

December 5, 2005

Via Express Mail and E-mail

Antitrust Modernization Commission

Attention: Public Comments

1120 G Street, N.W.

Suite 810

Washington, DC 20005

Re: Comments Regarding Contribution and Claim Reduction

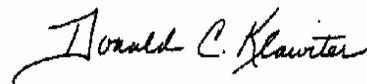
Ladies and Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments to the Antitrust Modernization Commission in response its request for public comments regarding joint and several liability, contribution, and claim reduction.

Please note that these views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



Donald C. Klawiter
Chair, Section of Antitrust Law

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2005-2006

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**REPORT ON CONTRIBUTION AND CLAIM REDUCTION BY THE
SECTION OF ANTITRUST LAW TO THE ANTITRUST
MODERNIZATION COMMISSION**

The Section of Antitrust Law (“Antitrust Section”) of the American Bar Association (“ABA”) is pleased to submit these comments to the Antitrust Modernization Commission (the “Commission”) in response to its request for public comment, dated May 19, 2005, regarding joint and several liability, contribution, and claim reduction. The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

Summary

The Antitrust Section recommends that the Antitrust Modernization Commission endorse the enactment of legislation providing for contribution and claim reduction in antitrust cases. This recommendation is consistent with the Antitrust Section's 1979 report on this issue.¹

Presently, defendants that are found to have jointly violated the antitrust laws are jointly and severally liable for treble damages, with no right of contribution. Moreover, if one defendant settles, the amount of the settlement is deducted from the trebled damages, rather than from the damages before trebling. These rules combine to create the potential for unjust results for several related reasons.

¹ ABA, Section of Antitrust Law, Report of the Section on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions (1979), *reprinted in* ABA Antitrust Section, Contribution and Claim Reduction In Antitrust Litigation (1986) [hereinafter ABA Monograph], at 52.

First, a plaintiff may arbitrarily impose the entire damage award on any one violator, either by suing only it or by enforcing the judgment only against it. Second, as the academic literature has recognized, the combination of the remedial rules discussed above tends to lead to settlements that exceed the risk-adjusted value of cases. Indeed, when the number of defendants becomes very large, the expected settlement amounts approach full treble damages even when the plaintiff has a small probability of prevailing on the merits. Third, the remedial rules tend to create a whipsaw effect that forces defendants to settle even when they are confident that they committed no violation. For example, in an industry where there were allegedly \$100 million of overcharges and all but one defendant settled for a total of only \$10 million, the remaining defendant would face exposure of \$290 million (\$100 million trebled less the \$10 million of settlements), even if it had imposed only \$1 million of the overcharges. The risk associated with this disproportionate liability tends to dissuade even confident defendants from pursuing their day in court.

The Section recommends that joint and several liability be retained because it encourages the private enforcement of the antitrust laws, which is in the public interest. The unfairness of the remedial scheme, however, should be address by (1) permitting contribution claims that would permit the defendants to allocate the total damages among all violators according to their relative fault (or if determinable, their relative gain from the violation) and (2) reducing the damages awarded to the plaintiff by the percentage allocable to all violators that have settled. These procedural changes could be implemented without any substantial adverse effect with respect to deterring antitrust violations or the efficiency of the judicial process.

I. THE EXISTING REMEDIAL SCHEME IS UNFAIR.

The present remedial scheme is defined by three interrelated rules. First, liability for concerted activity that violates the antitrust laws is joint and several.² Thus, a plaintiff may sue one or more conspirators for all damages caused by a conspiracy, and it may enforce a judgment against one or more of the liable defendants in whatever proportion it wishes. Second, a defendant that has paid more than its share (however defined) of a judgment may not assert a contribution claim to recover the excess from defendants that paid less than their share.³ Third, where a defendant settles, the judgment is reduced pro tanto: i.e., the settlement payment is subtracted from the trebled amount of the damages found at trial.⁴ Thus, absent an agreement among the defendants to the contrary,⁵ the allocation of liability among them will lie as the plaintiff sees fit.

² See *City of Atlanta v. Chattanooga Foundry & Pipe Works*, 127 F. 23, 25 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906); *Dextone Co. v. Bldg. Trades Council*, 60 F.2d 47, 48-49 (2d Cir. 1932).

³ *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

⁴ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397-98 (9th Cir. 1957); *cf. Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 391 (4th Cir. 1982) (rejecting attempt to reduce plaintiff's claim by damages attributable to settled defendants).

⁵ Courts have upheld the validity of "sharing agreements" that allocate liability among defendants. *E.g.*, *In re Brand Name Pharm. Antitrust Litig.*, 1995 WL 234521, Nos. 94 C 897, MDL 997 (N.D. Ill. Apr. 18, 1995). If a party to such an agreement is forced by the plaintiff to pay more than the portion of the judgment contemplated by the agreement, it may recover such excess payment from defendants that paid the plaintiff less than the share contemplated by the agreement. Sharing agreements sometimes provide that a defendant may settle only if it requires the plaintiff, as part of the settlement agreement, to "carve out" – i.e., to not seek to recover from the non-settling defendants – the portion of total damages attributed to the settling defendant by the sharing agreement.

The present remedial scheme is unfair in three principal respects, which we address in turn.⁶

A. Inequitably Allocating Judgments

The status quo unfairly permits a plaintiff to impose radically different consequences on similarly situated defendants. By choosing whom to sue, and against whom any judgment is enforced, a plaintiff can impose the entire liability on one defendant and spare other defendants any consequence for their actions. This inequity has been condemned by most commentators.⁷ As a leading treatise observed:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally... responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.⁸

The concern about disparate treatment of the similarly situated explains the widespread recognition of rights of contribution outside the antitrust context. Most states have

⁶ In addition to being unfair, the present scheme may also be inefficient in that it may create excessive deterrence and thereby discouraging procompetitive conduct. We address this issue below in connection with appraising whether the adoption of contribution and claim reduction would adversely affect deterrence. *See infra* pp. 14-15, 24-25.

⁷ *E.g.*, Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L. Rev. 1277, 1299-1304 (1987); A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 Stan. L. Rev. 447 (1981); Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. Fla. L. Rev. 217 (1980); Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1542-44 (1980); Note, *Contribution & Antitrust Policy*, 78 Mich. L. Rev. 890, 903-05 (1980); Note, *Contribution in Private Antitrust Suits*, 63 Cornell L. Rev. 682, 703-05 (1978).

