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ANTITRUST EQUAL ENFORCEMENT ACT OF 1979, S. 1468

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON

ANTITRUST, MONOPOLY AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1468

JUNE 8 AND 12, 1979

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ANTITRUST EQUAL ENFORCEMENT ACT OF 1979,
S. 1468

FRIDAY, JUNE 8, 1979

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLY
AND BUSINESS RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:45 a.m., in room 5110, Dirksen Senate Office Building, Hon. Birch Bayh presiding.

Present: Senators Bayh, Baucus, and Thurmond.

Also present: J. Michael Cooper, counsel; Marilyn Falksen, staff assistant; Peter Chumbris, minority consultant; Jessica Josephson, counsel to Senator Bayh.

Senator BAYH. We will ask our hearing to come to order, please.

I ask unanimous consent that the statement that I was going to make be put in the record so we can move expeditiously to our first witness.

OPENING STATEMENT OF SENATOR BAYH

Over the last 65 years of their existence, the antitrust laws of this country have been very effective. They have controlled the formation of cartels and other restrictive business practices which would be anathema to our economic well-being; they have also provided compensation to the victims of injustices performing just these two noble tasks. Since the enactment of the antitrust laws in the late 1890's, there has been an evolution in the nature and size of America's businesses. Large companies have become larger and the smaller companies are in a constant struggle to remain competitive with their seemingly ever-expanding neighbors.

One of the more critical problems facing smaller and medium-sized businesses today is their liability as defendants in large antitrust suits. I support the right of injured parties to assert their claims against alleged perpetrators of wrongs. Nonetheless, we have to be aware that in a large antitrust suit, where the treble damages could be in the millions—or even billions—a small or medium-sized company could easily face legal responsibility on behalf of the entire industry, of which they might comprise only a small part, while larger, more culpable businesses go relatively free—free from retribution, free to continue violating the laws. Clearly, the drafters of the original legislation cannot have intended this consequence. Thus, by considering the antitrust equal enforcement amendment in the next few days, it will be our intention to find the best remedy to set this situation right.

The antitrust equal enforcement amendment offers a solution to this problem: To allow contribution among antitrust violators so that no single party should have to pay more than his share of the damages. If the colluding parties share equal responsibility for their violations, for example, in horizontal price-fixing cases, each party will pay the same portion of damages as the other party. If some defendants settle, their proportionate and equal shares will be deducted from the total damages before the court apportion the sum among the remaining violators. This is the pro rata method of contribution.

In some cases, some large businesses can clearly exert pressure upon other, often subordinate parties, to join in antitrust violations. This situation is common among vertical combinations of business associates, for example among manufacturers, distributors, and small retailers. Clearly, the degrees of liability among coconspirators will be unequal; in order to apportion damages, the court will have to determine their individual levels of fault, whether or not there has been settlement. This is the comparative fault method of contribution.

We recognize that problems associated with contribution can be expected. It might become difficult to determine various levels of fault when litigation involves several parties and consolidated claims. On the other hand, antitrust litigation is already a complex undertaking with numerous parties and claims; and from this perspective, contribution does not complicate the litigation unduly.

We also recognize the possibility that contribution, particularly based upon notions of comparative fault, might deter settlements in some cases and might work to the detriment of plaintiffs' best interests. However, evidence is seriously lacking on these points, and we feel that the situations in which debilitating problems would occur will be few and far between. The amendment has provided for judicial discretion in such cases. It is necessary for us to consider the requirements of justice to all parties concerned, all plaintiffs, all defendants, and the public alike. It would be unjust to perpetrate any system which favors large, culpable antitrust violators at the expense of smaller, more innocent parties at the expense of the general public.

Based on these hearings, we hope to answer some of the fundamental questions underlying the current antitrust system:

1. What are the foreseeable costs involved in contribution? Will the contentions of the major critics really be supported in practice?

2. To what degree are small businesses and the public harmed in fact? Wouldn't contribution enhance the dual functions of the antitrust laws, to deter violations and to compensate victims, while preserving that essential element of justice which imparts respect to the laws? This requires the fair and equal enforcement of the laws toward all parties, including small businesses, often neglected, but still the cornerstone of our free enterprise system.

[The text and an explanation of the amendment follows:]

THE ANTITRUST EQUAL ENFORCEMENT AMENDMENT OF 1979

Except as may otherwise be determined by the court in accordance with principles of equity, two or more persons who are subject to liability for damages attributable to an agreement to fix or stabilize prices under section 4, 4A, or 4C of this act may claim contribution among them according to the damages attributable directly or indirectly to each such person's sales to, or purchases from,

the antitrust claimant or claimants. A claim for contribution may be asserted by cross-claim, counterclaim, third party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

A release or a covenant not to sue or not to enforce a judgment received in settlement by one or two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide, but it shall reduce the claim of the releasor against other persons subject to liability by the greatest of: (i) any amount stipulated by the release or covenant, (ii) the amount of consideration paid for it, or (iii) treble the portion of total damages determined by applying the percentage that the damages (including purchases from or sales to nonconspirators) attributable directly or indirectly to the settling person bears to the total damages caused by the illegal agreement. A release or covenant received in good faith relieves such person from liability to any other person for contribution.

EXPLANATION OF THE ANTITRUST EQUAL ENFORCEMENT AMENDMENT OF 1979

This amendment is designed to bring the largest and most guilty price-fixers to judgment and to assure that smaller, less culpable, and innocent defendants do not pay the penalties of an entire industry.

As we seek more strict enforcement of the antitrust laws against price-fixers, we must also assure fairness to those defendants—especially small and middle-sized businesses—who may be wrongly accused. Laws which are designed to deter and punish wrongdoers should not be used instead to permit sweetheart settlements with the largest or most culpable while coercing larger payments from smaller or more vulnerable defendants.

