

# **Antitrust Modernization Commission**

## **Comments of Illinois Tool Works Inc. In Support of the Right to Contribution in Antitrust Cases**

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## ANTITRUST MODERNIZATION COMMISSION

### **COMMENTS OF ILLINOIS TOOL WORKS INC. IN SUPPORT OF THE RIGHT TO CONTRIBUTION IN ANTITRUST CASES**

#### **Introduction and Summary**

This paper is submitted on behalf of Illinois Tool Works Inc. (“ITW”) in favor of the right to contribution in antitrust cases.

For over a century, antitrust defendants have been the victim of an unfair system that holds defendants jointly and severally liable for antitrust violations without a right of contribution.<sup>1</sup> As a result, defendants with little or no involvement in or direct monetary benefit from an alleged conspiracy can be liable for the victims’ entire damages trebled while at the same time co-conspirators not named can escape liability. Favoring plaintiffs and penalizing defendants, whether they are guilty of an antitrust violation or not, is inherently unfair. It has deprived many defendants of a fair trial and in some cases a fair settlement. To remedy this, Congress has several times looked at proposals to provide for contribution in antitrust cases<sup>2</sup> but to no avail. Congress should act now to correct the current system and provide a right of contribution in antitrust cases.<sup>3</sup>

#### **The Need for Legislation**

In 1981, the Supreme Court in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*,<sup>4</sup> unanimously held that, without legislative action by Congress, there is no right to contribution in antitrust cases. In so doing, the Court was careful to avoid comment on the merits of contribution itself. It noted that the basic issue raised by contribution was “whether sharing of

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<sup>1</sup> *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981).

<sup>2</sup> S. 1468, 96<sup>th</sup> Cong. (1979); S. 995, 97<sup>th</sup> Cong. (1982); S. 1510, 101<sup>st</sup> Cong. (1989).

<sup>3</sup> ITW’s proposal is set forth in more detail at *infra*, page 7.

<sup>4</sup> 451 U.S. 630 (1981).

damage liability will advance or impair the objectives of the antitrust laws.” After setting forth the arguments raised by both sides of the issue, the Court said this was a matter for Congress, not the courts, to resolve.<sup>5</sup>

The policy questions presented by petitioner’s claimed right to contribution are far-reaching. In declining to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.

In ITW’s view, antitrust compliance is important to our economy and our capitalistic system. Clearly, companies that violate the antitrust laws should be fined and required to provide restitution in damages to their victims. ITW supports a right to contribution because it would more accurately and fairly place the blame where it belongs – on those parties who violated the law, whether named or unnamed in private litigation – and it would do so in a more fair and equitable manner than the current system permits.

### **The Distortion Caused By the Current State of Affairs**

Under the current system, each defendant in a private antitrust case is jointly and severally liable for treble damages caused by all co-conspirators. Without the right of contribution, any defendant named in any antitrust case could be liable for the victims’ alleged entire damages trebled.

Because of this significant exposure, defendants who are innocent must settle early rather than litigate their case. In national class actions, joint and several liability encourages parties to settle early even if they have little or no exposure in order to avoid being liable for treble damages of the entire case as well as the costs associated with defending it. This is inherently unfair.

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<sup>5</sup> *Id.* at 646.

While the dynamics of negotiating and settling antitrust cases are complex, there is no question that, without a right of contribution, the incentives for settlement unfairly favor the plaintiffs. Plaintiffs already have an incentive to bring antitrust cases, where warranted, due to the treble damage recovery. In many cases, private class actions also “follow on” a criminal proceeding in which there is a presumption of liability in any subsequent civil litigation.<sup>6</sup>

Plaintiffs’ class action lawyers take advantage of the fact that there is no right of contribution and seek early settlements to finance their litigation. Faced with astronomical liability, some defendants simply cannot afford to litigate their case and are confronted with a “race to settle.” The incentives are such that the most culpable may seek to settle early while the least culpable may be faced with the choice of settling early without the opportunity to defend themselves or defend themselves at significant risk and expense. By allowing plaintiffs to settle early and relatively inexpensively with some defendants, the current system places great pressure on the remaining defendants to settle at higher and higher rates rather than run the risk of liability not only for their own damages, but also for the damages attributable to those who opted out earlier.

