respondents at 18, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) (citing for this proposition Lande, *Are Antitrust ‘Treble’ Damages Really Single Damages?* 54 OHIO ST. L.J. 115, 171 (1993)). Therefore, while the possibility of treble damages provides a strong deterrent stick in theory, potential defendants know that, as a practical matter, such damages are rarely actually recovered. Furthermore, because of various shortcomings in the rules governing antitrust damage calculations, treble damage estimates are really closer to actual single damages. See Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 LOY. CONSUMER L. REV. 329, 329, 335–40 (2004) (showing that treble damages really only “constitutes approximately single damages” because adjustments are not made to take into account the time value of money, the allocative inefficiencies resulting from cartels, the umbrella effects of market power, as well as other “adjustments to the so-called ‘treble damages’ multiplier that should be made to calculate the net harms to others from an antitrust violation”). Other commentators have noted that, given the difficulties of discovering and proving antitrust cases, treble damages are necessary to provide sufficient deterrence. See Brief of Amici Curiae Economists Joseph E. Stiglitz & Peter R. Orszag in Support of Respondents at 8, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) (arguing that because the “probability of detection and conviction [of cartels] is well under one, the treble damages remedy is seen as a rough approximation to the optimal fine”). Taken together, this evidence shows that concerns about over-deterrence resulting from treble damages are vastly overstated, and that, in fact, to assure adequate deterrence, antitrust damage levels should be raised. See generally Lande, *Why Antitrust Damage Levels Should be Raised*, *supra*.

¹⁶ See Jay N. Fastow, *Where the Money Is: Litigation Under Section One of the Sherman Act in the Financial Services and Securities Industries*, 115 BANKING L.J. 774, 775 (1998) (The author, a partner at

A simple example demonstrates this deterrent effect.¹⁷ Assume that Defendants A and B engage in a price fixing conspiracy that causes \$3000 in recoverable damages (after trebling) by Plaintiff C.¹⁸ Defendants A and B share equally in the economic benefits of the conspiracy—a gain of \$500 each. Assume further that there is a 30% chance that either party will be found liable for taking part in the conspiracy. If this occurs, under an individual liability system each party will pay an equal—50%—share of the damages.¹⁹ Therefore, excluding attorneys’ and other administrative fees, the long-term liability of each Party is \$450 ($\$3000 \times 50\% \times 30\% = \450).

Under a joint and several liability system we will assume that the chance of a party being held liable for the conspiracy is 35%. We rightly assume that joint and several liability increases the likelihood that a party will be found liable for participation in a conspiracy (in this example, from 30% to 35%) because joint and several liability increases the likelihood that potential plaintiffs will vigorously pursue antitrust actions. Furthermore, as will be discussed *infra*, joint and several liability increases the probability of a liability finding because it increases the likelihood that one or more defendants will settle early and provide critical evidence of the conspiracy, thus increasing the probability that co-defendants will be found liable.²⁰ Assuming that the co-

Weil, Gotshal & Manges when the article was published, writes that the potential for joint and several liability is an important reason why “antitrust compliance” in the “financial services and securities industries” is of utmost importance.).

¹⁷ This example is similar to the hypothetical cases discussed in A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447 (1981). However, in this hypothetical I argue that joint and several liability increases the likelihood that antitrust conspirators will be found liable.

¹⁸ It should be noted that this hypothetical and the other hypotheticals in my testimony do not explicitly account for the benefits of preventing antitrust conspiracies to the many individuals and businesses that suffer indirect harms from cartel behavior. See Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, *supra* note 15. Other harms to society, more generally, caused by antitrust conspiracies—for example reduced innovation and consumer choice—also are not incorporated into the hypotheticals presented, because most *federal* courts do not allow for them to be included in damage calculations. *Id.* Therefore, the liability that could result from damages tied to these harms does not increase deterrence to potential conspirators. However, this does not mean that the benefits of preventing these harms should be ignored when considering whether and how to alter the rules governing antitrust remedies. In fact, the benefits of preventing these harms shows how important it is to maintain the deterrent capabilities that exist because of joint and several liability and the rules precluding contribution and claim reduction.