⁸ William L. Prosser & Page Keeton, *Handbook of the Law of Torts* § 50 (5th ed. 1984).

recognized a right of contribution among joint tortfeasors in negligence cases, and some have done so for intentional torts.⁹ Congress has provided for contribution in some cases,¹⁰ and federal courts have also recognized a right to contribution in a variety of contexts.¹¹

The sharpest response to this fairness argument comes from Easterbrook, Landes, and Posner, who argue that, as an intentional tortfeasor, an antitrust violator “does not make a strong appeal to our moral sense.”¹² This response, however, is unpersuasive for a number of reasons. First, although this moral argument conjures up hard-core criminal offenses like naked price fixing and bid rigging, the category of concerted action subject to joint and several liability also encompasses conduct evaluated under the “rule of reason” – a standard that can make the line between legality and illegality depend upon controversial economic judgments. Indeed, it is not uncommon for different judges to look at the same set of facts regarding, for example, a joint venture, and disagree as to whether those facts establish an antitrust violation under Section 1 of the Sherman Act. Thus, the mere fact that individuals or entities are ultimately found to have engaged in an

⁹ See Restatement (Third) of Torts: Contribution § 23 cmt. a (2000).

¹⁰ *E.g.*, 42 U.S.C. § 9613 (f)(1) (CERCLA actions); 15 U.S.C. §§78i(e), 78u-4 (f)(5) (securities actions); 26 U.S.C. §6672 (d) (Internal Revenue Code personal liability actions against employer for improper employee income tax withholding); 15 U.S.C. §6605 (f) (Y2K Act claims).

¹¹ *E.g.*, *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 298 (1993) (Securities Exchange Act 10b-5 actions); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 110-13 (1974) (admiralty); *United States v. Yellow Cab Co.*, 340 U.S. 543, 551-53 (1951) (Federal Tort Claims Act); *United States v. Valentine*, 856 F. Supp. 627, 535 (D. Wyo. 1994) (Resource Conservation and Recovery Act).

¹² Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. of L. & Econ. 331, 339 (1980).

antitrust violation does not automatically trigger the unequivocal moral condemnation the Easterbrook, Landes, and Posner argument presumes.

Second, even intentional wrongdoers have a claim to fairness. After all, antitrust damages are only trebled, not infinite. Moreover, in barring claims by indirect purchasers, the Supreme Court was motivated in part by the unfairness of subjecting antitrust violators to duplicative recoveries.¹³ Finally, legal conduct is sometimes erroneously held to be illegal. Although the fairest outcome would be for there to be no liability in such a case, if several firms jointly engage in legal conduct that carries the risk of being perceived to be illegal, fairness requires that they share the burden of a finding of illegality.

Landes, Easterbrook and Posner also argue that all of those held jointly and severally liable in a particular case are treated evenhandedly *ex ante* — i.e., before the plaintiff enforces the judgment. They suggest that there is nothing unfair about the entire judgment being enforced against one defendant because each defendant faced the possibility that it would be the unfortunate one that would bear all the liability. Fairness *ex ante*, however, does not dispel the concern about unfairness *ex post*. In general, our legal system aspires to *ex post* fairness. When three men are convicted of committing a crime punishable by a sentence of five years for each of them, the penal laws do not permit the court to take the aggregate fifteen years of sentences and assign it to a single defendant, while letting the other two defendants walk free, even if the unlucky defendant is chosen by lot and thus the system is fair *ex ante*.

¹³ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730 (1977).

It has also been argued that requiring a single conspirator to bear all the damage the conspiracy has caused is not unfair because each conspirator's participation is necessary for the conspiracy to succeed and there is nothing unfair about requiring a defendant to pay for all the damages that it has caused. This argument begs rather than answers the salient question. Assuming that each conspirator's participation is essential to the conspiracy's success, it does not follow that it is fair that one conspirator bear the entire burden of the jointly-caused damages while the other equally essential conspirators bear no burden. As the Supreme Court put it when requiring contribution in noncollision admiralty cases:

“a more equal distribution of justice” can best be achieved by ameliorating the common-law rule against contribution, which permits a plaintiff to force one or two wrongdoers to bear the entire loss, though the other may have been equally or more to blame¹⁴

B. Providing Premia Over Expected Trial Outcomes

The status quo enables plaintiffs to recover settlements that exceed the expected value of their trial recovery. Consider first the two-defendant scenario. If the plaintiff's probability of prevailing is 50% and single damages are \$10 million, consider what happens if defendant A settles for its expected share of the judgment: .5 (probability of loss at trial) times \$30 million (trebled damages) times .5 (probability that judgment will be levied against it), or \$7.5 million. Defendant B then faces an expected liability of \$11.25 million: a 50% chance of a loss of \$22.5 million (\$30 million trebled damages less the first defendant's \$7.5 million settlement). Rather than accept this increase in its expected liability, B would bid against A for the privilege of settling first. The bidding

¹⁴ See *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974) (citation omitted).

process would end when one defendant settled for \$10 million. That settlement amount is an equilibrium because the expected liability of the other defendant would also be \$10 million (50% probability of loss times \$20 million exposure) and it would have no incentive to bid further. Assuming that the other defendant and the plaintiff then settle at the \$10 million expected value, the plaintiff has recovered \$20 million, \$5 million more than the expected value of trying the case against both defendants. This recovery is equivalent to the plaintiff's expected recovery at trial if damages were quadrupled rather than trebled.¹⁵

The expected settlement value increases as the number of defendants increases, regardless of the strength of the plaintiff's case. For example, if the plaintiff has a 10% probability of prevailing and there are 40 defendants, equilibrium settlements would give it about 82% of its expected treble damages, even though its expected recovery at trial would only be 10% of that amount.¹⁶ In other words, equilibrium settlements give the plaintiff the recovery it would expect at trial if the damage multiplier were about twenty-five instead of three.¹⁷

¹⁵ If trebled damages are \$30 million, quadrupled damages would be \$40 million. Given the 50% probability of the plaintiff's prevailing, the expected recovery at trial would be \$20 million with quadruple damages.

¹⁶ Easterbrook, Landes & Posner demonstrated that for n defendants, a probability p that the plaintiff will prevail, and treble damages of d , the equilibrium is a settlement (s) given by:

$$s = pd/(1 + pn - p)$$

See Easterbrook et al., *supra* note 12, at 358-59. The total recovery through settlements (S) is given by:

$$S = ns = npd/(1 + pn - p)$$

For $n = 40$ and $p = .10$, $S = .82d$.

¹⁷ Recovering 82% of the treble damages that are expected to be recovered if liability is established is equivalent to recovering 3 x 82% (i.e., 246% or a multiple of 2.46) of the single damages that are expected to be proven. With a probability of

As Easterbrook, Landes and Posner observed, “a plaintiff with a spurious claim against a large group of defendants may be able to extract an aggregate settlement comparable to what a plaintiff with a valid claim could obtain.”¹⁸ This result is irrational and unfair. If quadrupled or higher damages are to be allowed, it should be done explicitly and through a conscious decision rather than through the interplay of the remedial rules.