One of the most striking examples of this “whipsaw” tactic was noted during the Senate Judiciary Committee’s hearing on S. 1468 in 1979. Mr. George Kress, Chairman of the Board of Green Bay Packaging, Inc., related the experience of his company in the *Corrugated Container* litigation. According to Mr. Kress, Green Bay Packaging was a family-owned business with only 1.7 percent of the market. Although investigated by the Justice Department, neither Green

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<sup>6</sup> A final judgment or decree of an antitrust violation in the proceeding will serve as *prima facie* evidence in any subsequent action or proceeding. Clayton Act § 5(a), 15 U.S.C. § 16(a). Recently, Congress provided an additional incentive for its leniency program by enacting legislation that limits a successful leniency applicant’s exposure in civil cases to single damages without joint and several liability if it cooperates fully with the plaintiffs. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213, 118 Stat. 665, 666-667 (2004).

Bay nor any of its employees were charged. Less than a year following the government's investigation, Green Bay was named as a co-defendant in more than twenty-five class action lawsuits brought against thirty-nine corporations in the industry. Although Mr. Kress originally had planned to have his company fight the charges in court, he revised his decision once he realized that his potential damage exposure was literally in the billions of dollars. His choices were: (1) to settle the pending class actions for \$5.5 million and still face liability to those who had opted out of the class or (2) defend the lawsuit with contingent liability over \$5 billion. Approximately eighty percent of the defendants settled at a cost of over \$250 million and the dollar amount per market share percentage point rose steadily with each settlement to \$6.5 million a point. Mr. Kress testified that Green Bay "reluctantly concluded a settlement agreement. . . ." He noted, "[L]oss of borrowing power is a killing factor for a small, privately owned corporation involved in a capital intensive manufacturing industry where a small business must borrow in order to compete."<sup>7</sup>

Under the current system, without the right of contribution, joint and several liability may be so excessive and onerous on a defendant who chooses not to settle that competition actually may be reduced. While inherently unfair to all concerned, the current system is particularly harmful to those competitors who cannot bear the burden of joint and several liability for treble damages and the cost of defending a significant antitrust case. If required to make these payments, some may be substantially weakened or eliminated from the market entirely due to this liability. Clearly, companies that violate the antitrust laws should be fined and required to

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<sup>7</sup> S. Rep. No. 96-428, at 15 (1979).

provide restitution in damages to their victims, but they should not be totally incapacitated due to joint and several liability.<sup>8</sup>

Sharing agreements are only partially effective in remedying this distortion. Theoretically, if the plaintiff sued all co-conspirators and all co-defendants entered into a sharing agreement that addressed the issue of liability on a fair and equitable basis, the right of contribution would not be necessary. However, sharing agreements are not always possible. They are necessarily *ad hoc*. They are not always agreed to by all the co-defendants. They do not necessarily involve all the parties to the conspiracy. They are sometimes challenged.<sup>9</sup>

The current state of affairs was never intended by Congress but is the unanticipated result of a number of independent developments. Although the Sherman Act was enacted in 1890 with a private right of action for treble damages including reasonable attorneys' fees,<sup>10</sup> there have been many changes since then that have impacted joint and several liability. One of the most important occurred in 1966, when Rule 23 of the Federal Rules of Civil Procedure was "completely rewritten and augmented."<sup>11</sup> Under the new Rule 23, class action litigation in federal courts has expanded dramatically.<sup>12</sup> This new rule, which redefined class actions, significantly changed the consequences of joint and several liability.

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<sup>8</sup> Liability without a right to contribution may also lead to over-deterrence. This concern was recognized by the Supreme Court in the context of criminal exposure but could also be applicable in the face of civil liability without a right of contribution. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("[There exists] the distinct possibility of over-deterrence; salutary and pro-competitive 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 or even a good faith error of judgment.")

<sup>9</sup> *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995-2 Trade Cas. (CCH) ¶71,091 (N.D.Ill. 1995).

<sup>10</sup> Section 4 of the Clayton Act, 15 U.S.C. §15, which provides the private treble-damages action, derives from §7 of the Sherman Act as originally enacted. See H. R. Rep. No. 627 (pt. 1), 63d Cong., 2d Sess., at 14. (1914). Congress repealed the original §7 in 1955, Act of July 7, 1955, 63 Stat. 282, as being redundant of Clayton Act §4, H. R. Rep. No. 422, 84<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 2 (1955); S. Rep. No. 619, 84<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 2 (1955).

<sup>11</sup> Wright, Miller & Kane, *Federal Practice and Procedure* § 1753 (D.D.Ed. 1986).

<sup>12</sup> See Panel: *The Nuts and Bolts of Antitrust Class Actions*, 49 *Antitrust L.J.* 1499 (1980).