Currently, a defendant in a price-fixing case is liable for damages attributable not only to his sales to the plaintiff or plaintiffs, but also for the sales of all coconspirators (whether or not they are also defendants). Accordingly, a defendant faces the prospect of liability for all damages caused by any conspirator and, particularly in a class action suit, may be caused to settle rather than litigate even if he feels he has a very good case merely because of the risk involved. It also means that if one or more defendants settle a price-fixing case without getting the plaintiff to agree not to seek treble damages with respect to the settling defendants' sales, the remaining defendant or defendants face the prospect of an enormous liability since they would remain liable for damages on other persons' sales as well as their own. Moreover, a defendant is not only liable for damages on all the conspirators' sales but is also liable for damages on sales by a non-conspirator if the plaintiff can prove that the prices on the sales of such nonconspirator were affected by conspiracy.

The effect of this joint and several liability is to allow plaintiff's counsel to settle relatively inexpensively with a few defendants and force the remaining defendants (often those who have the best case or are in the poorest financial position, usually smaller companies) to settle at a higher price rather than run the risk of litigation and liability for everybody else's damages. The accompanying proposed amendment to the Clayton Act would allow a defendant to seek contribution from anyone else adjudged to be a coconspirator whether or not sued by the plaintiff. The defendant could do this in the same action or by instituting a separate action. As a practical matter, this would mean that in most cases (except for example where a coconspirator was insolvent or not present in the United States) a defendant would be liable in the end only for damages caused by his sales and proportionate portion of damages attributable to sales by a non-conspirator.

The right of contribution would not complicate antitrust cases. In those cases where the claim for contribution was brought as a cross-claim or by way of impleader in the main action, the plaintiff's claim would be in no way affected. The defendants would each be liable for the damages caused by their own sales. The damages caused by each party's sales would have to be determined as part of the plaintiff's case, in any event. In those cases where a defendant chose to pursue his right of contribution in a second action, he would have to prove that the alleged coconspirator was in fact a coconspirator (assuming the other conspirator had not been a party to the original action), but that would be the first cocon-

spirator's problem and would in no way affect the plaintiff's rights or complicate their lawsuit.

To the extent a defendant is made liable for damages caused by a codefendant without recourse against such codefendant, the present law creates the potential for abuse.

Senator BAYH. We are here today to discuss the Antitrust Equal Enforcement Amendment of 1979 which would require contribution among defendants in price-fixing cases.

We are privileged to have one of the top officials in the Justice Department, The Honorable John Shenefield, Assistant Attorney General in charge of the Antitrust Division, here this morning to give us his thoughts and the Department of Justice's thoughts.

He has, I think it is fair to say, more than a passing interest in this field.

Mr. Shenefield, we appreciate your taking the time to be with us this morning.

STATEMENT OF JOHN SHENEFIELD, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. SHENEFIELD. Thank you very much, Senator Bayh.

Mr. Chairman, members of the committee, I am pleased to be here to discuss on behalf of the Department this very important issue. I am pleased to have had the chance to consult with you, Senator Bayh, and your staff on this issue as it grew and became more defined. I think this is a good example of how the legislative and executive branches can work, and I hope constructively, to the very best ends as far as we are concerned in antitrust policy.

I very much welcome the opportunity to offer thoughts, and I look forward to examining the record of this hearing in order to further refine our own thoughts which, as you will shortly see, are in somewhat of a state of confusion about an ultimate position on this.

But let me say at the outset that Judge Bell has asked that I tell you and the subcommittee that he is generally in favor of contribution among joint tortfeasors based on a fair share allocation of damages, with a right of recovery over.

That general proposition is his starting point, although he also asked me to say that he has not had an opportunity to focus on the specifics of this amendment that we are considering this morning. He favors examination of the issues, including those that arise from transplanting rules worked out over time for dealing with unintentional torts into the area of intentional criminal behavior.

Senator BAYH. I understand the Attorney General is very busy. I appreciate his giving us his general thoughts. Has he made the distinction between unintentional and intentional tortfeasors?

Mr. SHENEFIELD. Not within my hearing he hasn't. I understand he is going to be looking at this over the next week.

He last night became concerned, I am informed, that we were talking here about criminal behavior as well. I understand he asked one of his assistants whether the focus on criminal behavior might change the general rule. I have not talked with him this morning on where he

comes down on that. But he has looked at a variety of papers, I know, on both sides of the issue. He has thought some about it, and I expect to be talking with him some time next week.

I will not go through my whole prepared statement, Mr. Chairman, but I will try to highlight it to put some of the issues on the table.

Contribution grew up in our law in order to somehow spread the risk of liability among all defendants and not allow one defendant to pay more than his fair, proportionate share.

In the context of antitrust cases, I take it that contribution would create a right of action by one defendant against other parties who are alleged to have shared in the responsibility for injuries sustained by plaintiffs.

Under the proposal that we examine this morning, as I understand it, defendants found liable for damages resulting from a price-fixing conspiracy could claim contribution among themselves on the basis of sales to the antitrust claimant or claimants, in the same action or perhaps in some separate action.

Defendants who settle would not be liable to nonsettling defendants, but settlements would reduce remaining damage liability by the greater of several amounts. The amount of the settlement is one alternative; any amount stipulated in the settlement is another; or—and this is a crucial point—the amount of the damages that would have been attributable to that defendant if it had not settled—a kind of a proportionate share of the total universe of liability—is still another.

All of us, I assume, are concerned about the question of fairness in all of the several aspects that arise in this general area. We are also concerned with fairness among defendants, and we are concerned with fairness between defendants on the one hand and plaintiffs on the other. I suppose, in a sense, we are also concerned with fairness to the public and to the criminal justice system.

Arguments based on fairness demand important consideration, and that is why this proposal, based as it is upon fairness considerations, demands serious consideration.

Antitrust damages generally serve two important purposes. One is the compensation of victims; the other is the deterrence of antitrust violations.

In examining the proposal, one must look at both the fairness question and also whether effects may be felt in the areas of deterrence and compensation.

The whole issue seems to us to involve several important questions as to which we don't, I confess to you, Senator, have the last answer and as to which we are quite curious.

First: I suppose the question one begins with in evaluating the proposal is: What are the problems that contribution would solve, what are the problems that it would create and what is the relative incidence and relative importance of those problems?