¹⁹ This assumes that damage apportionment is determined by a party’s economic gain from the conspiracy, relative to the other co-conspirators.

²⁰ Some commentators object to the fairness of these partial settlements because the evidence obtained from settling defendants can be used in settlement negotiations with or at trial against co-defendants. This may,

defendants in our hypothetical are equally likely (50%) to be found liable for the plaintiff's full damages, the expected liability of each actor under joint and several liability is \$525 ($\$3000 \times 35\% \times 50\% = \525).

If the parties are risk-neutral, they will choose to engage in the conspiracy under an individual liability system because the expected liability of \$450 is less than the expected gain of \$500. Assuming joint and several liability, however, the parties will decide *not* to engage in the conspiracy because the expected liability of \$525 is more than the expected gain of \$500.

Moreover, joint and several liability is a significant deterrent to *risk-averse* antitrust defendants.²¹ A risk-averse party “considers not only the expected value of a risky situation, but also the absolute magnitude of the risk.”²² Therefore, a risk-averse party may choose not to engage in the conspiracy under a joint and several liability regime even if the long-term liability is less than the expected gain, because of the possibility of being held liable for the entire amount of the damages, \$3000—an outcome that would not exist if joint and several liability were eliminated.²³

in theory, result in liability for co-defendants that is disproportionate to the damages attributable to their individual sales. However, instead of being criticized, partial settlements that lead to exchanges of information about the conspiracy should be encouraged. Because of the difficulty of detecting and proving antitrust cases, without these disclosure agreements there would be significantly reduced deterrence and a lower chance of plaintiffs being compensated. This is worrisome because even now few conspiracies are uncovered. *See* OECD, *HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD* 27 (“Some believe that as few as one in six or seven cartels are detected and prosecuted. A multiple of three is more commonly cited however.”). *See also* ANDREW I. GAVIL, WILLIAM E. KOVACIC, & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 1044 (2002). Although enforcement has since improved, in 1986 the Assistant Attorney General for Antitrust, Douglas Ginsburg, said that less than 10% of cartels are caught. *See* United States Sentencing Commission: Unpublished Public Hearings, 1986 volume, at 15 (July 15, 1986 Hearing). Additionally, the notion that it is acceptable for co-conspirators to be found liable for damages disproportionate to their role in a conspiracy if this increases the likelihood of a conspiracy's discovery is at the heart of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004's civil liability provisions. These provisions grant civil damage leniency to the first conspirator to report illegal antitrust activity, even though this may result in disproportionate liability for co-conspirators. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 § 213. The Act's provisions will be discussed in more detail *infra*.

²¹ There are indications that businesses engage in risk-averse decision-making. *See* Polinsky & Shavell, *supra* note 17, at 452 n.18 (arguing that “many aspects of business behavior suggest” that firms act in a risk-averse manner).

²² *Id.* at 452.

²³ As the number of co-conspirators increases, the *ex ante* deterrent impact of joint and several liability may concurrently rise. This is so because parties to a conspiracy involving many actors may realize that while their potential gain from a conspiracy is minimal, the possibility of being found liable for treble all the

Joint & Several Liability and Settlement

As the Court acknowledged in *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, private antitrust actions often are immensely complex,²⁴ making efficiency in antitrust dispute resolution critically important. Joint and several liability improves efficiency in antitrust cases by encouraging settlements and thus conserving judicial resources. It also encourages defendants to provide critical information to plaintiffs in exchange for partial settlements. This information, which often is necessary to prove an antitrust case, increases the likelihood that co-conspirators will be punished and plaintiffs sufficiently compensated.

