



MEMORANDUM

From: AMC Staff[†]

To: All Commissioners

Date: May 4, 2006

Re: Civil Remedies-Damages and Liability Discussion Memorandum

Table of Contents

I.	Background	
A.	Treble Damages.....	3
B.	Prejudgment Interest.....	5
C.	Attorneys' Fees.....	6
D.	Joint and Several Liability	7
II.	Discussion of Issues	
A.	Treble Damages.....	10
1.	Appropriateness of treble damages.....	10
a.	Deterrence	12
b.	Compensation	14
c.	Disgorgement	16
d.	Punishment.....	16
2.	Procedural Changes.....	16
a.	Retain for hard-core conduct.....	17
b.	Limit depending on nature of violation	17
	• <i>Per se</i> vs. rule of reason	17
	• Knowledge.....	19
	• Overt vs. covert.....	19
	• Criminal Conduct.....	20
	• Follow-on actions.....	20
c.	Procedural Limits	21
	• Judicial discretion	21

[†] This memorandum is a brief summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

	• Clear and convincing evidence.....	22
	• De-coupling.....	23
	• Limit to buyers and sellers.....	24
B.	Prejudgment Interest.....	25
C.	Attorneys' Fees.....	26
D.	Joint and Several Liability, Contribution, and Claim Reduction.....	27
	1. Joint and several liability.....	27
	2. Contribution.....	29
	a. Fairness.....	29
	b. Settlement.....	30
	c. Deterrence and enforcement.....	32
	d. Judicial efficiency.....	33
	3. Claim reduction.....	34
	4. Judgment sharing agreements.....	35

On January 13, 2005, the Antitrust Modernization Commission (“AMC”) agreed to study several interrelated issues regarding the “remedies and legal liabilities available in private antitrust proceedings.”¹ On May 19, 2005, the AMC requested public comments on the following questions.

A. *Treble Damages*

1. Are treble damage awards appropriate in civil antitrust cases? Please support your response, addressing issues such as inducements to private enforcement, evidence indicating that treble damage awards have led to either over-deterrence or under-deterrence, the probability of antitrust violations being detected, and how “optimal” deterrence levels can best be determined.
2. Should other procedural changes be considered to address issues relating to treble damage awards, such as providing courts with discretion in awarding treble (or higher) damages, limiting the availability of treble damages to certain types of offenses (*e.g.*, *per se* unlawful price fixing versus conduct subject to rule of reason analysis), or imposing a heightened burden of proof?

B. *Prejudgment Interest*

1. Should successful antitrust plaintiffs be awarded pre-complaint interest, cost of capital, or opportunity cost damages?
2. Are the factors used to determine when prejudgment interest is available set forth in 15 U.S.C. § 15(a)(1)-(3) appropriate? If not, how should they be changed?

C. *Attorneys’ Fees*

1. Should courts award attorneys’ fees to successful antitrust plaintiffs?
2. Are there circumstances in which a prevailing defendant should be awarded attorneys’ fees?
3. In areas of law other than antitrust, how effective is fee shifting as a tool to promote private enforcement?

D. *Joint and Several Liability, Contribution, and Claim Reduction*

1. Should Congress and/or the courts change the current antitrust rules regarding joint and several liability, contribution, and claim reduction?

¹ See Jan. 13, 2005, Meeting Trans. at 89-90, 105; Remedies Study Plan, at 1-2 (May 4, 2005).

2. Is the evolution of rules regarding joint and several liability, contribution, and claim reduction in other areas of the law instructive in the context of antitrust law?²

The Commission held hearings on these issues on July 28, 2005. The first panel, which addressed treble damages, attorneys' fees, and prejudgment interest, included: David Boies, chairman of Boies, Schiller & Flexner; Edward Cavanagh, Professor, St. John's University School of Law; Robert H. Lande, Professor, University of Baltimore School of Law; Abbott ("Tad") Lipsky, partner at Latham & Watkins (formerly Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice); and Stephen D. Susman, partner at Susman Godfrey.

The second panel, which addressed joint and several liability, contribution, and claim reduction, included: Lloyd Constantine, chairman of Constantine Cannon (formerly Assistant Attorney General in Charge of Antitrust Enforcement for the State of New York); the Honorable Frank H. Easterbrook, United States Court of Appeals for the Seventh Circuit; Michael D. Hausfeld, partner at Cohen, Milstein, Hausfeld & Toll; Don T. Hibner, Jr., retired member of Sheppard, Mullin, Richter & Hampton; and Harry M. Reasoner, partner at Vinson & Elkins.³

The Commission also received comments from 16 members of the public, including: the Honorable Donald A. Manzullo, Chairman, Committee on Small Business, U.S. House of Representatives; the Antitrust Section of the American Bar Association ("ABA"); the American Antitrust Institute; the Business Roundtable; and the U.S. Chamber of Commerce.

² 70 Fed. Reg. 28,902, 28,903-04 (May 19, 2005). Two additional questions, relating to the availability of injunctive relief for states and private parties, are addressed in the discussion memorandum for state enforcement institutions.

³ Unless otherwise noted, all citations to "Trans." are to the July 28, 2005 Civil Remedies Issues hearing.

I. Background

This memorandum provides brief background on each of the issues adopted by the Commission for study and summarizes the comments and testimony received by it. All six issues are part of an integrated treatment of antitrust civil remedies that is intended to satisfy several sometimes conflicting policy objectives, including, *inter alia*: (1) optimal deterrence of unreasonably anticompetitive conduct; (2) fair compensation to victims for their losses; and (3) an efficient system that is simple to understand and inexpensive to administer. In addition, these private antitrust remedies are part of a larger system of enforcement that includes criminal remedies and federal and state government civil remedies, as well as remedies (criminal and civil) that may be available outside the United States with respect to the same defendants and conduct.

A. Treble Damages

Section 4 of the Clayton Act allows “any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws” to “recover threefold the damages by him sustained.”⁴ This statute replaced an earlier version of the same treble damages provision included in the Sherman Act passed in 1890.⁵ The debate then centered on whether to impose double or treble damages; it appears that the imposition of single damages was not seriously considered.⁶ Senators “viewed multiple damages as primarily compensatory, . . . [and] in part for punitive purposes.”⁷

⁴ 15 U.S.C. § 15(a).

⁵ Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 778 (1987) (“Cavanagh, *Detrebling*”) (citing Section 7 of the Sherman Act as originally enacted).

⁶ Cavanagh, *Detrebling*, at 782.

⁷ *Id.*

There subsequently have been numerous calls and efforts to eliminate or limit the availability of treble damages, as well as some proposals to increase the multiplier above three.⁸

Awarding treble damages has four regularly identified and interrelated general goals:

- To deter anticompetitive conduct (taking into consideration both the benefits to defendants of engaging in such conduct and the likelihood that it will be detected and successfully challenged);
- To disgorge the benefits of anticompetitive conduct;
- To punish violators of the antitrust laws; and
- To provide full compensation to victims of anticompetitive conduct (including an incentive to act as “private attorneys general”).⁹

There are limited instances in which treble damages are not available. First, there are some statutory immunities from treble damages. For example, the National Cooperative Research and Production Act (“NCRPA”) limits the liability of certain joint research and development ventures and standards development organizations notified under the Act to single damages (plus interest and reasonable attorneys’ fees).¹⁰ Second, organizations that are accepted

⁸ See, e.g., Written Testimony of David Boies Before the Antitrust Modernization Commission: The Continuing Need for Treble Damages, at 2-4 (July 28, 2005) (“Boies Statement”) (recounting statutory proposals in early 20th century to revert to single damages, through calls in mid-20th century to make treble damages discretionary, to legislative efforts in 1980s to limit treble damages to *per se* violations).

⁹ See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 470 (1982); Boies Statement, at 6-7; Cavanagh, *Detrebling*, at 783-88 (“Trebling provides a powerful incentive to investigate, detect, and prosecute antitrust violations.”); Written Testimony of Stephen D. Susman Regarding Treble Damages, Attorneys’ Fees, and Prejudgment Interest, at 5 (July 28, 2005) (“Susman Statement”); Abbott (“Tad”) Lipsky, Private Damage Remedies: Treble Damages, Fee Shifting, Prejudgment Interest, at 3 (July 28, 2005) (“Lipsky Statement”) (including “punishment for reprehensible conduct,” and a “patch-kit” rationale intended to help compensate for the length and expense of litigation).

¹⁰ See 15 U.S.C. § 4303(a). The Export Trading Company Act similarly limits a plaintiff to recovering only actual damages for injuries resulting from conduct engaged in pursuant to a certificate of review granted under the Act. See 15 U.S.C. § 4016(b)(1).

into the Department of Justice’s corporate leniency program are eligible to have the liability arising from their cartel conduct limited to single damages.¹¹

B. Prejudgment Interest

Prior to 1980, prejudgment interest was not available for antitrust claims. In 1980, Congress amended Section 4 of the Clayton Act to permit courts to award prejudgment interest when it is “just in the circumstances.”¹² The statute directs a court to consider the following criteria in determining whether prejudgment interest is just:

- A party filed motions or asserted claims “so lacking in merit” that they could only have been intended for delay, or “otherwise acted in bad faith;”
- A party violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior; and
- A party engaged in conduct primarily intended to delay litigation or raise its cost.¹³

In the 26 years since the amendment, “there is no reported decision awarding prejudgment interest in an antitrust case.”¹⁴

The current provision for prejudgment interest arose from a recommendation by the National Commission for the Review of Antitrust Laws and Procedures to provide prejudgment interest from the time of filing the complaint.¹⁵ The Shenefield Report expressed concern in particular over “dilatory and abusive conduct” in antitrust litigation. It proposed various

¹¹ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666 (2004) (“ACPERA”).

