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Contribution, Claim Reduction,and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?

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Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?

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I. Introduction

Antitrust violations traditionally have been viewed as statutory torts,[1] yet tort principles of damage allocation, including contribution[2] and claim reduction,[3] have not been extended by anal-

1. Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 473 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983); Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 391 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331 (1980); Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 Sw. L.J. 779, 790-91 (1979); *see* Rose, *Contribution in Antitrust: Some Policy Considerations*, 48 Antitrust L.J. 1605, 1607 (1979) (arguing tort law contribution experience should to serve as a guide in considering the issue of contribution in the antitrust context).

2. Contribution is the right of a jointly liable defendant who bas paid a judgment to assert a claim against other jointly liable persons to recover their fair shares of liability. *Contribution and Claim Reduction in Antitrust Litigation*, ABA Sec. Antitrust L. Mono-

ogy in the federal courts to antitrust cases. Moreover, the principle of joint and several liability, made applicable to antitrust conspirators by judicial fiat[4] some eighty years ago, has gone largely unchallenged. While the federal antitrust laws are nearly a century old, the damage allocation debate is of recent vintage,[5] emerging in the wake of the *Electrical Equipment Cases*,[6] when the private treble damage remedy came into its own.[7]

The recent emergence of contribution and claim reduction as issues is not surprising. Scholarly debate in the antitrust field historically has involved liability issues and did not focus seriously on remedies until the 1970s.[8] The catalysts for the current debate are: first, the seeming anomaly of a no-contribution rule in light of the acceptance of damage allocation principles;[9] and second, the perceived unfairness of making relatively minor actors in a conspiratorial scheme solely liable for amounts that are disproportionate to the degree of wrongdoing.[10]

GRAPH NO. 11, at 4-5 (1986) [hereinafter ABA Contribution Monograph]; *see also* Schwartz, Simpson & Arnold, *supra* note 1, at 780.

3. Claim reduction serves to reduce the liability of jointly liable defendants by the fair share of damages attributable to jointly liable settling defendants regardless of the actual settlement amount. ABA Contribution Monograph, *supra* note 2, at 5; Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447, 448 (1981).

4. City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906).

5. In 1969 a district court considered and explicitly rejected an antitrust defendant's claim that it was entitled to contribution. Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969). As early as 1960, however, one federal appellate court had held that no right of contribution existed under federal common law among antitrust defendants. *See* Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960).

6. The *Electrical Equipment Cases* refer to some 2233 private cases brought between 1962 and 1966 against Westinghouse, General Electric, and Allis-Chalmers. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 371 (1970).

7. Although the antitrust laws originally provided a private treble damage remedy, the private action was not a potent enforcement weapon until the *Electrical Equipment Cases*. In the last 25 years, private actions have become the "bulwark of antitrust enforcement." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

8. Breit & Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405 (1985).

9. *See, e.g.*, UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §§ 1-9, 12 U.L.A. 63 (1975); Securities Act of 1933, 15 U.S.C. § 77(f) (1982); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(b) (1982).

10. *See, e.g.*, *In re* Corrugated Container Antitrust Litig., 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370 (10th Cir. 1979). *See generally* STAFF OF SUBCOMM. ON MONOPOLIES AND COMMERCIAL LAW OF THE HOUSE COMM. ON THE JUDICIARY, 97th CONG., 2d SESS., REPORT ON PROPOSED LEGISLATION TO ALLOCATE DAMAGES AMONG DEFENDANTS IN PRIVATE ANTITRUST LITIGATION 1-2, *reprinted in* 44 Antitrust & Trade Reg. Rep. (BNA) 280 (Feb. 10, 1983) [hereinafter

Recently the contest has shifted from the judicial arena to the legislative arena. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*[11] the Supreme Court held that conspiring codefendants have neither a statutory nor a common-law right of contribution in antitrust cases. The Court also has declined to review lower court rulings denying claim reduction.[12] Rather than ending the debate, however, these decisions have only added fuel to the fire, in part because of then Chief Justice Burger's suggestion that contribution is a matter for Congress, not the courts.[13] The focus of the controversy thus has shifted from what "is" to what "ought to be."

Much has been written on contribution and claim reduction in antitrust cases as well as related proposals for damages allocation,[14] but no consensus among scholars has emerged. The theoretical studies on contribution and claim reduction[15] have been somewhat illuminating, but their value is limited because conclusions on the desirability of damage reduction vary, depending on the assumptions one accepts in analyzing specific fact situations. Moreover, the assumptions themselves are questionable, for the extent to which they mirror reality is far from clear.

A consensus has not emerged among legislators either. Unfortunately, the congressional debates regarding the merits and demerits of contribution and claim reduction have been obscured by

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11. 451 U.S. 630 (1981).

12. *See* Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (declining to review lower court's refusal to allow claim reduction).

13. 451 U.S. 630 (1981).

14. *See* ABA Contribution Monograph, *supra* note 2; Cirace, *A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits*, 55 ST. JOHN'S L. REV. 42 (1980); Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111 (1962); Easterbrook, Landes & Posner, *supra* note 1; Jacobsen, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217 (1980); Polden & Sullivan, *Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 397 (1983); Polinsky & Shavell, *supra* note 3; Rose, *supra* note 1; Schwartz, Simpson & Arnold, *supra* note 1; Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution*, 1980 U. ILL. L.F. 389; Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682 (1978) [hereinafter Note, *Private Suits*]; Note, *Contribution Among Antitrust Co-Conspirators*, 48 GEO. WASH. L. REV. 749 (1980); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540 (1980); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890 (1980); Note, *A Case Against Contribution in Antitrust*, 58 TEX. L. REV. 961 (1980); Note, *Contribution for Antitrust Codefendants*, 66 VA. L. REV. 797 (1980); Recent Development, *Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979 (1980).

15. Easterbrook, Landes & Posner, *supra* note 1; Polinsky & Shavell, *supra* note 3.

self-interest.[16] During 1982, bills providing for contribution and claim reduction were considered while major antitrust cases were pending, and lobbyists seeking to obtain relief from potentially enormous treble damage judgments besieged Congress.[17] Recently, Congress has considered more modest damage allocation reform proposals—abolition of joint and several liability[18] and claim reduction without contribution.[19] Congress also is considering an antitrust remedies reform package that includes provisions calling for detrebling for most antitrust violations[20] and claim reduction in all antitrust cases.[21] While the debates continue, troublesome questions about the existing system of antitrust damage allocation remain.

Perhaps the ongoing debate's most significant shortcoming is that contribution and claim reduction generally have been viewed in isolation and not in the context of an overall reshaping of private antitrust remedies. Most scholars and attorneys, for example, have analyzed the issue of damage reduction assuming the continued presence of mandatory treble damages when, in fact, Congress and some authors have proposed eliminating mandatory treble damages.[22] Nor has there been sufficient study of the implications of the abolition of joint and several liability on contribution.[23] A broader view of antitrust remedies is necessary if the merits of the

16. In 1982 the Senate considered Senate Bill 995 and seemed favorably disposed to the contrihution measures embodied in that bill. The legislation lost its support largely because of the persistent efforts of certain firms to apply its provisions to pending cases. Over 200 firms contributed to the campaign, many of whom had a direct stake in the outcome. Among the most active advocates of a retroactivity provision were Georgia-Pacific, Weyerhauser, Willamette, Mead, and Milliken. *Senate Refuses to Invoke Cloture to End Debate on Contribution Bill*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1093, at 1055 (Dec. 9, 1982).

17. *See infra* notes 210-13 and accompanying text.

18. S. 1300, 99th Cong., 1st Sess. (1985).

19. S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987); S. 2162, 99th Cong., 2d Sess. (1986).

20. S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987).

21. S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987).

22. *See* S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100tb Cong., 1st Sess. (1987); Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 848 (1987) (stating that "any change in the damage multiplier should be made only after taking into account other possible changes in the law of antitrust remedies. Elimination of trebling combined with the introduction of contribution and/or claim reduction or with abolition of joint and several liability may severely hamper private enforcement efforts").

23. Abolition of joint and several liability generally has been viewed as an alternative to contrihution. *See* Moore, *Two Lawyers Put New Wine in Contribution Bottle*, Legal Times, May 6, 1985, at 2, col. 1.

Reagan Administration's legislative proposals are to be judged properly.

This Article analyzes the desirability of contribution, claim reduction, and the abolition of joint and several liability in the context of other reform proposals, including detrebling of damages in private actions and the abolition of the private remedy. The Article concludes that: (1) although the current law denying contribution and claim reduction may give antitrust plaintiffs unfair leverage and from time to time produce harsh results, the resulting inequities are neither so widespread nor of such a magnitude to require a rule of contribution with or without claim reduction; (2) the inequities of the present system are better addressed through selective detrebling of antitrust damages combined with a limitation on joint and several liability for marginal participants in the conspiracy to prevent unfairly disproportionate liability; (3) claim reduction is preferable to contribution if mandatory treble damages are retained; and (4) joint and several liability for antitrust conspirators ought not to be abolished except to the extent necessary to prevent marginal defendants from facing extraordinary liability.

II. Origins of the Debate

A. *The Distinctive Features of Private Treble Damages Actions Under the Antitrust Laws*

The current state of the law denying contribution and claim reduction to antitrust defendants should be of concern because several features of antitrust damage law may expose conspiring defendants to damages that are far in excess of the actual benefits they derive from their individual wrongdoing. First, under section four of the Clayton Act,[24] antitrust judgments automatically are trebled by the court. Unquestionably, wrongdoers ought to compensate victims for actual damages inflicted; the penal portion of a treble damages judgment, however, bears no necessary relationship to the victim's harm or the perpetrators' benefits and may drive the wrongdoer out of business.[25] Today, it is not unusual for actual

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24. 15 U.S.C. § 15 (1982).

25. *Individual Treble Damage Liability: Hearings on S. 1300 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 31-32 (1985) [hereinafter ITDR Hearings] (prepared statement of Ira M. Millstein, an attorney with the New York firm of Weil, Gotshal & Manges).

damages to approach one billion dollars[26]—damage judgments of far less could cripple many firms.

Second, in antitrust conspiracy cases, defendants are jointly and severally liable to the plaintiffs.[27] To satisfy a judgment, plaintiffs may proceed against one, some, or all of the defendants.[28] Hence, it is possible that a deep-pocket defendant, who had only peripheral involvement in the conspiracy or reaped only minor benefits, might be held liable for all of a treble damages judgment. Moreover, because defendants have no right of contribution, the most culpable actors may escape with only token liability. There is also no right to claim reduction when codefendants settle prior to judgment.[29] Any settlement amounts paid are subtracted from the treble damage award, rather than the amount of actual damages.[30] To the extent that a defendant has settled for less than its fair share of liability, nonsettling defendants face liability for a portion of damages inflicted by the settling party.[31]

Third, many antitrust suits are brought as nationwide class actions.[32] Obviously, defendants' monetary exposure increases significantly when there are many victims. Fourth, victorious plaintiffs are entitled to recover reasonable attorneys' fees under section four of the Clayton Act,[33] while successful defendants may not seek attorneys' fees under the antitrust laws.[34] Fifth, statutory tolling pro-

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26. *See Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 141 (1981-82) [hereinafter House Damage Hearings] (prepared statement of Robert P. Taylor, an attorney with the San Francisco firm of Pillsbury, Madison & Sutro).

27. Flintkote Co. v. Lysfjord, 246 F.2d 368, 397 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906).

28. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §§ 47, 48 (5th ed. 1984) [hereinafter PROSSER & KEETON].

29. Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 391-92 (4tb Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

30. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); Flintkote Co. v. Lysfjord, 246 F.2d 368, 397 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

31. *See infra* note 69.

32. ITDR Hearings, *supra* note 25, at 30-31 (prepared statement of Ira M. Millstein).

33. 15 U.S.C. § 15 (1982).

34. This is not to say that a prevailing defendant may never recover attorneys' fees in an antitrust suit. Sanctions imposed pursuant to Federal Rule of Civil Procedure 11 for filing frivolous claims frequently involve the award of attorneys' fees to the prevailing defendant. *See* Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986) (stating that "sanctions for misconduct and abuse of the legal system seem to be inevitably interwoven with the problems of shifting the burden of attorneys' fees, which have become the primary cost factor in litigation"). Attorneys' fees also may be shifted pursuant to 28 U.S.C. § 1927 if an attorney multiplies the proceedings "unreasonably and vexatiously." Finally, fees may be

visions[35] and the doctrine of fraudulent concealment[36] serve to extend the periods over which damages may be recovered. Finally, once a statutory violation and antitrust injury are established, the plaintiffs face a relatively lenient standard of proof in establishing the amount of damages. The award of damages may be based on just and reasonable estimates, including both "probable and inferential, as well as direct and positive proof."[37]

The combination of these factors—mandatory treble damages, joint and several liability, absence of contribution and claim reduction, class actions, prevailing plaintiffs' right to attorneys' fees, tolling of the statute of limitations, and lenient standards of proof—has had the unintended consequence of magnifying the potential damage exposure of any individual defendant.[38] These factors also provide plaintiffs with significant leverage in litigating antitrust claims, while at the same time making the defense of the lawsuit a risky venture. Defendants frequently face a Hobson's choice: either pay some amount to settle, even though they believe in their innocence, or try the matter and risk uncapped liability. For many firms, the risk of a catastrophic judgment is unacceptably high, and they choose to settle, regardless of their culpability.[39]

If one views the present system as favoring plaintiffs, then permitting contribution, with or without claim reduction, would be one way of alleviating the imbalance. The question that must be addressed is whether either or both contribution and claim reduction are appropriate means to correct this perceived imbalance.

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shifted pursuant to the court's inherent equitable power if plaintiff files or maintains the action in bad faith. Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-66 (1980).

35. 15 U.S.C. § 16(a) (1982). The normal statute of limitations in private actions is four years. 15 U.S.C. § 15(b). Nevertheless, the statute for private actions is tolled during the pendency of a government action, and to bring a suit, private plaintiffs must file within one year following the termination of a prior government proceeding.

36. The elements of fraudulent concealment include: (1) wrongful concealment by defendants; (2) failure of plaintiff to discover factual grounds for antitrust claims; and (3) due diligence by the plaintiff. ABA Contribution Monograph, *supra* note 2, at 10-11 (citing *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980)).

37. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946) (quoting Allison v. Chandler, 11 Mich. 542, 555 (1863)); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-64 (1931); *see* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-25 (1969).

38. ITDR Hearings, *supra* note 25, at 31-32 (prepared statement of Ira M. Millstein). Millstein, Birrell & Kessler, *S. 1300-H.R. 4831—An Overdue Antitrust Reform*, 31 ANTITRUST BULL. 955, 958-61 (1986).

39. Millstein, Birrell & Kessler, *supra* note 38, at 958-61.

B. *Historical Development of the Law on Contribution*

The history of the law on contribution among joint tortfeasors is shrouded in confusion. Based on the English case of *Merryweather v. Nixan*,[40] the common law did not give joint tortfeasors the right to contribution.[41] *Merryweather*, however, involved an intentional tort, and the narrow holding of the case is that contribution is not permitted in cases involving intentional misconduct.[42] Indeed, authority predating *Merryweather* indicates that contribution is permissible if the joint conduct was merely negligent.[43] Nevertheless, the later English cases, by denying contribution among joint tortfeasors despite the absence of intentional wrongdoing, either erroneously construed *Merryweather* or broadened its holding.[44] American cases adopted this broad rule against contribution, and by the twentieth century the rule had become firmly entrenched in the United States.[45]

Great Britain abrogated the common-law bar to contribution among joint tortfeasors by statute in 1935.[46] During the same period, American scholars criticized the rule denying contribution among joint tortfeasors as unduly harsh,[47] and legislatures and courts began to examine the reasons for banning contribution. In 1939 the Commissioners on Uniform Laws adopted the Uniform Contribution Among Tortfeasors Act,[48] which galvanized state legislatures into action. Today, thirty-five states have statutes allowing contribution;[49] five states, as well as the District of Colum-

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40. 101 Eng. Rep. 1337 (K.B. 1799).

41. PROSSER & KEETON, *supra* note 28, § 50; Rose, *supra* note 1, at 1605.

42. Rose, *supra* note 1, at 1607.

43. *Id.* at 1606-07 & n.13.

44. *Id.* at 1605-07.

45. *Id.* at 1605; ABA Contribution Monograph, *supra* note 2, at 6.

46. The Law Reform (Married Women and Tortfeasors) Act, 25 & 26 Geo. 5, ch. 30, § 6(1)(c) (1935).

47. *See, e.g.*, Gregory, *Contribution Among Joint Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365; Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941).

48. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §§ 1-9, 12 U.L.A. 63 (1975).