Joint and several liability promotes settlement and cooperation with plaintiffs because the potential post-trial alternative for a defendant is liability for the damages resulting from the entire conspiracy, less the amount the plaintiff settled with other co-conspirators.²⁵ Were a defendant responsible only for the damages connected to its sales, or alternatively, from its “role in or contribution to” the conspiracy, it likely would feel much less pressure to settle, and many more cases would need to be resolved by trial. This would lead to a considerable increase in the use of judicial resources to resolve antitrust actions. Furthermore, because of the difficulty of proving antitrust violations,²⁶ even considerable evidence of a conspiracy might be insufficient to deter a defendant facing only an individual share of the damages, who might prefer to take its chances at trial rather than reach a settlement.

In addition, replacing joint and several liability with an individual liability formula, which would of necessity require calculating the damages attributable to individual defendants, would cause other drains on the courts. Due to the inherently

damages resulting from the conspiracy is very real given the number of players with knowledge of the unlawful scheme. A party in this situation may forgo the conspiracy.

²⁴ *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 638 (1981).

²⁵ Donald I. Baker, *Revisiting History—What Have We Learned about Private Antitrust Enforcement that We Would Recommend to Others?* 16 LOY. CONSUMER L. REV. 379, 387–88 (2004). See *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 433 (3d Cir. 1993) (noting that “the court must . . . set off any amounts received earlier as settlements of the antitrust claims”).

²⁶ See *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982) (noting the difficulty of maintaining a suit under the antitrust laws). See also *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002) (discussing the difficulty of proving antitrust allegations).

collusive and concerted nature of actions in an antitrust conspiracy, it often would be very difficult to ensure that a plaintiff is fully compensated for its damages while simultaneously determining the amount owed by each defendant. Should the damages be awarded on a simple per capita basis? Should defendants be responsible only for damages attributable to their sales? Should a judge or jury apportion damages based on whether an actor played a leading role in the conspiracy or merely followed the lead of others? Whatever method is chosen, the determination is likely to be complicated and require the exhaustion of judicial resources to resolve complex factual and economic disputes, often between former or current co-defendants with the incentive and resources to pursue protracted litigation over the disputed damage amounts.

Corrective Justice, Fairness and Consistency with the Goals of the Antitrust System

It has been argued that joint and several liability is not *fair* to individual defendants that played only a supporting role in, or minimally benefited from, a conspiracy. This argument is incorrect. On the contrary, joint and several liability promotes the important goals of corrective justice and fairness. First, the rule does not allow for innocent parties to be held liable for harms that they have not caused. Rather, joint and several liability explicitly acknowledges the joint responsibility of co-conspirators for damages resulting from concerted efforts to violate the antitrust laws. This is consistent with the traditional tort rules for joint tortfeasors,²⁷ and the joint and several liability co-conspirators face under the RICO statute. Second, the rule is fairer to plaintiffs because it puts the burden of lapses in liability on defendants as opposed to those already harmed by the conspiracy.

Antitrust conspirators rely upon the concerted and coordinated efforts of all the actors. A price fixing conspiracy likely will not succeed if 3 of the 5 members of the conspiracy cheat on the conspiracy and offer reduced prices to purchasers. Merely because certain members of the conspiracy may benefit more than others does not alter the co-responsibility for the conspiracy.²⁸

²⁷ W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 46, at 322–23 (5th ed. 1984).

²⁸ See *Hydrolevel Corp. v. Am. Soc’y of Mech. Eng’rs, Inc.*, 635 F.2d 118, (2d Cir. 1980), *aff’d*, 456 U.S. 556 (1982) (holding that settlement proceeds should be deducted from a recovery against a co-conspirator