¹² 15 U.S.C. § 15(a); ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed. 2002), at 882-83 (“Antitrust Law Developments”) (explaining that post-judgment interest is mandatory in antitrust cases “as it is in all civil actions”).

¹³ See 15 U.S.C. § 15(a).

¹⁴ *Antitrust Law Developments*, at 882.

¹⁵ National Commission for the Review of Antitrust Laws and Procedures, *Report to the President and Attorney General 82, 89-91* (1979) (“Shenefield Report”).

remedies, including the award of prejudgment interest on actual (rather than trebled) damages.¹⁶

In response to that Report, Congress adopted the current language in 15 U.S.C. § 15(a), permitting the award of prejudgment interest in specified circumstances.¹⁷

Some courts have permitted damages to be adjusted for inflation pursuant to the consumer price index (CPI) or to be adjusted to present value.¹⁸

C. Attorneys' Fees

Section 4 of the Clayton Act permits successful plaintiffs to recover reasonable attorneys' fees and costs.¹⁹ A predecessor version of this provision was included in the Sherman Act in 1890, and it has been imitated in numerous other federal statutes.²⁰ An award of attorneys' fees is mandatory. A plaintiff is considered to be "successful" for this purpose whenever any damages are awarded.²¹ In addition, a plaintiff seeking injunctive relief under Section 16 of the Clayton Act may, if it "substantially prevails," recover attorneys' fees and costs.²² The purpose of awarding attorneys' fees to successful, or prevailing, plaintiffs is to help ensure that plaintiffs

¹⁶ *Id.*

¹⁷ See Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 4, 94 Stat. 1154 (1980); H.R. Rep. No. 96-1234, 96th Cong., 2nd Sess., at 9 (1980) (Conf. Rep.) (explaining that the amendments permitting the award of prejudgment interest in certain cases responded to concerns expressed by the Shenefield Commission regarding harassing and dilatory conduct in litigation and the desirability of permitting the award of prejudgment interest).

¹⁸ See *Law v. NCAA*, 185 F.R.D. 324, 347-48 (D. Kan. 1999) (adjustment based on CPI may be done without meeting requirements of prejudgment interest statute); *Concord Boat Corp. v. Brunswick Corp.*, 21 F. Supp. 2d 923 (E.D. Ark., 1998) (adjustment for present value), *rev'd on other grounds*, 207 F.3d 1039 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000).

¹⁹ 15 U.S.C. § 15(a).

²⁰ See Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51, 52 (1988) ("Cavanagh, *Attorneys' Fees*").

²¹ See, e.g., *United States Football League v. National Football League*, 887 F.2d 408, 411-13 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). In some circuits, fees may be available to a victorious plaintiff even if no damages are awarded. See Antitrust Law Developments, at 1012 & n.1065 (citing *Scambria v. Graham News*, 892 F.2d 411, 415-417 (5th Cir. 1990)).

²² 15 U.S.C. § 26.

with meritorious claims will have access to counsel to redress antitrust violations.²³ The provision thus works together with the award of treble damages to provide an incentive to bring private antitrust lawsuits.

Under current law, a successful defendant is not entitled to recover attorneys' fees.²⁴

D. Joint and Several Liability, Contribution, and Claim Reduction

Under the antitrust laws, liability is joint and several for all defendants, with no right of contribution among defendants.²⁵ Thus, a plaintiff can sue a single member of an alleged price-fixing conspiracy and obtain treble the damages resulting from the entire conspiracy from that defendant. The defendant cannot seek contribution from any other co-conspirator, however. In addition, if one or more defendants settle an antitrust claim, under the rule governing claim reduction, the amounts of any settlements are deducted from the final trebled damage award, rather than from actual damages determined before trebling. Under these combined rules, if an alleged co-conspirator settles for less than the full amount of damages fairly attributable to it, non-settling defendants remain liable for more than their "fair" share of damages.²⁶ A number of

²³ Cavanagh, *Attorneys' Fees*, at 57-58. Unsuccessful plaintiffs are not entitled to recover fees. Awarding fees to successful plaintiffs, but withholding them from unsuccessful plaintiffs, encourages plaintiffs and their counsel to assess the merits of a claim before filing suit and may thus help to limit the filing of frivolous claims.

²⁴ See *Antitrust Law Developments*, at 1013.

²⁵ See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); see also *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957) (referring to joint and several liability as both "firmly rooted" and a "wellsettled principle[]" in the context of antitrust damages).

²⁶ Assume for example, that total overcharges resulting from a conspiracy are found to be \$20 million pre-trebling. There are four defendants, each of which, based on its respective sales, is responsible for \$5 million in overcharges. If one defendant settles for \$1 million, the court will subtract that amount from the final award of \$60 million (\$20 million trebled). Each non-settling defendant will remain liable for \$59 million. The settling defendant thus will have shifted \$14 million in partial liability to the remaining defendants—\$5 million trebled, less \$1 million. Under a claim reduction rule allowing the deduction of settlement payments from actual

courts, however, have upheld judgment-sharing agreements among defendants made in order to ameliorate the affect of the rules against contribution and claim reduction.²⁷

The effect of current rules concerning joint and several liability, contribution, and claim reduction in antitrust cases is to maximize both the potential cost to any person of entering an illegal conspiracy and the incentive that person has to settle once it has been sued. The rules accordingly can maximize deterrence, encourage the efficient resolution of antitrust claims, and avoid complicated and costly proceedings to allocate damages. However, they can also over-deter conduct that may not be anticompetitive by exposing individual defendants to the potential of damage liability far in excess of the benefits they derived from their conduct, create undue pressure on defendants to settle antitrust claims of questionable merit, and result in less culpable (or innocent) defendants paying an unfairly large share of total damages while more culpable defendants escape significant (or any) liability. Unfortunately, the goals of deterrence, fairness, and the efficient resolution of disputes often conflict and can be difficult in practice to reconcile.²⁸

The policy questions raised by these rules have been debated extensively over the past two decades, particularly in the immediate wake of *Texas Industries*, which put the contribution

damages before trebling, however, the non-settling defendants would remain liable for \$57 million, and the settling defendant would have effectively shifted liability in the amount of \$12 million. See Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L. Rev. 1277, 1289 n.68 (1987) (“Cavanagh, *Contribution*”).

²⁷ See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995-2 Trade Cas. (CCH) ¶ 71,089 (N.D. Ill. 1995) (enforcing a private contribution agreement among defendants in order to avoid the disproportionate affects arising in the absence of contribution).

²⁸ See Cavanagh, *Contribution*, at 1314-15.

issue squarely in Congress' lap.²⁹ Up to now, however, Congress has declined to legislate in the area.³⁰ As described by Cavanagh, legislative efforts to add a right of contribution and claim reduction failed under the weight of lobbying by parties with a stake in significant pending antitrust cases to include or exclude their cases from coverage by the legislation.³¹ In addition, because many of the proposals considered by Congress would have applied only to hard-core price-fixing, opponents succeeded in labeling those proposals as "price-fixer relief" acts.³²

Congress implicitly approved the general rule of joint and several liability in antitrust cases when it passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") in June 2004.³³ Section 214 of the Act provides that nothing in the Act "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 . . ."³⁴

²⁹ See 451 U.S. at 646 (noting that the "far-reaching" nature of the policy questions presented by the defendant's claim for contribution were "a matter for Congress, not the courts, to resolve"). The Court explained:

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 of contribution should take, cannot be resolved without going beyond the record of a single lawsuit.

Id. at 646-47.

³⁰ See, e.g., Antitrust Remedies Improvement Act of 1987, H.R. 1155, 100th Cong. (1987); H.R. 5794, 97th Cong., (1982); S. 1468, 96th Cong. (1979); see also Cavanagh, *Detrebling*, at 1314-15 nn.207-15 (describing legislative proposals).

³¹ Cavanagh, *Detrebling*, at 1315 nn.210-13.

³² *Id.* at 1316 n.218.

³³ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004) ("ACPERA").

³⁴ *Id.* § 214.

II. Discussion of Issues

A. Treble Damages

1. *Are treble damage awards appropriate in civil antitrust cases?*

While some witnesses and commentators have argued that the current regime is “just right,” others contend that it is either “too hot” or “too cold,” at least in some circumstances.³⁵ Several witnesses and commenters called for no change to the current rule of automatic trebling.³⁶ Others recommended limiting the availability of treble damages to certain types of cases (*e.g.*, claims against conduct regarded as *per se* unlawful) or in certain circumstances (*e.g.*, at the discretion of the court).³⁷ One commenter called for eliminating the treble-damages remedy altogether.³⁸ One witness and several commenters recommended increasing the multiplier.³⁹

³⁵ Still others note the difficulty of judging the “correct” multiplier. Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 450 (1980) (Easterbrook, *Detrebling*”).

³⁶ *See, e.g.*, Comments of Thirty Antitrust Practitioners (and Their Firms) Responding to the Antitrust Modernization Commission’s May 19, 2005 Questions re Antitrust Remedies (June 17, 2005) (“Thirty Antitrust Practitioners Comments”); Comments of the American Antitrust Institute Working Group on Remedies (June 17, 2005) (“AAI Comments”); Letter from the Honorable Donald A. Manzullo Chairman, Committee on Small Business, U.S. House of Representatives RE: Remedies (June 17, 2005); Boies statement.