C. Whipsawing Settlements

The remedial scheme can place extraordinary pressure on a defendant to settle by creating exposure greatly disproportionate to its gain from the alleged conspiracy and its size. The problem again is most acute when one envisions a weak case with many defendants. Assume that a firm allegedly was responsible for \$1 million of the \$100 million of overcharges caused by a 20-firm conspiracy, and that the probability that the plaintiff would prevail at trial is only 10%. If nineteen defendants settle for an average of \$3 million, the remaining defendant would face potential liability of \$243 million, a multiple of 243 of its alleged gain and of more than 48 of its pro rata share of single damages. Faced with such a multiplier, the remaining firm could feel compelled to settle even if it believed it had a great likelihood of prevailing at trial.

prevailing at trial of 10%, the expected recovery would be 2.46 times single damages if the damage multiplier were $2.46/0.1$, or 24.6.

¹⁸ *Id.* at 359-60. It is not clear that plaintiffs in practice reach settlements that provide for as high a recovery as theory predicts. That could result from a variety of factors, including suboptimal bargaining by plaintiffs' counsel or the existence (or prospective existence) of sharing agreements that nullify this effect. The key point is that the status quo effectively increases the damage multipliers faced by firms that do not enter sharing agreements, not that the damages they will end up paying are precisely the equilibrium amounts discussed above.

This scenario is not purely hypothetical. Indeed, much of the attention given to contribution and claim reduction in the late 1970s and early 1980s stemmed from well publicized cases in which late settlers had faced exposure far exceeding three times their proportionate share of the alleged damages.¹⁹ The last two decades have not produced substantial publicity about late settlers that faced liability greatly disproportionate to their role in the alleged conspiracy. This may reflect the ability of defendants to protect themselves from being whipsawed by entering sharing agreements that ensure that signatories bear their proportionate share of liability.²⁰ It may also reflect the fact that some such situations remain confidential.

II. JOINT AND SEVERAL LIABILITY SHOULD BE RETAINED.

Eliminating joint and several liability would redress the unfairness of the status quo, but it would do so at a significant cost. Joint and several liability enhances both the certainty and the ease of a plaintiff's successfully enforcing its judgment. Replacing it with a system of several liability would shift to the plaintiff the risk that one or more defendants would be unable to satisfy its share of the total judgment. Given the priority that should be given to fully compensating the victim, several liability is not an attractive option.

¹⁹ See generally ABA Monograph, *supra* note 1, at 15-19.

²⁰ The possibility that defendants can reduce the unfairness of the present remedial scheme through sharing agreements does not undermine the rationale for change. At most, it indicates that contribution and claim reduction have, by private agreement, been instituted in some cases, meaning that the advantages and disadvantages of contribution and claim reduction that need to be appraised are those that would apply in the remainder of the suits. There does not appear to be any reason to believe that the fairness concerns are less significant in the subset of cases in which no sharing agreement is reached. Nor do any of the possible disadvantages of contribution or claim reduction (discussed below) appear to be more acute in this subset of cases.

One possibility would be to provide for several liability, subject to a plaintiff's right to obtain supplemental judgments against solvent defendants to the extent that insolvent defendants are unable to satisfy the judgments against them. This option is more palatable because the plaintiff is not forced to bear the risk of a defendant's insolvency. On the other hand, a plaintiff's recovery might be delayed and it may incur additional legal costs. These disadvantages might be worth bearing if several liability with recourse were the only practical way to redress the unfairness of the status quo. As explained below, they are not. Accordingly, joint and several liability should be retained.

III. CONTRIBUTION SHOULD BE AUTHORIZED IN ANTITRUST CASES.

We address below the public policy rationale for contribution and the standard of allocation that should be employed in a contribution statute.

A. The Rationale for Contribution

Contribution would allocate to each non-settling defendant its share (somehow defined) of the total judgment. If a plaintiff enforced a judgment against a defendant in an amount exceeding its share of liability, that defendant could assert contribution claims against other defendants (and unsued co-conspirators) for the amounts by which their shares of liability exceeded the judgments enforced against them. The principal rationale for contribution is that it would permit a fairer allocation of liability than the present system – i.e., it would remedy the first of the three fairness concerns with the status quo. While there is substantial room for debate about what allocation method is fairest, allocation schemes can be designed that are fairer than the status quo which leaves allocation entirely to the whim of the plaintiff.

Given that considerations of fairness provide a rationale for contribution, the question becomes whether they are outweighed by any disadvantages of a contribution

rule. The principal potential disadvantages that are explored in the literature are (1) decreasing deterrence, (2) discouraging settlement, and (3) increasing administrative costs.

1. *Deterrence*

There is no evidence that creating a right to contribution would impair the deterrence of antitrust violations. To begin with, we doubt that many potential antitrust violators are aware of the joint and several liability and no-contribution rules, much less how they can combine to make one defendant liable for another's share of total damages. If potential violators are unaware of the rule, its removal cannot decrease deterrence.

Even if potential violators were aware of the rule, there is no basis for concluding that creating a right to contribution would have a material adverse effect with respect to deterrence. The literature has explored the deterrence issue in some depth. Absent risk aversion (or risk seeking), the right to contribution should have no effect on deterrence in the ordinary case because each defendant's expected liability is not affected by contribution. For example, where two similarly situated conspirators are jointly and severally liable for a \$10 million judgment, each defendant's expected cost is \$5 million. While the plaintiff might enforce the judgment entirely or disproportionately against one of the defendants, if the defendants do not have a basis for predicting which of them will be the unlucky one, each has an expected cost of 50% (the probability that it will be the unlucky one) times \$10 million, or \$5 million. Given the premise that the defendants are similarly situated, a contribution scheme would presumably split the \$10 million liability

between them equally. Thus, the expected cost would be the same with or without contribution.²¹

Conceivably, however, contribution could decrease the deterrence of risk averse firms. Although there is a theoretical argument that corporations should be risk neutral, there is some evidence that they are risk averse.²² In theory, therefore, because contribution reduces the uncertainty associated with antitrust liability, it reduces the disutility of antitrust liability.²³ None of the commentators concludes, however, that corporate risk aversion implies that introducing contribution would substantially decrease deterrence, even if corporations were aware of the implications of the present rules.

Moreover, corporate managers who might be tempted to contravene the antitrust laws may be risk seekers, at least in the context of the huge damages possible in antitrust cases. Faced with a choice between the certainty of their firm's bearing one-half of a \$100 million judgment and a 50% chance of their firm's bearing the entire \$100 million judgment and a 50% chance of bearing none of it, managers may prefer the second option.²⁴ In such circumstances, contribution would increase deterrence by ensuring that each liable defendant paid its share.

In sum, the no-contribution regime was not designed to increase deterrence, and it is not clear that it does.²⁵ While one can posit scenarios in which the presence of

²¹ See Easterbrook et al., *supra* note 12, at 344-45.