An analogy to another area of federal civil law where joint and several liability has been applied to co-conspirators is instructive. All circuits that have considered the issue are in agreement that joint and several liability should apply in a civil action alleging a RICO conspiracy.²⁹ In reaching this position, the D.C. Circuit commended joint and several liability's deterrent effect and wrote that "although apportionment may be appropriate in some joint actions, if there is concerted action or conspiracy apportionment is never reasonable and joint and several liability must attach."³⁰ The Sixth Circuit agreed, holding that "joint and several liability is not only consistent with [RICO's] statutory scheme but in some cases will be necessary to achieve the aims of the legislation" because the "entire scheme would not have succeeded without the support of [the] enterprise."³¹

Joint and several liability in antitrust also places the burden for any lapses in liability on the defendants rather than the plaintiffs. Under an individual liability system, if a co-defendant were insolvent, missing or otherwise unable to pay damages, the plaintiff would receive less than full damages for its injuries.³² By contrast, joint and several liability requires solvent and available co-defendants to bear the burden of lapses in liability.³³ From this perspective, the question becomes one of who should be responsible for lapses in liability, the plaintiff or the defendant.³⁴ The plaintiff in an antitrust conspiracy suit suffered economic damages as a result of the collusive

after as opposed to before trebling in part because "antitrust defendants are joint tort-feasors, each is liable to complete the total deserved damages irrespective of fault"). *See generally* Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982) (rejecting a defense of claim reduction in an antitrust suit in part because of the co-responsibility for damages that joint and several liability places on co-conspirators).

²⁹ *See* United States v. Philip Morris USA Inc., 316 F. Supp. 2d 19, 27 (D.D.C. 2004) (holding that the imposition of joint and several liability against tobacco defendants facing RICO claims was proper and noting that "[e]very circuit in the country that has addressed the issue has concluded that the nature of both civil and criminal RICO offenses requires imposition of joint and several liability because all defendants participate in the enterprise responsible for the RICO violations").

³⁰ *Id.* at 27–28 (citing the Third Circuit's holding in SEC v. Hughes Capital, 124 F.3d 449 (3d Cir. 1997) approvingly for this proposition).

³¹ United States v. Corrado, 227 F.3d 543, 553 (6th Cir. 2000).

³² Richard W. Wright, *Allocating Liability among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS. L. REV. 1141, 1142 (1988).

³³ *Id.* at 1142–43.

³⁴ *Id.* at 1143.

conspiracy of the defendants. Plainly, fairness dictates allocating the burden of lapses in liability to the defendants. Furthermore, joint and several liability helps ensure that a plaintiff will be fully compensated for its injuries—one of the policy goals of the antitrust remedies.³⁵

Joint and Several Liability's Increased Importance in the Wake of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004

In June of last year, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.³⁶ In addition to increasing criminal penalties for antitrust violators, the Act limits the civil liability of participants in the Antitrust Division's corporate leniency program.³⁷ An "antitrust leniency applicant"³⁸ or "cooperating individual's"³⁹ liability to an antitrust claimant is limited to "that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods and services affected by the violation."⁴⁰

In the wake of these changes, retaining joint and several liability assumes increased importance.⁴¹ Joint and several liability encourages participation in the leniency program by vastly increasing the economic worth of a successful application. Consider the following scenario: Parties A, B and C participate in a price-fixing conspiracy. Years later, Party A becomes insolvent. Concurrently, Parties B and C realize that their price

³⁵ See *Flintkote Co. v. Lysfjord*, F.2d 368, 398 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957) (holding in an antitrust case that "a plaintiff is entitled to one full satisfaction of his claim in an action against joint defendants").

³⁶ Pub. L. No. 108-237, 118 Stat. 661 (2004).

³⁷ *Id.* at § 213. The relevant provisions of the act sunset in 2009. *Id.* at § 211.

³⁸ "The term 'antitrust leniency applicant,' or 'applicant,' means, with respect to an antitrust leniency agreement, the person that has entered into the agreement." *Id.* at § 212(3).

³⁹ "The term 'cooperating individual' means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement." *Id.* at § 212(5).