³⁷ *See, e.g.*, Comments of U.S. Chamber of Commerce, at 17; Comments of Business Roundtable, at 3-4; Lipsky Statement, at 14; Cavanagh Statement, at 9-10.

³⁸ Prof. Robert H. Bork responded to the Commission’s initial request for comment as to what issues to study with a suggestion that the Commission study the system of private antitrust remedies, and proposed eliminating treble damages. *See* Robert H. Bork, Comments on the Status of the Antitrust Laws, at 1 (Sept. 30, 2004) (“Trebling attracts bad lawsuits, lawyers interested only in the enormous cash rewards, and compels even innocent businesses to settle rather than risk trial with potentially catastrophic damages. Compensatory damages, without tripling, are entirely adequate to the enforcement of the antitrust laws.”).

³⁹ *See* Trans. at 64 (Lande) (because “treble” damages are actually single damages, the multiplier should be increased); Thirty Antitrust Practitioners Comments, at 2 (citing Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 Loy. Consumer L. Rev. 329 (2004)).

Arguments in support of the continued award of treble damages in antitrust cases include (i) deterrence; (ii) the compensation of victims; (iii) the forfeiture of ill-gotten gains; and (iv) punishment.⁴⁰ Critics of treble damages, while generally conceding the legitimacy of these goals in at least some cases, argue that they may also over-deter some conduct that may not be unreasonably anticompetitive and even encourage meritless claims in the hope of settlement.⁴¹

The correct multiplier to use in order to obtain optimal deterrence is elusive. As Judge Easterbrook said with respect to cartel conduct:

[H]ow high to set the multiple is a difficult empirical question. Too, because it is costly to initiate prosecutions, the optimal penalty is designed to permit some number of offenses; there is an optimal degree of underdeterrence. The right multiple is surely more than one, likely more than three, but how much more we do not know.⁴²

The main arguments for and against awarding treble damages are discussed first. Various possible reforms identified by AMC witnesses and commenters are addressed in the following section.

⁴⁰ Cavanagh Statement, at 3; *cf.* Lipsky Statement, at 3 (asserting that “no clear consensus has emerged regarding the appropriate purposes of the treble damages remedy,” although “classic” purposes include compensation, deterrence, and punishment).

⁴¹ *See, e.g.*, Comments of U.S. Chamber of Commerce at 17; 2 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 41 (2d ed. 2000) (“[T]reble damages should properly be awarded only for unambiguously anticompetitive conduct, when the defendant knew or should have known that its conduct was socially harmful, or when detection of the intended antitrust violation is uncertain.”).

⁴² Easterbrook, *Detrebling*, at 450; *see also* Prepared Statement of Robert H. Lande Before the Antitrust Modernization Commission, at 7 (July 28, 2005) (“Lande Statement”) (“No one knows the percentage of antitrust violations that are detected and proven.”); Trans. at 161 (Easterbrook) (suggesting multiplier for concealed cartels might appropriately be higher than three); Cavanagh, *Detrebling*, at 813 (“Given the lack of data on costs, settlement offers, and outcomes, and the limited ability of our statistical models to explain settlement behavior, we are unable to reach a normative judgment about whether it pays to reduce the damages multiplier.”); Trans. at 11 (Lipsky) (“We shouldn’t be satisfied with antitrust remedies that go wide of the mark in most cases and that seem effective only if you look at an irrelevant average.”).

Deterrence

Benefits:

- Treble damages deter unlawful conduct that may evade detection and challenge. Very simply put, if the benefit to a defendant of engaging in unlawful conduct is \$100, but the likelihood of detection and successful challenge is only 33 percent, then the profit-maximizing defendant will choose to engage in the conduct so long as it will be liable for only actual damages. But if the defendant will be liable for three times actual damages (or \$300), then it may choose not to engage in the conduct. That is because, while the defendant would gain \$300 from the engaging in the conduct, it would likely lose \$333.⁴³
- Automatic trebling further enhances deterrence by increasing the incentive of private plaintiffs to discover, investigate, and challenge violations. This increased incentive will in turn cause defendants to assume a higher probability of detection and challenge.⁴⁴
- Overall, the current antitrust regime may not be sufficiently deterring violations. It appears that companies and individuals have continued to engage in cartel and other unlawful activity notwithstanding aggressive criminal prosecution (including substantially increased fines and prison terms) and class-action treble-damage suits.⁴⁵
- Private actions are an important supplement to public enforcement.⁴⁶

⁴³ For a richer discussion of factors impacting deterrence, see Easterbrook, *Detrebling*, at 454 (the treble damage multiplier “create[s] optimal incentives for would-be violators when unlawful acts are not certain to be prosecuted successfully”); Lande Statement, at 8; Cavanagh Statement, at 4; Cavanagh, *Detrebling*, at 821-22; Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1017-21 (1986). Of course, under the current enforcement regime, defendants also must pay attorneys’ fees, face the prospect of joint and several liability for the entire damages caused by a conspiracy, and may be subject to criminal penalties in the United States and other jurisdictions.

⁴⁴ See Easterbrook, *Detrebling*, at 451-52; Cavanagh, *Detrebling*, at 786.

⁴⁵ Boies Statement, at 11; Susman Statement, at 8 (the “combined threats of governmental action and awards of treble damage and attorney fees in private litigation are not an adequate deterrent for even patently unlawful conduct”); Thirty Antitrust Practitioners Comments, at 2 (“despite the existence of treble damages, cartels continue to be formed and antitrust laws continue to be violated on a fairly frequent basis”); AAI Comments, at 2 (“the current treble-damages regime has actually resulted in sub-optimal deterrence”); Trans. at 61 (Boies) (treble damages “clearly do[] not have enough of an effect to deter this conduct”).

⁴⁶ See Thirty Antitrust Practitioner Comments, at 3 (“the federal government has limited resources at its disposal, and thus cannot adequately investigate and prosecute all (or even most) illicit anticompetitive behavior”); Cavanagh, *Detrebling*, at 790 (the “private remedy permits

- Any detrebling would “encourage lawlessness . . . [and] send[] the wrong signal to business and businessmen.”⁴⁷
- Eliminating treble damages altogether would eliminate an important incentive to participate in the Department of Justice’s corporate leniency program, which limits liability to single damages for cooperating defendants, and would thereby reduce deterrence.⁴⁸
- Too much tinkering with treble damages at the federal level, or even outright elimination, would encourage more antitrust suits to be filed in state courts instead.⁴⁹

Criticisms:

- The automatic trebling of damages can result in over deterrence. In particular, conduct assessed under the rule of reason that is generally not covert and may be competitively neutral or procompetitive may be unnecessarily chilled by the threat of treble damages.⁵⁰
- The availability of treble damages may encourage plaintiffs to sue on weak or even baseless claims.⁵¹

prosecution of illegal conduct which the federal government is without resources [to] pursue”); *see also* Reasoner Statement, at 2 (“governmental resources are plainly inadequate to police the American economy”); *but see* Comments of Business Roundtable, at 3 (“The legislative history suggests that Senator Sherman envisioned private suits as a little-used tool.”) (citing Cavanagh, *Detrebling*, at 783).

⁴⁷ Trans. at 46 (Susman).

⁴⁸ *See* Thirty Antitrust Practitioners Comments, at 2-3; Trans. at 21 (Boies).

⁴⁹ Susman Statement, at 11.

⁵⁰ Lipsky Statement, at 10 (treble damage can “over deter, thus creating an undesirable chilling effect for legitimate competitive conduct”); Business Roundtable Comments, at 3 (“Trebling for all antitrust cases can lead to over-deterrence because trebling discourages businesses from engaging in legitimate and beneficial competitive conduct.”); Cavanagh, *Detrebling*, at 801; *see also* Easterbrook, *Detrebling*, at 450 (“because it is costly to initiate prosecutions, the optimal penalty is designed to permit some number of offenses”); William Breit & Kenneth G. Elzinga, *Antitrust Penalty Reform* 8-12 (1986) (“efficient enforcement does not imply complete deterrence of all antitrust violations”).

⁵¹ *See, e.g.*, Comments of U.S. Chamber of Commerce, at 17 (the “opportunity to recover treble damages spurs marginal cases to be filed for their extortion value, if nothing else”); Business Roundtable Comments, at 5 (wasteful antitrust lawsuits are a problem); *see also* Easterbrook, *Detrebling*, at 452-53 (describing agency problem involved in class action suits).

- There is already substantial deterrence from the threat of criminal enforcement, which can result in substantial fines and incarceration for individuals, as well as joint and several liability and the class action mechanism.⁵²

Compensation

Benefits:

- Treble damages ensure fuller compensation to the victims of antitrust violations by making it more likely that claims will be brought against violators, compensating them for loss other than the payment of overcharges (for example, inefficient purchases of less expensive but less desirable substitute products), and making up for the unavailability of pre-judgment interest and the fact that some damages may not be recoverable (*e.g.*, because of the statute of limitations and the inability to recover “speculative” damages).⁵³
- Because damages are measured by loss to the plaintiff, they do not incorporate allocative efficiency losses, which may be about half of the transfer loss.⁵⁴
- Given that most antitrust claims settle, starting at a base of treble damages ensures victims will receive closer to actual damages.⁵⁵
- There is little or no evidence that plaintiffs recover “excessive” damages through the combination of direct purchaser lawsuits, indirect purchaser lawsuits, criminal fines and actions for disgorgement. Plaintiffs rarely recover treble damages, and more typically recover single damages or less.⁵⁶

⁵² Cavanagh Statement, at 6-7 (citing 18 U.S.C. § 3571(d)); *see also* Lipsky Statement, at 4 (noting that *per se* violations can be prosecuted criminally, both with fines and incarceration as penalties).