²² See Polinsky & Shavell, *supra* note 7, at 452-53 n.18.

²³ *Id.* at 453; Easterbrook et al., *supra* note 12, at 351-52.

²⁴ See Polinsky & Shavell, *supra* note 7, at 453-55.

²⁵ See Easterbrook et al., *supra* note 12, at 353 (concluding that it is unclear whether permitting contribution would decrease deterrence); Polinsky & Shavell, *supra* note 6, at 449, 450-55, 462 (same); *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*,

contribution would decrease deterrence, there are equally plausible scenarios in which it would have the opposite effect. Given that it is not clear which effect predominates, it seems likely that the net percentage of cases in which deterrence is increased or decreased would be relatively small. Moreover, even in those cases there is no basis for concluding that the magnitude of the effect would be significant.

Any deterrence-based objection to contribution is further undercut by the uncertainty over whether increased deterrence is a good thing. The line between competitively benign or neutral conduct on one hand and anticompetitive conduct on the other is often hard to draw.²⁶ Antitrust sanctions, therefore, can deter both the objectionable conduct that antitrust seeks to enjoin and other conduct that might be misperceived by a judge or jury as falling in this category.²⁷ Market conduct that may be misperceived as violating the antitrust laws may well be procompetitive, so that deterring it leaves society worse off. For example, joint ventures can create new products, reduce costs, and lead to other societal benefits,²⁸ but they have often been the subject of antitrust challenge.²⁹ Similarly, patent licensing agreements, trade association activities,

97th Cong., 1st and 2nd Sess. (1982) [hereinafter *House Hearings*], at 60-61 (testimony of Hon. William F. Baxter) (same).

²⁶ See *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-42 & n.17 (1978).

²⁷ See Polinsky & Shavell, *supra* note 7, at 455-57.

²⁸ See U.S. Dep't Of Justice & Federal Trade Comm'n, *Antitrust Guidelines For Collaborations Among Competitors* (2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, § 2.1.

²⁹ For example, in *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004), a case that will be before the Supreme Court in its October 2005 term, the Ninth Circuit ruled that two petroleum companies that had merged their U.S. refining and marketing activities into a joint venture may be subject to per se liability for permitting the joint venture to price their respective brands of gasoline together, notwithstanding that the joint venture, a single entity, marketed both brands.

and restrictive distribution agreements can be procompetitive, but they are often subject to antitrust challenge.³⁰ Thus, an increase in antitrust deterrence is likely to deter at least some socially desirable conduct.³¹

Some forms of joint conduct — such as hard-core price-fixing — can be condemned without hesitation, and arguably any decrease in deterrence is undesirable with respect to this conduct. For the most hard-core antitrust violations, however, damage actions do not appear to be the principal deterrent. Hard-core antitrust violators face the prospect of multi-year prison terms, and that more severe remedy would appear to relegate civil damages to a secondary role in their calculus, and the variance in civil damages caused by the absence of contribution to a tertiary role at best.³² It is difficult to envision the manager who would be willing to bear the risk of personally serving a three-year prison term and having his firm pay a nine-figure criminal fine and half of a treble damages award, but who would be deterred when faced with a 50% chance that the firm would pay the entire treble damage award and a 50% chance that it would pay none of it.

Finally, it should be noted that using the uncertainty attendant to joint and several liability to achieve the right amount of deterrence would be a bizarre approach. If more deterrence is needed either in general or for certain types of cases, then increasing the

³⁰ See *id.*; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1977) (discussing benefits of restrictive distribution arrangements for interbrand competition); Jon Leibowitz, *The Good, the Bad, and the Ugly: Trade Associations and Antitrust*, remarks to the Section of Antitrust Law, American Bar Ass'n, March 30, 2005, available at <<http://www.ftc.gov/speeches/leibowitz/050510goodbadugly.pdf> >.

³¹ See Polinsky & Shavell, *supra* note 7, at 455-57.

³² See Scott D. Hammond, *An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program*, remarks before the Antitrust Section of the ABA, Jan. 10, 2005 (“The Division has long supported the belief that the best and surest way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences.... [T]hat view has taken hold.”)

damage multiplier to something greater than three would be the most straightforward solution. Among other benefits of such a direct approach, it could not be negated by a sharing agreement and it could apply to unilateral conduct as to which joint and several liability is not applicable.

2. *Discouraging Settlements*

Commentators have generally concluded that creating a right to contribution among non-settling defendants will not discourage settlements substantially, if at all.³³ Although such a right might have some tendency to reduce settlements if the defendants are risk averse, the uncertainty regarding the existence and magnitude of corporate risk aversion and the uncertain degree of impact of any risk aversion on the likelihood of settlement make the significance of this qualification questionable. Moreover, to the extent that some defendants are today reluctant to contribute to a group settlement because they are relatively optimistic that a judgment would be enforced against others, contribution may facilitate settlements by eliminating the prospect of a free ride.³⁴

In contrast, if contribution claims were allowed against settlers, most of the rationale to settle would be eliminated.³⁵ If the plaintiff prevailed at trial, a settler that faced contribution claims would be essentially no better off for having settled. If the defendants prevailed at trial, a settler would be worse off for having settled, by an amount equal to the difference between the settlement payment and any avoided litigation costs.

³³ *E.g.*, Easterbrook et al., *supra* note 12, at 363 (where parties are risk neutral, contribution has no effect on likelihood of settlement); Cavanaugh, *supra* note 7, at 1313 (no significant effect).

³⁴ *See House Hearings, supra* note 25, at 240 (statement of Hon. William W. Schwarzer).

³⁵ *See* Easterbrook et al., *supra* note 12, at 360-63.

Accordingly, such claims should not be permitted. This does not cause serious fairness problems given the availability of claim reduction, discussed below.

3. *Administrative Costs*

Permitting contribution would to some degree increase the cost of litigation. The increased cost is attributable to (1) possibly adding parties to the primary litigation if defendants implead co-conspirators in order to enforce contribution claims, (2) introducing into the primary litigation additional issues relating to each defendant's proper share of any liability, and (3) spawning separate actions for contribution if the original defendants defer their contribution claims until they face an adverse judgment.

It seems unlikely that these costs would be significant. In horizontal cases, plaintiffs typically sue most or all of the alleged conspirators, and thus there would rarely be many, if any, conspirators for a defendant to implead. In vertical cases, in contrast, it is not uncommon for the plaintiff to sue only the supplier that entered the tying, exclusive dealing, or other agreement with its distributors or dealers. It is not obvious, however, that suppliers that need continued good relations with their distributors or dealers would elect to bring contribution claims. Moreover, the distributors or dealers might demand contractual protection from such claims. Finally, in both horizontal and vertical cases, the increase in costs that would result from adding a defendant or two to what would typically already be a complex litigation is probably small, especially given that the parties would probably seek discovery from non-party conspirators in any event.³⁶

³⁶ In addition, some costs could be avoided if the court stayed and severed contribution claims, thus avoiding some or all of the costs in cases in which defendants prevail in the underlying action. *See* Fed. R. Civ. Proc. 42(b).