It is quite clear, I think, that it is unfair for any one of several parties who are jointly responsible for antitrust damages to pay more than their fair share, defined in some way, of those damages. Contribution, in this context, would help to prevent that kind of a result.

Second: Small antitrust defendants at least as a matter of theory,

might be coerced to settle with plaintiffs without any regard to guilt or innocence out of a fear that if they don't, the door would be open to larger defendants to settle and thus leave the smaller defendants liable for all remaining damages.

When one considers this possibility from the standpoint of an innocent defendant, who could not afford to risk putting its innocence to the test, there is indeed an unfairness which contribution rules such as this one might ameliorate. This is what Judge Bell refers to as the Robin Hood concept, which he is clearly against and which all people I assume are clearly against.

One of the questions that has occurred to me in examining this issue from my own experience in antitrust law is just how severe the problem sought to be remedied here really is. We have discussed this issue with some members of the antitrust bar, and we find a little bit of the same kind of puzzlement.

For instance, how often do antitrust defendants, particularly small defendants, who may not have been particularly culpable, get left holding the bag? How frequently are small defendants coerced by plaintiffs into forgoing a legitimate claim of innocence?

I was surprised in thinking this over. In my Antitrust Review Commission experience, I don't recall anybody mentioning this as a problem. I am subject to correction on that, because it may have been in one of the submissions I never saw, but it is clear, at least that it wasn't at the top of the list of problems that needed to be remedied on behalf of the people who approached us. While that isn't a good reason for failing to proceed, I grant you, it does give me some pause in my consideration of how severe the problem may be.

All of us in that room who are interested in strong antitrust enforcement share this concern: We wish to be quite confident that we are not giving up more in the way of antitrust enforcement than we are protecting in the way of fairness to all the parties.

There has been some speculation, much of it unprovable and much of it difficult to base in actual fact, that the effect of this proposal may be in some ways to cut down on antitrust deterrence.

It is possible, for instance, to vary the deterrent effect based on the kind of conduct that would trigger contribution. It is also possible, I suppose, to vary the deterrent effect depending on how the contribution share is defined.

It is also important to consider how settlements would be treated and what the procedures would be for allowing contribution. Will it all be done in the case in chief? Will cross-claims and counterclaims be permitted or will separate actions be required? Will defendants who have settled be impleaded back into the main case in order to have some influence on the determination of the total universe of liability?

These questions all lead one to wonder whether it is best to proceed by way of a statute that specifies answers to all of these questions; or if contribution is a good idea, whether it might be best to say only that much legislatively but to leave, as in the securities laws, to the courts the questions of in what particular cases and under what standards contribution should be applied.

For instance, as I understand the securities laws in sections 77(k) and 78(i) of title XV, where false financial statements and manipula-

tion questions are mentioned, contribution is allowed, but details concerning its application are not specified, at least in the statute. The courts seem to be struggling to work out a useful way to approach all of the many questions that occur.

One begins, if you want to examine each of those questions a little bit, first with the question of what type of antitrust violation you wish to have addressed. This proposal addresses price fixing. Some of my staff did a little research into the history of contribution and found that it is most frequently used in cases of unintentional torts. The English common law confined it to unintentional torts and did not permit it in cases involving intentional torts. American judges, historically have not made this distinction as clearly. The general rule today, at least if you look to the restatement of torts, in this country still denies contribution among intentional tortfeasors, although it is clear that some judges have permitted contribution among intentional tortfeasors, and many States also permit it.

Intent in the antitrust context, and certainly in the civil antitrust context, is not as crucial an ingredient as it is in tort litigation. There may be other ways to make a similar distinction in antitrust cases if this difference between intentional and unintentional torts is crucial because of the deterrence issue. You would want to deter intentional conduct, but you also might want to spread the risk if conduct is truly unintentional. There may be ways to grasp that kind of distinction in the antitrust area that would be just as helpful.

For instance, instead of applying contribution to all antitrust violations, you might wish to confine it to rule of reason violations, to allow it only for noncriminal violations, or perhaps allow it for only particular categories of violations, the reason being that contribution has commended itself to judges as a means of spreading risk without affecting deterrence where you are dealing with unintentional torts. However, the analogy of that would be rule of reason cases in the antitrust field rather than the per se variety of cases.

The question of deterrence is obviously one which concerns me most of all. You can argue, and the eighth circuit court of appeals in permitting contribution in certain cases pointed out, that there seem to be two different kinds of implications for antitrust deterrence growing out of a rule of contribution.

First, in some cases it could be argued that you increase the deterrent effect by making it more likely that all members of an antitrust conspiracy will be sued by somebody, either by the plaintiff or by a defendant seeking contribution, so that nobody could enter into an antitrust conspiracy on the assumption that they might somehow escape totally from antitrust liability. In that sense a rule of contribution of some kind would enhance deterrence.

On the other hand, in some cases it could be argued that contribution would decrease the deterrent effect both by lowering each antitrust conspirator's potential liability and by allowing each conspirator to assess more fully in advance his potential exposure, thereby making the cost-benefit analysis of whether to enter an antitrust violation more predictable.

I just don't know whether you can prescribe a general rule in all cases that would avoid one or the other situation that would always

enhance deterrence or at least not impede it. It may well be that a good approach here would be to indicate to the courts by legislative action that some kind of contribution rule is appropriate in certain circumstances but not to mandate it in all circumstances. That is at least one possibility for dealing with these kinds of concerns.

Another category of questions which bears on deterrence to some extent is how the defendant's contribution shares are to be determined. You have a variety of ways of making this determination. This proposal has chosen one way. However, there are other quite conventional ways of doing it. Pro rata contribution, which I understand has been adopted in many of the securities cases, merely divides total liability by the number of the defendants. However many defendants there are, you divide it equally. That approach at least makes it easy, and doesn't require additional court time.

Another method is the so-called comparative fault method, whereby the judge tries to determine each defendant's relative culpability and divides liability accordingly. That is obviously a much more difficult way to do it. It seems appropriate, however, where the damages awarded bear little or no relationship to the benefits received by the defendants, but it may result in very small defendants bearing a very large amount of the total liability.