⁵³ Lande Statement, at 2-6 & n.8 (““treble damages’ . . . really only amounts to approximately single damages,” because there is no prejudgment interest, damages do not compensate for allocative inefficiency, and plaintiffs cannot recover for certain other harms”); Boies Statement, at 12 (delay in reaching trial and judgment is particularly long); *see also* Thirty Antitrust Practitioners Comments, at 4 (identifying harms that are not compensated for by antitrust damages).

⁵⁴ Lande Statement, at 5 (making argument in context that treble plaintiffs’ damages do not reflect full harm of violation); Easterbrook, *Detrebling*, at 455 (estimating efficiency loss is 50 percent of monopoly overcharge).

⁵⁵ Susman Statement, at 5-6; AAI Comments, at 3; *see* Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 130-34 (1993); Lande Statement (contending that plaintiffs typically settle for an amount closer to single damages or less).

⁵⁶ Lande Statement, at 9 (duplication is “a theoretical [concern] that has never occurred even once in the real world”); AAI Comments, at 3 (“even with any criminal fines that might be

Criticisms:

- Mandatory trebling may expose defendants to excessive damage awards far exceeding the harm caused to victims, particularly if the defendant is also subject to criminal penalties, claims by indirect purchasers, and claims for disgorgement.⁵⁷
- The availability of treble damages encourage plaintiffs to bring baseless lawsuits and defendants to settle out of court to avoid the risk of crippling three-fold damage awards.⁵⁸ The treble damage system may unintentionally have become a “wealth-transfer program that can be gamed” to the benefit of business rivals and others.⁵⁹

Disgorgement

Benefits:

- Treble damages assist in accomplishing the goal of disgorgement,⁶⁰ ensuring that violators do not profit from violating the law.⁶¹

Criticisms:

- With joint and several liability, the unavailability of contribution, and the limitation on claim reduction, a defendant may be liable for far more than any benefit it realized from unlawful conduct.
- Allocative efficiency is estimated to be 50 percent of overcharges.⁶² Accordingly, disgorgement of three times the overcharge is too large (assuming detection is likely).
- The availability of criminal penalties makes treble damages unnecessary to achieve disgorgement.⁶³

added to the totals from private damages actions, defendants’ total payouts rarely reach the true threefold level”).

⁵⁷ Lipsky Statement, at 4-5; Cavanagh, *Detrebling*, at 792.

⁵⁸ Business Roundtable Comments, at 3; *see* U.S. Chamber of Commerce Comments, at 17.

⁵⁹ Lipsky Statement, at 5.

⁶⁰ Boies Statement, at 12.

⁶¹ Cavanagh Statement, at 6 (makes it unlikely violators will profit); Cavanagh, *Detrebling*, at 787.

⁶² *See* Lande Statement, at 5; Easterbrook, *Detrebling*, at 455

⁶³ *See* Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Oregon L. Rev. 147, 162-63 (2005) (Cavanagh, *Revisited*).

Punishment

Benefits:

- Treble damages punish offenders, much like punitive damages under the common law and other statutes, which punish as well as deter.⁶⁴

Criticisms:

- There is no reason to punish with treble damages conduct assessed under the rule of reason.⁶⁵
2. *Should other procedural changes be considered to address issues relating to treble damage awards, such as providing courts with discretion in awarding treble (or higher) damages, limiting the availability of treble damages to certain types of offenses (e.g., per se unlawful price fixing versus conduct subject to rule of reason analysis), or imposing a heightened burden of proof?*

As noted above, several witnesses and commenters argued that treble damages should be retained for all cases. Others proposed to limit treble damages to certain kinds of cases, or in certain circumstances, as described below. Generally, these proposals fell into two categories: one based in part on the substantive nature of the violation (*e.g.*, *per se* violations versus other violations) and one consisting of procedural changes (*e.g.*, award treble damages in the discretion of a judge).

⁶⁴ Cavanagh Statement, at 6; Cavanagh, *Detrebling*, at 786-87.

⁶⁵ Lipsky Statement, at 5 (no basis for punishing “garden-variety exclusive dealing or product bundling”), and 8 (conduct formerly regarded as “reprehensible” is now recognized to be potentially procompetitive, depending on the circumstances, and should not be subject to punitive sanctions.)

a. Retain treble damages for hard-core conduct

- Witnesses and commenters generally agreed that treble damages should be retained at least for hard-core, cartel conduct.⁶⁶
- Some observers have argued that optimal deterrence for cartel conduct demands that the multiplier be higher.⁶⁷

b. Limit treble damages depending on the nature of the violation

Several commenters proposed that treble damages should not be available in certain types of antitrust cases, proposing several different dividing lines.

Per se versus Rule of Reason

Pros:

- Reserving treble damages to those cases in which the conduct is clearly unlawful under the antitrust laws, and devoid of any competitive benefit, would avoid (or reduce) chilling potentially procompetitive behavior.⁶⁸ Treble damages should be available only for “naked restraints that are *per se* illegal.”⁶⁹ Only single damages would be available in rule-of-reason cases because such cases typically attack conduct that has the potential for procompetitive benefits.
- Alternatively, treble damages would not be available for certain specific types of conduct, such as single-firm conduct or joint venture activity with legally

⁶⁶ Cavanagh Statement, at 7 (“trebling is absolutely critical in . . . horizontal price-fixing and horizontal divisions of markets” cases); Lipsky Statement, at 10 (“think long and hard before considering any radical revision to the private treble-damage claim as it is applied to covert cartel conduct”); Business Roundtable Comments, at 3 (“courts should continue to award treble damages” for cases involving “horizontal price fixing, market allocation, and bid rigging”); U.S. Chamber of Commerce Comments, at 17 (proposing limits on treble damages not applicable to cartel cases); *see also* Trans. at 29 (Susman) (“no danger in deterring” hard-core conduct).

⁶⁷ Thirty Antitrust Practitioners Comments, at 2 (citing Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 Loy. Consumer L. Rev. 329 (2004)); Lande Statement, at 19-20; *see also* Trans. at 162 (Easterbrook) (suggesting multiplier for concealed cartels might appropriately be higher than three).

⁶⁸ U.S. Chamber of Commerce Comments, at 23; Business Roundtable Comments, at 3-4.

⁶⁹ Business Roundtable Comments, at 3-4; *see also* U.S. Chamber of Commerce Comments, at 20-23; *see also* Cavanagh Statement at 8 (describing argument).

cognizable and plausible pro-competitive justifications.⁷⁰ This approach might include a requirement that the parties notify the antitrust agencies of their venture to be eligible for the immunity from treble damages.⁷¹

Cons:

- The proposed distinction between *per se* and rule of reason would complicate cases because of the need to litigate which test applies (and the precise nature of the conduct). It would also “lead to less business certainty in light of the current uncertain line between *per se* and rule-of-reason antitrust violations.”⁷²
- The rule is potentially under-inclusive: deliberate efforts at monopolization are generally analyzed under the rule of reason, but could be just as egregious and damaging as price-fixing.⁷³
- Because many rules in rule-of-reason cases are fairly clear, concerns over chilling arguably legal conduct do not always exist.⁷⁴
- Because criminal fines are not sought in rule-of-reason cases, treble damages are a necessary means of deterrence.⁷⁵

⁷⁰ See Trans. at 11, 40-41 (Lipsky); see also Lipsky Statement, at 14 (suggesting joint ventures is an area to look for limiting treble damages); Exclusionary Conduct Trans. at 64-65 (Tom) (Sept. 29, 2005) (advocating eliminating treble damages for certain single-firm conduct).

⁷¹ Trans. at 59 (Lipsky).

⁷² Lande Statement, at 16; see *National Collegiate Athletic Ass’n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984) (“there is often no bright line separating *per se* from Rule of Reason analysis”); see also Trans. at 39-40 (Cavanagh) (noting tying is nominally *per se* unlawful).

⁷³ Cavanagh, *Detrebling*, at 828; Trans. at 71 (Lipsky) (“I can still imagine cases of exclusionary conduct where you might be sorry that you didn’t have trebling available.”); AAI Comments, at 5; see also Trans. at 160 (Hausfeld) (opposed to single damages in rule of reason cases); Trans. at 144 (Constantine) (*Microsoft* as an example of rule-of-reason case in which treble damages sensible).

⁷⁴ Trans. at 82 (Lipsky); see also Trans. at 100 (Susman) (in monopolization cases, defendants generally have a high market share and are aware of what conduct is potentially questionable).

⁷⁵ Lande Statement, at 18 (“Abolishing treble damages in rule of reason cases could effectively destroy rule of reason private antitrust enforcement.”); see also Trans. at 32 (Lande) (still need incentive for plaintiffs to challenge anticompetitive rule-of-reason conduct).