It does not appear that litigations would be substantially complicated by making the defendants' relative shares of damages an issue. As discussed below, the complexity of this issue would depend on the allocation rule that is adopted, but under several possible rules the burden imposed by adding this issue to the trial should be modest.

If separate actions for contribution are permitted, and if they are not consolidated with the underlying action, all of the costs associated with such actions would be incremental. Such actions may not have to be brought,³⁷ or if brought would be abandoned, in the vast majority of cases where all the defendants settle with the plaintiff or prevail on the merits. In the remaining cases, based upon the general practice in civil litigation, it seems likely that most contribution claims would settle, thereby limiting costs to all involved. And because the facts would have been largely developed in the original litigation, discovery costs — the largest cost in antitrust cases — would be relatively modest in the contribution cases that are fully litigated. Little or none of the additional costs, moreover, would be borne by plaintiffs, so the costs should not discourage the initiation of socially desirable antitrust cases.

Some of those who have expressed concern about the increased administrative costs that contribution would entail have focused on the sheer number of additional claims or actions that would be brought. This focus on the number of claims appears misguided. The total burden imposed by all the additional claims would be to require a single allocation of liability among the defendants – something which would be automatic if the allocation were pro rata, derivable from the damage analysis if the

³⁷ Whether the contribution actions would have to be brought prior to the conclusion of the underlying antitrust action would depend on the statute of limitations for the contribution actions.

allocation were gain-based, and manageable (if subjective) if the allocation were fault-based.³⁸

Finally, that some increase in costs is the price of redressing the unfairness of the present remedial scheme is not a fatal objection to change. As the Supreme Court observed in *United States v. Reliable Transfer Co.*, in adopting comparative negligence in admiralty cases despite the argument that it would discourage settlements:

But even if this argument were more persuasive than it is, it could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.³⁹

B. The Standard for Allocating Liability

Any contribution scheme must include a method for allocating liability among the wrongdoers. Three principal allocation methods have been proposed, each of which has several permutations: (1) pro rata allocation (i.e., assigning equal liability to each conspirator); (2) gain-based allocation; and (3) fault-based allocation.

Pro rata allocation has the virtue of ease of administration. This efficiency, however, comes at a significant price. Pro rata allocation would do little to achieve the fairness that justifies the creation of contribution rights, and it may well lead to results less fair than the status quo. In horizontal conspiracies involving firms of widely differing market shares, pro rata allocation would guarantee that some defendants bear liability disproportionate to their gains from the conspiracy, a result of questionable

³⁸ See *infra* pp. 19-23.

³⁹ 421 U.S. 397, 408 (1975).

fairness absent a clear difference in responsibility for the violation. In vertical cases, pro rata allocation may be especially unfair. Where a large supplier forces a small distributor to acquiesce in the illegal conduct, the even division of liability may seem particularly inequitable in that the manufacturer (1) is likely to be able to extract the lion's share of the profit, (2) is more morally culpable as the instigator of the conduct, and (3) is probably better able to bear the financial burden of the liability.⁴⁰

A second possibility is gain-based allocation. In most horizontal conspiracies, a strong case can be made for allocating liability in proportion to each defendant's gain from the illegal activity. Under this approach, where competitors uniformly increased their prices pursuant to a price-fixing conspiracy, liability would generally be proportional to the market shares of the conspirators, which would render the allocation fairly straightforward. Because firms with large market shares may be most essential to a conspiracy, they arguably should bear more of the burden. Moreover, allocating responsibility in proportion to one's benefit from the conspiracy avoids the anomalous situation in which a conspirator could expect to profit from a conspiracy even if found liable for treble damages.⁴¹ The Antitrust Criminal Penalty Enhancement and Reform

⁴⁰ Vertical cases in which a single supplier agrees with numerous dealers or distributors raise a conceptual issue about what "pro rata" means. Construing the term literally, a manufacturer that agrees with all 99 of its dealers would, as one of 100 conspirators, be responsible for only 1% of damages—a result that appears unfair given the manufacturer's likely receipt of a much larger portion of the illicit profits and its likely role as the instigator of the illegal conduct. This problem could be ameliorated by viewing the case as involving 99 discrete illegal agreements, in each of which the manufacturer is one of the two parties. The manufacturer would thus bear 50% rather than 1% of the liability.

⁴¹For example, in a conspiracy among one firm a with market share of 80% and 4 firms with shares of 5%, if liability were allocated per capita then the large firm could likely profit from the conspiracy even if it is found liable. Its antitrust liability would be treble its one-fifth share of overcharges, or 60% of overcharges, which would

Act of 2004 adopted the share-of-gain method when it limited the civil antitrust remedy against certain participants in the Department of Justice's corporate leniency program to "actual damages ... attributable to the commerce done by the applicant."⁴²

The concept of making liability proportional to the benefit derived from the illegal conduct does not transfer well to vertical agreements. Whereas in the typical horizontal case the benefit derived by each defendant can be measured by the overcharge it receives, no such simple computation is available in the case of vertical agreements. In a vertical case where the measure of damages is an overcharge (e.g., a minimum resale maintenance case brought by a consumer), there is no straightforward way to determine what portion of that overcharge ultimately inures to the various levels of the distribution chain. Where the measure of damages is the profits lost by a foreclosed competitor, ascertaining how much profit was realized at each step of the distribution claim may prove even more difficult.

A third approach would be fault-based allocation. Under this approach, the ringleader of a horizontal conspiracy would bear a larger portion of liability than a mere follower with a similar market share. Similarly, a manufacturer that forced a tying arrangement on a dealer would bear more of the liability than the dealer. One drawback is that there is no objective way to allocate responsibility once the defendants' respective roles have been determined. For example, the ringleader of a conspiracy involving five

be less than the 80% of overcharges that it realized. While the proportionately heavier antitrust liability borne by the small firms might deter them from joining the conspiracy, they might do so if they judged the likelihood of detection small.

⁴² Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666-67 (2004). The adoption of contribution would not vitiate the incentive this statute provides to participate in the leniency program, because only such participation limits a firm's exposure to single damages.

firms with similar market shares would deserve to bear more than 20% of the liability, but there is no clear way to determine if its share of liability should be 30%, 50%, or 90%.⁴³

For all its subjectivity, the relative culpability standard has worked well in other contexts. It is the operative standard for the contribution and comparative negligence regimes in place in most states, and there is little indication that it has been especially vexing to courts or juries or has regularly led to perverse results. Fault-based allocation has also been adopted by the Supreme Court in the admiralty context, and there is no indication that substantial problems have developed. This is not surprising, given that assigning relative blame is hardly a foreign exercise to either courts or juries; deciding relative culpability is a common exercise both within and without the judicial system.