There also are other ways.

The method chosen by Senator Bayh's proposal is based on the percentage that each defendant's sales bears to the total sales of all defendants during the course of the conspiracy. In terms of calculation, that makes sense in the horizontal price-fixing areas; however, it raises troublesome questions in the vertical price-fixing area.

The language of the amendment doesn't appear to exclude vertical price-fixing as one of the offenses to which the amendment applies, and it certainly could apply to that kind of offense. There is no zero sum game, if you will, when you are dealing with vertical price-fixing. Thus, it may be rather difficult to assess both comparative benefits and the comparative liabilities, and how contribution ought to be determined in a vertical price-fixing context. It may well be here again that, instead of specifying a single standard, it would be appropriate to leave equitable discretion to the courts, even if a particular method is generally endorsed, so as to avoid unintended situations where contribution would be more unfair to defendants than no contribution at all.

Another important question which we all have discussed is how to treat settlements. You can do it by permitting deduction of the settlement amount from the remaining damages recoverable by the plaintiff from nonsettled defendants; that is a common way of dealing with the issue.

You could also deduct only the amount of any settlement from the remaining damages unless it can be shown that the settlement agreement was not reached in good faith, suggesting to the judge that he or she ought to be more closely involved with settlements to avoid what are sometimes called "sweetheart settlements."

A third method is the one proposed here, that is, to deduct the greater of either the amount of any settlement or the amount that the

settling defendant would have owed after contribution if it had not settled—which is also called the contribution share—from the remaining damages recoverable from nonsettling defendants and to prohibit entirely contribution from settling defendants.

The current rule, the base upon which we are all operating here in the antitrust context, is that only the amount of any settlement, is deducted from the plaintiff's damages after litigation so as to prevent a double recovery. That clearly creates the possibility that is of concern because small antitrust defendants might be forced to settle actions that they would prefer to litigate out of a potential concern that their entire existence could be jeopardized if they failed to do so.

Another point that merits the serious consideration of this subcommittee, is whether we have ways available to us to deal with this kind of a problem right now.

One way of course, is, as I suggested earlier, asking the judge, in effect, to be a regulatory agency with respect to settlements by requiring the judge to examine the question of settlement and the appropriateness of a particular level of settlement in a specific case, and requiring the judge to eliminate the unconscionably low settlement for major antitrust defendants.

We presently have sanctions for vexatious litigation in our legal system. There is not much question, I guess we all agree, that those sanctions have not been particularly effective.

There is also another solution, which is to adopt the settlement rule that permits contribution among defendants who have settled with the plaintiff, but only after a judicial determination that a settlement was made in bad faith. That is the solution adopted in the Uniform Contribution Among Tort-Feasors Act of 1955.

The best thing among the ALI, I am informed, and I have to confess I can sympathize with them, is that they are unable to determine which settlement rule is best. They have come to the conclusion in the second restatement of torts that each settlement rule has some advantages and some disadvantages in tort litigation. That is, at least as of now, where my own thinking is.

Another point that I think could be dealt with fairly clearly, but is a point that will be of concern to the plaintiffs' bar, is the procedure for claiming contribution. What is going to be required in order to get the adjustment of the universe of damages resolved, and what effects is the procedure likely to have on plaintiffs?

If, for instance, the problem is that settling defendants will be kept in the case or if plaintiffs will not have access to any damages until the share of each defendant is calculated, you may well find that plaintiffs would be substantially disadvantaged by some such rule.

On the other hand, if you have a situation in which the reckoning of contribution shares is severed to some separate proceeding, you may to some extent reduce the attractiveness on the part of some defendants of settling since they may well be held into either the case in chief or into the case at the final calculation stage, particularly if there is any kind of judgment to be made that would have a collateral estoppel effect in some cases.

I assume all of us could think of a procedure which would reduce these concerns to a minimum, and yet they will remain of some concern I am sure to the plaintiffs' bar.

I am trying to lay out, at least, some of the issues and indicate to you what we think some of the relevant factors are, and to indicate to you that although the proposal has much to commend it in the way of reducing perceived unfairness, it also raises some concerns of a procedural sort.

Quite apart from the issue of whether contribution should be available to antitrust defendants, we have the specific concerns involving the effectiveness of antitrust policy to which I have alluded.

The issues that I have set out, and perhaps some other technical matters, indicate that the application of contribution in any area of the law, and most certainly in the area of antitrust, is hardly a simple matter. At least it seems difficult and complex to me. The contribution rules, and the effects that they will have on antitrust enforcement, are so clearly direct and their meshing is so clearly important that I am continuing an intensive examination of these issues.

I do argue for caution in the application of contribution to antitrust cases, especially as to how it should be mandated and how it should be applied, until some of these questions have been resolved. I don't suppose we should expect resolution of these issues to be easy. Perhaps that is the best testimony of all, that these are important issues and ought not to be addressed quickly. But where you are dealing with a doctrine that is essentially one of fairness, which means fairness to everybody, you immediately have complex relationships that have to be analyzed quite carefully.

In summary, I urge that we take the time necessary to understand the need to allow contribution in antitrust damage cases, the likely effects of particular contribution rules in such cases, and the relative merits of making legislative choices that are specific or that leave development of the doctrine to a case-by-case approach in the courts.

The issue has been under active consideration for but a short time relative to the history of private damage actions under the antitrust laws. It is absolutely clear that the *Professional Beauty Supply* case in the eighth circuit has created an enormous amount of curiosity and discussion among the antitrust bar and will certainly involve a substantial revision of the advice that lawyers give their clients.

Cases on contribution, I understand, are soon to be decided in the fifth circuit and in the tenth circuit courts of appeals.

It seems to me that from all of this ferment and discussion, and the kind of examination that is underway in the antitrust law section of the ABA, which I understand is putting together on a high priority basis a monograph on this issue, we might well expect to receive some help on some of the questions that concern us all. We certainly hope to be involved with this subcommittee in exploring the matter further. We look forward to working with you in formulating the best possible provisions, the provisions most conducive to fairness and to antitrust enforcement that the minds of men and women can put together.