Knowledge

Pros:

- It has also been proposed that treble damages should be awarded only when conduct has been “clearly established” as unlawful under the antitrust laws and, therefore, a defendant knew or reasonably should have known that its conduct was unlawful.⁷⁶ Conversely, treble damages would not be available where the defendant had no reason to believe that its conduct was unlawful.⁷⁷

Cons:

- The criticisms of this approach are substantially similar to those regarding a *per se*/rule of reason distinction, including the difficulty of determining when the law is “clear.”⁷⁸

Overt versus Covert Conduct

Pros:

- A second proposed line of demarcation for treble damages is covert conduct versus overt (or “publicly open”) conduct.⁷⁹ This approach is premised on the rationale that damages should be trebled to account for the difficulty of detecting antitrust violations.⁸⁰ For conduct that is publicly open (or “overt”)—such as mergers, most joint ventures, distribution contracts, and most single-firm conduct—the probability of detection is close to 100 percent, as compared to covert cartel activity where the likelihood of detection is well below 100 percent. Accordingly, there is no particular need, for deterrence purposes, to multiply damages in instances where the conduct is overt.

⁷⁶ U.S. Chamber of Commerce Comments, at 17-19 (proposing a rule analogous to the qualified immunity doctrine that has developed in constitutional tort actions under 42 U.S.C. § 1983); *see* Cavanagh, *Revisited*, at 177; *see also* Cavanagh, *Detrebling*, at 794 (“[t]rebling is particularly harsh where liability turns on close questions of law or fact, on a novel interpretation of a statute, or on reversal of prior precedents upon which defendants have relied.”).

⁷⁷ U.S. Chamber of Commerce Comments, at 19; *see also* Cavanagh Statement, at 8. It is not clear whether, under this proposal, treble damages would be awarded in some rule of reason cases.

⁷⁸ *See* Cavanagh, *Revisited*, at 177.

⁷⁹ Chamber of Commerce Comments, at 23; *see also* Lipsky Statement, at 5 (less concern with overt conduct); Trans. at 162 (Easterbrook).

⁸⁰ *See* Easterbrook, *Detrebling*, at 454-58; William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 652-53 (1983); Trans. at 161-62 (Easterbrook) (multiplier should be set by dividing harm by probability of successful prosecution); *see* Cavanagh, *Detrebling*, at 832; *see also* Lande Statement, at 7 (citing comment of then Assistant Attorney General Douglas Ginsburg that only 10 percent of cartels were detected).

Cons:

- Overt conduct might be part of a “disguised cartel” or related, but not reasonably ancillary to, an otherwise legitimate joint venture.⁸¹

Criminal Conduct

Pros:

- Similarly to other proposals, it has also been suggested that treble damages should be awarded only in cases involving conduct that would be appropriate for criminal sanctions, or where criminal prosecution has taken place.⁸²

Cons:

- The line of what constitutes criminal conduct can be as unclear as the division between *per se* and rule of reason.⁸³
- If treble damages are restricted to cases in which the Department of Justice prosecutes, then the availability of treble damages lies within the discretion of the Department of Justice.⁸⁴

Follow-on actions

Pros:

- This limitation would provide only single damages in parallel actions brought after a U.S. government cartel prosecution.⁸⁵ As with overt conduct, once the public is aware of the conduct, there is no difficulty of detection, and no need to adjust damages accordingly.

⁸¹ Cavanagh, *Detrebling*, at 832; Trans. at 164 (Reasoner) (hard to draw line between overt and covert).

⁸² See Cavanagh Statement, at 8.

⁸³ Cavanagh Statement, at 8 (“[R]easonable attorneys can and do disagree as to when conduct is sufficiently egregious to warrant criminal sanctions.”).

⁸⁴ Cavanagh, *Revisited*, at 176-77.

⁸⁵ See Boies Statement, at 15; Trans. at 26 (Boies); see also Trans. at 29 (Susman) (“might be worth considering”).

Cons:

- The need for deterrence in cartel cases militates against limiting treble damages in such cases.⁸⁶

c. Procedural limits on treble damages

Others have advocated procedural mechanisms to determine when to impose treble damages, rather than trying to create bright lines based on the type of conduct. For example it has been proposed that courts would award treble damages in their discretion; that plaintiffs would have to prove violations by clear and convincing evidence in order to obtain treble damages; that damages should be “de-coupled,” so that a plaintiff would recover only actual damages, and punitive damages would be paid to the government; and that only persons that purchased from or sold to a defendant found guilty of violating the antitrust laws would be entitled to recover treble damages.

Judicial Discretion

Pros:

- Courts are in the best position to decide in each case whether treble damages are warranted.⁸⁷ A court can “tailor the penalty to the gravity of the violation.”⁸⁸ This approach has three main benefits: (1) where the question of law or fact is close, especially as to anticompetitive effects, no treble damages need be awarded; (2) it would reduce overdeterrence and chilling that may result from mandatory trebling; and, (3) it would eliminate the treble damages lever to extract settlements.⁸⁹

⁸⁶ Trans. at 158 (Reasoner); Trans. at 159 (Hausfeld) (the “fact that it’s a follow-on makes no difference” with respect to deterrence); Trans. at 158 (Easterbrook) (similar); *see also* Trans. at 58 (Cavanagh) (opposed).

⁸⁷ Cavanagh Statement, at 9; *see also* Exclusionary Conduct Trans. at 139-40 (Pitofsky) (Sept. 29, 2005) (advocating treble damages at a judge’s discretion).

⁸⁸ Cavanagh Statement, at 9.

⁸⁹ *Id.* The factors a court might take into account are: the willfulness of the violation; whether a reasonably well-informed person would have known that the conduct was illegal; the possibility of the conduct’s procompetitive benefits; the duration of the illegal acts; whether the

- Leaving the award of treble damages could also allow fairness considerations to be taken into account. For example, treble damages would not be awarded if they would bankrupt a company.⁹⁰

Cons:

- Leaving the damage multiplier to the discretion of a judge could lead to inconsistency across courts, and therefore could result in forum shopping.⁹¹
- Deciding on the damage multiplier could increase the length and cost of trials as parties contest factual issues relevant to the factors to be considered by the judge.⁹²
- Having a judge, rather than jury, determine whether to award treble damages may raise Seventh Amendment concerns.⁹³

Require Clear and Convincing Evidence for Treble Damages

Pros:

- Imposing a higher burden of proof is designed to “compensates for the imbalance between the risk of an erroneous . . . judgment adverse to the defendant and the lesser risk of an erroneous judgment adverse to the plaintiff.”⁹⁴

conduct was covert; the scope of the illegal activity; the benefits to defendant; and the impact of treble damages on the defendant’s business. Cavanagh, *Detrebling*, at 838.

⁹⁰ Cavanagh Statement, at 9.

⁹¹ Cavanagh Statement, at 10; Susman Statement, at 10-11; *see also* Cavanagh Statement, at 10 (judicial discretion could turn on judicial attitudes towards the antitrust laws, rather than on the relevant statutory factors); Trans. at 61-62 (Boies) (leaving to judicial discretion will create undesirable uncertainty).

⁹² Cavanagh Statement, at 10.

⁹³ Susman Statement, at 10; *see* Trans. at 62 (Susman) (although opposed to proposal, would have jury determine); Cavanagh, *Detrebling*, at 841 (potential constitutional issue); *see also* Report on Contribution and Claim Reduction by the Section of Antitrust Law to the Antitrust Modernization Commission, at 23 n.45 (Dec. 1, 2005) (proposing that legislation on contribution that would allow judge to allocate damages should include savings clause that would allow allocation to be determined by jury if required by Constitution).

⁹⁴ Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 298 (1983). The standard of proof “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington v. Texas*, 441 U.S. 418, 423 (1979).

Cons:

- This approach would make what is already a complicated and protracted process even more cumbersome.⁹⁵ Furthermore, it would create uncertainty that would undermine the policy objectives of treble damages.⁹⁶

De-Coupling

Pros:

- Decoupling would require defendants to pay treble damages (or other specified multiple), but would award only single damages to the plaintiff, with the balance paid to the government. This approach reduces incentives for excessive litigation. It keeps deterrence at the existing level, however, because any decreases in detection that result from decreased litigation could be compensated for by an increased multiplier.⁹⁷

Cons:

- Decoupling ignores compensation to plaintiffs/victims, and thereby reduces deterrence because of reduced incentive to detect and sue for violations.⁹⁸
- Decoupling would require increased judicial supervision of settlements.⁹⁹

Limiting Treble Damages to Buyers and Sellers

Pros:

- Treble damages would be available only to plaintiffs that bought from or sold to a defendant found to have violated the antitrust laws. Conversely, they would not be available to competitors.¹⁰⁰
- In competitor suits, there is a high probability of detection, lower societal loss (loss is primarily the lost profits of the plaintiff, which are themselves not a good measure of harm), and a greater danger of harming competition.¹⁰¹

⁹⁵ Trans. at 37-38 (Cavanagh); *see also* Trans. at 33 (Lande) (rejecting clear-and-convincing proposal).

⁹⁶ *See* Susman Statement, at 9.

⁹⁷ *See* A. Mitchell Polinsky, *Detrebling Versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 Geo. L.J. 1231, 1234 (1986).

⁹⁸ Cavanagh, *Detrebling*, at 842.

⁹⁹ Cavanagh, *Detrebling*, at 843.

¹⁰⁰ *See* Easterbrook, *Detrebling*, at 458-61, 67; *see* Antitrust Remedies Improvement Act of 1986, S. 2162, § 201 (1986).