49. *See* ALASKA STAT. §§ 09.16.010 to .16.060 (1983); ARIZ. REV. STAT. ANN. §§ 12-2501 to -2509 (Supp. 1986); ARK. STAT. ANN. §§ 34-1001 to -1009 (1962); CAL. CIV. PROC. CODE §§ 875-883 (West 1980 & Supp. 1987); COLO. REV. STAT. §§ 13-50.5-101 to -106 (Supp. 1986); DEL. CODE ANN. tit. 10, §§ 6301-6308 (1975); FLA. STAT. ANN. § 768.31 (West 1986); GA. CODE ANN. § 51-12-32 (1984); HAW. REV. STAT. §§ 663-11 to -17 (1985); IDAHO CODE §§ 6-803 to -806 (1979 & Supp. 1987); KAN. STAT. ANN. § 60-2413 (1983); KY. REV. STAT. §§ 412.010 to .050 (Michie 1972); LA. CIV. CODE ANN. art. 1805 (West 1987); MD. ANN. CODE art. 50, §§ 16-24 (1986); MASS. GEN. LAWS ANN. ch. 231B, §§ 1-4 (West 1986); MICH. COMP. LAWS ANN. §§ 600.2925a to .2925d (West 1986); MISS. CODE ANN. § 85-5-5 (1972); MO. REV. STAT. § 537.060

bia and the Virgin Islands, have court decisions permitting contribution.[50] In the federal system there also has been a similar trend toward contribution. Contribution is expressly permitted under the Securities Act of 1933[51] and the Securities and Exchange Act of 1934.[52] Moreover, the federal courts in recent years have permitted contribution in cases involving admiralty,[53] aviation collisions,[54] employment discrimination,[55] FELA claims,[56] and securities fraud.[57]

The federal courts did not directly confront the issue of contribution in antitrust cases until 1969.[58] Following that decision, other lower courts, with one notable exception,[59] also held that defendants had no right of contribution under the antitrust laws.[60] The Supreme Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*[61] ended the debate as to whether a right of contri-

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(1983); NEV. REV. STAT. §§ 17.223 to .305 (1979); N.J. STAT. ANN. §§ 2A:53A-1 to :53A-5 (West 1952); N.M. STAT. ANN. §§ 41-3-1 to -8 (1978); N.Y. CIV. PRAC. L. & R. §§ 1401-1404 (McKinney 1976); N.C. GEN. STAT. §§ 1B-1 to -7 (1983); N.D. CENT. CODE §§ 32-38-01 to -04 (1976 & Supp. 1987); OHIO REV. CODE ANN. §§ 2307.31, 2307.32 (Anderson 1981); OKLA. STAT. ANN. tit. 12, § 832 (West Supp. 1987); OR. REV. STAT. §§ 18.440 to -.460 (1983); PA. STAT. ANN. tit. 42, §§ 8321-8327 (Purdon 1982); R.I. GEN. LAWS §§ 10-6-1 to -11 (1985); S.D. CODIFIED LAWS ANN. §§ 15-8-11 to -22 (1984); TENN. CODE ANN. §§ 29-11-101 to -106 (1980); VA. CODE ANN. §§ 8.01-34, 8.01-35.1 (1984); W. VA. CODE § 55-7-13 (1981); WIS. STAT. §§ 113.01 to .11 (1985); WYO. STAT. §§ 1-1-110 to -113 (1977).

50. Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *cert. denied sub nom.* Hinckley Plastic, Inc. v. Reed-Prentice Div. Package Mach. Co., 436 U.S. 946 (1978); Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1967); Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Underwriters at Lloyds v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); Royal Indem. Co. v. Aetna Casualty & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975).

51. 15 U.S.C. § 77(k)(f) (1982).

52. 15 U.S.C. §§ 78i(e), 78r(b) (1982).

53. Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 110-15 (1974).

54. *See, e.g.*, Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974).

55. *See, e.g.*, Grogg v. General Motors Corp., 72 F.R.D. 523, 528 (S.D.N.Y. 1976).

56. *See, e.g.*, Chicago & Northwest Ry. v. Minnesota Ry., 371 F.2d 129, 131-32 (8th Cir. 1967).

57. De Haas v. Empire Petroleum Co., 286 F. Supp. 809, 815-16 (D. Colo. 1968), *aff'd*, 435 F.2d 1223 (10th Cir. 1970); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 957-58 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 941 (1971).

58. Sabre Shipping Corp. v. American President Lines, 298 F. Supp. 1339 (S.D.N.Y. 1969).

59. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

60. Hedges Enters. v. Continental Group, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. June 20, 1979); *In re* Corrugated Container Antitrust Litig., 84 F.R.D. 40 (S.D. Tex.), *aff'd*, 606 F.2d 319 (5th Cir. 1979); *In re* Ampicillin Antitrust Litig., 82 F.R.D. 647, 650 (D.D.C. 1979).

61. 451 U.S. 630 (1981).

bution exists under the Sherman Act,[62] the Clayton Act,[63] or federal common law by rejecting arguments in favor of contribution. Nevertheless, the contribution issue did not die; in fact, Justice Burger's invitation to Congress to provide a legislative solution to this problem only intensified the debate:

> 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.
>
> The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit.[64]

While Congress may be better equipped than the courts to deal with the damage allocation issue, Congress has not yet reached a consensus concerning a contribution statute.[65]

III. The Contribution Debate

A. *The Case for Contribution*

1. Fairness

The principal rationale for adopting a rule of contribution in antitrust cases is fairness. Mandatory trebling, joint and several liability, prohibition of contribution and claim reduction, class actions, prevailing plaintiff's right to attorneys' fees, liberal statute of limitations' tolling provisions, and lenient standards for proving damages combine to give plaintiffs enormous incentives to bring antitrust claims and significant leverage in prosecuting these claims.[66] Plaintiffs do not hesitate to exploit that leverage to take unfair advantage of defendants. Permitting contribution would create a more equitable balance of power between plaintiffs and defendants in antitrust litigation.

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62. 15 U.S.C. §§ 1-7 (1982).

63. 15 U.S.C. §§ 12-27 (1982).

64. *Texas Industries*, 451 U.S. at 646-47.

65. *See infra* notes 207-53 and accompanying text.

66. *See* ITDR Hearings, *supra* note 25, at 31-32 (prepared statement of Ira M. Millstein); Millstein, Birrell & Kessler, *supra* note 38, at 958-61.

a. Whipsaw settlements

Under the present system, defendants feel victimized by plaintiffs' whipsaw settlement tactics.[67] For example, in a price-fixing

67. *See* House Damage Hearings, *supra* note 26, at 309-13 (prepared statement of Benjamin Civiletti, an attorney with the Baltimore firm of Venable, Baetjer, Howard & Civiletti). Mr. Civiletti's testimony regarding whipsaw tactics was graphically illustrated by the following chart.

CORRUGATED CONTAINER LITIGATION

Company	Market Share	Settlement Date	Settlement Amount ($ Million)	Amount Per Point ($ Million)
FELONY INDICTEES				
International Paper	8.3	8/24/78	8.3	1.0
Champion	5.36	12/18/78	24.12	4.5
Weyerhaeuser	7.83	1/06/79	39.15	5.0
Owens-Illinois	5.45	1/12/79	32.70	6.0
Olinkraft	1.22	1/12/79	7.35	6.0
Continental Group	4.22	1/16/79	27.43	6.5
MISDEMEANOR INDICTEES				
Boise Cascade	2.82	12/18/78	9.89	3.5
Container Corp.	8.56	1/06/79	34.24	4.0
Inland Container	7.29	1/18/79	34.63	4.75
Stone Container	3.05	1/18/79	14.49	4.75
St. Joe Paper Co.	2.62	1/18/79	12.47	4.75
UNINDICTED COMPANIES				
St. Regis Paper Co.	3.97	7/21/78	1.98	.5
Union Camp	3.7	12/13/78	7.40	2.0
Diamond International	.5	12/14/78	1.00	2.0
Dura Container	.37	12/14/78	.75	2.0
Chesapeake Corp.	1.26	12/18/78	3.02	2.4
Longview Fibre	2.58	12/18/78	6.45	2.5
Willamette Industries	4.18	12/18/78	11.29	2.7
Menasha Corp.	1.67	12/18/78	4.59	2.75
MacMillan-Bloedel	2.11	12/18/78	8.44	4.0
U.S. Corrugated	.76	1/25/79	3.07	4.0
Green Bay Packaging	1.71	1/25/79	5.56	3.25

Id. at 330; *see Antitrust Equal Enforcement Act: Hearings Before the Comm. on the Judiciary of the United States Senate*, 97th Cong., 2d Sess. 68-73 (1981) [hereinafter S. 995 Hearings] (testimony of George Kress, Chief Executive Officer, Green Bay Packaging, Inc.). Mr. Kress stated that his firm, Green Bay Packaging, Inc., felt coerced into settling with the plaintiffs in *In re Corrugated Container Antitrust Litigation* even though the company, unlike other defendants, had not been indicted on criminal price-fixing charges and none of its customers was a named plaintiff. *Id.* at 71. Plaintiffs offered to settle with Green Bay Packaging, which represented less than 2% of the sales in question, for $5.5 million or $3.7

case involving numerous firms, plaintiffs target certain defendants, usually deep-pocket defendants, and offer them a sweetheart settlement. Those defendants accept the discount settlement and are released from any further liability. This approach accomplishes two goals: (1) plaintiffs receive cash to finance the suit against other defendants; and (2) plaintiffs gain the ability to exert more pressure on other defendants because if the settlement was for less than the defendant's share of damages, the nonsettling defendants now are exposed to damages disproportionate to their degree of responsibility.[68] Because there is no claim reduction under the antitrust laws, the settlement amounts are set-off, not against the actual damages claimed but rather against the final trebled amount. In effect, treble damages combined with the lack of claim reduction could diminish the settlement to one-third of its actual value.

Thereafter, plaintiffs may engage in a second or third round of settlement overtures. With each succeeding round, the asking price for peace increases and the concomitant risk of an enormous liability judgment for those remaining at trial increases. Defendants

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million per market share point. *Id.* at 71-72. This offer was 7.5 times greater than the $500,000 per market share point that had been offered to the defendants who had settled early. *Id.* at 71. Kress observed:

> Green Bay thereby realized that it faced a monumental decision—pay the $5.5 million settlement, or face the financial risk that it may ultimately be the only remaining defendant who, under the existing law, would be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged pricefixing conspiracy. The absence of a right of contribution and claim reduction therefore served to coerce us into a settling posture.
>
> An estimate of the potential damages which might be decided by a Court was then necessary in order that a proper assessment of the situation be made.
>
> Using a variety of assumptions in order to arrive at a feasible damage figure which might ultimately be determined by a jury, we assumed that a damage figure of 5 percent of the total industry annual sales was feasible. Subtracting the settlements already made, and multiplying the results by 2 ½ times after taxes, we concluded that we must stand ready to bear the burden of a potential legal liability of from 2 to 5 billion dollars if we followed our original decision to defend our innocence of any civil antitrust liability.

Id. at 72.

68. For example, assume that a price-fixing conspiracy imposed $20 million of overcharges on plaintiffs. Defendant X has a 25% share of the price-fixed sales or $5 million. X settles with the plaintiffs for $1 million. Because of the principle of joint and several liability, plaintiffs may still assert their claims for overcharges imposed by X against all nonsettling defendants. Thus, plaintiffs would be permitted to offer proof that overcharges amounted to $20 million. If successful, plaintiffs' award would be trebled automatically to $60 million. At that point, the court would deduct the $1 million settlement payment by X. Plaintiffs could collect $59 million from the nonsettling defendants. In effect, by settling for $1 million, X has been able to shift to its nonsettling codefendants liability in the amount of $14 million—$5 million trebled minus the $1 million settlement.

who are either marginal players in the conspiracy or wrongfully accused feel extorted by such tactics. Even those defendants who were acquitted in the criminal phase of the case are not immune from pressures to settle and may find themselves competing for an early settlement to avoid the alternative risk of going to trial and being held liable for damages wholly out of proportion to any wrongdoing.[69] Perhaps even more unfair is the fact that these companies, precisely because they are small players with marginal culpability, are rarely if ever offered settlement terms comparable to those provided to the ringleaders.

The lack of contribution in antitrust cases permits the utilization of whipsaw tactics that result in defendants paying settlement amounts bearing no reasonable relationship to their degree of culpability or their benefits from the conspiracy. The most culpable defendants may pay the least in settlement, while the least culpable defendants may be exposed to a disproportionate share of liability.

b. Impact on business operations

Wholly apart from the inequities created by whipsaw tactics, a no-contribution scheme may impair the ability of a defendant firm to compete.[70] The doctrine of joint and several liability permits a plaintiff to proceed against any defendant.[71] A plaintiff's decision to proceed against a given defendant may result in that defendant's financial ruin.[72] At the very least, a catastrophic judgment would impair the firm's ability to obtain credit.[73] The no-contribution rule may distort a defendant's potential liability even prior to

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69. *See* S. 995 Hearings, *supra* note 67, at 71-73 (testimony of George Kress).

70. *See* Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York, *Report on Treble Damages*, 40 THE RECORD 647, 654-55 (1985) [hereinafter City Bar Report on Treble Damages] (pointing out the profound impact of mandatory trebling combined with joint and several liability); *see also* Kline v. Coldwell Banker & Co., 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975):

> The amount of recovery is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2,000 are joined in a class action in which each is jointly and severally liable, the liability is increased in geometric progression. Such an award [of upwards of three quarters of a billion dollars] against each of 2,000 real estate broker defendants would shock the conscience.

Id. at 234; Main St. Drugs v. Beer Distribs., Inc., 26 Fed. R. Serv. 2d (Callaghan) 87, 90 (N.D. Ind. 1978) (stating that the current antitrust damages scheme might well bankrupt many of the present and potential defendants).

71. *See* PROSSER & KEETON, *supra* note 28, § 46.

72. *See* S. 995 Hearings, *supra* note 67, at 71-73 (testimony of George Kress).

73. *Id.* at 73.

judgment because contingent liabilities must be noted on a firm's financial statement. Since a marginal defendant could be held liable for one hundred percent of total damages, a defendant must disclose that fact, which may impair a company's credit rating while the suit is pending.

c. Uncertainty in the antitrust laws

The antitrust laws are not a model of clarity, and the scope of their prohibitions is not always apparent ex ante.[74] While there are some areas of antitrust law, including horizontal price-fixing, horizontal division of territories and concerted refusals to deal, where liability is clear and unambiguous, there are many areas where liability is neither clear nor settled. Territorial restraints imposed by a manufacturer on a dealer, exclusive dealing arrangements, and requirements contracts, for example, restrain trade but at the same time provide significant procompetitive benefits that outweigh any such restraint.[75] The legality of these arrangements is judged on a case by case basis.

Particularly perplexing is the law with respect to conspiracy. The Supreme Court has held that proof of an express agreement is not required to establish an antitrust conspiracy.[76] Nevertheless, the line between an illicit tacit agreement and legitimate parallel conduct is vague and ill-defined.[77] The Supreme Court, in *Monsanto*[78] and more recently in *Matsushita*,[79] sought to clarify the standards governing proof of conspiracy. The Court held that in order to establish conspiracy a plaintiff must show a "conscious commitment to a common scheme."[80] What constitutes a "conscious commitment to a common scheme," however, is far from self-evident. A party may be held to have conspired even though it

74. Congress drafted the antitrust laws with broad brush. *See* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 573 n.11 (1982) (observing that Congress desired that the antitrust rules sweep broadly); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 13 (1977) (stating that "[t]he substantive provisions of the Sherman Act are stated in brief compass but in broad, suggestive language").

75. *See, e.g.*, Continental Television Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

76. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939).

77. *Compare id.* (stating that conspiracy may be found when defendants, "knowing that concerted action was contemplated and invited[,] . . . gave their adherence to the scheme and participated in it") *with* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1951) (stating that "'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely").

78. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

79. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986).

80. *Monsanto*, 465 U.S. at 764.

did not know the identity of the other conspirators and the precise scope of the conspiracy.[81] Under these circumstances it is unduly harsh to expose such a minor actor to joint and several liability for the entire treble damage amount.

