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I am a partner in the firm of Vinson & Elkins L.L.P. in Houston, Texas. I have tried a number of antitrust cases on behalf of both plaintiffs and defendants to jury verdict and judgment. I have a docket of antitrust cases and consult with clients on antitrust issues.

I am honored to have the opportunity to testify before the Antitrust Modernization Commission (the “Commission”) about the separate, yet related remedy issues of joint and several liability, contribution, and claim reduction.

As the Commission is aware, there has been significant scholarly and Congressional debate over the decades concerning the wisdom and fairness of the antitrust law’s imposition of joint and several liability on all joint tortfeasors and refusal to permit either contribution or claim reduction.¹ That debate illuminates the complexity of these issues and the profound difficulties in predicting with any degree of confidence whether changes to joint and several liability, contribution, or claim reduction will advance “fairness” without impairing the objectives of the antitrust laws.

The role of private litigation is more critical than ever in enforcing the antitrust laws. Our economy has both grown enormously, and markets have internationalized.

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I wish to express my appreciation to my partner, Bruce A. Blefeld, who coauthored these remarks.

¹See, e.g., Frank Easterbrook, William Landes & Richard Posner, CONTRIBUTION AMONG ANTITRUST DEFENDANTS: A LEGAL AND ECONOMIC ANALYSIS, 23 J. Law & Econ. 331 (1980); A. Mitchell Polinsky & Steven Shavell, CONTRIBUTION AND CLAIM REDUCTION AMONG ANTITRUST DEFENDANTS: AN ECONOMIC ANALYSIS, 33 Stan. L. Rev. 447 (1981); Edward Cavanagh, CONTRIBUTION, CLAIM REDUCTION, AND INDIVIDUAL TREBLE DAMAGE RESPONSIBILITY: WHICH PATH TO REFORM OF ANTITRUST REMEDIES?, 40 Vand. L. Rev. 1277, 1296 (1987); ANTITRUST DAMAGE ALLOCATION: HEARINGS BEFORE THE SUBCOMM. ON MONOPOLIES AND COMMERCIAL LAW OF THE HOUSE COMM. ON THE JUDICIARY, 97th Cong., 1st & 2d Sess. (1982).

There has been no concomitant growth in the resources allocated to federal enforcement of the antitrust laws. While the joint activities of state attorneys general have contributed significantly to enforcement resources, the combined governmental resources are plainly inadequate to police the American economy.

At the same time, antitrust litigation has become more expensive and riskier for private plaintiffs. Trial preparation requires electronic discovery, a variety of experts, and costly graphic and demonstrative presentations. Most courts have become rigorous and many quite narrow in their view of the role of the antitrust laws. Little deference is given to jury verdicts by most courts.²

This is not a time to amend the remedial provisions of the antitrust laws in a manner that carries a significant risk of lessening their deterrent effect. At the same time, it cannot be denied that joint and several liability without contribution or claim reduction can result in unfairness in particular cases.

Unhappily, our knowledge of the effects of joint and several liability are almost entirely anecdotal.

Similarly, the costs of proposed remedies are theoretical and largely speculative. What would the effects of claim reduction be on the settlement process? If they impede and delay it, the transactional costs of litigation could be significantly increased, providing another barrier to filing private enforcement actions. For example, would

² See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

concern over settling too cheaply with those subsequently found to be primarily responsible delay settlements until the eve of trial, resulting in a significant increase in litigation expense?

How would one ask a jury to determine comparative responsibility for damages? In a garden-variety price-fixing conspiracy, market shares might be a workable surrogate; but even there, it would not work in bid-rigging cases or geographic submarkets might complicate the issue. Beyond such cases, allocation could become difficult if not arbitrary. Could error in allocation require retrial of the plaintiff's case?

Happily, we may have an opportunity to develop empirical data. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") provides allocation in certain situations. Under the ACPERA, which grants limited protection to participants in a corporate leniency program, civil recoveries are limited to "actual damages . . . attributable to the commerce done by the applicant"³ Application of this standard in a trial might teach something about the cost of applying comparative responsibility concepts in antitrust litigation.

Similarly, the proportionate responsibility scheme of the Private Securities Litigation Reform Act of 1995 ("PSLRA")⁴ may provide learning about the potential transaction costs of such a scheme in the antitrust area.⁵

³ Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666-67 (2004).

⁴ 15 USC §78u-4.

⁵ See *In re World Com Inc. Securities Litigation*, 2005 WL 335201 (S.D.N.Y. Feb. 14, 2005) (Rejecting proposed settlement with independent directors which would vary application of the statutory scheme); M. Steinberg & C. Olive, CONTRIBUTION AND PROPORTIONATE LIABILITY UNDER THE FEDERAL SECURITIES LAWS IN MULTIDEFENDANT SECURITIES LITIGATION AFTER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, 50 SMU L. Rev. 337 (1996).