I would like to offer whatever resources the Antitrust Division has to assist in that effort, Senator Bayh. I would be happy to try to

answer whatever questions you have either today or, if they are complicated ones as I anticipate, to do the best I can afterwards.

Thank you very much.

Senator BAYH. Mr. Shenefield, I appreciate the positive thrust of your testimony. I think all of us are indebted to you for the kind of sensitivity you bring to the Antitrust Division of the Justice Department. Antitrust enforcement is one of the most complicated, vexing issues that our system of justice must deal with. It takes a fellow who is as objective and patient as you are, yet persistent. So I appreciate your analyzing the general contribution issue and presenting it. I suppose it is fair to say that there are questions that you feel must yet be answered on this subject and which you, yourself, are not quite certain of the answers.

Our staffs collectively, and I am sure the committee staff, and I will speak for our distinguished chairman who was thoughtful in letting us have these hearings, Senator Metzbaum, want to proceed together with you on this matter.

I have been in the legislative process long enough to know that when a piece of legislation is introduced, there are people on both sides who overreact. Those supporting the legislation claim this is a panacea to all the ills; those opposing suggest that it would create every sort of problem imaginable.

It seems to me that antitrust cases are complex—and are so, with or without contribution, are they not?

Mr. SHENEFIELD. They certainly are.

Senator BAYH. The problem is whether we are going to have contribution or not, with or without this legislation. The eighth circuit case discusses as you know, the application of contribution in antitrust cases generally.

The court said, as I recall, that "We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances." That is, of course, just one circuit. But from what we have been led to believe, and you may have other information, we have been advised by several people that once that eighth circuit makes such a determination, it is not confined just to the eighth circuit. In the other circuits defendants are now moving in this direction, so that we really have sort of a national problem of application instead of just one confined to the eighth circuit.

Mr. SHENEFIELD. There is no question about that at all.

Senator BAYH. Is it fair to assume that it is in the best interest of antitrust enforcement and justice to all the parties, plaintiffs, and defendants, that there be a uniform rule, that there not just be an eighth circuit rule?

Mr. SHENEFIELD. I think it is clearly well to have a uniform approach. A uniform rule in the sense of one that is rigid, that isn't what you mean, I presume.

Senator BAYH. "Uniform approach," I think is the language you use. Or a rule, if it is loosely defined to make applicable whatever response seems to be just and equitable and fair, given the different circumstances.

Mr. SHENEFIELD. I think that is right. If you don't have that, you are going to have the kind of forum shopping that you want to avoid.

Senator BAYH. That seems to me to make sense. I am glad you concur. You and I have discussed this. There are several problems. You have enunciated two of the main ones.

As you know, I have been one of those who has been with Senator Kennedy, Senator Metzenbaum, and Senator Hart—God rest his soul—who is no longer with us, who has been particularly sensitive to what needs to be done to minimize the possibility of conspiracies which occur to the detriment of the consuming public, the citizenry generally, and the competitive health of our free enterprise system generally. So I salute you for your efforts in this direction.

You mentioned the alleged small tort-feasors and the increased burden that is placed on such a person. The situation arises where there is a more culpable individual who settles early and cheaply, call it a sweetheart deal or a legitimate settlement—once they are out of it, they are out of it—and which increases the burden on the smaller, perhaps less culpable individual. That happens under present law right now, as I see it.

Second, the ones I really am concerned about are the innocent parties. If you are a large corporation, you have the resources to fight your innocence; you are in a better position than the smaller corporations. The concern which has been expressed to us by a number of the smaller corporations is what this does is grind to a halt the financing to modernize and to take the sorts of actions which are necessary for corporate growth and development. That concerns me.

In addition, although I have nothing but warm and laudatory feelings for a plaintiff's lawyer who is willing to devote his life to fighting injustice and stopping monopolies in antitrust practices, I must say I have nothing but disdain for a plaintiff's lawyer who will just try to find a way to make a darn good living for himself by trying to create the type of environment in which you just frighten the pants off innocent people to get them to settle, with no concern for the merits of the issue.

Let me ask, if we have contribution, would we still have—I am concerned about deterrence—would we still have treble damages?

Mr. SHENEFIELD. Yes, sir.

Senator BAYH. So the culpable individual would be liable for treble damages as the deterrent factor, just like present law?

Mr. SHENEFIELD. That is correct.

Senator BAYH. What about criminal prosecution? Whether you have contribution or you don't have contribution, the concern I have is that damages may be considered to be sort of a business expense. It can be written off. The stockholders sitting out here on the end of the corporate chain that have really no direct culpability at all in an antitrust violation, and can be totally unaware and totally innocent. They are the ones who carry that burden. The criminal prosecution gets at the culprits and deals with them. What role does criminal prosecution play in deterrence?

Mr. SHENEFIELD. I like to think it is important. I have heard in their most candid moments that some antitrust plaintiffs' lawyers suggest that it is more of a nuisance to them than anything else, that

it would be well if we stayed out of the way and let them play a larger role. They say that because of the complications to them of having grand jury material secret and the rule of criminal procedure 6(e) problems, and all of the immunities questions.

Harkening back to my own experience as an antitrust litigator, I would put it this way: If you are dealing with an industry where the origins of a conspiracy are likely to be at a relatively low level, that is, at the plant manager or the sales vice president level of a particular division, then I think the criminal law deterrence points are greatest. Those people are afraid of going to jail; they are less concerned about the balance sheet of the entire operation.

If, on the other hand, you are talking about an industry or a company where the origin of the conspiracy is at the top of the corporation, the chief executive officer or the president, and their compensation is closely related to the health and welfare of that company, then I think private enforcement may sound a little bit larger than does criminal enforcement, in my intuitive sense.

This contribution proposal, of course, would not change criminal deterrence and the criminal law effects. We are doing much better in that area than 2, 3, 4 years ago, as a result of your efforts and that of others to increase the criminal penalties from misdemeanors to felonies.

Senator BAYH. As you know, Senator Kennedy has been a champion on that. Is there anything else we can do?