In *United States v. Container Corp.*[82] the Supreme Court held that reciprocal exchanges of current pricing information are unlawful when the following economic factors are present: a market dominated by few sellers, inelasticity of demand entry in the face of overcapacity and declining prices, and product fungibility.[83] Given the presence of these factors, the Court found that "The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition."[84] It is difficult to derive a bright-line rule from the *Container* holding and unclear whether infrequent reciprocal exchanges of price information are unlawful when the inferences of anticompetitive effect are less than "irresistible."[85] Indeed, in *United States v. United States Gypsum Co.*[86] the Supreme Court seemed to retreat somewhat from the *Container* holding by suggesting that an interseller price verification program, which involved infrequent reciprocal exchanges of price information, is not invariably anticompetitive and may well promote vigorous price competition.[87] Consequently, it would be unfair to expose a party who has casually exchanged price information to the same penalties that await the boldest price-fixer.[88]

d. Baseless suits

The rule of joint and several liability may encourage baseless antitrust suits or, at the very least, may encourage the inclusion of

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81. Hoffman LaRoche, Inc. v. Greenberg, 447 F.2d 872 (7th Cir. 1971); *see, e.g.*, United States v. Masonite Corp., 316 U.S. 265, 275 (1942) (holding that conspiracy properly found when defendant became aware that contract was part of larger anticompetitive arrangement); *Interstate Circuit, Inc.*, 306 U.S. at 226 (stating that "[i]t was enough that, knowing that concerted action was contemplated and invited, tbe distributors gave their adherence to the scheme and participated in it").

82. 393 U.S. 333 (1969).

83. *Id.* at 336-37.

84. *Id.* at 337.

85. *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 457-59 (1978) (indicating tbat although the consequence of the informal and infrequent exchange of price information among competitors, even absent specific agreement to fix prices, is likely to be price stability, there may be circumstances in which exchanges may be procompetitive).

86. 438 U.S. 422 (1978).

87. ABA Contribution Monograpb, *supra* note 2, at 13-14.

88. *Id.*

claims against innocent defendants in addition to the claims against culpable defendants.[89] The liberalized pleading standards of the Federal Rules of Civil Procedure[90] encourage plaintiffs to paint their claims with a broad brush that may not distinguish between key operatives in a conspiracy and those acting, if at all, on the fringe.[91] Where the major sellers in a given field are allegedly involved in a conspiracy, the temptation is great to characterize the conspiracy as "nationwide" or "industry-wide" and to treat all market participants as guilty. Innocent defendants thus must either settle or risk the uncertainties of litigation. Baseless suits, combined with the whipsaw settlement tactics described above, illustrate how the no-contribution rule is especially unfair to innocent sellers operating in the culpable defendants' marketplace.

2. Deterrence

Adoption of a rule permitting contribution may enhance deterrence.[92] Under the present system, an antitrust defendant, however blameworthy, may totally escape liability if the plaintiff chooses to proceed against other conspirators. Under these circumstances, a defendant may choose to violate the law and take the chance that ultimately someone else will have to pay the victims. A contribution rule would mean that a wrongdoer would always have to pay. Proponents of contribution argue that the certainty of sharing in the liability would be a greater deterrent than the possibility of paying the entire trebled amount,[93] especially since the latter alternative entails the possibility that a culpable defendant may pay nothing. Moreover, the no-contribution rule may overdeter and, in effect, deter legal conduct that has significant procompetitive benefits.[94] In *United States v. United States Gyp-*

89. *See, e.g.*, House Damage Hearings, *supra* note 26, at 402-03 (prepared statement of Burnell R. Roberts, Chairman and Chief Executive Officer, Mead Corp.).

90. FED. R. CIV. P. 8(e)(2).

91. *See, e.g., In re* Corrugated Container Antitrust Litig., 756 F.2d 411 (5th Cir. 1985). Marginal defendants, such as the Mead Corporation, were grouped together with the conspiracy's central operatives.

92. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979); Sullivan, *supra* note 14, at 412.

93. *Professional Beauty Supply, Inc.*, 594 F.2d at 1185; S. REP. No. 359, 97th Cong., 2d Sess. 18 (1982); Sullivan, *supra* note 14, at 412; *see also* S. 995 Hearings, *supra* note 67, at 40 (testimony of Robert Joffe, Chairman, Committee on Trade Regulation, New York City Bar Association) (arguing that treble damage liability and criminal exposure are the true deterrents of illegal behavior in the antitrust field).

94. House Damage Hearings, *supra* note 26, at 9 (testimony of Stephen D. Susman, attorney, Susman & McGowan) (testifying that lack of contribution for vertical antitrust

sum Co.[95] the Supreme Court, in the context of a criminal antitrust case, cautioned against the dangers of overdeterrence: "[S]alutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who choose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good faith error of judgment."[96] This admonition applies equally to civil cases. Some nonprice vertical restraints, such as location clauses and exclusive dealing arrangements, may offer procompetitive benefits that may be excessively discouraged by a rule of joint and several liability without contribution.[97]

3. Settlement

A contribution rule would eliminate the unfair whipsaw settlement tactics that plaintiffs have commonly used. The settlement process therefore would become more equitable. Settlement amounts would be based on defendants' culpability or benefits derived from the conspiracy rather than on the fear of enormous liability from an adverse judgment. Defendants would no longer be caught in an irrational settlement stampede. Contribution also may discourage early, bargain basement settlements because plaintiffs could not shift the burden of satisfying a judgment onto nonsettling defendants. This is not to say, however, that settlements will not be reached; significant incentives to settle remain, wholly apart from joint and several liability. Only unfair settlements and the pressure to enter into unfair settlements would be eliminated. Although the federal system encourages settlements,[98] settlements are not its primary objective; the Federal Rules of Civil Procedure seek to foster the just resolution of claims as well.[99] Allowing contribution may place plaintiffs in a less advantageous posture to negotiate early, favorable settlements, but this is simply the quid pro quo for a fairer system of damage allocation. The plaintiff's advantageous bargaining position was created, in part, by the unfair na-

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offenses might discourage socially useful conduct).

95. 438 U.S. 422 (1978).

96. *Id.* at 441.

97. *See* House Damage Hearings, *supra* note 26, at 9.

98. *See, e.g.*, FED. R. CIV. P. 16(c)(7) (making settlement an appropriate agenda item for pretrial conferences); *see also* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 346-47 (1971) (stating that promotion of settlement is consistent with the aims of the treble damages remedy).

99. *See* FED. R. CIV. P. 1 (stating that the Federal Rules shall he construed "to secure the just, speedy, and inexpensive determination of every action").

ture of the no-contribution rule.

4. Costs of a Contribution Rule

A contribution rule would add new issues to antitrust litigation, increasing the length and cost of trials.[100] These undesirable aspects of the rule are mitigated by several factors. First, the final allocation of damages would be fairer. Second, plaintiffs' right to recovery and payment would not be affected. Plaintiffs still may collect from any defendants they choose. If simultaneous trial of the contribution issues unduly complicates the trial and thereby prejudices the plaintiffs, tbe contribution issues could be severed and determined expeditiously in a separate proceeding.[101] Third, there is no basis for assuming that determination of contribution issues would overwhelm the courts. In related areas of law, most notably the securities field, which presents issues comparable in complexity to antitrust cases, courts have had little difficulty ap-

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100. *See* ABA Contribution Monograph, *supra* note 2, which states:

> In the first instance, contribution complicates antitrust litigation by introducing new parties, claims and issues. New parties are those potentially added by the defendants by way of cross-claims for contribution. The new claims are the contribution claims asserted, most likely, between all defendants. The new issues are those bearing on the damage allocation formula that is employed by the particular contribution legislation enacted. Depending on what that formula is, it will be necessary to define markets and determine market shares, assess relative culpability, or otherwise determine proportional responsibility.
>
> A rule of contribution is very likely to lead to the filing of numerous cross-claims. In a ten-member price fixing conspiracy, there exists the potential for ninety contribution cross-claims. In a national class action, that potential can be much greater. The *Corrugated Container* litigation involved 37 original defendants, allowing conceivably for 1,332 cross-claims. The *Folding Cartons* litigation involved over 40 defendants and thus over 1,600 possible cross-claims. Judge Hubert L. Will, who presided over the Folding Cartons case, testified on the likely course of that litigation had contribution been available when it was filed.
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> "If contribution and claim reduction had been the law at that time, each of these defendants could have and undoubtedly would have filed cross-claims for contribution against the other defendants and these hundreds of additional claims, cross-claims, third-party claims, answers and related motions would have seriously threatened any chance for the successful management of the case."

Id. at 33 (footnote omitted) (quoting House Damage Hearings, *supra* note 26, at 252 (letter from Hon. Judge Hubert L. Will to Rep. Peter Rodino)); *see also* S. 995 Hearings, *supra* note 67, at 122-28 (testimony of William Baxter, Assistant Attorney General, Antitrust Division, United States Department of Justice); House Damage Hearings, *supra* note 26, at 4-6 (testimony of A. Stephens Clay, an attorney with the Atlanta firm of Kilpatrick & Cody); *id.* at 18 (prepared statement of Stephen D. Susman); HOUSE STAFF REPORT, *supra* note 10, at 12 (conceding that "some complications and protraction would result").

101. S. REP. No. 359, 97th Cong., 2d Sess. 23-24 (1982) (suggesting that the wide latitude afforded by the Federal Rules of Civil Procedure for control of litigation make it unlikely that contribution issues will overly complicate a case).

plying contribution rules. In any event, the courts have sufficient authority to limit the quantum and order of proof on contribution issues in order to prevent a trial from becoming unwieldy.[102]

B. The Case Against Contribution

1. Fairness

Opponents of contribution are not moved by claims that the present system of joint and several liability is unfair.[103] First, price fixing is an intentional act.[104] Those who have purposefully and secretly conspired to fix prices are not entitled to any leniency.[105] Second, the argument that the no-contribution rule is unfair is based upon hindsight: contribution is perceived as unfair after defendants have committed acts that arguably violate the antitrust laws.[106] When viewed prior to the time any wrongdoing is committed, the antitrust laws affect all actors equally because each actor must consider the risk of antitrust liability.[107] Only those who, through their conduct, violate the antitrust laws risk unequal treatment; they may be held liable for the entire damages amount and unable to obtain contribution.

Third, the success of a conspiracy depends on the participation of all members.[108] In this "one for all and all for one" atmosphere, it is difficult to assess individual liability based on degree of participation or benefits derived. In effect, responsibility is indivisible, and the concept of contribution is somewhat artificial.

2. Deterrence

The case against contribution argues that a contribution rule would have an adverse impact on the deterrence of antitrust violations.[109] Joint and several liability combined with treble damages

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102. FED. R. CIV. P. 42(b); S. REP. No. 359, 97th Cong., 2d Sess. 23-24 (1982).

103. *See* Easterbrook, Landes & Posner, *supra* note 1, at 339.

104. House Damage Hearings, *supra* note 26, at 9-10 (testimony of Stephen D. Susman).

105. *See* Easterbrook, Landes & Posner, *supra* note 1, at 339.

106. *Id.* at 342.

107. *Id.*

108. The recent collapse of OPEC supports this view. As long as OPEC members limited their production, they were able to maintain artificially high prices. When members ignored production limits, oil prices plummeted. *See* ABA Contribution Monograph, *supra* note 2, at 21.

109. *Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Comm. on the Judiciary of the United States Senate*, 96th Cong., 1st Sess. 7 (1979) (testimony of John H. Shenefield, Assistant Attorney General, United States Depart-

provides a very powerful deterrent to potential antitrust violators. If, as would be the case under a contribution rule, the violator is liable for, at most, a specified portion of a treble damages judgment, the violator is less likely to feel restrained in its behavior than it would were it severally liable for treble the entire amount of damages inflicted by the conspiracy. In effect, contribution serves to subsidize price-fixing as well as other activities illegal under the antitrust laws. In addition, because a contribution rule makes individual liability more certain, it is easier, at least in theory, to develop a cost-benefit analysis regarding a company's illegal acts.

The argument that the present system overdeters is more theoretical than real.[110] In theory, it is possible that conduct having procompetitive benefits, and thus subject to the so-called "rule of reason," might be chilled.[111] In reality, however, few "rule of reason" cases result in findings of liability.[112] Furthermore, the primary target of the no-contribution rule is horizontal price-fixing, which has no socially useful benefits and hence cannot be overdeterred.[113]

3. Settlement

The present system encourages defendants to compete for early settlements at favorable terms. The possibility that plaintiffs may offer sweetheart settlements to the most culpable actors is a benefit and not a shortcoming of the no-contribution rule. Although settlement demands of parties who hold out escalate as a case proceeds to trial, this is one of the many risks that must be taken into account in determining whether and when to settle.

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ment of Justice); House Damage Hearings, *supra* note 26, at 17-18 (prepared statement of Stephen D. Susman).

110. *See supra* notes 95-97 and accompanying text.

111. House Damage Hearings, *supra* note 26, at 9 (testimony of Stephen D. Susman).

112. There are, of course, cases in which liability has been found under a rule of reason standard. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (holding that NCAA rules limiting appearances of member schools in televised football games were illegal under the rule of reason); Eiberger v. SONY Corp. of Am., 622 F.2d 1068 (2d Cir. 1980) (holding that certain vertically imposed territorial restriction on sales were unlawful).

113. ITDR Hearings, *supra* note 25, at 13-14 (prepared statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, United States Department of Justice) (stating that "moreover, to the extent a change in damage allocation rules provides relief to businesses engaged in felonious antitrust activities as opposed to those businesses engaged in competitively ambiguous conduct subject to the rule of reason, that change will affect only conduct that bas no merit and cannot be overdeterred").

Moreover, as discussed above,[114] the very nature of joint and several liability makes potential damage exposure unpredictable; and where exposure is large, a rule of joint and several liability pushes defendants toward settlement.

On the other hand, a contribution rule removes some of the incentive to settle. Early "discount" settlements would become less frequent because plaintiffs would be unable to determine what is sacrificed by settling. Most contribution proposals include "carve out" provisions that would remove the settling defendant's sales from the case;[115] unlike the present system, a contribution rule with a "carve out" provision would not permit recovery of overcharges imposed upon a nonsettling defendant. A defendant would be less eager to settle early if contribution were permitted because a defendant could calculate more easily its share of liability under a contribution formula.[116] At worst, this may result in more trials and fewer settlements; at best, this may lengthen settlement negotiations. In either case, significant process costs are likely to be incurred.

4. Costs and Complexity

More trials and fewer settlements are just one source of increased costs that would inevitably result from a contribution rule. Trials themselves might involve new parties and would become lengthier and more costly.[117] Contribution formulas may further complicate already complex antitrust issues.[118] This is particularly likely in cases involving vertical conspiracies or conspiracies that contain both horizontal and vertical aspects.[119] Defendants have an incentive to spread potential losses as widely as possible and thus would be inclined to bring marginal "co-conspirators" into the contribution phase of the suit, which further adds to costs and delay. Since a right of contribution would make defendants adversaries, they may have less incentive to cooperate on discovery.[120] Judicial

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114. *See supra* note 67 and accompanying text.

115. *See, e.g.*, S. 380, 98th Cong., 1st Sess. § 4I(b) (1983); H.R. 2244, 98th Cong., 1st Sess. § 4J(a) (1983); S. 995, 97th Cong., 2d Sess. § 4I(b) (1982); H.R. 4072, 97th Cong., 1st Sess. § 4I(b) (1981); S. 1468, 96th Cong., 1st Sess. § 4I(b) (1979).

116. House Damage Hearings, *supra* note 26, at 7-9 (prepared statement of A. Stephens Clay); *id.* at 19 (prepared statement of Stephen D. Susman); ABA Contribution Monograph, *supra* note 2, at 37-40.

117. *See supra* note 100; HOUSE STAFF REPORT, *supra* note 10, at 12.

118. *See infra* notes 220-53 and accompanying text.

119. *Id.*

120. ABA Contribution Monograph, *supra* note 2, at 33-34.

economies that might have been achieved by cooperative defenses are thus lost. While a contribution rule would provide significant advantages to defendants, it would create significant disadvantages for both plaintiffs and the federal judicial system.

C. Analysis of the Debate

The contribution debate has been characterized by a lack of analytical precision.[121] This imprecision is due to the enormous complexity of the issue and the inability to quantify the concepts upon which the debate has focused—fairness and deterrence. The key issue is whether the instances of unfairness are sufficiently serious and widespread to justify a major change in antitrust damage allocation rules, which might weaken the deterrent mechanism of the private damage remedy and ultimately increase the cost of litigation.