On balance, while there is real merit to arguments for contribution, claim reduction, and limiting joint and several liability in some circumstances, I do not believe that at present we have sufficient knowledge to take the risk of diminishing deterrence. I will outline the competing arguments.

The Debate Concerning Joint and Several Liability, Contribution, and Claim Reduction

Automatic joint and several liability, coupled with the mandatory trebling of all actual damages, has caused many to argue that the law concerning joint and several liability, contribution, and claim reduction should be modified to ameliorate what some say is the *in terrorem* effect on a single defendant facing potentially crippling liability. Many of those arguments have merit. The countervailing considerations against modifying the law, however, are also persuasive. Summarized below are important issues that should be considered in any debate concerning the modification of joint and several liability, contribution, and claim reduction.

I. Joint and Several Liability

The rule of joint and several liability for antitrust cases was derived from tort law.⁶ The Restatement of Torts calls for application of joint and several liability where “damages . . . cannot be apportioned among two or more causes.”⁷ The comments add that “where two or more causes combine to produce . . . a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing

⁶See *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 646 (1981) (“courts generally have acknowledged that treble-damages actions under the antitrust laws are analogous to common-law actions sounding in tort”); *City of Atlanta v. Chattanooga Foundry & Pipe Works*, 127 F. 23, 26 (6th Cir. 1903) (with regard to a price fixing conspiracy, the court held that “[i]f the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed”), *aff’d*, 203 U.S. 390 (1906).

⁷See Restatement (Second) of Torts § 433A (2005).

about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.”⁸

As a consequence, in private antitrust actions against multiple defendants, a prevailing plaintiff may obtain the entire damage judgment from any one defendant or may arbitrarily apportion the judgment among many defendants.⁹

A. Reasons to Eliminate Joint and Several Liability

Joint and several liability produces the possibility that damages are unfairly allocated among the tortfeasors (i.e. one defendant pays all the damages with no right of contribution against the other defendants). Eliminating joint and several liability may be the simplest way of achieving fairness in the allocation of damages among culpable defendants. Each defendant would be responsible for the damages they caused, but not more. Analogously, under the PSLRA, joint and several liability is eliminated for violations that are not “knowing.”¹⁰ This marked a significant shift from pre-PSLRA law which imposed joint and several liability on all violators regardless of their degree of scienter.¹¹

Moreover, eliminating joint and several liability would not complicate the adjudication of antitrust claims. Unlike contribution, eliminating joint and several liability would not require a “suit within a suit;” there would be no need for defendants to file suit against each other to remedy a perceived misallocation of damages. Instead, a plaintiff could never recover more damages from any single defendant than the damages attributable to that defendant.

⁸*Id.* at cmt. i.

⁹See *City of Atlanta*, 127 F. at 26; Polinsky & Shavell at 447.

¹⁰15 U.S.C. § 78u-4(a)(f)(2)(A).

¹¹See *Employers Ins. of Wausau v. Musik, Peeler & Garrett*, 954 F.2d 575, 578 (9th Cir. 1992), *aff'd*, 508 U.S. 286 (1993).

Additionally, joint and several liability may over-deter companies from engaging in pro-competitive conduct for fear of potentially being sued and held individually liable for all the damages.¹² At the time a firm decides whether to potentially commit an antitrust violation it does not know whether it will have to pay damages for a co-conspirator or whether the co-conspirator will have to pay; thus, the imposition of joint and several liability can be argued to not be unfair.¹³ However, antitrust cases often turn on ambiguous facts, legitimately contested legal principles, and theoretical economics. Particularly in rule of reason cases, the line between winning and losing may be exceedingly fine and yet, no matter how close the case, each defendant is held jointly and severally liable for all damages.¹⁴

Over-deterrence and unpredictability are recurring problems in various antitrust areas subject to the rule of reason, and the risks of litigating close questions are magnified by the mandatory application of joint and several liability.¹⁵ As a result, companies, because of uncertainties about whether, for example, vertical non-price arrangements, exclusive dealing contracts, or joint ventures will pass muster under the rule of reason standard, may choose not to engage in what may ultimately be pro-competitive conduct because of the possibility that the arrangement will be held to violate the antitrust laws.¹⁶ Joint and several liability, therefore, may have the unintended effect of discouraging conduct ultimately beneficial to consumers.

¹²See, e.g., Frank Easterbrook, DETREBLING ANTITRUST DAMAGES, 28 J.L. & Econ. 445, 456-57 (1985).