It is one of the things we have tried to do, with only limited success. With your concurrence, we want to continue to try to beef up criminal enforcement; perhaps we ought to get together for a more effective strategy—and to get more resources into the area.

The resources that you, as a public official are given, are not as large as we would like; and there is the reality of the tenure of people who you rely on to prosecute antitrust violators. When you compare your operation to those of some of the defendants, it is my feeling that you are going into a big league ball game with minor league resources. Is there anything more we can be doing in this area?

Mr. SHENEFIELD. I agree with your sentiments entirely, Senator. I don't think there is any substitute for experience.

We have among our lawyers, I think, the best criminal lawyers, or those who are among the best. But we have a lot of people who are young, zealous, interested, and enthusiastic about antitrust enforcement, but who are, in realistic terms, not likely to stay with us longer than 3 or 4 years.

Resources help in two ways. They help in terms of our total institutional budget, and the authorization bill that has just been passed is a substantial help in that area for the Antitrust Division. They also help to the extent that they can help us bring the compensation for our best lawyers and our senior lawyers a little more into line with those on the outside. It is never going to be entirely even, but I keep having people leave and double, triple, and quadruple their salaries.

I make a lot of arguments, very enthusiastically, about the virtues of public service and the importance of the job. They come right back at me with the statement they have done it for 4, 5, 6 years, and now they have to be thinking about their families.

Then the ceiling question, the supergrade question, that you, Senator Bayh, and others are concerned with, are very important questions to me as the manager of the Antitrust Division.

Senator BAYH. I must say, although I have spent, I guess, most of my adult life working in public service, when I look back on it, I can't think of anything I would rather have done. I have said, rather repeatedly, somehow or other, the value of that doesn't fit on the net worth statement that the bank makes out when you have to borrow money or pay off the mortgage payments.

But I don't mean in comparing the major league and the minor league assessment, to in any way deprecate the personalities or the profession of the people who work for you, but just to illustrate the picture of the sum total of your resources as compared with the various resources of the defendants.

I appreciate the fact you have been willing to work so hard under the circumstances. Although the present authorization for your division is certainly a step in the right direction, I would hope we can work together to zero in on the appropriations process which is what is going to pay your folks down there.

Mr. SHENEFIELD. I will do anything I can.

Senator BAYH. Let me ask you to look at some of the specifics, because with your critique of our efforts and our staffs rather rigorously discussing the merits, we are considering some changes that we hope will be helpful to deal with some of the problems.

One of the changes that we are considering is in the first clause. The equity language, "except as may otherwise be determined by the court, the court with the principle of equity," might be moved to the second paragraph in order to ensure the method of allocation of damages among defendants would operate with more predictability. It would seem to me the court could use this equity power in vertical price-fixing cases, which is one that you mentioned. We are really not necessarily bound to any absolute formula but may want to try to give the judge some equity power.

Would that help deal with this problem within the flexibility you expressed concern about?

Mr. SHENEFIELD. I think it would, Senator. I guess if you coupled that thought with changing—well, one possibility would be to couple it with changing the word "greatest" so that you could give the court the power to make some sort of finding as to whether it made sense in a particular case to simply subtract the value of the settlement itself or the proportional share of the total damages. That might well make more concrete the calculation for defendants in settling and plaintiffs in accepting settlements.

On the other hand, of course, it is going to leave open somewhat exactly what they are settling for.

Senator BAYH. Perhaps we can look at that. I think we both recognize that presently judges now have to OK settlements. I don't know how we get around a judge who just isn't responsible in this regard. That is the strong link or the weak link.

I am not absolutely locked into the word "greatest." If we adopt the present rule, where you can only deduct the amount of the settle-

ment, we then don't get to the problem of the sweetheart deal or the intimidation of innocent parties. So we have to find some way of providing flexibility that you suggest.

Your concern about defendants remaining in the case has been dealt with. I don't know whether we have had a misinterpretation here or a breakdown of communications. We have not changed that part of our amendment. The way we intended it and the way we structured it, settling defendants would not stay in the case.

Mr. SHENEFIELD. I guess the concern arises for the following reason: If you have the settling defendant who is out of the case so far as that particular plaintiff is concerned, in the next stage of the procedure somehow that defendant's share of the entire universe of damages has to be calculated.

Now, if it is done by a sharing agreement, as it sometimes is done today, there are no effects that go on to any other litigation. But if a judge makes a finding, let us say, that that defendant, if it had stayed in the case, would have been liable for 30 percent of the damages, and that is a conclusion of law, I suppose, either because of collateral estoppel—though if a defendant isn't there, collateral estoppel at least technically wouldn't apply—or for some other reason, the defendant can't really turn his back on that aspect of the proceeding. He must remain concerned how it comes out, because (other plaintiffs' lawyers may well be emboldened to try to come in and argue in connection with a possible settlement with that already settling defendant that a court has found it liable for 30 percent of the total universe of damages, and therefore the settlement in the next case ought to be closer to that.

Senator BAYH. In the whole business of settlement, both the plaintiffs and the defendants in exchange for benefits of not pursuing take a risk, don't they?

Mr. SHENEFIELD. There is no question about that.

Senator BAYH. That will be the case now, as well as whether there is a contribution.

Mr. SHENEFIELD. I suppose the concern that comes along with the point that you just made is how likely plaintiffs are to settle, particularly on behalf of a class, where you are talking about very large amounts, if the total universe of damages, not which they could receive but which they actually receive, is substantially reduced.

Take a situation, let's say, where the total universe of damages is \$1,000 and, by hypothesis, one party is liable for 30 percent and the other party is liable for 70 percent. The 70 percent party settles for, let's say, half of it, but the remaining party's liability isn't in any way affected, except that he is only liable for up to 30 percent of the total amount. The total amount that that plaintiff could receive, the damages available, is the same. What he actually receives, though, is reduced.

To the extent of the uncertainty, which you mentioned, at the time of settlement, plaintiffs may be persuaded that it just doesn't make much sense for them to settle too early. They are going to pursue it a little further until they get the grand jury transcripts or do their own civil discovery and get a chance to see who the major culprits are.