## Solving This Problem with a Right to Contribution

Congressional action is necessary to remedy the current state of affairs. The key issues to consider with respect to contribution in antitrust cases are:

- (1) Whether the right to contribution should be limited to price fixing cases or apply to all antitrust cases;
- (2) The manner in which claims for contribution are considered;
- (3) Whether contribution is permissible against a settling defendant;
- (4) The effect of a settlement upon the plaintiffs' claim for damages;
- (5) The basis for determining contribution; and
- (6) Whether the right to contribution should be applied to pending cases.

Although all of these issues warrant careful consideration, ITW believes no one issue is so important to defeat a legislative solution to this issue. ITW submits the following proposal.<sup>13</sup>

1. Right to Contribution. Defendants in all antitrust cases should have a right of contribution. Although some of the earlier bills limited the right to horizontal price fixing cases, there is no basis for this limitation other than the fact that price fixing cases lend themselves to a simple, formulistic measurement of contribution by market share. Otherwise, this limitation on contribution is not supportable.<sup>14</sup>

2. Method of Considering Claims. Claims for contribution should be allowed in a separate action or filed in a counterclaim, cross-claim or third-party claim in the plaintiffs' main litigation. While it is preferable to have all claims for contribution litigated in the main action, other considerations such as personal jurisdiction, venue and third-party practice may create

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<sup>13</sup> This proposal is based in substantial part on a proposal of the American Bar Association Section of Antitrust Law in 1979. See Resolutions of the Section of Antitrust Law on Legislation to Permit Contribution – Antitrust L.J., 289 (August 17, 1979) (“Resolutions”).

<sup>14</sup> *Id.* at 298.

some situations in which such a procedure is not workable. Claims for contribution should be barred unless filed within a specified period of time within service of the original complaint or after the claimant for contribution has reasonable notice of its claim, whichever occurs later. It is preferable to require claims for contribution to be filed as soon as possible after they are known, but there must be time for a defendant in a newly filed proceeding to evaluate the case against it, confer with others and perhaps explore a sharing agreement before being required to plead any contribution claims.

3. Parties Subject to Contribution. Contribution rights should be claimed only against those persons named by the plaintiffs or consistent with the plaintiffs' cause of action. For example, in a horizontal price fixing case, a defendant may seek contribution against any co-conspirator alleged to have been involved in the price fixing conspiracy whether named by the plaintiff or not.<sup>15</sup>

4. No Right of Contribution By or Against a Settling Defendant. To make certain that contribution rights do not discourage settlements, contribution should be prohibited by or against a settling defendant. Non-settling defendants should not be permitted to seek contribution from settling defendants. Similarly, a settling defendant should not be permitted to seek contribution from others for its settlement since other defendants had nothing to do with the settlement and ought not to contribute to it.

5. Claim Reduction. When plaintiffs settle with a defendant, the plaintiffs should have the option of reducing their claim by removing the settling party from their theory of damages or, alternatively, of having the plaintiffs' final judgment reduced by the amount of the

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<sup>15</sup> *Id.* at 300.

settling defendant's obligation for contribution.<sup>16</sup> Under the current practice only the dollar amount of the settlement is subtracted from the entire judgment after trebling. This option will have the practical effect of removing sales of the settling defendant from the dispute.<sup>17</sup>

6. Basis for Contribution. While there are many different ways to allow contribution, most contribution statutes in other areas of the law use the concept of comparative fault.<sup>18</sup> This is sometimes a difficult standard to apply in antitrust cases. A more objective standard in price fixing cases would be market share. Alternatively, a more flexible standard of relative responsibility that takes into account both impact (market share) and culpability (role and extent of participation) might be more appropriate. It is important that the measure of contribution be sufficiently flexible to achieve fairness.<sup>19</sup> In addition, contribution should not prevent judgment sharing agreements on some specified basis in lieu of a court making this determination.

7. Effective Date. While a right of contribution would be appropriate in all cases, to avoid issues related to settlement calculations and strategies, the right of contribution should only apply in proceedings initiated after the effective date of the legislation.

### **Prior Legislative Attempts**

In prior attempts to address this issue, Congress focused on five major areas of concern: (1) Deterrence; (2) settlement; (3) increased complication of litigation and control of the lawsuit; (4) the propriety of contribution and claim reduction in price fixing cases; and (5) application of

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<sup>16</sup> For example, where a defendant settles for \$1 million and its share of damages based on market share would be \$1.5 million, the plaintiff's options are to reduce (1) its claim for damages before trebling by \$1.5 million or (2) the final judgment by \$4.5 million.