¹³See Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW, ¶ 330 AT 147 (SUPP. 2005).

¹⁴See 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, 384 (2004) (discussing this issue in the context of the mandatory trebling of damages).

¹⁵See *id.*

¹⁶See *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978) (cautioning in a criminal antitrust case against the dangers of over-deterrence: “Salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who choose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good faith error of judgment.”).

Finally, joint and several liability may encourage the filing of baseless or very questionable antitrust suits. Pleading standards are liberal, making it relatively easy for plaintiffs to formulate nationwide conspiracies broadly asserted against many companies without regard necessarily to whether all defendants are actually involved in the alleged conspiracy. Though meritless claims should be disposed of by the courts through routine motion practice, some courts are occasionally reluctant to grant motions on the pleadings or summary judgment motions in antitrust cases. Innocent defendants may, as a result, feel coerced to settle when facing trial and the risk of being held severally liable for all damages.

B. Reasons to Retain Joint and Several Liability

The primary benefit of making all antitrust conspirators jointly and severally liable is that this—along with mandatory treble damages—provides a very powerful deterrent to potential antitrust violators. As Judge Easterbrook recognized, “[j]oint and several liability is [a] vital instrument for maximizing deterrence.”¹⁷ Absent joint and several liability, conduct proscribed by the antitrust laws may nevertheless be engaged in because it may be profitable under a cost-benefit analysis of any single company’s expected individual liability.¹⁸

Further, absent joint and several liability, plaintiffs will probably have a lesser incentive both to sue and to settle antitrust cases, consequences argued to now exist in securities cases due to the PSLRA’s elimination of joint and several liability except for “knowing” violations.¹⁹ Without joint and several liability, plaintiffs will likely file

¹⁷*Paper Systems, Inc. v. Nippon Paper Indus.*, 281 F.3d 629, 633 (7th Cir. 2002) (citing LEWIS A. KORNHAUSER & RICHARD L. REVESV, *Sharing Damages Among Multiple Tortfeasors*, 98 Yale L.J. 831 (1989)); see also *Texas Industries*, 451 U.S. at 646 (“[J]oint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants.”) (citation omitted).

¹⁸See Cavanagh at 1296.

¹⁹See Douglas M. Branson, *SECURITIES LITIGATION IN STATE COURTS—SOMETHING OLD, SOMETHING NEW, SOMETHING BORROWED . . .*, 76 Wash. U. L.Q. 509, 533 (Summer 1998).

fewer antitrust suits because the cost of litigation to plaintiffs will increase since they will have to incur the cost of securing judgment from every conspirator.²⁰ Plaintiffs will also bear the risk of not being able to recover their full loss because of “judgment proof” defendants.²¹

Similarly, for those cases that are filed, plaintiffs will have less incentive to settle without joint and several liability. A settlement for less than a defendant’s treble damage exposure (a common occurrence) would “throw away” money that could be recovered from the non-settling defendants under joint and several liability.²² Caution should be exercised so that modifications to the antitrust laws do not have the unintended consequence of inhibiting the ability of parties to settle litigation.

II. Contribution and Claim Reduction

A. The Law of Contribution and Claim Reduction

Contribution has a long history in the law.²³ One of the leading, earliest cases to first discuss contribution was the 1799 decision in *Merryweather v. Nixan*.²⁴ There, Lord Kenyan stated that he had “never before heard of such an action having been brought, where the former recovery was for a tort.”²⁵ Similarly, Dean Prosser, in his hornbook on the law of torts, described an early case in which the contribution issue arose. One highwayman had sued another for a share of their ill-gotten plunder. The court dismissed

²⁰See ABA ANTITRUST SECTION, MONOGRAPH NO. 11, CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION at 48 (1986) (“ABA MONOGRAPH”).

²¹*Id.*

²²*Id.* at 49.

²³See generally ABA Monograph at 4-7.

²⁴101 Eng. Rep. 1337 (K.B. 1799).

²⁵*Id.*

the case, fined the plaintiff's solicitors, and had each of the highwaymen hanged. As Dean Prosser summarized: "In short, contribution was not allowed."²⁶

Over time, contribution has become common in many areas of the law. In England, contribution was established by statute in 1935. The United States followed suit when many states and the District of Columbia permitted joint tortfeasors to seek contribution. Likewise, federal courts followed this trend by recognizing claims for contribution in suits involving, for example, securities fraud, admiralty, aviation collisions, and employment discrimination.²⁷

The trend of recognizing contribution did not, however, extend to antitrust. The United States Supreme Court's unanimous holding in *Texas Industries, Inc. v. Radcliff Materials*²⁸ settled—at least as a jurisprudential matter—that there is no right of contribution among defendants in an antitrust case. Chief Justice Burger's opinion illuminated the complicated policy considerations that must be considered when determining whether to permit contribution:

The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit. . . . In declining to provide a right to contribution, we neither reject the validity of those arguments [in favor of contribution] nor adopt the views of those opposing contribution. Rather, we recognize that, regardless

²⁶W. Prosser, LAW OF TORTS, § 50 at 305 n.40 (4th ed. 1971).