Cons:

- The criticisms are substantially similar to those regarding a *per se*/rule of reason distinction. In particular, predatory and exclusionary conduct can cause substantial harm.¹⁰²
- Lawsuits brought by a competitor for anticompetitive reasons are not brought for purposes of recovering treble damages, and would likely still be brought even if only single damages were available.¹⁰³

B. Prejudgment Interest

1. *Should successful antitrust plaintiffs be awarded pre-complaint interest, cost of capital, or opportunity cost damages?*
2. *Are the factors used to determine when prejudgment interest is available set forth in 15 U.S.C. § 15(a)(1)-(3) appropriate? If not, how should they be changed?*

AMC witnesses and commenters did not address these questions extensively. No witnesses or commenters argued that the statutory factors should be changed, although one group of commenters argued they should remain as they are.¹⁰⁴ The following are arguments for and against the award of pre-judgment interest.

- Prejudgment interest should be more readily available in antitrust cases because its absence under-compensates victims and reduces overall deterrence.¹⁰⁵

¹⁰¹ Easterbrook, *Detrebling*, at 459.

¹⁰² See Cavanagh, *Detrebling*, at 835-36.

¹⁰³ Trans. at 28 (Boies).

¹⁰⁴ See Thirty Antitrust Practitioners Comments, at 6. The ABA Task Force on Remedies proposed that prejudgment interest be available to indirect purchaser actions as part of a comprehensive reform of indirect purchaser litigation. See Civil Remedies—Indirect Purchaser Discussion Memorandum (May 4, 2006).

¹⁰⁵ AAI Comments, at 6 (calling for pre-judgment interest, cost of capital or opportunity cost damages, as well as adjustment of damages for inflation); Trans. at 24 (Boies); see also Lande Statement, at 20 (arguing for prejudgment interest to make remedies more robust); see also Susman Statement, at 15; *Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) (“The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders.”); but see Susman Statement, at 15 (“[T]he current limitations on the availability of prejudgment interest . . . [is not] a critical problem in private antitrust actions.”).

- Prejudgment interest should be available only in the currently limited circumstances, so long as there are treble damages.¹⁰⁶ Treble damages provide a rough approximation of prejudgment interest, such that both need not be awarded.¹⁰⁷
- On the other hand, awarding prejudgment interest as a matter of right would make proceedings more complex and make analyzing risk of litigation more difficult.¹⁰⁸

C. Attorneys' Fees

1. *Should courts award attorneys' fees to successful antitrust plaintiffs?*
2. *Are there circumstances in which a prevailing defendant should be awarded attorneys' fees?*¹⁰⁹

The current rule entitles only successful plaintiffs to recover reasonable attorneys' fees; it does not confer the same right to successful defendants.

- Allowing plaintiffs to recover fees provides incentives to bring antitrust lawsuits.¹¹⁰
- Barring the right to recover fees would reduce the number of meritorious cases.¹¹¹ In particular, many antitrust plaintiffs are financially limited, and the ability to recover attorneys' fees is a significant inducement to plaintiffs' firms to handle the cases.¹¹²

¹⁰⁶ Cavanagh Statement, at 15; Thirty Antitrust Practitioners Comments, at 6.

¹⁰⁷ Cavanagh Statement, at 15.

¹⁰⁸ Cavanagh Statement, at 15.

¹⁰⁹ A third question posed by the Commission—"In areas of law other than antitrust, how effective is fee shifting as a tool to promote private enforcement?"—was intended to elicit evidence from other areas of the law relevant to these questions. No commenters presented the Commission with such evidence.

¹¹⁰ Trans. at 27 (Boies) ("to encourage the private attorneys general, to encourage people to bring lawsuits"); Cavanagh Statement, at 12 (creates "an important incentive for bringing a private antitrust action"); Thirty Antitrust Practitioners Comments, at 8; AAI Comments, at 7-8; *see also* Trans. at 38 (Cavanagh) (eliminating fees would "throw the ecosystem out of balance, and we're going to stack the deck in favor of defendants").

¹¹¹ Cavanagh Statement, at 13 (it would "chill the institution of meritorious antitrust claims"); Susman Statement, at 13.

¹¹² Susman Statement, at 13 ("the typical antitrust plaintiff is a financially strapped company or a consumer or class that can only afford to take on a case on a contingent fee basis. Even with the prospect of treble damages and attorneys' fees, there are very few firms that are willing to take on the risks of pursuing a major antitrust case.").

- The justification for attorneys’ fees—that it provides incentives for private litigation—is also used in support of treble damages. Indeed, they may provide the same incentive for frivolous litigation as treble damages are said to.¹¹³
- Defendants should be awarded attorneys fees as well, for frivolous lawsuits.¹¹⁴

D. Joint and Several Liability, Contribution, and Claim Reduction

*Should Congress and/or the courts change the current antitrust rules regarding joint and several liability, contribution, and claim reduction?*¹¹⁵

The following section summarizes major arguments made by witnesses and commentators regarding joint and several liability, contribution, and claim reduction.

1. *Joint and Several Liability*

Benefits:

- By relieving plaintiffs of the burden and cost of pursuing their claims against each and every co-conspirator, joint and several liability makes plaintiffs more likely to sue and ensures that they will receive more complete compensation for their injuries.¹¹⁶ In contrast, under a system of individual liability, a plaintiff would not be fully compensated if a co-conspirator were insolvent, not amenable to suit, or otherwise missing or unable to pay damages. The burden of “lapses in liability” should be borne by the wrongdoers, rather than by the victims.¹¹⁷
- Joint and several liability encourages companies to participate in the Justice Department criminal leniency program. Under the ACPERA, antitrust damages against a leniency program participant are limited to “that portion of the actual damages sustained by such claimant which is attributable to the commerce done

¹¹³ See Business Roundtable Comments, at 4-5.

¹¹⁴ See AAI Comments, at 9-10; Business Roundtable Comments, at 5. One proposed awarding defendants fees only pursuant to Rule 11. Thirty Antitrust Practitioners Comments, at 8 (citing Fed. R. Civ. P. 11).

¹¹⁵ A second question posed by the Commission—“Is the evolution of rules regarding joint and several liability, contribution, and claim reduction in other areas of the law instructive in the context of antitrust law?”—was intended to elicit evidence from other areas of the law relevant to the first question. Evidence presented in comments and testimony is described herein.

¹¹⁶ See, e.g., Reasoner Statement, at 7-8; see also Hausfeld Statement, at 4.

¹¹⁷ See, e.g., Hausfeld Statement, at 9; Report on Contribution and Claim Reduction by the Section of Antitrust Law to the Antitrust Modernization Commission, at 10 (Dec. 1, 2005) (“ABA Comments”) (“priority should be given to fully compensating the victim”).

by the applicant in the goods and services affected by the violation.”¹¹⁸ A system of individual liability might substantially reduce the incentive for any company to apply under the Department’s leniency program. Although the ACPERA de-trebles damages as well as limits them to the defendant’s proportionate share of damages based on its sales, if joint and several liability were eliminated a company would have substantially less incentive to expose the conspiracy and provide information incriminating itself.¹¹⁹

- Maintaining joint and several liability helps to ensure full treble-damage recoveries by plaintiffs in price-fixing cases where defendants have participated in the Justice Department’s leniency program. Without joint and several liability, a plaintiff’s recovery in such cases would be limited to treble damages specifically attributable to the defendants not participating in the leniency program, plus single damages from the participants in the leniency program.¹²⁰
- Joint and several liability (assuming no contribution and claim reduction) increases deterrence of antitrust violations by exposing each co-conspirator to potential liability for the entire damages caused by a conspiracy.¹²¹ The risk of having to pay total damages may be sufficiently high to make the cartel unprofitable for at least one member, which should undermine the formation and/or continued operation of the cartel.¹²² Such deterrence is particularly important for inherently anticompetitive, hard-core price-fixing and similar crimes.
- Joint and several liability (assuming no contribution and claim reduction) increases the incentive for risk-averse individual defendants to settle early in order to avoid the possibility of being responsible for paying treble the damages attributed to the entire conspiracy.¹²³ It also enhances the efficacy of enforcement insofar as settling defendants provide critical evidence relating to a conspiracy.¹²⁴ It thus helps to avoid costly protracted litigation and delivers more timely compensation to the victims of anticompetitive conduct, who generally are not entitled to recover pre-judgment interest.

¹¹⁸ ACPERA at § 213(a).

¹¹⁹ See Hausfeld Statement, at 10-11; Thirty Antitrust Practitioners Comments, at 3. *But see* ABA Comments, at 21 n.42 (leniency program still provides incentive of single damages).

¹²⁰ See Hausfeld Statement, at 11.

¹²¹ See, e.g., *id.* at 4; Reasoner Statement, at 7.

¹²² See Trans. at 105-06 (Easterbrook).

¹²³ See, e.g., Hausfeld Statement, at 5, 7. Joint and several liability thus increases the likelihood that any defendant will be held liable for a conspiracy and should also increase deterrence. *Id.* at 5.

¹²⁴ See *id.* at 5.