Moreover, addressing the relative fault of the defendants would likely do little to complicate the trial. Each defendant has an incentive to adduce exculpatory evidence whether or not relative fault is an issue. Even where relative fault is an issue, defendants will often opt not to proffer inculpatory evidence about other defendants lest it increase the likelihood of a finding that a conspiracy existed.

Each allocation rule is inferior to some other in at least some respect. The guiding principle is not to let the perfect become the enemy of the good. Several allocation rules

⁴³ Judge Easterbrook remarked that “relative responsibility,” as a basis for allocation, “has no apparent meaning.” *Hearings on S. 995 Before the Comm. on the Judiciary, United States Senate, 97th Cong., 1st & 2nd Sess.* [hereinafter *Senate Hearings*], at 201 (statement of Hon. Frank H. Easterbrook). To the extent that “responsibility” refers to causation rather than to blameworthiness, it may indeed be meaningless to speak of relative responsibility. Because it takes at least two to conspire, the hapless dealer that is coerced into an illegal agreement by the manufacturer is as essential to the conspiracy—and as a causal matter just as responsible for it—as the manufacturer. On the other hand, it would be less at fault.

could be adopted that, for all their infirmities, are preferable to the status quo. Based upon the advantages and disadvantages discussed above, we propose that a hybrid and flexible allocation scheme be employed. The default option in all cases would be pro rata allocation. Where there is a reasonable basis to estimate the relative gains of the defendants from the conspiracy (e.g., most horizontal overcharge cases),⁴⁴ the initial pro rata allocation would be replaced by gain-based allocation. This allocation could then be adjusted to reflect relative fault to the extent it is deemed appropriate. In all other cases, the initial pro rata allocation should be adjusted based on relative fault.

Despite its initial reliance on pro rata allocation, the proposed allocation does not suffer from the more serious problems with pro rata allocation that were discussed above. The gravamen of the criticism of pro rata allocation was that in certain cases it would be demonstrably unfair. The proposed allocation method requires that the initial pro rata allocation be adjusted in such cases; i.e., when there is evidence of the allocation of gains (e.g., in horizontal overcharge cases) or of relative fault. Thus, pro rata allocation would be employed only when there was not evidence that its application would be unfair.⁴⁵

⁴⁴ An ability to allocate precisely should not be required. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (antitrust damages need not be proven with precision).

⁴⁵ Legislation would have to specify who resolves the contribution claims, the judge or the jury. Committing this issue to judges would appear to minimize costs. There may, however, be constitutional problems with this approach. While the equitable nature of a contribution claim provides a basis for arguing that the Seventh Amendment's right to a jury trial is inapplicable, the resolution of that issue is uncertain. Prudence may dictate embracing the approach reflected in the contribution bill proposed by the Department of Justice in 1982: contribution claims should be resolved by the judge, provided that they should be resolved by the jury if necessary to preserve the constitutionality of the statute. *See Senate Hearings, supra* note 43, at 134 (statement of Hon. William F. Baxter).

IV. CLAIM REDUCTION SHOULD BE ADOPTED IN ANTITRUST CASES.

With claim reduction, a plaintiff's damage claim (before trebling) against non-settling defendants is reduced by the damages attributable to a settling defendant. The relevant questions are (1) whether claim reduction is sound public policy and (2) what standard should be used to allocate damages to defendants that have settled.

A. Policy Issues

Claim reduction enhances the fairness of the remedial scheme by inhibiting a plaintiff's ability to negotiate settlements that exceed the expected value of recovery at trial and to whipsaw settlements. Claim reduction does not have negative effects relating to deterrence, settlement, and administrative costs that outweigh its contribution to fairness.

1. *Deterrence*

Because, as demonstrated above, the status quo creates incentives for settlements that exceed the plaintiff's expected recovery at trial, a claim reduction regime, with its decrease in expected settlement values, might decrease deterrence to some degree.⁴⁶ Both the existence and the magnitude of this effect are questionable, however, because it depends upon prospective violators being aware of the rules of joint and several liability and no-contribution, and how they combine to generate a settlement equilibrium that exceeds the plaintiff's expected recovery at trial.

Perhaps more importantly, such a reduction is not necessarily undesirable. Assuming that treble damages create the proper level of deterrence, then settlements that exceed the expected value of a treble damage award overdeter and are to that extent

⁴⁶ See Polinsky & Shavell, *supra* note 7, at 458; Easterbrook et al., *supra* note 12, at 359-60.

counterproductive. Moreover, as demonstrated above, the status quo provides the greatest premium over the expected recovery at trial where the plaintiff's case is the weakest and thus the conduct is least likely to be anticompetitive. Reducing the deterrence of competitively benign conduct is not a disadvantage.

2. *Discouraging Settlements*

Claim reduction arguably discourages settlements for two reasons. First, compared to the status quo, settlements become more expensive to the plaintiff, because its potential post-trial judgment is reduced by the settling defendant's proper share of trebled damages, rather than by the amount of the settlement. For example, if a firm responsible for 50% of \$10 million in overcharges settled for \$2 million, the plaintiff could still collect \$28 million — \$10 million trebled, less \$2 million — from the remaining defendants. With claim reduction, in contrast, if gain-based allocation were employed the plaintiff would have to exclude the \$5 million of overcharges attributable to the settling defendant from its damage claim, meaning that its maximum recovery would be the remaining \$5 million in damages trebled, or \$15 million. Thus, with claim reduction the \$2 million settlement potentially costs the plaintiff \$15 million. A plaintiff would therefore be less inclined to settle.⁴⁷

More precisely, the plaintiff would be less inclined to settle with that defendant for only \$2 million. The present remedial scheme enables a plaintiff to make up for early cheap settlements by exacting more from late settlers that are left bearing some of the exposure of the early settlers. Claim reduction eliminates this distortion, meaning that a plaintiff will not be likely to give as good a deal to the first to settle or as likely to insist

⁴⁷ See Easterbrook et al., *supra* note 12, at 363-64.

on as large a payment from late settlers. Early settlers would be expected to pay more and late settlers would likely pay less than under the present system. Arguably, this makes settlement less likely, because the attractiveness of cheap early settlements lures some into settling early, and those settlements create the whipsaw effect that makes even much more costly settlements attractive, or at least acceptable, to late settlers.