²⁷ABA Monograph at 6-7.

²⁸451 U.S. 630 (1981).

of the merits of the conflicting arguments, this is a matter for Congress, not the courts to resolve.²⁹

Because there is no right to contribution in antitrust, claim reduction, a “concomitant of contribution,” is also not permitted.³⁰ Instead, under “traditional principles of compensation . . . a coconspirator is entitled to the defense of payment to the extent of any sum received by the plaintiff in settlement with another coconspirator.”³¹ To reconcile this defense with the treble-damage mandate of the Clayton Act, the “unbroken rule has been that any settlement payments are deducted from the damages award after trebling.”³² Thus, even if a settlement reflected the actual damages attributable to a settling defendant, the non-settling defendants are still liable for the difference between the actual settlement amount and that amount trebled.³³

Congress has from time to time debated legislation that would permit some form of antitrust contribution and claim reduction.³⁴ In each contribution proposal, Congress has considered including virtually identical claim reduction provisions that would carve out from the claims against the non-settling defendants the greater of the amount of the settlement or the treble damages attributable to the settling defendant.³⁵ Contribution and claim reduction legislation however has not been enacted.

²⁹*Id.* at 646-47.

³⁰*The Duplan Corp. v. Milliken, Inc.*, 1981 WL 2116, *12 (D.S.C. June 15, 1981); *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 392 (4th Cir. 1982) (“No court . . . has ever applied the theory of claim reduction in an antitrust treble-damage action.”)

³¹*Burlington*, 690 F.2d at 391.

³²*Id.* at 392 (citations omitted).

³³*Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 347 (1971) (holding that when an antitrust conspirator settles with a plaintiff and obtains a release, the release does not insulate co-conspirators from liability unless the parties to the settlement so intend); *Flinkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir. 1957) (the settlement amount should be deducted only from the trebled damage amount).

³⁴*See* Cavanagh at 1314-15 (discussing proposed legislation).

³⁵*See id.* at 1321-26.

B. The Case for Contribution

1. Fairness

The principal rationale for adopting a rule of contribution is fairness. Proponents of contribution argue that it is unfair for a single defendant to bear the entire liability for damages caused in part by another. As former Assistant Attorney General William Baxter succinctly stated: “The equitable desirability of a [contribution and claim reduction] bill . . . seems to me to be clear.”³⁶

Allowing contribution may enhance the fairness of antitrust litigation because it would prevent some antitrust violators from escaping liability altogether; permit individual defendants to avoid the risk of potentially crushing liability from being held liable for all damages, particularly when liability is predicated on conduct not illegal *per se*; and minimize plaintiffs’ use of “whipsaw” settlement tactics.

(i) All Culpable Defendants Should Pay

Without contribution, some antitrust violators may escape liability if they are not sued or if they negotiate “discounted” settlements with the plaintiff (discussed below). Fairness dictates that each violator pay their proportionate share of the damages.³⁷ Indeed, contribution would remove the unfettered discretion plaintiffs presently enjoy in selecting which defendant to hold jointly and severally liable for all the damages.³⁸ With

³⁶ANTITRUST DAMAGE ALLOCATION: HEARINGS BEFORE THE SUBCOMM. ON MONOPOLIES AND COMMERCIAL LAW OF THE HOUSE COMM. ON THE JUDICIARY, 97th Cong., 1st & 2d Sess., at 56 (1982).

³⁷See ABA Monograph at 13-14.

³⁸See Areeda & Hovenkamp at 146 (“The current rule of no contribution injects some arbitrariness into private enforcement of the antitrust laws. Theoretically, at the plaintiff’s whim one defendant can be held liable for far more than treble the damages it caused. Another equally at fault, goes away free. This has prompted arguments that a no-contribution rule is overdeterrent, because under it a single firm may be liable for very large damages. The

contribution, any defendant held jointly and severally liable could obtain contribution from the other parties responsible for plaintiff's losses thus fairly allocating the responsibility for paying those losses among all responsible tortfeasors.

(ii) Uncertainty in the Law

Conduct subject to the rule of reason standard, by definition, is not plainly unlawful. Rather, this standard requires a detailed evaluation of the economic effects in the relevant product and geographic market to determine whether the pro-competitive benefits of the activity outweigh the anti-competitive harm.