⁴⁰ *Id.* at § 213(a). The antitrust leniency applicant only receives the leniency benefits if a court finds that a number of requirements, such as divulging relevant facts to the claimant, are fulfilled. *Id.* at § 213(b).

⁴¹ Not surprisingly, the 2004 legislation contains a provision that explicitly says that joint and several liability will be maintained: "Nothing in this subtitle [included the civil liability leniency provisions] shall be construed to . . . affect, in any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicant and cooperating individuals . . ." *Id.* at § 214. This provision indicates Congressional intent to retain joint and several liability in the antitrust context.

fixing conspiracy is likely to be discovered shortly. Each party knows that if it does not participate in the leniency program, it may be held jointly and severally liable for treble all the damages resulting from the conspiracy, minus the individual, single damages paid by the leniency program applicant. This likely will lead to a desire by both conspirators to rush to participate in the program, and, consequently, the uncovering of the price fixing conspiracy and the rightful recovery by the parties who were damaged by the conspiracy.⁴² Were the potential damages to be paid by any defendant equivalent merely to the damages inflicted by that defendant, the incentive to participate in the program would be significantly lessened.

Maintaining joint and several liability after the passage of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 also is important because, absent joint and several liability, recovery from the non-applicant defendants would not allow for a full treble damages recovery by the plaintiff(s). The recovery would, at best, equal treble the damages specifically attributable to the non-participants plus the single damages of the participants, and could be substantially lower if one or more members of the conspiracy were insolvent at the time it was discovered. Such an outcome would reduce the compensatory, deterrent and punitive impact of treble damages,⁴³ especially if the applicant played a substantial economic role in the conspiracy.

III. Contribution

A right to contribution would enable a defendant who is found liable for damages “disproportionate to the harm [the defendant] has caused . . . in a separate action . . . to obtain contribution from other defendants—either those who have litigated but received

⁴² The “rush to participate” is compelled by the fact that current DOJ policy only allows the first co-conspirator that reports the illegal activity to receive leniency. Department of Justice, *Corporate Leniency Policy*, at A (“Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, [only] if . . . [a]t the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source”), available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>.

⁴³ See *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 639 (1981) (“The very idea of treble damages [in antitrust] reveals an intent to punish past . . . unlawful conduct, not to ameliorate the liability of wrongdoers.”).

disproportionately small judgments, or those who have settled.”⁴⁴ Current antitrust law bars contribution actions between co-conspirators.⁴⁵ A legislative move to formulate a right to contribution in antitrust cases would be ill-advised, because it would be inconsistent with the law’s intent to punish antitrust wrongdoers and deter future conspiracies.⁴⁶ Contribution rights also necessarily would reduce incentives to settle antitrust actions and lead to new, complicated, and resource-intensive litigation.

Contribution, Settlement and the Creation of Additional, Costly Litigation

The rule against contribution reinforces joint and several liability’s encouragement of settlements between plaintiffs and defendants.⁴⁷ If a co-conspirator knows that it will potentially be held jointly and severally liable for an antitrust violation, and that there are no contribution rights, the defendant will attempt to settle with the plaintiff(s) rather than see co-defendants settle and face the risk of paying increased damages.⁴⁸ Contribution rights, in contrast, would reassure a non-settling defendant that, even if it alone is found jointly and severally liable for the full damages of a conspiracy, eventual contribution from co-conspirators would mitigate damages to a share proportionate to the illegal economic gain from the conspiracy.⁴⁹ This would eliminate much of the incentive to settle created by joint and several liability.

Additionally, contribution rights could further discourage settlements in unanticipated ways. As discussed *supra*, if a co-defendant settles early on with a plaintiff under the current scheme, regularly the settlement includes the requirement that the settling defendant disclose evidence of the conspiracy. This material will then assist the plaintiffs in obtaining the full damages caused by the conspiracy.⁵⁰ However, a defendant that knows that it will be subject to a contribution action from a co-defendant found liable

⁴⁴ Polinsky & Shavell, *supra* note 17, at 447.