This reduction in the likelihood of settlement is not necessarily undesirable. Because the status quo produces settlements that exceed the defendants' expected liability at trial, the elimination of some such settlements is arguably a virtue, not a shortcoming, of claim reduction. It has often been argued that from an economic perspective a reduction in settlements is undesirable because it increases administrative costs, which are a deadweight loss to society. But, to the extent that claim reduction reduces the expected value of settlements (and thus actions) by eliminating the premium over the expected recovery at trial, it should discourage the commencement of suits at the margin. To the extent that these cases are at the margin (i.e., have relatively low expected returns) because the plaintiff's probability of prevailing is low, then the defendants' conduct is likely not anticompetitive. Discouraging antitrust challenges to legal conduct is not a disadvantage.⁴⁸ To the contrary, in addition to avoiding the administrative costs of such suits, discouraging them would eliminate the chilling effect on procompetitive conduct created by the prospect of such suits.

Claim reduction might discourage settlements for a second reason. If the portion of liability attributable to the prospective settler were highly uncertain, a plaintiff may be reluctant to settle only to discover later that it had carved out more of the settlement than

⁴⁸ See *House Hearings*, *supra* note 25, at 62 (statement of Hon. William F. Baxter).

it had contemplated.⁴⁹ The significance of this effect is questionable. The presence of some uncertainty about a defendant's ultimate share of liability should not impede settlement any more than uncertainty about the amount of damages does. Decisions to settle would be based on the parties' projections of the share of liability that would be attributed to a particular defendant, just as they are based on the parties' projection of damages. As with damages, if a defendant is relatively optimistic (compared to the plaintiff) about its share of liability, settlement is less likely; if it is relatively pessimistic, settlement is more likely.

Thus, while the uncertainty about the percentage of liability being released under claim reduction may reduce the tendency to settle somewhat, there is no reason to believe that any such effect would be substantial. There is, in fact, reason to believe that it would not. Comparative negligence rules, which have become the norm in tort law, create the same theoretical disincentives to settle as claim reduction, yet a high percentage of cases subject to such rules settle.⁵⁰ Moreover, in many antitrust cases a sharing agreement creates, in effect, a claim reduction regime, yet such cases often settle.⁵¹

3. *Administrative Costs*

Compared to the status quo, claim reduction would increase administrative costs somewhat because it would inject into the case the issue of the settled defendants' share

⁴⁹ See Jacobson, *supra* note 7, at 243-44.

⁵⁰ See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 n.13 (1975) ("Comparative negligence ... does not appear to discourage the negotiation of settlements ..."); Marianne M. Jennings, *The Impact of Alternative Negligence Defense Rules on Litigation Behavior and Tort Claim Disposition*, 5 *BYU L. Rev.* 33, 64-65 (1991).

⁵¹ See Jacobson, *supra* note 7, at 237.

of liability. For the reasons discussed above with respect to contribution,⁵² it is not clear that this additional complexity would greatly increase costs. Moreover, if a right to contribution has been recognized, the incremental administrative burdens of claim reduction decrease, because much of the culpability issue would be addressed by non-settling defendants. Finally, some increased administrative costs are a reasonable price to pay for achieving the fairness goals discussed above.

B. Method of Allocation for Claim Reduction

In determining the share attributable to a settling defendant, whatever standard is used to allocate liability in a contribution claim (assuming that contribution is allowed) should be employed. Using different standards for claim reduction and contribution would create an artificial incentive to settle because some defendants would be responsible for less under the claim reduction standard than under the contribution standard. Such defendants would have an incentive to settle disproportionate to their risk-adjusted liability at trial, permitting a plaintiff to realize settlements that exceed its expected recovery at trial.⁵³

V. A LEGISLATIVE PROPOSAL

In light of the foregoing analysis, the Antitrust Section submits for consideration by the Commission proposed legislation providing for contribution and claim reduction.

⁵² See *supra* pp. 17-19.

⁵³ For example, assume that conspirator A realized 80% of the gain and conspirator B realized 20%, that the plaintiff had a 50% probability of success, and that if there is liability damages are expected to be \$30 million. Assume that contribution is gain-based but claim reduction is pro rata. The expected cost to A if it proceeds to trial is \$12 million: $.5 \times \$30 \text{ million} \times .8$. If A settles for \$12 million, B's expected cost would be \$7.5 million: its 50% chance of prevailing times its \$15 million pro rata share of damages. Thus, the plaintiff would expect to recover \$19.5 million in settlements, even though its expected recovery at a trial against both defendants was only \$15 million: $.5 \times \$30 \text{ million}$.

There are virtually limitless ways to craft such legislation, and we do not mean to suggest that there are not alternate formulations that we would find to be acceptable, even preferable, alternatives to the proposal below. Rather, the proposal reflects one approach that the Antitrust Section finds markedly preferable to the status quo.

A. Draft Legislation

The Antitrust Section proposes that the Clayton Act be amended by adding thereto the following section:

Section _____. *Contribution Rights of Defendants.*

- (a) When used in this section, the following terms shall have the indicated meanings:
 - (i) “Contribution claim” shall mean a claim by a person who has paid or may pay more than his allocated share of a judgment for which he is jointly and severally liable to (a) recover some or all of any such excess payment from a person who has paid less than his allocated share of such judgment or (b) to determine such allocated shares. For purposes of this subsection, the amount that a person has paid shall include payments to the plaintiff in the underlying action and to contribution claimants on contribution claims.
 - (ii) “Contribution claimant” shall mean any person who asserts a contribution claim, whether in the underlying action or otherwise.
 - (iii) “Underlying action” shall mean the antitrust action that has resulted or may result in a judgment that gives rise to a contribution claim.
 - (iv) “Allocated share” shall mean the portion of the joint and several liability in the underlying action attributed to any person for purposes of this section, determined according to subsection (g). Depending on context, “allocated share”

may refer to a percentage or an absolute amount.

- (b) Contribution claims may be asserted by the filing of a counterclaim, cross-claim or third party claim in the underlying action, or in a separate action. If a contribution claim is transferred to a court pursuant to 28 U.S.C. § 1407, such court may retain jurisdiction over the claim for trial.
- (c) Contribution claims will be barred unless they are filed
 - (i) within one year of the date of service of the pleading in the underlying action asserting the claim giving rise to the liability or potential liability as to which contribution is sought, or
 - (ii) within sixty (60) days after the contribution claimant receives reasonable notice that the person from whom contribution is sought is or may be jointly liable for the alleged antitrust violation, whichever date occurs later.Notwithstanding the foregoing, contribution claims shall be barred unless they are filed within sixty (60) days after the entry of the judgment with respect to which contribution is sought.
- (d) A person who settles a claim with a plaintiff:
 - (i) may not thereafter assert or maintain a contribution claim against any person with respect to such claim by such plaintiff; and
 - (ii) may not thereafter be subjected to a contribution claim, regardless of when filed, by any other person with respect to amounts paid to such plaintiff with respect to such claim, provided that notice of the settlement is provided in writing to the court in the underlying action and to such other person no later than sixty (60) days after execution of the settlement agreement or the time of entry of the judgment on such contribution claim, whichever is earlier.
- (e) Where a person settles a claim with a plaintiff prior to entry of final judgment for the plaintiff on such claim

against one or more defendants, any damage award for such plaintiff on such claim against such defendants shall be reduced by the percentage that would have been allocated to such person by subsection (g) if no person had settled.