Simply stating this standard illustrates the practical inability of any firm to predict with certainty that its contemplated conduct will not subsequently be found to be illegal. A misjudgment *ex ante* on this complicated and inherently uncertain evaluation subjects a company to the same liability as the most blatant price-fixer. Joint and several liability, combined with the no-contribution rule, may have the effect in those cases of imposing excessive punishment on defendants that acted in a good faith, but mistaken belief that their conduct was permissible under the antitrust laws. Further, the risk of being held jointly and severally liable, with no right of contribution, may chill what is actually pro-competitive, consumer-enhancing conduct. Contribution, by requiring all culpable defendants to pay, may reduce the risk that beneficial conduct will be foregone because of the risk of being held individually liable for all of the plaintiff's damages.³⁹

(iii) "Whipsaw" Settlement Tactics

The threat that a defendant may be held responsible for the losses caused by others without any ability to obtain contribution from the other conspirators is a powerful

answer, of course, is an argument that a no-contribution rule is really underdeterrent because some firms known to be guilty will not pay anything.") (citation omitted).

³⁹See *Texas Industries*, 451 U.S. at 637 (recognizing the "possibility that severe antitrust penalties will chill wholly legitimate business agreements") (citation omitted); Easterbrook, Landes & Posner at 368 ("[A] rule of no contribution—that increases the antitrust penalties will deter lawful 'gray area' conduct as well as unlawful conduct creating social costs difficult to estimate but impossible to ignore.")

weapon for plaintiffs to use in settlement negotiations. “Whipsaw” settlement tactics result in progressively escalating settlement demands made on non-settling defendants, who, as co-defendants settle, face an ever-increasing risk of having to pay all the damages. Early settlements are often relatively cheap; plaintiffs receive needed cash to finance their litigation and gain leverage to exert more pressure on the remaining defendants to settle at ever-increasing prices.⁴⁰ By the end of the process, the remaining defendants face potential liabilities so large that they cannot afford to take the risk of going to trial and losing. With joint and several liability and no contribution, the amount of settlement paid by any defendant may correlate more closely to when it settled rather than to its relative degree of culpability.⁴¹

2. Deterrence

Deterrence may be strengthened if contribution is permitted because all violators will be required to pay a share of the damages. Presently, the possibility of avoiding liability entirely, or agreeing to an early, relatively cheap settlement, may skew the cost-benefit analysis such that it may be financially profitable to break the law.⁴²

Moreover, a “right to contribution may increase the incentive of a single defendant to provide evidence against co-conspirators so as to avoid bearing the full weight of the judgment.”⁴³ Doing so may deter the formation of antitrust conspiracies.

⁴⁰ABA Monograph at 15. This same phenomenon occurred in securities cases prior to the PSLRA’s elimination of joint and several liability in many cases. See Douglas M. Branson, RUNNING THE GAUNTLET: A DESCRIPTION OF THE ARDUOUS, AND NOW OFTEN FATAL, JOURNEY FOR PLAINTIFFS IN FEDERAL SECURITIES LAW ACTIONS, 65 U. Cin. L. Rev. 3, 38 (Fall 1996) (Prior to the PSLRA, plaintiff’s counsel would negotiate a “sweetheart settlement” with one of the less culpable defendants. “Banking that settlement, the plaintiff would fatten his ‘war chest’ for a more dogged pursuit of the remaining defendants.”)

⁴¹ABA Monograph at 15; Cavanagh at 1288-90.

⁴²See Cavanagh at 1293.

⁴³*Texas Industries*, 451 U.S. at 636.

Additionally, the most effective deterrents to violations of the antitrust laws may be the threat of criminal liability and, to a lesser extent, treble damages. Recognizing claims for contribution will not undercut those twin pillars of deterrence.

3. Judgment Sharing Agreements Cannot Substitute For Contribution

Judgment sharing agreements have been used among defendants in large antitrust cases due to the risk of joint and several liability for treble damages with no right of contribution. Sharing agreements attempt to apportion potential liability among joint defendants prior to trial. As a result, a sharing agreement essentially provides defendants with a right of contribution by contract.⁴⁴

The amount of each defendant's liability under the agreement is often based on either (i) a per capita formula—dividing liability equally among defendants; (ii) by relative culpability; or (iii) by market share—allocating liability by size, therefore, rather than culpability. Settling parties are only relieved of liability if the plaintiff agrees to reduce the total recovery by the amount of damages attributed to the settling defendant. By carving-out the settling defendant's share, a plaintiff is prevented from double recovery of damages attributable to the settling company. If a settling defendant, however, does not obtain a “carve-out” agreement with the plaintiff, it remains obligated to the non-settling defendants for the share of any ultimate damages attributable to its market share.⁴⁵

While sharing agreements have their utility, they should not be viewed as a substitute for contribution (or claim reduction). As a practical matter, sharing agreements are very difficult and time-consuming to negotiate. When all defendants profess innocence, no one may be willing to sign an agreement. Moreover, negotiations over a sharing agreement are difficult because inevitably some defendants perceive their rights

⁴⁴See *In re Brand Name Drug Litig.*, 1995-2 Trade Cases (CCH) ¶ 71,089 (N.D. Ill.).