1. Fairness

Some commentators dismiss the fairness argument by saying that the law ought to have no sympathy for defendants who are intentional tortfeasors.[122] This rather cavalier dismissal of the fairness problem is far from compelling. First, the Supreme Court recognized in *Illinois Brick*[123] that the fair treatment of antitrust defendants, including accused price-fixers, is important.[124] A principal reason for the Court's ruling that indirect purchasers are not "injured" as a matter of law under section four of the Clayton Act was the danger that permitting indirect purchaser plaintiffs to proceed would create serious risks of double recovery. The Court specifically rejected suggestions that a slight risk of double recovery was acceptable.[125] In *Kline v. Coldwell Banker & Co.*[126] the Court of Appeals for the Fifth Circuit expressed concern about the geometric escalation of antitrust damages resulting from the combined effects of treble damages, class actions, and joint and several liability. The ancient precept that jointly liable intentional wrongdoers are not entitled to contribution is outmoded. Contribution

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121. Breit & Elzinga, *supra* note 8, at 423.

122. Easterbrook, Landes & Posner, *supra* note 1, at 339.

123. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

124. *Id.* at 731 n.11 (specifically rejecting plaintiff's contention on oral argument that "a little slopover on the shoulders of the wrongdoers . . . is acceptable").

125. *Id.* at 731 (stating that "we are unwilling to 'open the door to duplicative recoveries' under § 4" (quoting Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 264 (1972)).

126. 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

has been allowed under federal securities law in cases in which defendants have knowingly violated rule 10b-5.[127] Thus, fairness concerns cannot be ignored merely because the subjects are alleged intentional wrongdoers.

Second, even if opponents of contribution are correct in dismissing concerns for fair treatment of intentional wrongdoers, the fact remains that not all antitrust violations are the products of intentional wrongdoing. Conspiracy may be inferred in some instances but not in others, depending on the facts existing in a given marketplace.[128] Furthermore, alleged violations governed by the so-called "rule of reason" frequently involve conduct having significant procompetitive potential and can hardly be said to entail intentional violations of the law.[129] Even assuming that intentional wrongdoers are estopped from seeking equitable treatment, fairness concerns cannot be conveniently ignored when violations of the law were unintentional. Hence, the *ex ante/ex post* distinction,[130] which has some force in the case of intentional wrongdoing, is inapposite when intent is not involved.

On the other hand, it is true that the vast majority of successful antitrust prosecutions involve horizontal price-fixing and that defendants are generally victorious in "rule of reason" cases.[131] Indeed, the situations that purportedly illustrate the harshness of the no-contribution rule generally involve price-fixing.[132] There-

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127. Globus v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971); McLean v. Alexander, 449 F. Supp. 1251, 1267 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

128. *See supra* notes 76-81 and accompanying text.

129. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) (holding that blanket licensing of copyrighted music compositions creates efficiencies which outweigh any detriment to competition); Continental Television Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (upholding validity of location clauses imposed by a manufacturer); *see also* R. BORK, THE ANTITRUST PARADOX 285-88 (1978) (applauding the *Sylvania* opinion for its economically sophisticated approach to antitrust policy).

130. *See* Easterbrook, Posner & Landes, *supra* note 1, at 341.

131. This is not surprising because horizontal price-fixing is a naked restraint and hence governed by a per se standard. In per se cases, elaborate inquiries into justifications for the particular restraints are foreclosed; plaintiff need show only that the agreement in question had on anticompetitive purpose or effect. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 & n.59 (1940). In rule of reason cases, defendants are permitted to introduce evidence justifying their utilization of a particular restraint of trade. Consequently, by definition, rule of reason cases are more difficult for plaintiffs to win. For a summary of post-*Sylvania* decisions on non-price vertical restraints, see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (SECOND) 65-74 (2d ed. 1984).

132. *See, e.g.*, House Damage Hearings, *supra* note 26, at 141 (prepared statement of Robert P. Taylor) (citing *In re* Corrugated Container Antitrust Litig., 1979-1 Trade Cas. (CCH) ¶ 62, 689 (S.D. Tex. May 30, 1979) and *In re* Plywood Antitrust Litig., 655 F.2d 627

fore, rule of reason cases may have less significance in the contribution debate. Nevertheless, "rule of reason" cases cannot be casually dismissed. Even when such cases are successfully defended, alleged wrongdoers face the *risk* of disproportionate judgments and the *risk* of whipsaw tactics; this in itself is unfair.

Given that fairness concerns must be seriously weighed, the next question is whether the problem of unfairness is pervasive in private antitrust damages actions. If the problem is systemic, remedial action may be appropriate, even though this action might alter the present equilibrium. If the problem is isolated, any remedial action might create a disequilibrium that could seriously impair the private antitrust remedy.[133] A careful review of the legislative debates concerning damage allocation reform suggests that the unfairness arguments have been generated by a few well-publicized cases. The problem is hence not as pervasive as it might appear at first glance.

The circumstances surrounding many of these well-publicized cases may not recur. For example, in *In re Corrugated Container Antitrust Litigation*[134] the Mead Corporation, a marginal defendant that had previously been acquitted of any wrongdoing in criminal proceedings, proceeded to trial in the civil phase of the suit, but lost on the liability issue and faced treble damage exposure for substantially all of the illegal overcharges. The Mead plight is infrequent because over ninety percent of antitrust treble damages actions settle prior to trial.[135] Infrequency of litigated liability judgments, however, does not mean that the problem of disproportionate liability can be disregarded. The more fundamental prob-

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(5th Cir. 1981), *cert. denied*, 462 U.S. 1125 (1983)).

133. For a discussion of the interplay of various antitrust substantive remedies against each other, see Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1083-98 (1986).

134. *In re* Corrugated Container Antitrust Litig., M.D.L. No. 310 (S.D. Tex.) (LEXIS, Tradereg. Library, Dist. File) (M.D.L. is the abbreviation for multidistrict litigation). In the criminal phase of the *Corrugated Container* case, Mead Corporation had been indicted along with 13 other companies and 26 individuals and subsequently acquitted. Nevertheless, Mead was named as a defendant in the ensuing private treble damages actions. Companies that settled early paid only $1 million per market share point. Mead, which had a 3% market share, did not settle, went to trial, and was found liable. House Damage Hearings, *supra* note 26, at 402-03 (prepared statement of Burnell R. Roberts). The company eventually settled the damage claim for $45 million or $15 million per market share point. *Id.* at 402, *In re* Corrugated Container Antitrust Litig. M.D.L. No. 310 (S.D. Tex.) (LEXIS Tradereg. Library, Dist. File).

135. ABA Contribution Monograph, *supra* note 2, at 32. *But see* Millstein, Birrell & Kessler, *supra* note 38, at 962-64 (offering *Corrugated Container* as a case study in the potential for antitrust remedies abuse).

lem is that a no-contribution rule exposes defendants to unfair whipsaw settlement tactics long before the trial begins. The no-contribution rule changes the calculus of the settlement process; defendants, faced with the possibility of enormous treble damages judgments, irrespective of their degree of involvement in the conspiracy, feel unfairly pressured to settle for amounts that bear no relation to their degree of culpability. Contribution therefore is necessary to restore the balance of power between plaintiffs and defendants. A contribution rule does not necessarily impair the settlement process. Experience with contribution rules under the federal securities laws[136] suggests that such rules present no special hurdles to settlement.

The argument that contribution is needed to avoid whipsaw settlement tactics, however, ignores two very significant counterpoints. First, in any litigation, significant incentives to settle exist wholly apart from the amount in controversy. Parties want to limit attorneys' fees, ongoing administrative expenses associated with trial preparation,[137] loss of time for executives who are involved in discovery and trial preparation, and minimize the negative publicity caused by the pending dispute. Parties also may pursue settlement so as not to disrupt business relations. Thus, potentially uncapped liability is not the sole reason for settling antitrust cases.

Moreover, even proponents of contribution concede that the present system does promote favorable settlements for certain defendants. The question then becomes whether the benefits provided by early favorable settlements are outweighed by unfairness to "whipsawed" defendants. The case for contribution is weakened by this cost/benefit analysis. On the one hand, the present system unquestionably promotes early settlements and thereby enables plaintiffs to finance continued prosecution of suits against alleged violators. Indeed, a prominent criticism of the present system is that it promotes a veritable rush to settlement. On the other hand, there is little hard evidence that unfair whipsaw settlements are pervasive in the antitrust arena, notwithstanding the widespread perception to the contrary.[138] Even within the Department of Jus-

136. *See* Scott, *Resurrecting Indemnification: Contribution Clauses in Underwriting Agreements*, 61 N.Y.U. L. REV. 223, 256 (1986) (stating that per capita contribution in securities cases "may also encourage early settlements").

137. These expenses include costs associated with file searches, duplicating, witness preparation, experts' fees, and discovery.

138. *See, e.g.*, ABA Contribution Monograph, *supra* note 2, at 17-18; ITDR Hearings, *supra* note 25, at 19 (prepared statement of Charles F. Rule) (testifying that existence of

tice, unanimity on this issue is lacking as divergent statements by Antitrust Division heads within the last two years clearly illustrate.[139]

In addition, critics of the present system urge that it promotes baseless suits.[140] Even if joint and several liability encourages baseless suits, firms so victimized now have a remedy—sanctions under rule 11 of the Federal Rules of Civil Procedure.[141] Amended rule 11 was promulgated in 1983 to deter the assertion of frivolous claims by providing mandatory sanctions against an attorney or client if the attorney signs a pleading that is not well-grounded in fact or law or interposed for an improper purpose, such as "to harass or to cause unnecessary delay or needless increase in the cost of litigation."[142] Amended rule 11 provides an objective "reasonableness" standard in place of the more rigorous subjective "bad faith" test that previously had governed and thereby offers a stronger deterrent to strike suits.[143] While courts rarely imposed sanctions under former rule 11,[144] particularly in antitrust matters,[145] courts appear

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abuses under tbe present system "remains largely theoretical and anecdotal"); HOUSE STAFF REPORT, *supra* note 10, at 1 (concluding that "[t]he record evidence of unfairness in current damage allocation among defendants is at best elusive"). *But see* S. REP. No. 359, 97th Cong., 2d Sess. 18-22 (1982); House Damage Hearings, *supra* note 26, at 141 (prepared statement of Robert P. Taylor); S. REP. No. 428, 96th Cong., 1st Sess. 11 (1979). ABA Contribution Monograph, *supra* note 2, at 9; ITDR Hearings, *supra* note 25, at 30-31 (prepared statement of Ira M. Millstein).

139. *Compare* ITDR Hearings, *supra* note 25, at 19 (prepared statement of Charles F. Rule) (testifying tbat the existence of abuses under the present system "remains largely tbeoretical and anecdotal") *with Antitrust Remedies Reform: Hearings on S. 2162 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 15 (1986) (statement of Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, United States Department of Justice) (stating tbat "[a]fter examining the record of antitrust damage allocation, we are convinced tbat there is a real problem to be solved, namely the use or potential use of wbipsaw settlements").

140. *See, e.g.*, House Damage Hearings, *supra* note 26, at 403 (prepared statement of Burnell R. Roberts) (asserting that "I bave always believed that in our society if you are innocent you should not submit to blackmail").

141. FED. R. CIV. P. 11.

142. *Id.*

143. Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 253 (2d Cir. 1985) (observing that "subjective good faith no longer provides the safe harbor it once did").

144. One author observed:

> In view of litigation activity from 1938 to 1976, it was found that rule 11 motions bad been filed in only nineteen reported cases. Among these cases, violations were found in eleven instances, and attorneys were sanctioned in only three. Lest these findings be dismissed as outdated, another report reviewed the relevant case law through 1979 and found only one additional reported opinion in which counsel was disciplined under rule 11.

S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 2 (1985) (footnotes omitted); *see also* Mr. Frank, Inc. v. Waste Management, Inc., 591 F. Supp. 859, 870 (N.D. Ill. 1984); Pudlo v.

more hospitable to the amended rule and have not hesitated to impose sanctions when appropriate, especially in antitrust cases.[146]

The 1983 Amendments to rule 16 of the Federal Rules of Civil Procedure further strengthened the protection from baseless claims. Rule 16(c)(1) permits the court to dismiss, without necessity of formal motion papers, meritless claims.[147] Courts can use this mechanism to dismiss antitrust claims asserted against a defendant simply because it sold in the market in which price-fixing occurred.

Close examination of the fairness issues reveals that the case for contribution is far from compelling. The present system from time to time may permit a defendant to be saddled with disproportionate liability; but the existence of isolated occurrences does not justify a radical restructuring of damage allocation rules that may result in fewer and even more unfair settlements in antitrust actions. A less intrusive remedy may address more appropriately the narrow problem of disproportionate liability.

2. Deterrence

No consensus has emerged on the question of the impact of a contribution rule on the deterrent function of private treble damages actions. The theoretical analyses by Easterbrook, Posner, and Landes[148] followed by the work of Polinsky and Shavell[149] have provided useful insights into the interplay of deterrence and contribution but have not resolved the issue. Whether a contribution rule is superior to a no-contribution rule depends ultimately on which competing but equally defensible economic assumptions one accepts in analyzing the problem. Nor is it clear the extent to which the assumptions with respect to risk accurately describe the real world in which economic decisions are actually made and antitrust violations are committed.[150]

IRS, 587 F. Supp. 1010, 1011 (N.D. Ill. 1984).

145. *See, e.g.*, Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (3d Cir. 1967) (refusing, in absence of specific statutory authorization, to award defendants attorneys' fees after an alleged baseless antitrust suit had been dismissed).

146. *See, e.g.*, Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243 (2d Cir. 1985).

147. FED. R. CIV. P. 16(c)(1).

148. *See* Easterbrook, Landes & Posner, *supra* note 1.

149. *See* Polinsky & Shavell, *supra* note 3.

150. *See* S. 995 Hearings, *supra* noto 67, at 50 (statement of Robert D. Joffe) (stating "[the Trade Regulation Committee of the Association of the Bar of the City of New York] knows of no empirical evidence that business men, including the most sophisticated, factor the possibility of liability for an entire industry's actions falling on one firm's shoulders into

a. Risk analysis and deterrence

i. Theoretical work

Theoretical analyses start with the assumption that alleged wrongdoers make decisions by rationally weighing the costs and benefits of wrongdoing.[151] Theoreticians further posit that the decisionmakers' choices depend on their attitude toward risk.[152] In economic parlance, firms are either risk neutral, risk averse, or risk preferring. A risk neutral firm is a firm that is indifferent to risk factors.[153] It therefore would treat the following situations as equivalent: a ten percent chance of losing one hundred dollars; a twenty percent chance of losing fifty dollars; a fifty percent chance of losing twenty dollars; and a one hundred percent chance of losing ten dollars.[154] In theory, a risk neutral firm will violate the antitrust laws if the expected benefit, its share of profits from the illegal activity, exceeds the expected loss, its share of damages if the conspiracy is discovered and successfully prosecuted, discounted by the probability of detection and successful prosecution.[155]

A risk averse firm is a firm that seeks to avoid risk.[156] Given the choice of a ten percent chance of losing one hundred dollars, a fifty percent chance of losing twenty dollars, or a one hundred percent chance of losing ten dollars, the risk averse firm would opt for the last alternative.[157] Risk avoiders consider both the expected value of the risk and its absolute magnitude and pursue policies that minimize exposure to risks of greater absolute magnitude, even though the chance of suffering that loss is less likely to occur.[158]

A risk preferring firm seeks out risky ventures. Faced with the choice of a ten percent chance of losing one hundred dollars, a fifty

any decisionmaking process with respect to whether or not they should fix prices"); Note, *Private Suits*, *supra* note 14, at 702 (suggesting that the consequences of joint and several liability and of a rule denying contribution are "probably not fully appreciated by many nonlawyers" operating business entities).

151. ABA Contribution Monograph, *supra* note 2, at 25-26.

152. *Id.*; *see* Easterbrook, Landes & Posner, *supra* note 1, at 344-45; Polinsky & Shavell, *supra* note 3, at 450-55.

153. Polinsky & Shavell, *supra* note 3, at 450.

154. *Id.*

155. *Id.*; Easterbrook, Landes & Posner, *supra* note 1, at 345.

156. Polinsky & Shavell, *supra* note 3, at 452-53.

157. *Id.*; Easterbrook, Landes & Posner, *supra* note 1, at 351-52.

158. Easterbrook, Landes & Posner, *supra* note 1, at 351-52; Polinsky & Shavell, *supra* note 3, at 452.

percent chance of losing twenty dollars, or a one hundred percent chance of losing ten dollars, the risk preferring firm will elect the first option. Like the risk averse firm, the risk preferring firm looks at both the expected value of the risk and the absolute magnitude. Even though each of the choices is actuarily equivalent, the first alternative presents the risk of greatest absolute magnitude and the least likelihood of apprehension.