⁴⁵ See *Texas Industries*, 451 U.S. 630.

⁴⁶ *Id.* at 639.

⁴⁷ See Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 364–68 (1980).

⁴⁸ *Id.* at 353–64.

⁴⁹ *Id.* at 364–68.

⁵⁰ These disclosures of course must be consistent with existing law, such laws governing trade secrets.

for the remaining damages of the conspiracy will be much less likely to disclose information that will increase this risk. This reticence will have the dual effect of reducing the opportunity for settlements with co-defendants (who will rest assured that their co-conspirators have not released harmful information that would hurt their chances at trial), and reduce the likelihood that plaintiffs will be compensated for damages incurred as a result of cartel behavior.

Creating contribution rights would also generate significant additional litigation. Contribution “would generate additional litigation by permitting defendants to sue their co-conspirators. Such lawsuits might be limited to ‘fair share’ calculations, but where those sued for contribution had not been found liable in the plaintiff’s original action, they could be full scale antitrust damage actions.”⁵¹ Aside from the general problem with adding strain to our already over-burdened federal judicial system, creating a right to contribution actions that would deplete judicial resources is particularly unjustified. As the Supreme Court pointed out:

[T]he Sherman Act and the provision for treble-damages actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade. On the contrary, petitioner [a company urging contribution rights] is a member of the class whose activities Congress intended to regulate for the protection and benefit of *an entirely distinct class* [There is no evidence] that Congress was concerned with softening the blow on joint wrongdoers [by creating a right to contribution].⁵²

Contribution and Deterrence

Creating contribution rights also would reduce the deterrent effect of joint and several liability.⁵³ Deterrence is “a function of expected liability (in turn a function of the range and probability of possible liability) and the variability of liability (just how large it might be).”⁵⁴ Permitting contribution actions would reduce both the probability of liability and the variability of liability. As explained *supra*, creating contribution rights would reduce the probability of liability by decreasing the likelihood of settlements that

⁵¹ Cannon, *supra* note 13, at 122. See also Easterbrook, Landes & Posner, *supra* note 47.

⁵² *Texas Industries*, 451 U.S. at 639 (internal citations and quotations omitted).

⁵³ See Easterbrook, Landes & Posner, *supra* note 47, at 364–68.

⁵⁴ Cannon, *supra* note 13, at 120.

include the exchange of helpful information to the plaintiffs. Preventing contribution also increases the “variability of liability” by ensuring the distinct possibility that a single defendant can be held liable for treble all of the damages sustained by the plaintiff(s).⁵⁵ Contribution decreases this risk, and thus reduces the deterrent effect of joint and several liability on risk-averse corporations.

IV. Claim Reduction

The current rules limit a plaintiff’s recovery from a co-defendant by the actual dollar settlement amount obtained from co-defendants subtracted from the plaintiff’s full treble damages.⁵⁶ Past claim reduction proposals would change this rule and “provide that when a defendant settles, the plaintiff’s claims shall be reduced by the greatest of: (1) any amount stipulated by the plaintiff’s release or covenant not to sue; (2) the amount of consideration actually paid in settlement; or (3) treble the actual damages attributable to the defendant’s sales or purchases of goods and services.”⁵⁷

Proponents of claim reduction contend that it would do limited harm to the joint and several liability rule. However, a careful examination shows that joint and several liability and the rules against contribution and claim reduction work together to deter potential antitrust conspiracies, to ensure that those already underway are discovered, to encourage settlements, to increase the likelihood that the victims of a conspiracy are compensated, and to punish wrongdoers. When viewed through this lens, it is clear that the claim reduction rules should not be altered by the courts or by Congress.

Deterrence and Claim Reduction

The goal of claim reduction would explicitly be to mitigate the consequences of an antitrust conspiracy, a goal about which the Supreme Court expressed substantial

⁵⁵ *Id.* at 121–22. See also Easterbrook, Landes & Posner, *supra* note 47, at 344–53.