⁴⁵See Mary B. Cranston & Susan Whitecotton, *JUDGMENT SHARING AGREEMENTS* (2002).

are prejudiced to a greater degree than their co-defendants and thus will refuse to enter the sharing agreement. As a consequence, sharing agreements are most readily negotiated among horizontal competitors, similarly situated, and that are being sued under the same substantive antitrust provisions. That significantly limits the utility of sharing agreements.⁴⁶

Further, for an agreement to be effective, it must be negotiated and executed early in the case before any defendant settles with the plaintiff. But, early in litigation, it is often difficult to estimate a fair allocation of liability among defendants, and a defendant's greater degree of culpability may not become evident until after substantial discovery.

Therefore, although sharing agreements can be a useful tool for defendants to ameliorate the risk of joint and several liability without contribution, they cannot take the place of contribution or claim reduction in many cases.⁴⁷

C. The Case Against Contribution

1. Fairness

Opponents of contribution argue that antitrust litigation will not be made more fair by permitting contribution. The opposite, in fact, would occur.

Contribution-opponents contend that “fairness” to felons like price-fixers is not something to be concerned about. Those who purposefully and secretly conspire to fix prices and reduce output are not entitled to leniency. Just as the criminal laws most harshly mete out punishment for the worst acts, felons who choose to violate the antitrust laws by engaging in conduct without any redeeming pro-competitive virtues should not be allowed to share their financial responsibility for the losses they caused with their other conspirators. (These points would not apply in a rule of reason case.)

⁴⁶*See id.*; Cavanagh at 1326-27.

⁴⁷*See id.*

Moreover, pro-contribution arguments rely on the perceived lack of fairness that results when one guilty party pays for the offenses of another guilty party. However, “if consumer welfare and efficiency are the principal goals of antitrust . . . the current rule of no right of contribution among antitrust defendants may be a good one, for it achieves the same total level of deterrence and reduces litigation costs.”⁴⁸ Indeed, any “unfairness” implicit in the no-contribution rule can be avoided simply by conforming conduct to the antitrust laws.

Furthermore, the argument that no-contribution is unfair is based on hindsight, after the illegal conduct has been discovered and one or more defendants is held liable for arguably more than their proportionate share of the damages. Prior to the time any wrongdoing is committed, however, the antitrust laws affect all actors equally because each actor must consider the possibility that they will be held responsible for all losses caused by violations of the antitrust laws.⁴⁹

Finally, a no-contribution rule is fair because the success of any conspiracy depends on the participation of all its members. Had any one member of the conspiracy refused to participate, the conspiracy may have been unsuccessful or at the least detected earlier by enforcement authorities or the plaintiff’s bar. In effect, responsibility for the losses caused by a conspiracy is indivisible; therefore, the concept of contribution is inapplicable.

2. Deterrence

Recognizing contribution—and allowing violators to be responsible for only a portion of the treble damage judgment—undermines deterrence because companies may

⁴⁸See Areeda & Hovenkamp at 148.

⁴⁹See *id.* at 147; Easterbrook, Landes & Posner at 342 (“In discussing equal treatment, it is important to distinguish *ex ante* from *ex post*. A person who buys a lottery ticket and loses the lottery is unequally treated *ex post* in comparison to the winner; but *ex ante*—that is, when he bought the ticket—there was no inequality. The *ex ante* perspective is the correct one in the antitrust-damages as well as the lottery case.”)

feel less constrained by the antitrust laws.⁵⁰ Moreover, though there is a theoretical possibility that joint and several liability combined with no-contribution over-deters legitimate, pro-competitive conduct, there are few, if any, real-world examples of situations where lawful activity was not pursued because of the potential risk of antitrust liability.

3. Contribution Would Increase the Costs and Complexity of Litigation

The one certainty in the debate over whether to recognize contribution is that contribution will complicate what is already complicated and protracted litigation. Contribution will result in new claims, parties, and issues being added. Defendants will have the incentive to spread potential losses as widely as possible by asserting contribution claims against as many potential “co-conspirators” as possible. A defendant will want to maximize the number of persons, including ones not sued by the plaintiff, so that the jury may assign at least some percentage points of responsibility to as many people as possible in order to decrease the liability of that defendant.⁵¹ As a result, cases will be even more difficult for courts to administer, and more expensive for parties to litigate.