For a risk neutral firm, deterrence depends upon the probability of being sued and found liable, the probability that the entire judgment will be collected from that firm, and the amount of the judgment. Professors Polinsky and Shavell[159] demonstrate that, theoretically, a rule of contribution has no additional deterrent effect on a risk neutral firm. Polinsky and Shavell assume that two conspiring companies have a fifty percent chance of being detected and successfully sued.[160] With a no-contribution rule, the likelihood that either would pay the entire judgment is fifty percent.[161] If each company would gain ten million dollars from this fictional conspiracy, the total overcharges trebled would be sixty million dollars.[162] If contribution is not permitted, the expected liability is fifteen million dollars.[163] The benefit is only ten million dollars. Therefore, the illegal conduct would be deterred because the cost, fifteen million dollars, exceeds the benefit, ten million dollars.[164]

If contribution is available, the illegal conduct would be equally deterred. The likelihood of detection and prosecution is again fifty percent. The total liability for each would be thirty million dollars because each conspirator would be liable for one-half of the sixty million dollar treble damages. Therefore, the expected value of the violation would be fifteen million dollars. Since the benefit is again only ten million dollars, the illegal conduct would be deterred.[165]

A contribution rule, however, would affect deterrence adversely if firms were risk averse. Assume that two firms again stand

159. Polinsky & Shavell, *supra* note 3, at 450-52.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* This is hecause the authors suggest that the conspirators have only a 50% chance of being detected. If the conspiracy is detected, each conspirator has a 50% chance of being targeted and successfully prosecuted. Therefore, the expected value of the illegal conduct is $15 million.

164. *Id.*

165. *Id.*

to gain ten million dollars from a conspiracy and the probability of a successful suit is twenty-five percent.[166] The expected liability is seven and one-half million dollars in this case, while the expected gain is ten dollars.[167] If the parties are risk neutral, the conduct will not be deterred. Under a contribution rule, the expected liability would also be seven and one-half million dollars[168] and a risk neutral firm would not be deterred. However, if a firm is risk averse a contribution rule may provide less deterrence. The absolute magnitude of a loss under a contribution rule, thirty million dollars, is less than the magnitude of the loss with a no-contribution rule, sixty million dollars, even though the expected values are actuarily equivalent.[169]

A contribution rule may be a greater deterrent to the risk preferring firms than a no-contribution rule. Risk preferring firms would rather take a chance on a lower likelihood (fifty percent) of a greater exposure (sixty million dollars) than on a more certain likelihood (one hundred percent) of a lesser absolute exposure (thirty million dollars).

ii. Critique of the theoretical analyses

The theoretical works of Easterbrook, Posner, and Landes, as well as those of Polinsky and Shavell, provide a rational framework with which to measure the impact of a contribution rule on deterrence. Nevertheless, in their efforts to quantify the parameters of the debate, the theoreticians have made a series of simplifying assumptions that do not correspond to marketplace realities. Therefore, the theories cannot address effectively the question of whether a contribution rule would be desirable in an actual antitrust case. The Supreme Court noted in *Hanover Shoe*,[170] and again in *Illinois Brick*,[171] that the economist's simplifying assumptions work well with an economist's hypothetical model but generally must be abandoned when applied to the real economic world.

When contemplating a violation of the antitrust laws, corporate decisionmakers may weigh the costs and benefits of illegal conduct.[172] Nevertheless, the application of expected value concept

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166. *Id.* at 452-53.
167. *Id.*
168. *Id.*
169. *Id.*
170. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968).
171. Illinois Brick Co. v. Illinois, 431 U.S. 720, 742 (1977).
172. *But see supra* note 150.

to the actual corporate decisionmaking process is counterintuitive. First, no rational way to calculate probability of detection exists. Detection depends largely on the conspirators ability to conceal their misconduct. This, in turn, depends on the conspirators' ability to keep their members content and their ability to allay any suspicion from rivals, customers, government enforcement agencies, and the general public. The probability of detection increases if the conspiracy is operating in an area under intensive governmental scrutiny. Similarly, if a fellow conspirator becomes disaffected with the conspiracy, detection becomes more probable. More importantly, these factors can change. Thus, a change in enforcement priorities or a change in the relative economic strength of the conspirators can affect the success of the conspiracy. Indeed, the success of the cartel may be strengthened or undermined by events that the conspirators can neither foresee nor control, such as the outbreak of war among foreign nations or a foreign embargo of a necessary commodity.[173] Even if, theoretically, these variable factors could be measured and quantified, the cost of doing so would be prohibitive.

Assuming that the probability of detection could be gauged accurately, detection is only the first step in measuring the probability of treble damages liability. The likelihood of successful prosecution must also be taken into account. Litigation is quintessentially unpredictable, particularly when a jury is the factfinder. Thus, any attempt to quantify probability of success at trial is highly speculative.

The second element of expected value—anticipated benefits in the form of overcharges—is also difficult to quantify *ex ante*. Because conspiracies rely on secrecy and deception to succeed, participants cannot rationally project future monopoly profits in the same manner as a firm would project profits from an open and legitimate business deal. Real world conspiracies are not analogous to time-limited business ventures, such as a five-year joint selling arrangement, in which an end date is certain. Conspiracies operate in a more serendipitous fashion. Unlike business partners who are bound contractually to perform, members of a conspiracy may exit at will and do so when they find their participation no longer useful. The probability of the events' occurrence over which the con-

173. Thus, for example, the outbreak of the Arab-Israeli War in 1973 led to severe cutbacks in petroleum shipments to the United States and skyrocketing oil prices as well. That war, for a time, unified Arab oil producing countries and strengthened the OPEC petroleum cartel.

spirators have no control makes any effort to project total benefits futile.

In short, a number of factors in the real world, which can be neither assumed away nor held constant, affect the expected value of cartel participation. Rather than simplifying the analysis, attention to the "sound laws of economics" only heightens one's awareness of the difficulties involved in undertaking a cost/benefit analysis of illegal cartel participation.[174]

The theoretical analysis is further complicated when the risk factor is considered. Whether firms are, in fact, risk averse has generated much scholarly debate but has produced no consensus.[175] A respectable body of literature urges that corporate managers are risk averse.[176] On the other hand, since horizontal price-fixing, the most common form of conspiratorial conduct, may be prosecuted criminally as well as civilly,[177] perhaps the penology model of risk preference is the appropriate standard.[178] Yet, another argument could be made for the proposition that firms are risk neutral.[179] What is most troublesome is that the impact of contribution on deterrence will vary depending on the view one adopts as to a firm's attitude toward risk.

A third shortcoming of the theoretical analysis is the rejection of fairness as a legitimate concern in the contribution debate. The theoreticians disdain for fairness may be because the concept cannot be quantified, but surely such an argument cannot be justified. The fairness argument must be addressed on its merits.[180] It may be that arguments for contribution based on fairness are unpersuasive, but these arguments cannot be ignored.

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174. Illinois Brick Co. v. Illinois, 431 U.S. 720, 742-43 (1977).

175. ABA Contribution Monograph, *supra* note 2, at 28-29; House Damage Hearings, *supra* note 26, at 60 (prepared statement of William F. Baxter) (acknowledging that whether firms generally are risk averse is "a proposition that produces endless debate among scholars"); ITDR Hearings, *supra* note 25, at 18 n.12 (prepared statement of Charles F. Rule).

176. Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 704-06 (1973) and studies cited therein.

177. In theory, any violation of § 1 may give rise to criminal penalties. In practice, only egregious violations—horizontal price-fixing and bid rigging—are prosecuted criminally.

178. House Damage Hearings, *supra* note 26, at 57 (testimony of William F. Baxter).

179. Polinsky & Shavell, *supra* note 3, at 452 n.18 (noting that while this is a theoretical possibility, practical considerations dictate that "the aversion of risk of individual managers will often influence the firm's activities").

180. *See supra* notes 122-32 and accompanying text.

b. Criminal penalties and deterrence

On a more practical level, a serious question exists as to whether altering the rules with respect to joint and several liability significantly affects deterrence. The rule of joint and several liability is only one mechanism in the arsenal of antitrust enforcement and deterrence. The successful antitrust plaintiff is entitled to mandatory treble damages, and liability may be enlarged by use of the class action procedures.[181] In addition, in egregious cases, such as horizontal price-fixing and bid rigging, criminal penalties may be employed. Criminal violations of the Sherman Act are felonies, punishable with up to three years imprisonment[182] and substantial fines.[183] Treble damages and possible criminal penalties arguably provide even greater incentives for compliance than the rule of joint and several liability.[184] Unquestionably, the combination of mandatory treble damages and criminal liability itself provides a powerful deterrent. Nevertheless, the significance of criminal penalties as a deterrent should not be overemphasized. The suggestion that criminal liability is the true antitrust deterrent and that the rule of joint and several liability has little impact on deterrence is flawed in two respects. First, that position is contrary to the one taken by other proponents of contribution who maintain that contribution would increase deterrence.[185] Second, criminal penalties, because they do not attach to all antitrust violations,[186] cannot be viewed as a primary deterrent in all antitrust cases. Even when

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181. *See* FED. R. CIV. P. 23.

182. Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §§ 1, 16 (1982 & Supp. III 1985).

183. Under the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 1 (1982), an individual could have been fined up to $100,000 and a corporation up to $1 million. However, in 1984, the amount of the fine that could be levied against an individual was raised to $250,000. Criminal Fines Enforcement Act of 1984, 18 U.S.C. ch. 229, § 3623 (Supp. III 1985). More importantly, Congress also provided that an individual or firm may be fined as high as twice the benefit derived from the wrongdoing or twice the gross loss inflicted on the victim, unless such a fine would "unduly complicate or prolong the sentencing process." *Id.* (governing crimes committed from January 1, 1985 until November 1, 1987). Under the Sentencing Reform Act of 1984, 18 U.S.C. § 3551, effective November 1, 1987, the maximum fine for a criminal violation of the Sherman Act is $250,000.

184. S. REP. No. 359, 97th Cong., 2d Sess. 16-17 (1982); House Damage Hearings, *supra* note 26, at 39 (prepared statement of Denis McInerney, attorney, Cahill, Gordon & Reindel).

185. *See supra* note 93 and accompanying text.

186. Violations of the Sherman Act carry potential criminal exposure. Violations of the Clayton Act, 15 U.S.C. §§ 12-27 (1982), as originally promulgated, did not contain criminal sanctions. However, when the Clayton Act was amended by the Robinson-Patman Act in 1933, criminal sanctions were added for Robinson-Patman offenses only.

applicable by statute, criminal sanctions are, in practice, utilized only in the limited category of per se offenses, such as horizontal price-fixing, wherein the illegal conduct is manifestly unreasonable.[187]

c. Overdeterrence

Perhaps the more appropriate question is not whether joint and several liability is ineffective but whether it overdeters because it may discourage procompetitive conduct. Much as been written about potential overdeterrence of the private antitrust remedy, particularly in the context of mandatory treble damages.[188] The prohibitions of the antitrust laws are far from certain. While there is a consensus among scholars and practitioners that certain conduct, *e.g.*, horizontal price-fixing, is clearly anticompetitive, a far larger class of cases exists in which the reach of the antitrust laws is unsettled.[189] Yet, the rule of joint and several liability applies uniformly to all alleged conspiratorial conduct, even if the joint conduct is not intended to restrain trade and may in fact have procompetitive aspects.

The position that joint and several liability overdeters is flawed in two respects. First, it too is inconsistent with the position taken by some contribution advocates that contribution would enhance deterrence.[190] Second, most contribution proposals[191] would apply primarily to horizontal arrangements affecting price. These naked restraints of trade are both injurious to competition and devoid of any procompetitive benefits and hence cannot be overdeterred.[192]

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187. *See* ABA Contribution Monograph, *supra* note 2, at 350-51 (stating that government initiates criminal prosecutions only where violation is "clear and purposeful").

188. *See, e.g.*, Breit & Elzinga, *supra* note 8, at 428-30; Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 456-57 (1985); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 228 (1976).

189. *See supra* notes 74-81 and accompanying text.

190. *See supra* notes 185-87 and accompanying text.

191. *See, e.g.*, S. 904, 98th Cong., 1st Sess. (1983); S. 380, 98th Cong., 1st Sess. (1983); S. 995, 97th Cong., 2d Sess. (1982); S. 1468, 96th Cong., 1st Sess. (1979); H.R. 4072, 97th Cong., 1st Sess. (1981); H.R. 1242, 97th Cong., 1st Sess. (1981); H.R. 6792, 96th Cong., 2d Sess. (1980).

192. See ITDR Hearings, *supra* note 25, at 19 (prepared statement of Charles F. Rule).

3. Settlement and Costs

The arguments that a contribution rule must be rejected because it would discourage settlements and increase the cost and complexity of antitrust proceedings are unpersuasive. Unquestionably, damage allocation hearings would lengthen trials and add to their costs. This fact alone, however, does not compel rejection of contribution. Indeed, in admiralty cases the Supreme Court has held that mere difficulty in determining relative fault does not justify the unfair results generated by a per capita rule of damage allocation.[193] The real question is whether the federal judicial system can tolerate lengthier and more expensive trials. The courts have proven quite capable of resolving contribution issues in securities cases in which issues of comparable complexity exist.[194]

The Supreme Court in *Illinois Brick Co. v. Illinois*[195] did caution against introducing issues that would further complicate already complex antitrust cases, yet that admonition addressed problems of proof, issues which contribution does not raise. In *Illinois Brick* the question was whether the courts were equipped to trace the incidences of overcharges through the chain of distribution.[196] Because this task would entail making numerous assumptions about market behavior and measuring relevant cross-elasticities of demand, which itself would generate a plethora of economic data, the Court concluded that the additional complexity and speculativeness would overburden the courts.[197] On the other hand, contribution requires a measure of relative fault. In many cases, this determination can be made by using sales data, which, if not already part of the record, can be discerned with little difficulty. Nonsales-based formulas may be more complicated to apply, but do not require detailed economic analyses of the marketplace or simplifying assumptions.

Any increases in the costs of trial caused by a contribution rule would fall primarily on defendants and third parties. Contribution issues, however, could be severed and tried separately so as not to interfere with the plaintiff's main claims.[198] In addition, de-

193. United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Sullivan, *supra* note 14, at 411.

194. *See, e.g.*, Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

195. 431 U.S. 720, 741 (1977).

196. *Id.* at 741.

197. *Id.* at 741-42.

198. FED. R. CIV. P. 42(b). *But see* Wilson P. Abraham Constr. Corp. v. Texas Indus.,

termination of contribution issues could be expedited through the active judicial management techniques espoused in rule 16 of the Federal Rules of Civil Procedure[199] and the *Manual for Complex Litigation (Second)*.[200]

A rule of contribution may well alter pretrial strategies and minimize competition for early "sweetheart" settlements. Some cases that would have otherwise settled may not settle; other cases might settle later. Settlement alone cannot justify legal rules that generate unfair results.[201] Given the incentives to settle, which exist wholly apart from concerns about joint and several liability, it is unlikely that the uncertainties interjected by contribution would significantly alter the percentage of pretrial settlements in antitrust cases.[202] Judicial experience in applying comparative negligence principles supports this view.[203] Contribution does not appear to have deterred settlements in securities cases.[204] In sum, a rule of contribution may increase the length of trials and change settlement strategies, but these changes alone are not a sufficient basis to maintain the present system.

Inc., 604 F.2d 897, 906 (5th Cir.) (stating that "allowance of third-party claims may open a Pandora's box of procedural problems against which district court discretion may prove a palliation"), *aff'd*, 451 U.S. 630 (1981); House Damage Hearings, *supra* note 26, at 253 (submission by Hon. Judge Hubert L. Will) (arguing that "contribution and claim reduction would create immense additional management problems").

199. Rule 16 encourages courts to establish early control over litigation to prevent wasteful pretrial activities and protracted proceedings. FED. R. CIV. P. 16(a). The rule requires the court to enter a scheduling order that sets deadlines for joinder of parties and completion of discovery. FED. R. CIV. P. 16(b). In addition, courts are encouraged to use pretrial conferences to formulate and limit issues, to limit unnecessary proof, to explore settlement, and to determine the need for special procedures to handle complex issues or unusual proof problems. FED. R. CIV. P. 16(c).

200. MANUAL FOR COMPLEX LITIGATION (SECOND), *reprinted in* 1 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE 1 (1986). The *Manual* contains practical guidance for the court in controlling and managing complex litigation. Among other things, the manual discusses limitations on presentation of proof, narrowing of issues, evaluation of economic data, and use of *in limine* hearings.

201. *See* United States v. Reliable Transfer Co., 421 U.S. 397, 408 (1975) (stating that "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations"); Sullivan, *supra* note 14, at 416.

202. *See* House Damage Hearings, *supra* note 26, at 141 (prepared statement of Robert P. Taylor).