Criticisms:

- By magnifying the potential liability of any one participant in coordinated activity, however, joint and several liability may also discourage conduct that is not unambiguously and inherently anticompetitive—that is, it may result in overdeterrence of procompetitive or competitively neutral conduct. Some competitor collaborations and “vertical” arrangements, such as exclusive dealing and requirements contracts and manufacturer distribution arrangements, are competitively neutral or procompetitive. The legality of such conduct is assessed *ex post facto* under a sometimes complex rule-of-reason test. Nevertheless, the current rule of joint and several liability extends the same deterrence to this type of conduct as it does to conduct such as price-fixing and *per se* unlawful offenses.¹²⁵
- Joint and several liability may result in plaintiffs’ naming companies as defendants that have no involvement, or only peripheral involvement, in the alleged conspiracy. Plaintiffs, for example, may allege a “nationwide” or “industry-wide” conspiracy that treats all members of the industry similarly, regardless of those companies’ actual involvement or level of culpability in the alleged conspiracy.¹²⁶
- Joint and several liability (without contribution and claim reduction) may result in the “unfair” allocation of damages among defendants.¹²⁷ “Deep-pocket” defendants may be specially targeted by plaintiffs for recovery regardless of their level of involvement in or benefit from the unlawful conduct. In general, some defendants may be required to pay damages far in excess of any benefit they derived from the conspiracy, while others who might have played a central role in the conspiracy and/or realized a substantial amount of the benefit pay little or no damages.¹²⁸
- Joint and several liability (without contribution and claim reduction) may induce inefficient settlements. Even a defendant who may be innocent or may have played a peripheral role in a conspiracy and/or experienced small economic gain may feel compelled to settle due to the substantial contingent liability it faces under joint and several liability and the prospect of having to pay an amount of

¹²⁵ See, e.g., Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. Fla. L. Rev. 217, 234 (1980) (“Jacobson, *Contribution*”); Cavanagh, *Contribution*, at 1293-94; Reasoner Statement, at 6, 12.

¹²⁶ See, e.g., Cavanagh, *Contribution*, at 1293; Reasoner Statement, at 7.

¹²⁷ ABA Comments, at 4 (“inequity has been condemned by most commentators”).

¹²⁸ See, e.g., Reasoner at 5-6; see also Jacobson, *Contribution*, at 221 (noting small and unindicted alleged participants in cartel settling for relatively large amounts); ABA Comments, at 4.

money substantially exceeding its actual proportionate share of any damages.¹²⁹ Early settlements provide funds for the plaintiffs to continue the litigation and potentially to extract further settlements, regardless of the actual merits of the claims.

- The current rule allows plaintiffs to recover in settlement exceeding the expected value of their trial recovery. As the number of defendants increases, the “equilibrium” settlement approaches the full potential value of the claim.¹³⁰
- Advocates of eliminating joint and several liability argue that, unlike allowing contribution, eliminating joint and several liability would not unduly complicate the adjudication of antitrust claims because it would not involve a “suit within a suit” or require antitrust defendants to sue each other.¹³¹

2. *Contribution*

The existing rule on contribution in antitrust cases—that it is not available—has given rise to the criticism that it is unfair to defendants who are “coerced” into settling. Proponents of the current rule against contribution argue that it is fair, *ex ante*, and that it increases deterrence, encourages settlement, and is more efficient. The competing arguments on each point are presented below.

Fairness

- The principle benefit of contribution cited by opponents of the existing rule is fairness to defendants. Allowing contribution would enable a court to ensure a fair allocation of damages based on the relative culpabilities of defendants and/or the benefits they derived from the unlawful conduct. Innocent defendants or minor actors would not be coerced into settlement, suffer the detriment of having to record and report large contingent liabilities beyond the amount of their own

¹²⁹ See Cavanagh, *Contribution*, at 1292-93 nn. 89-91 (describing argument); Jacobson, *Contribution*, at 220-21 (innocent defendants forced to settle, given high potential liability); Reasoner Statement, at 12-13. Ironically, some companies may be unable to buy peace through settlement because of their unimportance to the conspiracy and inability to offer evidence to the plaintiffs. See Cavanagh, *Contribution*, at 1293.

¹³⁰ See ABA Comments, at 7-9 (setting forth mathematical example).

¹³¹ See, e.g., Reasoner Statement, at 5.

sales, or have to pay large and potentially ruinous damage awards. At the same time, more culpable defendants would not escape liability.¹³²

- Opponents of the existing rule believe that fairness to defendants is an especially significant concern in rule-of-reason cases, where it may not be clear to a person whether conduct will be found to be unlawful.¹³³
- Supporters of the existing rule note that there is no unfairness to defendants because the rule against contribution is clear and applies to all persons equally; each person will consider the consequences before it engages in unlawful (or potentially unlawful) conduct that will subject them to joint and several liability, and it cannot complain about surprise after the fact.¹³⁴
- Supporters of the existing rule believe that fairness to defendants should in any event be irrelevant, at least with respect to conduct that is *per se* unlawful. Persons who intentionally and secretly conspire to defraud consumers through higher prices deserve neither sympathy nor leniency.¹³⁵ In any event, the objective of deterrence (discussed below) outweighs any concern for fairness among defendants.¹³⁶
- Supporters note that the rule against contribution is fairer to plaintiffs in situations where some defendants may be unavailable to pay damages. In that case, opponents to contribution believe that it is fairer for the defendants to bear the burden of the liability gap.¹³⁷

Settlement

- According to opponents of the existing rule, allowing contribution would eliminate distortion in the bargaining leverage of plaintiffs and defendants in settlement discussions. Defendants would retain the ordinary incentive to settle that exists in any litigation. But they would not feel the same undue pressure to race to settle even claims that are of questionable merit or where they played a minor role in the alleged conspiracy (indeed, even where they have been acquitted

¹³² See, e.g., Hausfeld Statement, at 12; Reasoner Statement, at 5, 11.

¹³³ See, e.g., Cavanagh, *Contribution*, at 1299-300; ABA Comments, at 5-6.

¹³⁴ See, e.g., Cavanagh, *Contribution*, at 1296.

¹³⁵ See, e.g., Frank. H. Easterbrook, et al., *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331, 339 (1980) (the notion of fairness to intentional wrongdoers “does not make a strong appeal to our moral sense”) (“Easterbrook, *Contribution*”); Trans. at 114 (Constantine) (to allow a right to contribution in antitrust cases would be tantamount to “legislating a code of honor among thieves”); Hausfeld Statement, at 8; Reasoner Statement, at 15.

¹³⁶ See, e.g., Reasoner Statement, at 16.

¹³⁷ See, e.g., Hausfeld Statement, at 8-9.

of criminal liability or not sued by the government in the criminal case).¹³⁸ With contribution, settlement discussions would proceed in the context of the particular defendant's likely liability based on its own culpability.¹³⁹

- Supporters of the existing rule contend that the rule promotes settlement and judicial economy in antitrust litigation.¹⁴⁰ Allowing contribution would remove an important incentive for defendants to settle or to settle early.¹⁴¹ A non-settling defendant would know that, even if it alone were found to be jointly and severally liable for the full damages of the conspiracy, it eventually could obtain contribution from its co-conspirators, so that its actual burden would be closer to its actual economic gain from engaging in the conspiracy.¹⁴²
- Evidence presented to the Commission regarding the effect of contribution on settlements in other areas of the law was relatively thin and mixed. According to Cavanagh, the right to contribution does not appear to have been a particular impediment to settlement.¹⁴³ One panelist, however, testified that the existence of contribution has “slowed down settlements and protracted litigation in the securities area.”¹⁴⁴ Another panelist noted that it has been argued that securities law plaintiffs have had less incentive to settle cases not involving “knowing” violations.¹⁴⁵ Finally, one witness noted that contribution in CERCLA cases has led to time-consuming and expensive litigation over damages.¹⁴⁶

¹³⁸ Business Roundtable Comments, at 6.

¹³⁹ See, e.g., Cavanagh, *Contribution*, at 1294-95. The ABA argued allowing contribution could facilitate settlements by eliminating free-riders. ABA Comments, at 16.

¹⁴⁰ See, e.g., Hausfeld Statement, at 3, 12; AAI Comments, at 11.

¹⁴¹ See Easterbrook, *Contribution*, at 364-68; Hausfeld Statement, at 12; Reasoner Statement, at 20.

¹⁴² See Hausfeld Statement, at 12; Trans. at 129-30 (Easterbrook). In addition, a settling defendant that knows it might be subject to a contribution action by a co-defendant may not disclose information to the plaintiff that could heighten its risk of contribution. This reticence would have the dual effect of reducing the opportunity to settle with remaining defendants who will be less fearful about what the prior-settling defendant may have disclosed about the extent of the conspiracy and reducing the likelihood that plaintiffs will be fully compensated for their injuries. See Hausfeld Statement, at 12-13.

¹⁴³ See Cavanagh, *Contribution*, at 1302 (citing Helen S. Scott, *Resurrecting Indemnification: Contribution Clauses in Underwriting Agreements*, 61 N.Y.U. L. Rev. 223, 256 (1986)).

¹⁴⁴ See *id.*; see also Trans. at 123-24 (Reasoner) (citing the cases against Enron as a “vivid example” of how contribution has been a disincentive to settlement); cf. Hausfeld Statement, at 8 (no contribution under RICO).

¹⁴⁵ See Reasoner Statement, at 7, 13 n.40.

¹⁴⁶ Trans. at 128-29 (Easterbrook).