Further, and quite significantly, the methodology for determining the amount of contribution to be paid by any defendant is problematic. As Chief Justice Burger noted, damages might be “allocated according to market shares, relative profits, sales to the particular plaintiff, [each defendant’s] role in the organization and operation of the conspiracy or simply pro rata . . . on the theory that each one is equally liable for the injury caused by the collective action.”⁵² There does not appear to be any contribution

⁵⁰See Easterbrook, Landes & Posner at 352 (“[U]nder no contribution, the firm faces some probability of having to pay the entire damages of the cartel. This possibility makes no contribution a riskier regime than contribution and therefore less attractive to the risk averse firm.”)

⁵¹See Cavanagh at 1298-99.

⁵²*Texas Industries*, 451 U.S. at 637.

method applicable to all antitrust cases.⁵³ Meaningful standards for calculating contribution must be provided to courts and juries; otherwise, uncertainty over the applicable contribution method would invite litigation. Moreover, the three most likely ways of determining a defendant's contribution share, by (i) allocation of sales (or purchases); (ii) relative responsibility; or (iii) per capita,⁵⁴ each suffer from lack of fairness, administrative problems, or both.

Contribution based on a defendant's sales or purchases would be relatively easy to determine because that data will have already been produced in connection with the defense of plaintiff's claims. However, this methodology would not work in cases where sales or purchases cannot be used as a surrogate for determining a defendant's contribution to plaintiff's losses. For example, in bid rigging cases, this contribution formula would impose liability only on the bidder that actually made the sales. The other bid riggers—because they did not make any sales—would escape liability for contribution.⁵⁵

Similarly, although contribution based on the relative responsibility among the defendants sounds appealing in terms of equitable justice, it would be very difficult to practically apply. What does “responsibility” mean? It could mean, for example, responsibility for originating the idea of the conspiracy; responsibility for the effectiveness of the conspiracy; responsibility for the losses caused to the plaintiff; or some combination of these or other factors. For the standard to work, the court and jury must have articulable standards for how to determine a defendant's contribution share.

⁵³See, e.g., Prepared Statement of William F. Baxter, ANTITRUST DAMAGE ALLOCATION: HEARINGS BEFORE THE SUBCOMM. ON MONOPOLIES AND COMMERCIAL LAW OF THE HOUSE COMM. ON THE JUDICIARY, 97th Cong., 1st & 2d Sess., at 61-62 (1982) (discussing various methods for determining contribution and noting that there may be no “best” method of calculating contribution shares that is applicable to all antitrust cases).

⁵⁴See ABA Monograph at 41.

⁵⁵*Id.* at 41-42.

By analogy, the PSLRA permits contribution based on a proportionate liability construct. Little guidance, however, is provided to the fact-finder other than to say that it should consider the nature of the conduct constituting the violation and the nature and extent of the causal relationship between the violation and the damages.⁵⁶ As commentators have noted, the “process of allocation is arbitrary.”⁵⁷ That experience in securities cases may be particularly relevant to antitrust because both fields of law generally involve multi-party litigation centering on complex financial and economic concepts.

Additionally, adopting a relative responsibility contribution standard would require a “suit within a suit.” Defendants would fight among themselves as to their relative responsibility for plaintiff’s losses while at the same time trying to defend against plaintiff’s claims. This, of course, undermines the ability of defendants to jointly defend against plaintiff’s claims. While defendants’ contribution claims could be severed from the trial of plaintiff’s claims so that defendants could jointly defend against liability to the plaintiff, severance would delay the final resolution of all claims in the case and would multiply the number of suits that courts must handle.

Finally, the per capita model for determining contribution shares would simply count the number of defendants and divide the damages accordingly. While easy to administer, this system lacks any inherent fairness because not all co-conspirators will share the blame equally or have reaped equal benefits from the antitrust violations.⁵⁸

⁵⁶15 U.S.C. § 78u-4(g)(3)(C).

⁵⁷Donald C. Langevoort, THE REFORM OF JOINT AND SEVERAL LIABILITY UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995: PROPORTIONATE LIABILITY, CONTRIBUTION RIGHTS AND SETTLEMENT EFFECTS, 51 Bus. Law. 1157, 1167 (August 1996).

⁵⁸See ABA Monograph at 43-44.

Accordingly, the absence of any single method for determining contribution in a fair manner without unreasonably complicating litigation is a significant impediment to the recognition of antitrust contribution claims.