⁵⁶ *Burlington Indus., Inc. v. Milliken & Co.*, 690 F.2d 380, 391 (4th Cir. 1982).

⁵⁷ Edward D. Cavanaugh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?* 40 VAND. L. REV. 1277, 1321–22 (1987).

skepticism in *Texas Industries*.⁵⁸ Achieving this goal at the expense of deterrence is even more questionable, and claim reduction severely would undercut the deterrent effect of joint and several liability. If claim reduction were permitted, a defendant would know that it could not be held liable for all the damages resulting from a conspiracy if any of its co-defendants settled with the plaintiff(s), a necessary step in many antitrust suits due to the difficulty of successfully prosecuting an antitrust action without settling with and/or gaining cooperation from at least one defendant. This would reduce the *ex ante* deterrent effect of joint and several liability.

Claim reduction also would weaken the deterrent force of the treble damages rule. If a plaintiff settled with any co-defendant for less than treble the damages caused by that defendant and claim reduction were permitted, the plaintiff could not obtain treble damages, even if it successfully sued every other member of the conspiracy. The desire to avoid this type of “softening” of the treble damages rule is one reason why courts deduct settlement amounts from co-conspirators *after* trebling the damages as opposed to before trebling.⁵⁹

Settlements, Judicial Economy and Claim Reduction

A claim reduction rule would also weaken the settlement incentives created by joint and several liability and the rule against contribution. If plaintiffs knew that any settlement entered into with a co-defendant would reduce their ultimate recovery proportionate to that defendant’s role in the conspiracy, this would, as the Fourth Circuit held, “giv[e] antitrust plaintiffs a powerful incentive to avoid partial settlements.”⁶⁰

⁵⁸ The Fourth Circuit in *Burlington Industries* held that allowing a claim reduction defense would be inconsistent with principles espoused by the Supreme Court in *Texas Industries* and *Hydrolevel*. See *Burlington Industries*, 690 F.2d at 393–94 (analyzing these cases). The Fourth Circuit pointed out that in *Texas Industries* the Court made clear that antitrust remedies were designed to punish antitrust conspirators, and to deter future conspirators, but not to allow for actions that would “ameliorate the liability of wrongdoers.” See *id.* at 393 (quoting *Texas Industries*). In *Hydrolevel*, the Supreme Court referred to the broad sweep of the antitrust laws, and again to their deterrent and punitive goals. *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 574–78 (1982).

⁵⁹ See *Hydrolevel Corp. v. Am. Soc’y of Mech. Eng’rs, Inc.*, 635 F.2d 118, 130 (2d Cir. 1980), *aff’d*, 456 U.S. 556 (1982) (Here, the Second Circuit pointed out that any “ultimate recovery totaling less than three times proven damages would weaken the statutory incentive through judicial construction.”); *Burlington Industries*, 690 F.2d at 393 (holding that claim reduction would reduce the deterrence created by the treble damages rule).

⁶⁰ *Burlington Industries*, 690 F.2d 380 at 394.

For example, assume that three defendants share equally in the economic benefits of a conspiracy valued at \$3000. Assume further that all the damages are incurred by one plaintiff. If the plaintiff settles with one defendant for less than \$3000—the defendant’s share of the liability trebled—the plaintiff’s ultimate potential recovery will be diminished. Therefore, the plaintiff’s incentive to settle for less than this amount will be reduced. Claim reduction would thus reduce partial settlements, which save judicial resources and encourage plaintiff-defense cooperation.⁶¹

Claim reduction also would drain judicial resources by creating additional litigation “over the assignment of liability among the defendants”⁶² In this newly-created type of litigation, a plaintiff would try to minimize the value of the settling defendant’s share of the economic damages caused by the conspiracy, in order to maximize potential gains from co-defendants. The settling party’s co-defendants, on the other hand, will play up the damages caused by the settling party to reduce their own share of the total liability. This additional litigation, which would be undertaken solely to mitigate the share of liability of each *co-conspirator*, is an unnecessary and wasteful burden on the judicial system.