<sup>17</sup> Resolutions at 301. This approach is warranted because the plaintiffs use early settlements to finance their litigation. It is their choice whether or not to settle for less than the defendant's share of the liability.

<sup>18</sup> Another common method of allocation is *per capita*. However, in antitrust cases, it seems unequitable to require a small competitor to pay the same amount in damages as a much larger competitor.

<sup>19</sup> *Id.*

claim reduction in pending cases.<sup>20</sup> Significantly, the one issue that appeared to cause the bills to fail was application of contribution and claims reduction in pending cases.

Deterrence. In addressing the issue of deterrence, the Senate Judiciary Committee made clear that a right of contribution would not change joint and several liability. An antitrust plaintiff could continue to sue only one defendant to recover damages caused by it and other unnamed co-conspirators. What would change are the allocation of damages among co-conspirators and the ability of a co-conspirator completely to avoid liability for its acts, should the plaintiff elect not to sue that particular co-conspirator. It was the opinion of the Committee that a right of contribution would strengthen rather than weaken deterrence.<sup>21</sup>

Settlement. On the issue of settlement, the Senate Judiciary Committee rejected the argument that a right of contribution would undermine the settlement process and lead to even more protracted antitrust litigation. Rather the Committee found that the effect of a right of contribution would “simply be to lessen the possibility of coerced settlements.”<sup>22</sup>

Complexity. The Committee also rejected the argument that a right of contribution would have the effect of greatly increasing the complexity of already complex antitrust litigation and that the process of determining appropriate contribution would cause the plaintiffs to lose control of their lawsuit. The Committee was of the opinion that neither criticism was sufficiently justified to create significant problems.<sup>23</sup> It viewed the Federal Rules of Civil Procedure up to the task of preventing any added complexity from causing undue hardship.

Appropriateness. Considering the appropriateness of applying contribution and claim reduction in what has been characterized as intentional torts, the Committee noted that the trend

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<sup>20</sup> S. Rep. No. 97-359, at 15 (1982).

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.* at 18.

<sup>23</sup> *Id.* at 23.

of the law in general tort litigation is away from drawing a distinction between intentional and non-intentional torts for purposes of contribution. Moreover, in civil antitrust cases, intent is not an element for recovery. Corporate defendants and others are held civilly liable even though they have no intent to violate the law. More importantly, the Committee found that one of the principal purposes of a right of contribution “is to prevent wrongdoers from avoiding responsibility for their wrongful acts”<sup>24</sup> where the plaintiffs, either due to a lack of knowledge or other practical or strategic considerations, do not sue all of the co-conspirators.

Pending Cases. Perhaps the greatest debate and the reason prior legislative attempts failed related to claim reduction in pending cases. The Committee concluded that it would be unfair to arbitrarily either deny or apply claim reduction in pending cases.<sup>25</sup> However, there was significant opposition to applying the right to contribution in pending cases. Some said it was “bad policy,” creating “a highly controversial piece of legislation.”<sup>26</sup> As a result of this controversy, Congress did nothing. This time Congress should enact legislation providing a right of contribution prospectively even if it would have no effect on pending cases.

## **Conclusion**

The antitrust laws are an important part of our economy and our capitalistic system. They benefit consumers by assuring fair and open competition among competitors. Those who violate the antitrust laws are currently subject to harsh criminal penalties, joint and several liability without a right of contribution and treble damages. Unfortunately, the overall effect of denying a right to contribution is to favor plaintiffs and penalize defendants -- whether they are guilty of an antitrust violation or not. Few, if any, class actions actually go to trial because the defendants cannot afford to take the risk of treble damage exposure for the entire damages

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<sup>24</sup> *Id.* at 25.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 58 (separate views of Senators Max Baucus, Jeremiah Denton and Robert Dole).

caused by the alleged illegal act. The inability of parties to seek contribution has resulted in coerced settlements or, even worse, reduction in competition due to increased costs and liability for treble damages.

Providing a right of contribution would facilitate a more appropriate balance to private antitrust enforcement, permit more timely and equitable settlements, and allow defendants who want to go to trial the opportunity to do so. Plaintiffs would continue to have the upper hand resulting from treble damages and, in cases following criminal proceedings, a presumption of liability. But a right of contribution would reduce or eliminate much of the gamesmanship involved in private treble damage class actions. There would continue to be some advantages for those who choose to settle first, but those who want to defend themselves at trial could do so without the fear of exorbitant damages.

For all of the reasons above, ITW urges the Antitrust Modernization Commission to support a right of contribution in antitrust cases.

Respectfully submitted,

ILLINOIS TOOL WORKS INC.

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