Senator BAYH. Of course, the plaintiffs who settle never get 100 percent.

Mr. SHENEFIELD. I never got 100 percent.

Senator BAYH. Let me ask you, here again I am trying to determine the difference between where we are and where we would like to go, if we look at the question of severance and stay, do I understand the court already has the authority under rule 14 of the Federal Rules of Civil Procedure to sever questions of contribution?

Mr. SHENEFIELD. There is no question that a court can organize the litigation in that way.

Senator BAYH. So it would seem to me that particularly if we are very careful in our legislative history so we can see that the judge continues to have the control of the situation, and it is a complex kind of business we are dealing with, at least, if the judge continues to have that kind of authority, which we certainly intend for him to have, he can minimize complexity, at least not let it get more complex as a result of the contribution.

Another complicated change is to strike the words "directly or indirectly." We put those words in when we intended to offer this as an amendment to *Illinois Brick*. I don't think they are necessary now. In fact, they may add some confusion.

Let me ask your thought here again. When you are dealing with antitrust laws, you are dealing not only with enforcing the law, you are trying to deal with a relationship in the world of business and economics which is designed to create more competition, more growth. If antitrust enforcement is done right, it can be a shot in the arm for the economy, for the free enterprise system generally. If it isn't done right, it can be extremely detrimental to the economy.

Let me just read to you the concern expressed in the court in the *Gypsum* case in 1978 to see whether you have any concern. Here again, let me emphasize that I want to get the person who is guilty. I want to deter people who are tempted. But it is a fine line, it seems to me, and you have to be careful you don't step over so it is a negative reaction. This was expressed I think, very frankly, very well by the court in that decision, where they said:

There exists the distinct possibility of over-deterrence. Salutory and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good faith error of judgment.

Further, the court says in a footnote there:

Where the conduct prescribed is difficult to distinguish from conduct permitted, and indeed encouraged, as in the antitrust context, the excessive cautions spawned by a regime of strict liability will not necessarily redound to the public's benefit.

Then they use the comparison and say:

The antitrust laws differ in this regard from, for example, the laws designed to ensure that adulterated food will not be sold to the consumers. In the latter example, excessive caution on the part of consumers is entirely consistent with the legislative purpose.

I know that this is the excuse given by those who oppose all antitrust enforcement. They are going to kill the goose who lays the golden egg,

et cetera. But it seems to me the court expresses the idea of over-deterrence clearly. How do you feel about this?

Do you care to make a comment on that?

Mr. SHENEFIELD. Yes, Senator. I think the court well points out what is one of the most difficult areas of antitrust. They were considering a case in which, at least it was alleged, in order to avoid violation of one law, the companies were accused of having run afoul of another.

Obviously, in that kind of a situation in particular, it is easy to see the dangers of overdeterrence. It is one of the questions that I think plagues everybody in the antitrust world: how to be adequately vigorous without straying into areas where you will chill and dampen competition. It is probably most clearly seen in the areas of attempted monopolization and monopolization. You don't want to punish success and you don't want to punish active competition; yet you don't want to permit something less than fully competitive behavior.

In the price-fixing area, however, I don't have the same kind of concern. I think where you are dealing with a per se violation of the law and one that is easy to define, one that everybody agrees is harmful, that the question of overdeterrence is probably not so serious.

It is interesting that following that Supreme Court case the courts of appeal which have considered that issue have generally decided that a corporation that is found to have violated the price-fixing laws can be presumed to have known the consequences of its act. You shouldn't be concerned about the questions the Supreme Court is raising in that opinion.

Senator BAYH. If you have flat-out price fixing, then it seems to me there would be no question in the minds of the parties involved that this is illegal; price fixing is really not designed to further competition and make business more profitable.

I don't want to monopolize this dialog.

Senator Thurmond, do you have questions to ask?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Schenefield, would you mind repeating for the benefit of those who were not here throughout the entire testimony the position of the Attorney General on the Bayh amendment to S. 390 since it has an impact on what position the administration may take on the Bayh amendment?

Mr. SHENEFIELD. I wouldn't mind at all, Senator.

The Attorney General states that he generally favors contribution among joint tort-feasors based on some fair share allocation with the right of recovery over among defendants.

He also states that he has not concluded his examination of the precise terms of this proposal. I noted he continues to look at it and will, I presume, conclude his examination. He expressed in language that he specifically approved his wish to examine particularly the issue arising from transplanting rules worked out over time for dealing with the unintentional tort area to the area of intentional criminal behavior. He expressed a concern about that.

The only other thing I know he said about it, Senator, is that he is concerned about the problem of the innocent defendant who is—these

aren't his words—but who is blackjacked into a settlement. He characterized that as the "Robin Hood" approach to justice, and he stated he clearly opposes that.

That is about all that I know of what he thinks about this issue at this time.

Senator THURMOND. As I understand it, the Bayh amendment is geared to bringing the biggest and the principal price fixers to bear their appropriate portion of the damages and to assure the smaller, if not lesser, totally innocent defendants do not assume these shares.

We had testimony of an undisclosed defendant who was found in a treble-damage suit which not only makes the company liable for such damages but places that smaller business in a position of losing its credit standing because of the threat of a multibillion dollar judgment.

Is this fair to the innocent company?

Mr. SHENEFIELD. It certainly isn't, and steps ought to be taken in some way to deal with that problem.

Senator THURMOND. Do you have a recommendation here?

Mr. SHENEFIELD. I do not, Senator. As I mentioned in my testimony, that situation is of undoubted unfairness. I mentioned also some of the problems that are, by implication, involved in trying to solve it and told the committee that we were continuing to look at the question, and that we would continue to work with the committee on trying to get some fair way to deal with the problem.

Senator THURMOND. Do you plan to make a recommendation to the committee?