Deterrence and Enforcement

- Opponents of the rule against contribution contend that allowing contribution may actually enhance deterrence by ensuring that no defendant would escape liability or pay proportionately less than the benefit it derived from its unlawful conduct. Otherwise, a company might calculate that there is a chance it will be able to avoid liability or shift it to others.¹⁴⁷
- At the same time, proponents of allowing contribution believe that contribution ameliorates the excessive deterrent effect that joint and several liability may have on procompetitive or competitively neutral rule-of-reason behavior.¹⁴⁸
- Opponents of changing the rule on contribution believe that allowing contribution would materially undermine the deterrence of undesirable conduct. Where a company knows that it will be liable for, at most, treble the amount of damages attributable to its conduct, it is more capable of performing a cost-benefit analysis of unlawful conduct and may be more likely under such an analysis to determine that it would be profitable to it to engage in the unlawful conduct.¹⁴⁹
- Opponents contend that although the rule against contribution, in theory, might restrain rule-of-reason conduct, in fact, defendants prevail in rule-of-reason cases.
- Several panelists testified that, in their experience, companies generally are *not* deterred from engaging in either rule-of-reason or *per se* unlawful conduct by the prospect of joint and several liability and no contribution.¹⁵⁰ Apparently, the consequences of the rule against contribution become a factor only once

¹⁴⁷ See e.g., Reasoner Statement, at 13; see also Cavanagh, *Contribution*, at 1293; Jacobson, *Contribution*, at 233; ABA Comments, at 12 (no evidence allowing contribution would have adverse effect on deterrence).

¹⁴⁸ See Cavanagh, *Contribution*, at 1293; Reasoner Statement, at 12 (joint and several liability, with no contribution, “may chill what is actually pro-competitive, consumer-enhancing conduct”); ABA Comments, at 14-15; see also Statement of Donald T. Hibner, at 16 (July 28, 2005) (“Hibner Statement”) (“[I]n an antitrust world increasingly populated by economic and rule of reason analysis, we should recognize that ‘one size does not fit all’ and that there are gradations of relative responsibility.”).

¹⁴⁹ See, e.g., Jacobson, *Contribution*, at 233; Cavanagh, *Contribution*, at 1298, 1306; Easterbrook, *Contribution*, at 365 (if defendants are risk averse, deterrence is likely to be greater without contribution); Hausfeld Statement, at 13-14 (While deterrence is a function of expected liability and the variability of liability, “permitting contribution actions would reduce both the probability of liability and the variability of liability.”) (citing W. Stephen Cannon, *The Administration’s Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 *Antitrust L.J.* 103, 120 (1986) (“Cannon, *The Administration’s Antitrust Remedies*”)); AAI Comments, at 11.

¹⁵⁰ See Trans. at 120 (Hibner); Constantine Statement, at 4; Hibner Statement, at 15; Reasoner Statement, at 16-17.

companies have been sued and are evaluating exposure and litigation and settlement strategies.¹⁵¹

- A general rule of contribution might undermine the success of the Justice Department's leniency program, for reasons discussed above.¹⁵²
- One panelist suggested that allowing contribution might enhance the efficacy of antitrust enforcement by encouraging one defendant to incriminate others in order to establish its share of fault.¹⁵³

Judicial Efficiency

- Opponents of changing the rule against contribution contend that creating contribution rights would generate additional litigation by defendants seeking contribution from other defendants.¹⁵⁴ In instances where a company was not found liable in the plaintiff's original action, such cases could be like full-scale antitrust cases.¹⁵⁵
- Allowing contribution would require allocation of liability between defendants in order to determine each defendant's "fair" share of damages. Several allocation mechanisms, each with drawbacks, were proposed. The ABA noted the criticisms with each method, but called for not letting "the perfect become the enemy of the good."¹⁵⁶
 - ▶ A per capita (or "pro rata") model that divides damages by the number of defendants is simple to apply, but fails to account for the fact that not all defendants share blame equally or benefited equally from the conspiracy.¹⁵⁷

¹⁵¹ See, e.g., Constantine Statement, at 4.

¹⁵² But see ABA Comments, at 21 n.42 (leniency program still provides incentive of single damages).

¹⁵³ See, e.g., Reasoner Statement, at 13.

¹⁵⁴ See, e.g., Hausfeld Statement, at 13; Reasoner Statement, at 17-18.

¹⁵⁵ See Hausfeld Statement, at 13 (citing Cannon, *The Administration's Antitrust Remedies*, at 122, and Easterbrook, *Contribution*, at 364-68). See also Trans. at 107 (Easterbrook) ("I can tell you from having had too many [CERCLA] cases pass through my court, [deciding contribution shares] ain't pretty; it's expensive; it's highly imprecise."); accord Jacobson, *Contribution*, at 234-35.

¹⁵⁶ ABA Comments, at 22.

¹⁵⁷ Reasoner Statement, at 18; Cavanagh, *Contribution*, at 1318-19; ABA Comments, at 21-22.

- ▶ Contribution based on the relative responsibility of defendants sounds equitable, but is difficult to apply in practice.¹⁵⁸
- ▶ Contribution based on a defendant's sales or the plaintiff's purchases from a particular defendant is straight-forward and relies on evidence that is likely already to have been produced in a price-fixing case, for example. But it could not be used in a case alleging bid-rigging or boycott.¹⁵⁹
- ▶ H.R. 2244 (introduced in 1983) would have allowed a court to reduce damages payable by a culpable defendant or allocate damages among defendants in order to promote justice. A court could not reduce a defendant's liability to an amount less than the plaintiff's unrecovered actual damages unless the plaintiff's conduct contributed significantly to the substantial injustice. Nor could a defendant's liability be reduced to less than the treble damages fairly attributable to the defendant's conduct or treble the defendant's sales to or purchases from the plaintiff.
- ▶ The ABA proposed one approach to legislation that would allow contribution and claim reduction in its Comments.¹⁶⁰

3. *Claim Reduction*

- Proponents of claim reduction believe that it eliminates the unfairness of some defendants' paying an amount disproportionately greater than their economic gain even if the plaintiff settles with other defendants.¹⁶¹ Opponents counter with arguments made above with respect to contribution.
- Opponents of claim reduction contend that claim reduction, like contribution, would weaken deterrence by mitigating the consequences of treble damages and joint and several liability.¹⁶² Proponents contend that permitting claim reduction would have less impact on deterrence than would a right to contribution because joint and several liability is preserved with respect to non-settling defendants.¹⁶³
- Claim reduction would reduce the likelihood of partial settlements. A plaintiff would be wary of entering into a partial settlement if it knew that any such

¹⁵⁸ Reasoner Statement, at 18-19; Cavanagh, *Contribution*, at 1318-19; ABA Comments, at 19-20.

¹⁵⁹ Reasoner Statement, at 18; Cavanagh, *Contribution*, at 1317; ABA Comments, at 20-21.

¹⁶⁰ See ABA Comments, at 28-35.

¹⁶¹ See, e.g., Hausfeld Statement, at 16; Reasoner Statement, at 21.

¹⁶² See, e.g., Hausfeld Statement, at 14-15; Reasoner Statement, at 22.

¹⁶³ See, e.g., Cannon, *The Administration's Antitrust Remedies*, at 121; *Antitrust Remedies Reform: Hearings on S. 2162 Before the Senate Comm. on the Judiciary*, 99th Cong. 36-40 (1986) (statement of Hon. Douglas Ginsburg) ("Statement of Hon. Douglas Ginsburg"); Cavanagh, *Contribution*, at 1324-25.

settlement would reduce its ultimate recovery proportionate to the settling defendants' part in the conspiracy.¹⁶⁴

- Opponents of claim reduction contend that it would increase litigation over the assignment of liability among defendants.¹⁶⁵ Proponents counter that the administrative costs would be less than that associated with contribution because there would be no need to allocate damages among all defendants.¹⁶⁶

4. *Judgment Sharing Agreements*

Judgment sharing agreements among defendants stipulating how damages should be allocated are form of contractual contribution.

- It has been argued that it is inconsistent to prohibit contribution while enforcing such agreements.¹⁶⁷
- Judgment sharing agreements are not a substitute for contribution. They are difficult and time-consuming to negotiate, especially where there is a significant disparity in the size and/or culpability of defendants.¹⁶⁸ They may not be stable, as defendants may break them if offered a better deal by the plaintiff.¹⁶⁹ They may also be subject to legal challenge, although some courts have enforced them.¹⁷⁰

¹⁶⁴ See, e.g., Hausfeld Statement, at 15-16; Reasoner Statement, at 21-22 (“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”); Cavanagh, *Contribution*, at 1326; Trans. at 167 (Easterbrook).

¹⁶⁵ See, e.g., Hausfeld Statement, at 16; see also Trans. at 126-27, 168 (Reasoner).

¹⁶⁶ See Cannon, *The Administration’s Antitrust Remedies*, at 121-22; Statement of Hon. Douglas Ginsburg.

¹⁶⁷ See Trans. at 151 (remarks by Commissioner Jacobson).

¹⁶⁸ See Reasoner Statement, at 14-15; Cavanagh, *Contribution*, at 1326-27; Easterbrook, *Contribution*, at 365-66; Hibner Statement, at 2.

¹⁶⁹ See Trans. at 188-89 (Easterbrook)

¹⁷⁰ See Cavanagh, *Contribution*, at 1326-27; Trans. at 191 (remarks by Commissioner Kempf). See also Trans. at 152-53, 156 (Easterbrook) (the negotiation of such agreements shares characteristics of the undesirable collusive behavior); AAI Comments, at 11.