203. United States v. Reliable Transfer Co., 421 U.S. 397, 408 n.13 (1975) (observing that the rule of comparative negligence "does not appear to discourage the negotiation of settlements").

204. *See* Sullivan, *supra* note 14, at 411 (recoguizing that "since 1933, in fact, federal trial courts have been able to successfully apply a contribution rule established under the securities laws").

D. *The Ideal Rule*

Assuming that a contribution rule is desirable in the antitrust field, the ideal rule would: (1) fairly allocate damages among defendants without impairing the plaintiffs' right to recover the entire damages amount; (2) be simple to comprehend and inexpensive to administer; (3) be predictable; and (4) have minimal impact on deterrence. Unfortunately, the goals of equity, efficiency, predictability, and deterrence frequently conflict and are therefore difficult to harmonize in practice. For example, it may be equitable to allocate damages among defendants based on their relative responsibility for initiating the illegal conduct; the cost of establishing relative responsibility, however, may be prohibitively expensive. Moreover, a relative responsibility standard may not only be unpredictable but also may allow defendants who had been minor players but major beneficiaries in the conspiracy to retain a portion of its ill-gotten gains, which impairs deterrence.

Similarly, a fair contribution standard might impair deterrence. Deterrence may be weakened if price-fixers are permitted to allocate damages among themselves rather than face liability for all damages inflicted by a conspiracy.[205]

The inevitable conflict among the various goals of the ideal rule make its implementation impossible; trade-offs must be made. The contribution debate focuses upon the extent to which the various aims of antitrust enforcement should be sacrificed in creating a contribution rule. Congress' approach to contribution has been pragmatic, if not unsophisticated.[206] Contribution adherents have been unable to forge a favorable consensus in Congress without a standard that allows acceptable trade-offs between fairness, efficiency, predictability, and deterrence.

E. *The Legislative Response*

As early as 1979, prior to the Supreme Court's refusal to read a contribution rule into other antitrust statutes,[207] Congress considered legislation proposing to modify the no-contribution rule in private antitrust actions.[208] That bill, like those that have been introduced in succeeding Congresses[209] failed to pass. Contribution

205. *See supra* note 103.
206. *See infra* notes 220-53 and accompanying text.
207. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).
208. S. 1468, 96th Cong., 1st Sess. (1979).
209. S. 904, 98th Cong., 1st Sess. (1983); S. 380, 98th Cong., 1st Sess. (1983); S. 995,

advocates might have succeeded in 1982 with Senate Bill 995 if Congress could have resolved the issue of retroactive application of any remedial statute.[210] Congress considered the proposed contribution statute while several major antitrust cases were pending;[211] those having a stake in these cases beseeched members of Congress to either include or exclude their cases from the bill's coverage.[212] These excessive lobbying efforts apparently dismayed legislators and ultimately doomed the bill.[213]

1. Conduct Covered

With two exceptions,[214] the contribution proposals considered by Congress have been limited to price-fixing cases.[215] The apparent justification for limiting contribution to price-fixing cases is that unfairness and abusive tactics are most widespread in price-fixing cases.[216] This limitation is easy to apply, predictable, and narrowly targeted to correct an identified problem. It creates, however, the anomalous situation of providing potentially significant benefits only to those defendants who have engaged in the most egregious of antitrust offenses. At the same time, the limitation denies contribution to defendants whose conduct is neither per se unlawful nor necessarily devoid of procompetitive benefits. This approach may underdeter naked restraints of trade but overdeter possibly illegal conduct—conduct that is not clearly legal or clearly

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97th Cong., 2d Sess. (1982); S. 1468, 96th Cong., 1st Sess. (1979); H.R. 2244, 98th Cong., 1st Sess. (1983); H.R. 5794, 97th Cong., 2d Sess. (1982); H.R. 4072, 97th Cong., 1st Sess. (1981); H.R. 1242, 97th Cong., 1st Sess. (1981); H.R. 6792, 96th Cong., 2d Sess. (1980).

210. 43 Antitrust & Trade Reg. Rep. (BNA) No. 1093, at 1055 (Dec. 9, 1982) (noting that "although legislators seemed favorably disposed toward the basic objective of the legislation, S. 995 was doomed by an amendment to extend relief to defendants in pending cases").

211. *See, e.g., In re* Corrugated Container Antitrust Litig., M.D.L. No. 310 (S.D. Tex.); *In re* Plywood Antitrust Litig., M.D.L. No. 159 (E.D. La.); Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

212. 43 Antitrust & Trade Reg. Rep. (BNA) No. 1093, at 1055 (Dec. 9, 1982); *see supra* note 16 and accompanying text.

213. 43 Antitrust & Trade Reg. Rep. (BNA) No. 1093, at 1055 (Dec. 9, 1982).

214. H.R. 2244, 98th Cong., 1st Sess. (1983); H.R. 5794, 97th Cong., 2d Sess. (1982). These two bills applied to any damages action brought by private persons, the federal government, or state government *parens patriae*.

215. S. 904, 98th Cong., 1st Sess. (1983); S. 380, 98th Cong., 1st Sess. (1983); S. 995, 97th Cong., 2d Sess. (1982); S. 1468, 96th Cong., 1st Sess. (1979); H.R. 2244, 98th Cong., 1st Sess. (1983); H.R. 4072, 97th Cong., 1st Sess. (1981); H.R. 1242, 97th Cong., 1st Sess. (1981); H.R. 6792, 96th Cong., 2d Sess. (1980).

216. Indeed, a review of the congressional hearings reveals that the case for contribution has been based largely on the experience of certain smaller defendants. *In re* Corrugated Container Antitrust Litig., M.D.L. No. 310 (S.D. Tex.).

illegal—that may promote competition.[217] Indeed, opponents of contribution focus on this anomaly and characterize this legislation as the "price-fixers relief act."[218]

In addition, the superficial simplicity of a contribution rule limited to price-fixing is deceiving. When methods for allocating damages are considered, this narrow rule may be far more complicated and less predictable than it initially appears.[219]

2. Damage Allocation Formulas

Several different formulas may be used to allocate damages among defendants. These proposals focus on the following: sales, relative responsibility, per capita allocation, and judicial discretion. Congress[220] and the Department of Justice[221] favor a sales-based approach. The American Bar Association suggests allocating damages based on relative responsibility.[222] The Department of Justice endorses this approach in nonhorizontal conspiracy cases.[223] The per capita approach is borrowed from tort law.[224] In addition, a fourth approach, to leave the allocation to the court's discretion, has some scholarly[225] and congressional[226] support. Each of these formulations has benefits and drawbacks; none is perfect. A formula that is fairest to all defendants may be complex and costly to administer; but a simple, inexpensive formula may prove to be inequitable.[227]

a. *Sales*

Apportioning damages based on sales is usually a straightforward exercise in horizontal price-fixing cases. Sales data is normally readily available, and each defendant's share of supracompetitive sales can be calculated easily. In simple vertical price-

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217. ABA Contribution Monograph, *supra* note 2, at 45.

218. House Damage Hearings, *supra* note 26, at 15 (testimony of Stephen D. Susman).

219. *See infra* notes 220-47 and accompanying text.

220. *See, e.g.*, S. 995, 97th Cong., 2d Sess. (1982); S. 1468, 96tb Cong., 1st Sess. (1979); H.R. 4072, 97th Cong., 1st Sess. (1981); H.R. 1242, 97th Cong., 1st Sess. (1981).

221. *See* House Damage Hearings, *supra* note 26, at 65-67.

222. ABA Contribution Monograph, *supra* note 2, app. A, at 42.

223. House Damage Hearings, *supra* note 26, at 66-67.

224. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(b), 12 U.L.A. 63 (1975). The per capita metbod also bas some judicial support. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 (8tb Cir. 1979).

225. *See* Sullivan, *supra* note 14, at 421.

226. *See* H.R. 2244, 98th Cong., 1st Sess. (1983).

227. ABA Contribution Monograpb, *supra* note 2, at 41-44.

fixing conspiracies, the plaintiff is dealing only with one seller, and therefore contribution is not applicable. The formula is more difficult to apply when the price-fixing conspiracy has both horizontal and vertical elements. Distinguishing sales that were caused by horizontal price-fixing from sales that were caused by vertical price-fixing may be impractical or impossible. The costs of allocating damages undoubtedly would exceed the benefits. Finally, in areas in which the conspiracy does not operate to affect price, such as concerted refusals to deal, sales-based formulas may not accurately mirror the relative degree of participation in the conspiracy.

Moreover, even in horizontal conspiracies to affect price, a sales-based formula may be underinclusive. For example, when defendants seek to raise prices by conspiratorial refusals to bid or by agreeing to submit phony bids to maintain a facade of competition, apportionment by sales is inappropriate. A sales-based approach punishes only "winning" bidders and therefore is inequitable. Defendants who never made sales but who benefitted from the conspiracy are not held accountable for illicit gains. The sales-based approach is also inequitable in that it implicitly assumes that blameworthiness relates to the volume of sales at supracompetitive prices.[228] This view ignores the presence of ringleaders whose impact on the conspiracy is not reflected in sales.[229] Using sales as a yardstick also may prove cumbersome when a defendant's overcharges were not constant and varied from customer to customer.

A sales formulation also fails when plaintiffs claim damages under the so-called "umbrella theory" of damages. The umbrella theory permits plaintiffs to recover "overcharges" imposed by nondefendants on the theory that the conspiracy has created an umbrella which supports higher prices by rival sellers not part of the conspiracy.[230] A sales-based allocation obviously does include sales by those who are neither defendants nor conspirators.

228. *Id.* at 42.

229. *Id.*

230. The courts are split as to whether a plaintiff that purchases from a nonconspiring competitor, who has been able to inflate prices artificially under defendants' price umbrella, may recover these "overcharges" from defendants. *See In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1166 n.24 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *In re* Arizona Dairy Prods. Antitrust Litig., 1985-2 Trade Cas. (CCH) ¶ 66,895 (D. Ariz. 1985); Washington v. American Pipe & Constr. Co., 274 F. Supp. 961 (W.D. Wash. 1968) (accepting umbrella theory). *But see* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979); *In re* Folding Carton Antitrust Litig., 88 F.R.D. 211, 219-20 (N.D. Ill. 1980) (rejecting umbrella theory).

b. Relative responsibility

Allocating damages according to relative responsibility focuses on each conspirator's degree of culpability. Culpability is not necessarily coextensive with the benefits derived from overcharges imposed in a price-fixing conspiracy.[231] Apportionment based on relative responsibility may allocate damages more equitably than a sales-based formula. At the same time, however, determining relative responsibility is far more expensive than determining sales. A sales-based formula normally would be more efficient and therefore preferable in horizontal conspiracies affecting price.

Relative responsibility, nevertheless, is more appropriate in those horizontal cases in which sales-based formulas are inadequate—such as bid-rigging cases and those employing the umbrella theory of damages—and in nonprice-fixing horizontal cases. The application of a relative responsibility formula is complex.[232] The main question is what criteria the factfinder must take into account in establishing each defendant's degree of culpability. Possible factors include: the length of participation in the conspiracy, the role in organizing or sustaining the conspiracy, the steps taken to conceal the existence of the conspiracy and the identity of its participants, the benefits derived from the conspiracy, and the harm inflicted by anticompetitive acts in furtherance of the conspiracy. These factors are difficult to quantify, and the factfinder faces a monumental task in applying them. Although a relative responsibility standard seems the fairest allocation device in theory, in practice it may be both arbitrary and expensive.

c. Per capita

A third alternative is per capita apportionment of damages.[233] Under this system, a defendant's share of damages is determined by dividing total damages by the number of conspirators. A per capita formula is simple to apply and inexpensive to administer. The court need only determine that a particular defendant participated in a conspiracy; it need not establish degrees of culpability as it would under a relative responsibility standard. Because the per capita approach provides certainty of liability, it may enhance

231. *See* ABA Contribution Monograph, *supra* note 2, at 41-44.

232. *See* Scott, *supra* note 136.

233. *See, e.g.*, UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(b), 12 U.L.A. 63 (1975).

deterrence and foster early settlement.[234]

On the other hand, a per capita scheme may be unfair precisely because it fails to recognize the actors' differing degrees of culpability. This rule produces especially harsh results for a very small company marginally involved in a conspiracy with very large companies.[235] In a recent admiralty case[236] the Supreme Court supported a relative responsibility standard over a per capita standard. The Court observed that "[a] rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others."[237] The per capita allocation has been criticized in the securities area as well.[238]

d. Judicial discretion

Under H.R. 2244,[239] a court may reduce damages payable by a culpable defendant or allocate damages among that defendant and

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234. *See* Scott, *supra* note 136, at 256.

235. ABA Contribution Monograph, *supra* note 2, at 43-44.

236. United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

237. *Id.* at 405 n.11.

238. *See* Scott, *supra* note 136, at 256 n.188 (noting that "[t]he per capita rule has been said to produce results 'characterized by more mathematical than judicial integrity' "). Professor Scott observed that:

> The arguments in favor of per capita and relative fault under the securities laws are in equipoise. The incremental deterrent effect of one over the other does not seem amenable to empirical verification. While the courts strain for equitable solutions, they have been perfectly willing to impose a per capita allocation, in some cases without discussion. Where the courts use relative fault concepts, they do so with little analysis. Both methods are accepted mechanisms to encourage performance of the due diligence required under the federal securities acts. The principal advantage of a per capita rule is its ease of administration. The principal advantage of a relative fault rule is its promotion of notions of fairness.

Id.

239. H.R. 2244, 98th Cong., 1st Sess. (1983). Section 3 of that bill provides:

> Reduction of Damage Awards
>
> Sec. 3. The Clayton Act is amended by inserting after section 4I, as added by section 2 of this Act, the following new section:
>
> "Reduction of Monetary Relief
>
> "Sec. 4J(a)(1) In an action under section 4, 4A, or 4C, after determination of the amount of any monetary relief which would be awarded in the absence of this section, the amount of such monetary relief shall be reduced, or allocated between the defendant and any other defendants found liable in the action for the injury, if it is determined on a motion promptly made that the amount would be substantially unjust with respect to a defendant.
>
> "(2)(A) A reduction or allocation under paragraph (1) may diminish the defendant's liability to an amount less than the plaintiff's unrecovered actual damages only if

other culpable defendants upon a finding that the amount of damages would be substantially unjust. A court may not reduce the defendant's liability to an amount less than the plaintiff's unrecovered actual damages unless the court finds that the plaintiff's conduct contributed significantly to the substantial injustice.[240] Furthermore, any reduction or allocation may not reduce the defendant's liability to an amount less than treble the damages fairly attributable to the defendant's conduct or treble the defendant's sales or purchases from the plaintiff.[241]

This approach would maintain the current damage allocation system but would permit reallocation of damages by the court in those exceptional circumstances in which unfairness otherwise would result. Plaintiffs would have a strong incentive to name all putatively culpable parties as defendants. If the plaintiffs failed to name all culpable parties then they would risk allocations against a given defendant that would be less than their unrecovered actual damages. This risk arises because the failure to name all prospective culprits may contribute significantly to a substantially unjust damage allocation.[242] The proposal would eliminate situations in which the most culpable defendants escape suit by coercing plaintiffs not to sue them, which leaves the named defendants liable for excessive damages.[243] Moreover, unlike most of its predecessors, the bill's coverage would not be limited to price-fixing cases.

Nevertheless, the bill has two principal flaws. First, the "substantially unjust" criterion is vague and might encourage introduction of voluminous evidence that would lengthen and complicate the trial. The standard is also unpredictable and may yield conflicting precedents. Without stricter guidelines, this standard may

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it is determined that the plaintiff's conduct of the action significantly contributed to the substantial injustice.

"(B) A reduction or allocation under this subsection shall not diminish the defendant's liability to an amount less than threefold the damages fairly attributable to the conduct of the defendant, or the defendant's sales to or purchases from the plaintiff.

"(b) A determination under subsection (a) shall be made by the court unless doing so in the absence of a jury is inconsistent with the just and expeditious conduct of the action."

Id. (citation omitted).

240. *Id.*

241. *Id.*

242. H.R. 2244, unlike other contribution proposals, puts the onus on the plaintiff to include all potentially liable firms as defendants. *See also* S. 1300, 99th Cong., 1st Sess. (1985) (proposing that under the individual treble damage responsibility approach, joint and several liability would be abolished and thus plaintiff would have to sue all firms from which it wanted to collect damages).