Fairness and Claim Reduction

Fairness concerns have led some commentators to conclude that claim reduction should be allowed. The crux of these concerns is the unfairness of defendants paying damages disproportionate to their economic gains from the conspiracy, even if a plaintiff settles with their co-defendants.⁶³ But these fairness arguments deemphasize the joint responsibility for damages that the antitrust laws place on co-conspirators. Furthermore, as was made clear during the discussion of joint and several liability, because one party’s refusal to engage in a conspiracy often prevents it from succeeding, it is justified to hold each party liable for all the damages caused by the conspiracy.

⁶¹ See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 347 (1971) (noting the benefits of partial settlements and holding that a settlement with a co-conspirator does not prevent the imposition of liability on another co-conspirator unless this is expressed in the settlement). *Zenith*’s holding was a rationale used by the court in *Burlington* to deny a claim reduction defense. See 690 F.2d at 394 n.9.

⁶² Cannon, *supra* note 13, at 121.

⁶³ *Id.* at 116–22.

Arguments that current claim reduction rules are unfair to antitrust co-defendants necessarily downplay the difficulty of proving an antitrust conspiracy. As the Court pointed out in *Hydrolevel*, private antitrust suits are very difficult to maintain.⁶⁴ Surviving a summary judgment motion often is a hurdle only overcome as a result of information provided by a co-conspirator in exchange for a partial settlement. Claim reduction would reduce the likelihood of partial settlements. As a result, more conspiracies will remain undiscovered, fewer plaintiffs will be compensated, fewer conspirators will be punished, and there will be fewer disincentives to engage in antitrust conspiracies. This is an unacceptable outcome if those devising the antitrust rules desire to root out and deter conspiratorial behavior.⁶⁵

Indeed, the types of value judgments promoted in this section are at the heart of the civil liability provisions of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The Act limits the liability of an antitrust leniency applicant or cooperating individual, but it explicitly maintains joint and several liability for those parties that are not part of the “amnesty program.” This may result in a party being subject to damages that are disproportionate to the party’s economic benefit from the conspiracy. Congress is clearly worried less about this result than about encouraging conspirators to come forward so that antitrust violations can be uncovered and punished. The same value judgment employed by Congress should be reflected in a judicial and legislature rejection of claim reduction.

⁶⁴ *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982). See Brief of Amici Curiae Economists Joseph E. Stiglitz & Peter R. Orszag in Support of Respondents, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724); OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, *supra* note 20, at 27; Gavil, Kovacic, & Baker, *supra* note 20, at 1044.

⁶⁵ Additionally, as the Supreme Court has pointed out, there is no evidence that the drafters of the antitrust laws had fairness to antitrust violators in mind when they wrote the statutes’ damage provisions. *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 635, 639 (1981). On the other hand, it is clear that the laws were written with the express intention of creating damages that did not necessarily match the gains of the conspirators—as is evidenced by the treble damages provisions. With this in mind, it is not surprising that when deciding not to allow for a defense of claim reduction, the Fourth Circuit held that “judicial notions of fairness and equity must yield to the prophylactic policies of the treble-damage remedy.” *Burlington Industries*, 690 F.2d 380 at 393.

V. Conclusion

In theory and in practice, joint and several liability and the current rules against contribution and claim reduction are necessary to provide sufficient incentives for the private pursuit of antitrust violators, to deter antitrust activities, to make sure that victims of a conspiracy are fully compensated, and to punish violations of the antitrust laws. These rules are more important now, when Congressional concern with antitrust violations has led it to increase criminal sanctions for antitrust violations and to statutorily encourage conspirators to come forward, admit their illegal activities, and name their co-conspirators. These interdependent elements of the current antitrust regime should all be maintained.