4. Contribution Will Reduce Settlement Incentives

A contribution rule would remove some of the incentives to settle. “A rule of no contribution creates competition among defendants to settle rather than litigate. Each defendant dreads being the last to settle, because every time one defendant settles the expected liability of the remaining increases.”⁵⁹

Early “discount” settlements would moreover become less frequent because plaintiffs would be unable to determine what is sacrificed by settling. Most contribution proposals include ‘carve out’ provisions that would remove the settling defendant’s sales from the case; thus, plaintiff could not recover damages attributable to those sales.⁶⁰ Plaintiffs will not be willing to settle, therefore, until sufficient discovery has been obtained so that they have the ability to rationally evaluate the impact of the settlement on their ultimate recovery, which necessarily means that settlement cannot occur until the later stages of the litigation.⁶¹ Additionally, contribution may reduce a defendant’s incentive to settle because a defendant may be able to calculate its share of liability more easily.⁶²

Reducing the parties’ incentive to settle is a significant disadvantage to contribution. As the Supreme Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, rules facilitating partial settlements were “most consistent with the aims and purposes of the treble damage remedy under the antitrust laws.”⁶³

⁵⁹See Easterbrook, Landes & Posner at 365.

⁶⁰See Cavanagh at 1298; see *infra* at section D.

⁶¹ABA Monograph at 38.

⁶²Cavanagh at 1298.

⁶³401 U.S. 321, 346 (1971).

D. Claim Reduction

Under a rule of “claim reduction,” the litigating defendant’s liability is reduced by the share of damages attributable to the settling defendants even if the actual settlement is less than the damages attributable to the settling party.⁶⁴ The non-settling defendants would be unable to obtain contribution from the settling defendants because they would not pay more than their share of the liability.”⁶⁵ Because the no-claim reduction rule may result in defendants being held liable for more than their proportionate share of the plaintiff’s damages, there has been debate over whether to permit some form of claim reduction in antitrust cases. The PSLRA, for example, permits claim reduction. There, “the amount of recovery to the plaintiff will be reduced by the greater of the settlement amount or the amount representing the proportionate responsibility of the settling person.”⁶⁶

The principal advantage of permitting claim reduction in antitrust cases would be that the non-settling defendants could not be held liable, as they presently can, for more than their proportionate share of liability. With claim reduction, if a settlement is less than the defendant’s actual share of liability, a plaintiff’s claim would be reduced by the larger amount. The combination of claim reduction and contribution would assure that a non-settling defendant is exposed only to its fair share of damages.

However, there are significant disadvantages to permitting claim reduction. Plaintiffs would have less incentive to settle early in litigation because they would have to determine how much of their claim they will lose as a result of the settlement. That can only be determined after sufficient discovery has occurred.⁶⁷ Indeed, it is predicted

⁶⁴See Polinsky & Shavell at 448.

⁶⁵Lewis A. Kornhauser & Richard L. Revesv, SETTLEMENTS UNDER JOINT AND SEVERAL LIABILITY, 68 N.Y.U. L. Rev. 427, 445 (1993).

⁶⁶See Langevoort at 1173; 15 U.S.C. § 78u-4(g)(7)(B).

⁶⁷See ABA Monograph at 37-38.

that the PSLRA's limitation of liability to a defendant's proportionate amount of damages "will . . . cause some . . . litigation . . . to be stillborn. With reduced prospects of settlements before trial, law firms will hesitate to bring suit. Once suit is brought, the dry spell will be longer—from the filing of the complaint to the courthouse steps, the possibility of settling cases along the way is vastly reduced."⁶⁸

Moreover, with claim reduction, plaintiffs would bear the risk of settling too cheaply (i.e. for less than the settling defendant's actual liability) because their ultimate recovery will be reduced by the greater of the settlement or the settling party's trebled liability. On the other hand, over-payment in a settlement inures to the benefit of all of the non-settling defendants because their liability will be reduced by more than the settling party's proportionate share of the loss.⁶⁹

Finally, like contribution, claim reduction may weaken the deterrent effect of the antitrust laws and would complicate litigation. Deterrence may be weakened because defendants' liability may be more certain; therefore, defendants may be able to more accurately weigh the costs and benefits of their wrongdoing. Moreover, claim reduction would make litigation more expensive and protracted because the parties would be required to litigate the damages attributable to the settling defendant in order to determine the amount by which the plaintiff's claim will be reduced against the remaining defendants.

Conclusion

While there are appealing arguments on both sides, given the vital role of private litigation in deterrence and the significant risk that its role would be diminished, I do not believe that the antitrust remedies scheme should be amended at this time.

⁶⁸Branson, *RUNNING THE GAUNTLET* at 38.

⁶⁹*See* Langevoort at 1173.