- (f) Where a person settles a claim with a plaintiff at a time such that subsection (e) does not apply, then the settlement with such person shall be deemed to satisfy a portion of the judgment in favor of the plaintiff equal to the settling person's allocated share. To the extent that such settlement thereby results in satisfaction of more than 100% of the judgment, non-settling persons may recover such excess from the plaintiff in proportion to the excess of their actual payments over their allocated shares of liability.
- (g) A person's allocated share of a joint and several liability shall be determined by the following allocation rules:
 - (i) In cases where the relative gains from the illegal conduct of the persons liable for such conduct can be reasonably estimated, their allocated shares shall be in proportion to their respective gains, provided however that such allocation may be adjusted to the extent the court believes is fair given the relative fault of such persons.
 - (ii) In all other cases, allocated shares shall be in proportion to the relative fault of the parties liable for such conduct. Absent any evidence to the contrary, all persons shall be presumed to be equally at fault.
 - (iii) In appraising relative fault, the court may consider, among other things, the role of each person in conceiving of the joint illegal conduct; urging others to participate in, organizing and implementing such conduct; and maintaining the secrecy of the conduct, as well as whether each person's participation was voluntary or coerced and the extent of each person's participation in such conduct.

- (iv) For purposes of this section, “the parties liable for such conduct” shall mean those found liable for the conduct in the underlying action or in any contribution claim in a separate action, but not any person whose settlement of the claim with the plaintiff led to a reduction of the damage award pursuant to subsection (e) hereof.
- (v) If a determination that any person is liable or is not liable for the underlying antitrust violation is reversed as a result of an appeal in such action or in a separate contribution action, any party to any contribution action may reopen such action in order to have liability reapportioned in light of the new determination of the parties who are liable, provided that nothing herein shall permit the assertion of a contribution claim that is barred by subsection (c) hereof.
- (h) Nothing in this section shall deprive any person of a right to trial by jury on the issue of its liability for the joint conduct that forms the basis of the antitrust liability.
- (i) Nothing in this section shall preclude two or more persons from agreeing to (i) apportion their collective liability in some manner other than as specified in this section or (ii) toll the automatic barring effect of paragraph (c).
- (j) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.

B. Discussion of Proposed Statute

Subsection (a) defines terms. A “contribution claim” is defined to embrace both an action to permit recovery by someone who has paid too much and an action to

determine what portion each defendant should pay (as may occur after the verdict, but before the judgment is enforced).

Subsection (b) provides that contribution claims may be brought in the underlying case or in separate actions. The Antitrust Section believes that it is preferable to have all claims for contribution litigated in the underlying action, and the proposed legislation is designed to encourage and facilitate that result. We anticipate that, at least in horizontal cases, defendants will ordinarily prefer to bring contribution claims in the underlying action, if only to avoid having to prove to a second jury that there was a violation for which the contribution defendant should be held liable. Where for jurisdictional or other reasons a defendant brings a separate action for contribution, the Judicial Panel for Multi-district Litigation would be able to transfer the contribution action and consolidate it with the underlying antitrust action for pretrial purposes pursuant to 28 U.S.C. § 1407.

Subsection (b) provides that the transferee court shall retain jurisdiction of the transferred contribution action for trial. Because of the fairly tight time periods provided in subsection (c), transfers should occur early enough in a case to permit efficient consolidation.

Subsection (c) provides that claims for contribution will be barred unless filed within one year of the service date of the original complaint, or within sixty days after the claimant for contribution has reasonable notice of his claim, whichever date occurs later. The Antitrust Section believes that it is desirable to require claims for contribution to be filed as soon as possible after they are apparent. However, a defendant in a newly filed proceeding is entitled to some substantial period of time to evaluate its case, confer with others and perhaps explore a sharing agreement before being required to state

contribution claims. The proposal permits contribution claims to be filed within one year from the filing of the original complaint. Once that year has passed, a contribution claim would be permitted only if filed within sixty days of the claimant's learning of the basis for the claim. To provide a limitation for the rare case in which there is an early judgment or in which a contribution claim does not become apparent until trial or after, the proposed statute provides that all contribution claims are barred sixty days after judgment in the trial court, irrespective of the one year provision and the existence of notice.

Subsection (d) bars contribution claims by settling defendants following such settlement, and it bars contribution claims against them where they provide timely notice of settlement to the court and other defendants. The subsection permits contribution actions to be brought or maintained by a person who later settles with the plaintiff. For example, a defendant may pursue contribution claims to reduce its share of total liability and then settle with the plaintiff while the judgment for the plaintiff is on appeal. Similarly, a judgment for contribution against a defendant is not upset by that defendant's subsequent settlement with the plaintiff

Subsection (e) provides for claim reduction in the case of persons who settle with the plaintiff prior to judgment in the underlying action.

Subsection (f) provides that where a person settles with the plaintiff subsequent to the entry of the judgment in the underlying action, the settlement is deemed to satisfy the portion of the judgment attributed or attributable to the settling person. Thus, a late settlement has the same effect on other defendants as an early settlement, although the mechanics are somewhat different because a judgment has already been entered. If a

plaintiff has enforced its judgment against other defendants in an amount that exceeds the share due from them given the satisfaction of judgment deemed to have occurred by virtue of such a settlement, those defendants may recover that excess from the plaintiff. (E.g., if two defendants are equally liable, the plaintiff enforces 70% of the judgment against one and then settles with the other for any amount, the non-settling defendant would be entitled to a refund of 20% of the judgment from the plaintiff, because having been deemed to receive 50% of the judgment by settling with one defendant, the plaintiff was entitled to recover only 50% from the other.)

Subsection (g) provides for allocation as discussed above. It enumerates a nonexclusive list of factors that may be considered in assigning relative fault. It does not prescribe how these factors should be weighted or applied, leaving that to the judgment of the court. This subsection recognizes that the allocation of liability might have to be revisited if some liability findings are reversed on appeal, and it provides that any party may reopen a contribution claim to do so.

Subsection (h) provides that a defendant in a separate contribution action is entitled to a jury trial on its liability for the underlying antitrust offense if that issue has not been resolved in a prior action.

Subsection (i) provides that parties may enter sharing agreements or toll the barring effect of subsection (c).

Subsection (j) provides that the legislation applies only prospectively.