243. *See* Sullivan, *supra* note 14, at 421.

ultimately prove unworkable. Second, in quantifying the limits of any reduction or allocation, the bill proposes either relative fault or sales as a standard. Yet, it offers no guidelines on whose relative fault is to be determined. The relative fault standard may prove arbitrary and costly to implement.[244]

Professor Thomas Sullivan has proposed a slightly different approach to judicial discretion in damage allocation.[245] He contends that contribution ought to be allowed only in non-per se cases against violators of equal or greater fault.[246] Sullivan, however, would grant the courts discretion to allow contribution in order to "deny economically influential defendants the opportunity to escape liability by coercing plaintiffs into agreeing not to sue them."[247] The Sullivan approach on discretion is less sweeping than H.R. 2244 but shares a common premise that damage allocation is appropriate when the plaintiff's conduct results in substantial unfairness to a given defendant.

3. Claim Reduction and Contribution

Each contribution proposal entertained by Congress has also included a claim reduction provision.[248] These "carve out" formulations have been virtually identical[249] and would provide that when a defendant settles, the plaintiff's claims shall be reduced by the greatest of: (1) any amount stipulated by the plaintiff's release or covenant not to sue; (2) the amount of consideration actually

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244. *See supra* note 232 and accompanying text.

245. *See* Sullivan, *supra* note 14, at 421.

246. *Id.*

247. *Id.*

248. S. 904, 98th Cong., 1st Sess. (1983); S. 380, 98th Cong., 1st Sess. (1983); S. 995, 97th Cong., 2d Sess. (1982); S. 1468, 96th Cong., 1st Sess. (1979); H.R. 2244, 98th Cong., 1st Sess. (1983); H.R. 5794, 97th Cong., 2d Sess. (1982); H.R. 4072, 97th Cong., 1st Sess. (1981); H.R. 1242, 97th Cong., 1st Sess. (1981); H.R. 6792, 96th Cong., 2d Sess. (1980).

249. Two bills do have different formulations. H.R. 2244 would leave any damage allocation to the court's discretion by providing that a court reduce a damage award or allocate damages among culpable defendants if it finds that the amount of damages imposed in absence of contribution would be "substantially unjust." H.R. 2244, 98th Cong., 1st Sess. § 4J(a)(1) (1983). In addition, H.R. 5794 varies slightly from the usual formulation. It provides:

> "(e) In any action under section 4, 4A, or 4C of this Act, the court shall reduce the claim of any person releasing any person from liability or potential liability for damages by the greatest of—
>
> "(1) any amount stipulated for this purpose;
>
> "(2) the amount of the consideration paid for the release; or
>
> "(3) the contribution share of the person released."

H.R. 5794, 97th Cong., 2d Sess. § 41(e) (1982).

paid in settlement; or (3) treble the actual damages attributable to the defendant's sales or purchases of goods and services.[250] Current law allows only the actual amount of settlement to be subtracted from a plaintiff's total trebled damages.[251] Claim reduction thus has been viewed as an integral part of any contribution scheme. Contribution would permit a defendant who has paid an antitrust judgment to proceed against those jointly liable, and recover from them amounts representing their fair share of liability. Ordinarily a party who has settled is immune from any contribution claim.[252] Claim reduction carves out from the claims against nonsettling defendants the portion of the claims attributable to the settling defendants. The combination of contribution and claim reduction thus assures that a nonsettling defendant faces exposure only for its fair share of damages, irrespective of whether co-conspirators choose to litigate or settle. Claim reduction alone may diminish a nonsettling defendant's damage exposure and thereby weaken deterrence.[253] The combination of contribution and claim reduction may significantly impair deterrence and undermine the private antitrust damage remedy.

F. Alternatives to Contribution

1. Individual Treble Damage Responsibility

A proposed alternative to contribution is the abolition of joint and several liability. Ira Millstein and Griffin Bell have been the most notable proponents of this alternative, known as Individual Treble Damage Responsibility ("ITDR").[254] A bill embodying the ITDR approach was introduced in the Senate in 1985 and subsequently approved by the Judiciary Committee[255] but not debated on the Senate floor. As with most contribution proposals, ITDR

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250. Trebling would not apply to government suits brought under 15 U.S.C. § 15a. *See, e.g.*, S. 995, 97th Cong., 2d Sess. § 41(b) (1982).

251. 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.), *cert. denied*, 355 U.S. 835 (1957).

252. Without such a provision, parties would have little incentive to settle, since they could be brought back into the suit by impleader. *See* Scott, *supra* note 136, at 264 (noting that under securities laws, settlement does not bar subsequent contribution claims; but courts are, nevertheless, not inclined to disturb settlements).

253. *See infra* notes 260-68 and accompanying text.

254. *See* Moore, *supra* note 23, at 2, col. 1. *See generally*, Millstein, Birrell & Kessler, *supra* note 38, at 975-80 (describing ITDR and its advantages over other damage allocation proposals).

255. S. 1300, 99th Cong., 1st Sess. (1985).

would be limited to conspiracies affecting price.[256] Generally, each defendant would be responsible to the plaintiff for overcharges attributable only to its sales. Joint and several liability would be retained, however, in cases involving sales by a defendant who is beyond the jurisdiction of United States courts or who lacks the financial capacity to satisfy its portion of the judgment.[257]

ITDR offers an advantage over the present system by reducing the likelihood of unfair whipsaw settlement tactics and disproportionately high judgments against defendants who lose at trial. In addition, ITDR is far less complicated than contribution, which may necessitate lengthy and complex cross-claims or impleader.

The key difference between ITDR and contribution is that under ITDR the burden is on the plaintiff to sue all parties from whom it wishes to collect damages. If a plaintiff does not sue a given defendant, it cannot recover overcharges based on that defendant's sales. Under a contribution rule, the burden is on defendants to implead or bring subsequent actions against any alleged conspirators not named as defendants. With contribution, plaintiffs thus can avoid suing conspirators whom they favor, yet collect the entire amount of damages due from named defendants. ITDR denies plaintiffs this tactical edge. Nor could plaintiffs under ITDR enter into sweetheart settlements with favored defendants. Thus, early settlements may be discouraged.

More importantly, ITDR, like most contribution proposals, is defective because it relieves the most egregious of antitrust offenders—price-fixers—from joint and several liability, while paradoxically subjecting less culpable defendants to joint and several liability.[258] It is not clear how ITDR applies to bid rigging cases in which defendants have agreed not to bid against each other. Nor is it clear how ITDR applies when a conspiracy has both horizontal and vertical aspects. In general, ITDR suffers from substantially the same defects as contribution and may disadvantage plaintiffs to an even greater extent than other forms of damage allocation.

2. Claim Reduction Without Contribution

Another proposal that has received serious attention from scholars[259] but little attention from Congress is claim reduction

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256. *Id.* § 41(a).
257. *Id.* § 41(b).
258. *See supra* notes 217-18 and accompanying text.
259. *See* Polinsky & Sbavell, *supra* note 3.

without contribution.[260] Claim reduction provisions included with contribution schemes carve out from plaintiffs' claims against non-settling defendants the greatest of either: the amount stipulated in the settlement agreement; the actual amount of settlement; or the trebled actual damages attributable to the settling defendant's sales or purchases.[261]

Several methods for calculating actual damages attributable to the settling defendant's sales or purchases have been proposed.[262] If the prices were fixed uniformly by defendants and all conspirators participated in the conspiracy for the same length of time, the amount would be calculated by multiplying the plaintiffs' actual damages by the settling defendant's share of total price-fixed sales.[263] If the prices charged were not uniform and the identity of conspirators and length of participation varied, the amount of claim reduction might be based on the settling defendant's sales to the plaintiffs considering certain factors, including the extent of the violation, its duration, and the transactions affected.[264] If the settling defendant had no sales to the plaintiffs, the actual amount of settlement is deducted from the treble damage award.[265]

Early claim reduction proposals, because they had been drafted as part of contribution schemes applicable only to price-fixing cases, had sales-based carve-out formulas. Recent claim reduction plans, designed to have broad application to all antitrust suits, have based carve-out provisions on a relative fault concept when sales-based formulas are inapposite.[266]

Claim reduction is not a perfect solution to the perceived problems created by the combined effects of mandatory trebling and joint and several liability, yet this approach offers significant advantages over contribution (with or without a claim reduction feature) and ITDR. The primary benefit of claim reduction is that its impact on the equilibrium between plaintiffs and defendants in private antitrust litigation is less profound and hence less disruptive than either contribution or ITDR. First, it lessens the likeli-

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260. Claim reduction without contribution was proposed as part of the Reagan Administration's 1986 antitrust legislative package. *See* S. 2162, 99th Cong., 2d Sess. § 401 (1986). A virtually identical bill has been introduced into the 100th Congress. *See* S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987).

261. *See supra* notes 248-50 and accompanying text.

262. *See* S. Rep. No. 359, 97th Cong., 2d Sess. 28-29 (1982).

263. *Id.* at 28.

264. *Id.*

265. *Id.* at 29.

266. *See infra* notes 285-299 and accompanying text.

hood of whipsaw tactics without impairing the rule of joint and several liability. Thus, plaintiffs could not, as they could under the present law, negotiate sweetheart settlements from the more culpable defendants and use those settlements as levers to exact higher settlements from the remaining defendants by exposing the nonsettling defendants to greater risk in the form of added liability to the extent of the discounts granted in the sweetheart settlements. Under claim reduction, nonsettling defendants could not be held liable for these discounts. If a settlement is less than the defendant's actual share of liability, a plaintiff's claim would be reduced by the larger amount.

A second benefit of claim reduction is ease of application. Claim reduction, unlike contribution and ITDR, can be applied in virtually every antitrust case. Contribution and ITDR are unwieldy, if not unworkable, outside the horizontal area, and hence are limited largely to price-fixing offenses. Claim reduction may complicate matters when relative fault is the basis of excluding damages, but this does not create significant difficulties because many antitrust suits involve horizontal price-fixing when liability based on sales is easily calculated and even when price-fixing is not involved, a sales-based formula may in some instances serve as a surrogate for relative fault.

In addition, a claim reduction approach eliminates the anomaly that exists with contribution and ITDR: price-fixers, whose conduct is without redeeming value, are favored while those accused of far less serious antitrust infractions receive no benefit. Thus, claim reduction cannot simultaneously subsidize price-fixers and chill potentially procompetitive behavior.

Third, adoption of claim reduction will not significantly add to the burdens of the courts. When the determination of relative fault is required, the courts would have to make additional findings. Unlike contribution, however, claim reduction does not necessitate hearings on cross-claims, third party claims, or separate proceedings to reallocate damages. When the damage phase of an action is reached, all settlements will have been consummated.

This is not to say that a claim reduction approach is without drawbacks. It does not totally eliminate whipsaw settlement tactics; a plaintiff is still free to choose defendants and may opt not to sue a major conspirator or decline to settle with certain defendants who have made significant sales at supracompetitive prices. This problem, however, can be mitigated by requiring plaintiffs to join as defendants all alleged conspirators.[267] In addition, claim reduction would tend to lessen the deterrent function of antitrust suits by lessening the uncertainty of defendants as to their liability. To the extent that defendants' liability becomes more certain, defendants, in theory, can better evaluate the risks of their wrongdoing. However, the adverse impact on deterrence in the case of claim reduction is far less than the impact would be under contribution or ITDR because in the latter cases a defendant is liable only to the extent of its own wrongdoing whereas under claim reduction, joint and several liability is preserved for the nonsettling defendants.

Finally, because claim reduction lessens the likelihood of sweetheart settlements, it may slow down the settlement process. Plaintiffs, in particular, would be more circumspect about settlement, delaying any overtures until they were sure how much would be carved out of their claims by agreeing to settle. Indeed, claim reduction may tend to slow down the disposition process, but it would not present a significant hurdle. There are significant incentives to settle any case, wholly apart from damage allocation.[268] Settlements reached under a claim reduction rule, in fact, may be fairer than those agreed upon under the present system.

Claim reduction alone is far less disruptive than contribution alone, contribution with claim reduction, or ITDR and would provide important benefits without significantly altering the balance of power between plaintiffs and defendants. Claim reduction alone is therefore preferable to contribution or ITDR.

3. Sharing Agreements

Another approach is to reject congressionally imposed damage allocation formulas and allow defendants to allocate liability among themselves[269] through sharing agreements. The case law pertaining to sharing agreements is sparse, but generally the agreements are assumed to be valid[270] and have been used effectively to

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267. *The Antitrust Remedies Improvement Act of 1986: Hearings on S. 2162 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 7 (1986) (statement of Douglas H. Ginsburg).

268. *See supra* notes 98-99 and accompanying text.

269. *See In re* Industrial Gas Antitrust Litig., No. 80-3479 (N.D. Ill. Oct. 10, 1981) (denying plaintiff's motion to void defendants' sharing agreement), *aff'd*, 681 F.2d 514 (7th Cir. 1982); *see also* Cranston & Kingdon, *Judgment Sharing Agreements, 1985 Research Project of the Civil Practice and Procedure Committee*, ABA Sec. Antitrust L. 6 (1985).

270. S. Rep. No. 359, 97th Cong., 2d Sess. 2 (1982); House Damage Hearings, *supra* note 26, at 7 (statement of A. Stephens Clay); *id.* at 135 (statement of Robert P. Taylor); *id.*

avoid the problems of whipsawing.[271] In theory, sharing agreements may serve as effective substitutes for statutory damage allocation. In practice, however, defendants may not be eager to join in such pacts, particularly when the defendants vary in size and potential liability. In that case, deep-pocket defendants and those with the largest exposure, who may be one and the same, may prefer to seek an early, sweetheart settlement as a way of minimizing damages. Marginal defendants have no way of forcing the principal players into a sharing arrangement. Sharing agreements can work in the rare cases in which all of the defendants are more or less equal in size and culpability or when all defendants feel comfortable with a common defense. Thus, sharing agreements, although useful in certain cases, do not offer a panacea.

IV. A New Approach to Damage Allocation

The inconclusiveness of the contribution debate serves to underscore the complexity of the issues involved. Some scholars suggest that the inconclusive nature of the debate is reason to maintain the present system because the proponents of change have failed to meet their "burden of proof."[272] But, this approach misses the mark, particularly when one considers that the debate has proceeded under the assumption that the mandatory treble damages provision of section four of the Clayton Act[273] ought to be left intact. Rather than conclude the debate, the stalemate on damage allocation invites inquiries into other avenues of reform to relieve the perceived ills of the private antitrust enforcement system. This section offers a different approach to the damage allocation issue and proposes that the problems associated with private antitrust damage suits—fairness, the proper deterrence level, and efficiency—can be better addressed by selective detrebling rather than through mandatory treble damages with contribution, claim reduction, or ITDR.

at 266 (statement of Hon. Judge Hubert L. Will); *id.* at 231 (letter of Charles B. Renfrew, attorney, Pillsbury, Madison & Sutro); *id.* at 444 (letter of Denis P. McInerney); *id.* at 474 (letter of James F. Rill, attorney, Collier, Shannon, Rill & Scott).

271. For example, in the *In re Antibiotics Antitrust Cases*, the five defendants entered into a sharing agreement and thereby avoided any "rush to settlement."

272. Easterbrook, Landes & Posner, *supra* note 1, at 368.

273. 15 U.S.C. § 15 (1982).

A. Detrebling: A Synopsis

The debate surrounding contribution, claim reduction, and ITDR is of relatively recent origin, yet the appropriateness of mandatory treble damages has been questioned from time to time since 1890.[274] Nevertheless, scholarly criticism of mandatory trebling has emerged only in the last fifteen years. Critics have agreed that mandatory trebling for all antitrust violations may be unfair[275] and may overdeter conduct that has significant procompetitive potential by discouraging traders from engaging in practices that fall near the ill-defined line between legality and illegality.[276] As early as 1983, officials of the Reagan Administration proposed that mandatory trebling be abolished.[277] In 1986, and again in 1987, the Administration offered and Congress considered identical detrebling proposals as part of a package of reforms in private antitrust actions.[278]

While there are those who would retain mandatory trebling in all cases,[279] there is also a significant body of scholars and practitioners who would eliminate mandatory trebling.[280] In this latter

274. For example, within eight years after the passage of the Sherman Act, Representative William Greene of Nebraska proposed limiting private recoveries to double damages. In 1908 Representative William Hepburn proposed that multiple damages be abolished altogether. K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES 65-66 (1976). More recently, Representative Chauncey Reed advocated making treble damages discretionary with the court. *Discretionary Treble Damages in Private Antitrust Suits: Hearings on H.R. 4597 Before Subcomm. No. 3, of the House Comm. on the Judiciary*, Serial No. 8, 83d Cong., 1st Sess. 1-8 (1953) (testimony of Rep. Chauncey W. Reed). Similarly, discretionary trebling was recommended in the 1955 Attorney General's Report. *See* Report of the Attorney General's National Committee to Study the Antitrust Laws 378-79 (1955). *See generally* K. ELZINGA & W. BREIT, *supra*; HOUSE SELECT COMM. ON SMALL BUSINESS, CONGRESS AND THE MONOPOLY PROBLEM, FIFTY YEARS OF ANTITRUST DEVELOPMENT, 1900-1950: A HISTORY OF CONGRESSIONAL ACTION IN THE ANTITRUST FIELD DURING THE PAST FIFTY YEARS; H.R. Doc. No. 599, 81st Cong., 2d Sess. 35-42 (1950).

275. *See, e.g.*, City Bar Report on Treble Damages, *supra* note 70, at 654-55.

276. R. POSNER, *supra* note 188, at 228; Breit & Elzinga, *supra* note 8, at 428-30; Easterbrook, *supra* note 188, at 456-57.

277. 44 Antitrust & Trade Reg. Rep (BNA) No. 1108, at 713 (Mar. 31, 1983); Hershey, *Antitrust Law Limits Proposed*, New York Times, Mar. 30, 1983, at D1, col. 5.

278. S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987); S. 2162, 99th Cong., 2d Sess. (1986).

279. *See* 132 CONG. REC. S1397-98 (daily ed. Feb. 19, 1986) (statement of Rep. Peter Rodino).

280. City Bar Report on Treble Damages, *supra* note 70; II P. AREEDA & D. TURNER, ANTITRUST LAW 151 (1978); Breit & Elzinga, *supra* note 8, at 428-30; Easterbrook, *supra* note 188, at 456-57; R. POSNER, *supra* note 188, at 228; Baumol & Ordover, *Use of Antitrust Laws to Subvert Competition*, 28 J.L. & ECON. 247, 253 (1985) (stating that the "case against trebled damages is far from clear-cut"); Goldschmid, Comment on the Policy Implications of the Georgetown Study 8 (Georgetown Conference on Private Antitrust Litigation

group, some have even proposed the abolition of the private remedy,[281] but most would retain the private claim and even treble damages in certain cases.[282] The problem that arises in the selective detrebling approach is easy to state but far more difficult to resolve: how do you identify the cases in which trebling is still appropriate? A number of attempts to delineate the categories of cases in which trebling remains beneficial have been made. A detailed analysis of all of the various detrebling proposals is beyond the scope of this article,[283] but a listing of the suggestions is instructive:[284]

1. Detrebling only in "per se" cases;
2. Detrebling when defendant has no reason to believe conduct was unlawful;
3. Detrebling in class actions;
4. Trebling only when specific intent to violate the antitrust laws is proven;
5. Treble only when covert acts are involved;
6. Trebling damages to defendants but awarding plaintiffs only actual damages (de-coupling damages from the remedy);
7. Trebling only up to a certain amount and permitting only actual damages beyond that amount;
8. Permitting plaintiff the option of pursuing either treble or actual damages at the risk of facing liability for attorneys' fees if unsuccessful in seeking treble damages;
9. Trebling when overcharges or undercharges are involved;
10. Permitting up to treble damages at the discretion of the court.

Nov. 8, 1985); *see also Antitrust Remedies Reform: Hearings on S. 2162 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 28 (1986) (statement of Douglas H. Ginsburg) (stating that "after 90 years, there is good reason to believe that some adjustments [in antitrust remedies] are necessary"); *Japanese Technological Advances and Possible United States Responses Using Research Joint Ventures: Hearings Before the Subcomm. on Investigations and Oversight and the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology*, 98th Cong., 1st Sess. 159 (1983) (testimony of William F. Baxter).

281. Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353, 1372.

282. *See supra* note 239.

283. For an in-depth analysis of detrebling proposals, see Cavanagh, *supra* note 22, at 824-47.

284. *Id.*

While some of these approaches are better than others, each has its negative aspects. The detrebling and contribution debates are similar in several respects. First, each provides solutions about which reasonable persons might differ. Thus, none of the alternatives is ideal. Second, the detrebling and contribution controversies have proceeded largely in isolation of each other. The contribution debate has proceeded under the assumption that mandatory treble damages would remain viable: the detrebling debate has proceeded under the assumption of the no-contribution rule's continued existence. Thus, detrebling and damage allocation have been widely perceived as alternative means of reform. Nevertheless, two approaches merit more detailed discussion: (1) detrebling in all cases not involving overcharges or undercharges; and (2) discretionary detrebling. Detrebling in all cases not involving overcharges or undercharges merits further discussion because that proposal was made a part of the antitrust remedies reform package now pending before Congress that contains a claim reduction provision. Therefore, this new proposal recognizes that detrebling and claim reduction are complementary, rather than alternative means of damage allocation reform.[285] Discretionary detrebling merits further discussion because this approach eliminates the perceived unfairness of mandatory trebling without adversely affecting deterrence and without significantly increasing litigation costs, thus obviating the need for contribution, claim reduction, or ITDR.

B. Prescriptions

1. Detrebling and Claim Reduction

Senate Bill 539 introduced in Congress in 1987 as the Antitrust Amendments Act of 1987[286] provides for mandatory trebling in cases involving overcharges and undercharges and for claim reduction in all cases.[287] The Bill essentially confines treble damage claims to suits brought in the context of a supplier-customer relationship and, as a practical matter, limits trebling to price-fixing suits. Trebling is eliminated in suits between rivals.[288] A three-pronged rationale exists for this approach. First, the measure of

285. *See* S. 2162, 99th Cong., 2d Sess. (1986).

286. S. 539, 100th Cong., 1st Sess. (1987). An identical bill has been introduced into the House of Representatives. *See* H.R. 1155, 100th Cong., 1st Sess. (1987).

287. The detrebling provisions of S. 539 and H.R. 1155 are substantially identical to those of S. 2162.

288. S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 99th Cong., 1st Sess. (1987).

damages in rivals' suits is normally lost profits, not overcharges. Attempts to measure lost profits, particularly when the victim is a relative newcomer to the field, are speculative.[289] Second, rivals' suits may be brought for anticompetitive purposes, such as to lessen the intensity of future competition[290] or to challenge potentially procompetitive behavior.[291] Suits by competitors may raise defendants' costs and weaken their competitive ability. Detrebling would lessen the incentives for rivals to prosecute baseless suits. Third, when the alleged violation is committed by a rival, prospective plaintiffs are likely to be aware of the misconduct.[292] Because the conduct is not concealed, the chances of detection are much greater, and the incentive provided by mandatory trebling is unnecessary.[293]

In addition, the Antitrust Equal Enforcement Act of 1987[294] contains a claim reduction proposal applicable to all antitrust cases.[295] The Bill permits the deduction from plaintiff's claims the greatest of either: the amount stipulated in the settlement agreement; the amount actually paid in settlement; or the actual damages (trebled when treble damages apply) fairly allocable to the settling defendant.[296] The amount fairly allocable to the settling defendant in overcharge cases would be determined by the defendant's share of overcharges.[297] In all other cases, the defendant's fair share would be determined by its relative responsibility unless the court determines that a sales-based allocation is more equitable.

Standing alone, without detrebling, the claim reduction proposal has considerable merit, even though claim reduction alone tends to reduce deterrence.[298] However, a claim reduction proposal combined with a detrebling feature greatly reduces the deterrent effect of private suits, which alters the balance of power between plaintiffs and defendants. This combination seriously threatens private antitrust enforcement. The Bill would impair deterrence of

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289. *Antitrust Remedies Reform: Hearings on S. 2162 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 30 (statement of Douglas H. Ginsburg); Easterbrook, *supra* note 188, at 462.

290. Austin, *supra* note 281, at 1363-66.

291. Easterbrook, *supra* note 188, at 461.

292. *Id.* at 458-60.

293. *Id.*

294. S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987).

295. *Id.*

296. *Id.*

297. *Id.*

298. *See supra* notes 260-68 and accompanying text.

certain pernicious anticompetitive conduct that does not result in overcharges, such as group boycotts and predatory acts aimed at driving a rival from the field. This conduct may involve specific intent to violate the law with little, if any, procompetitive potential. It is not appropriate to detreble violations merely because they are open and notorious; serious harm may still be inflicted by the unconcealed anticompetitive conduct.[299] Furthermore, a rule of actual damages combined with claim reduction reduces the plaintiffs' incentives to prosecute violations.[300]

The proposal would reduce unfair whipsaw settlement tactics. Nevertheless, the more equitable treatment of defendants may be unfair for plaintiffs. Lost profits, long recognized as an element of damages in business torts,[301] cannot be trebled under this Bill. The mere fact that lost profits may be difficult to calculate in some cases is no reason for detrebling. Plaintiffs ought not to be penalized because the difficulty in measuring damages has been created by defendants' own misconduct.[302] Even if, on the whole, the combination of selective detrebling and claim reduction is fairer to defendants, the price paid is too high.

2. Discretionary Detrebling with a Liability Limitation

A more effective approach to resolving the problems of the present system of antitrust damage allocation would be to permit trebling only at the discretion of the court. The factors that the court would take into account in exercising discretion might include:[303]

1. the willfulness of the violation;
2. whether a reasonably well-informed person should have known that the conduct was illegal;
3. whether the illegal restraint gave rise to some societal benefit or whether it was the kind of naked restraint of trade

299. *See, e.g.*, American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

300. To the extent conduct is open and notorious, however, plaintiffs' incentive to detect and prosecute violations is probably not significantly affected by a rule of actual damages combined with claim reduction.

301. *See* PROSSER & KEETON, *supra* note 28, § 130. *But see* Breit & Elzinga, *supra* note 8, at 418 (stating that "[t]he measurement of damages caused by an antitrust violation is more complicated than the measurement in many torts cases because the damage to property is not physical and does not occur instantaneously. Moreover, during the time of injury, the plaintiff must seek to mitigate damages").

302. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

303. *See* Cavanagh, *supra* note 22, at 838-41.

which traditionally has been condemned by the per se rule;
4. the length of time the illegal acts were committed;
5. whether the conduct was engaged in openly or whether efforts were made to keep the conduct secret;
6. the scope of the illegal activity;
7. the benefits derived by the defendants from the illegal activity; and
8. the impact of increased damages on defendant's business.

Violations involving naked restraints of trade would give rise to a presumption of trebling. Similarly, misconduct evaluated under a rule of reason standard would presumptively involve only actual damages. The discretionary factors come into play in two key instances. First, the factors may be used in cases that do not neatly fall into the per se or rule of reason classifications. Second, the factors may be considered to rebut the presumptions of trebling of actual damages. For example, in a case such as *BMI*,[304] which on one level resembles a classic price-fixing agreement, but on another level is an efficiency-enhancing activity, trebling would not be appropriate. On the other hand, in cases such as *NCAA*,[305] in which the rule of reason governs but the impact of the arrangement is like that of a classic cartel, multiple damages may be appropriate.

Discretionary detrebling would preserve joint and several liability and obviate the need for contribution, claim reduction, or ITDR. Unlike the foregoing alternatives and the pending legislative proposal discussed above, this approach would not adversely affect the deterrent function of the private damage action; deterrence would be fine-tuned. Egregious violations, such as horizontal conspiracies affecting price and concerted predatory acts still would be punishable by treble damages. Overdeterrence would be avoided because conduct likely to bave significant procompetitive benefits would be subject only to actual damages. The discretionary approach, even with the presumptions discussed may create some uncertainty. However, added uncertainty is likely to increase rather than to reduce the deterrent effect.

Discretionary detrebling alone, nevertheless, is problematic on the issue of fairness. Whipsaw settlements would still be possible

304. Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979).
305. National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

in price-fixing cases, and the very evils that arose in *In re Corrugated Container Antitrust Litigation,*[306] which gave impetus to the movement for contribution, could recur. This problem could be mitigated, however, by adopting a ceiling on the liability of marginal defendants in treble damage cases.[307] Marginal defendants would not be held jointly and severally liable for all damages. This approach raises two immediate issues: the definition of a "marginal defendant" and the amount of the ceiling.

Developing a hard-and-fast definition of a "marginal defendant" is difficult. In cases involving overcharges, the degree of participation ordinarily can be determined by sales. In cases in which sales-based formulas are not appropriate, degree of participation can be determined by relative fault. Two approaches might be considered. One would define "marginal" as a seller with less than ten percent of sales or relative fault; the other would set the threshold at five percent. A ten percent threshold would assure that only the more culpable actors face joint and several liability. Conspirators with at least ten percent of sales derive significant benefits from the illicit scheme and thus have a vested interest in sustaining the cartel. As sales shares dip below ten percent, the seller's interest in the conspiracy becomes less vested, and the seller becomes more of a follower than a leader. Drawing the line at ten percent theoretically would permit ten equally culpable defendants to escape joint and several liability, but the probability of this actually occurring is remote, particularly when one considers the tendency of conspirators to cheat on one another. Thus, the risk that a moving force in the conspiracy will avoid joint and several liability under a ten percent test is low.

A five percent threshold, on the other hand, would save only those on the outer periphery of the conspiracy from joint and several liability. As a practical matter, a five percent test may be too stringent to provide meaningful relief from the perceived evils of the present system. Relatively minor actors with sales in the five to ten percent range would remain subject to joint and several liability. Moreover, as the degree of participation in an illegal scheme declines, it becomes more difficult to draw a rational distinction

306. *In re* Corrugated Container Antitrust Litig., 756 F.2d 411 (5th Cir. 1985).

307. This proposal for limited abolition of joint and several liability is borrowed from recently enacted article 16 of the New York Civil Practice Law and Rules. This law provides for partial repeal of joint and several liability for noneconomic elements of personal injury damages whether the alleged tortfeasor is 50% or less responsible for tbe injury. N.Y. Civ. Prac. L. & R. § 1601 (McKinney Supp. 1987).

between sales levels that fall within the unprotected range and those that fall within the safe haven. For example, the difference in culpability of a defendant with four and one-half percent of sales and one with five and one-half percent is arguably de minimis, but the former is protected while the latter remains subject to joint and several liability.

Both the ten percent test and the five percent test may be criticized as arbitrary, but this is not a sufficient basis for their condemnation. Bright-line rules always contain some degree of arbitrariness.[308] These rules are justified when their benefits, such as administrative efficiency, ease of application, and predictability, outweigh any negative effects on antitrust enforcement. Here, either the five percent or ten percent threshold would provide an efficient, straightforward means of damage allocation.

The second concern is the amount of the ceiling. One approach is to limit a marginal defendant's liability to damages based on its own sales, trebled when appropriate. In effect, this approach adopts ITDR for marginal defendants. Alternatively, the ceiling might be set higher, perhaps double the overcharges based on sales, subject to trebling in appropriate cases. This would permit the plaintiff a degree of leeway that exists under joint and several liability but also would offer the defendant a clearly defined cap on damages. The second alternative is more desirable than the first in its provision of maximum flexibility for the plaintiff.

An approach that features discretionary trebling and a limited repeal of joint and several liability for marginal defendants is likely to add to the costs of litigation by increasing the length of trial and the scope of discovery. The courts will face new issues concerning the appropriateness of trebling and determining marginal participation in the conspiracy. The latter issue is no more complicated than the determination of relative fault under contribution claim reduction and ITDR. New issues are almost certain to be interjected into the lawsuit by the application of the discretionary factors. The impact on the judicial process, however, may be minimized by using the presumptive approach discussed above[309] and through the court's power to limit discovery[310] and proof at trial so as to prevent the litigation from becoming unmanage-

308. United States v. Container Corp., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

309. *See supra* notes 303-05 and accompanying text.

310. *See supra* notes 199-200.

able.[311] At the same time, introduction of the discretionary factors encourages delay and tactical maneuvering. Thus, the proposed approach has its costs, but the price may be very well worth paying for a system that achieves a fair result without sacrificing deterrence.

V. Conclusion

The question of reform in the present system of antitrust damage allocation raises enormously complex issues. Given the competing and interrelated goals of antitrust enforcement, any change in the status quo is likely to have far-reaching and unpredictable effects on deterrence. The present rule of no contribution may promote whipsaw settlement tactics and in some cases may produce unfair results, but instances in which the problems have occurred are not sufficiently widespread to justify the adoption of contribution principles. If treble damages are to be retained, claim reduction is a less intrusive and hence preferable approach to damage allocation.

On the other hand, if the problem of reform in damage allocation is to be considered in the context of overall reform in private antitrust remedies, both claim reduction and contribution should be rejected. The preferred approach would be to permit detrebling at the courts' discretion combined with a limitation on joint and several liability for marginal defendants. This proposal eliminates unfairness without weakening deterrence. Claim reduction without detrebling, although perhaps a second best approach, offers a far less desirable alternative.

311. *Id.*