Mr. SHENEFIELD. If we find one, I would be only too happy to do so. I mentioned some of the implications of the kind of solution that would call for contribution. One of the things that seems perhaps to be the best solution, if contribution is thought or balanced, since many courts have used the absence of a congressional statement about contribution as an excuse for not really looking at the question, is to make a clear legislative statement that contribution ought to be permitted in antitrust cases where that is an equitable thing to do, and then allow the trier of fact to determine in an individual case whether it is an equitable thing to do and on what basis.

Senator THURMOND. Thank you, very much.

Senator BAUCUS [presiding]. Thank you very much, Senator.

Mr. Shenefield, I have a couple of questions to ask you. No. 1, in your letter to Senator Metzenbaum of May 14, you seemed more critical of this legislation than you are in today's testimony. Is that a correct perception on my part?

In the letter of May 14 to Senator Metzenbaum you outline serious problems you have with the legislation. Specifically, you raise the issue of deterrence. You did seem to raise more objections to the legislation than in your testimony today. I am curious if there is any reason for that.

Mr. SHENEFIELD. I don't know if there is a good reason for it. Things look crisper in black and white than they do when they are spoken face to face. I intended the letter to say that we have certain problems with the proposal and to suggest that we get answers resolving these questions before going ahead affirmatively. That was the intent of the letter.

Senator BAUCUS. What in your judgment, is the basis for the general American common law of no contribution among joint tort-feasors? Why did that arise?

Mr. SHENEFIELD. I guess it was because, at least under the oldest theories of tort law, there was much less emphasis on spreading risk than there appears to be today. The English always had a limited rule. They had no contribution for intentional torts, but permitted it for unintentional torts.

I guess in our own frontier justice, those refinements simply didn't get the proper attention. Now, of course, courts are going in the direction more and more, as tort philosophy changes, of permitting contribution.

Excepting the securities area, at the Federal level the rule has been in some confusion. If you are talking about a diversity case, of course, you use the law of the State. If you are talking about Federal torts, admiralty cases, or securities cases, the law varies.

We don't have, I think, a rule of contribution at the Federal level that is as specific in setting out the precise standards and organizing the situation as this amendment does. I gather the trend has been to permit contribution affirmatively but leave it to the triers of fact to try to work out after looking at facts.

Senator BAUCUS. What has led to that increase in the number of courts permitting contributions?

Mr. SHENEFIELD. I think it is a change in tort philosophy, particularly when dealing with unintentional torts. It just seems unfair to people to allow a particular defendant to be stuck with the entire liability at the whim of a plaintiff.

Senator BAUCUS. What in your view are the changes since 1914 that may have created a need for this legislation? Our antitrust laws have included joint and several liability and treble damages for 65 years.

What social changes and changes in our legal procedures, including the rise in the number of class actions would dictate that we need the change called for in this bill? Is there a basis for Senator Bayh's proposal in the change of circumstances in America between 1914 and today?

Mr. SHENEFIELD. I think there is, Senator. I think that is the crucial point. We have seen a virtually whole new world of antitrust enforcement in the private treble-damage area in the last 10, 15, 20 years, and particularly in the use of class actions. That simply didn't exist before.

We looked through the learned journals to see whether this issue had come up very frequently in the antitrust context. There is almost nothing written about it. So it is obvious that the topography has changed substantially.

One of the things I mentioned in my testimony was that the antitrust bar in the last year, since the eighth circuit decision, has awakened to a whole new subject they didn't really realize existed before. A lot of comment, ferment, and discussions are going on that didn't go on before.

Senator BAUCUS. Could you amplify on that point a little more? What is it about the rise in the number of class action suits that has

altered antitrust enforcement? Could you be more specific and give more specific examples?

Mr. SHENEFIELD. I think the concern is that where you have potential liabilities in the hundreds of millions or billions of dollars, which is not an exaggeration in some cases, what was deemed an unfairness before but a kind of small unfairness can have such serious repercussions in terms of the continued existence of firms that it has to be dealt with. That is the perception.

I don't have any firsthand knowledge of the problem that would educate me particularly on this issue. That is why I am groping for many of the same answers that all of you are.

I am aware that the choice that a defendant in these kinds of cases faces is a difficult one. The first choice is what to put on his balance sheet in the way of notes about contingent liabilities. What is that calculation? Is it some kind of limited area of damages or is he potentially liable for the entire universe? If it is a small company and the potential damage universe is very large, you will find accountants and potential lenders very troubled about it.

Senator BAUCUS. Have accounting procedures changed to take into consideration these matters?

Mr. SHENEFIELD. They very clearly have changed. It is an area of enormous concern to companies and their lawyers and accountants because the law is changing and is unclear. To fail to put on the balance sheet the proper measurement and then to, in effect, be deemed to have participated in a misleading statement implies the possibility of criminal action.

Senator BAUCUS. Does it make any sense to look at the contribution issue separately from the question of joint and several liability?

Mr. SHENEFIELD. I think it does. I don't see this legislation as dealing at all with the question of joint and several liability. I think contribution ought to be dealt with on its own merits.

Senator BAUCUS. I want to thank you, Mr. Shenefield. I think my other questions have already been asked by the chairman of the subcommittee.

I believe counsel has a couple of questions.

Mr. COOPER. Mr. Shenefield, as I understand your testimony, it seems to me that you think the greatest possible danger to the deterrent effect in the antitrust laws some form of contribution would create would be in the area of intentional tort and price fixing. Am I correct?

Mr. SHENEFIELD. That is right. Of course, this amendment only applies to price fixing.

Mr. COOPER. I understand.

Mr. SHENEFIELD. The reason I think that is because at least in some situations a potential price fixer thinks out to himself the costs and the benefits of such conduct. We can all imagine situations in which a very large company, let us say, might think quite coldbloodedly about the advantages of going into a price-fixing conspiracy as against its potential liability and decide differently under this regime than under the previous regime.

Mr. COOPER. In other words, it is more likely that a businessman will intentionally take the risk of breaking the law in the price-fixing

context than, say, section two monopolization situation, where the business decision is more uncertain about whether in fact it is an anti-trust violation.

Mr. SHENEFIELD. I think across the range of the premeditated anti-trust crimes, if you will, price fixing is clearly the most coldblooded.

Mr. COOPER. Now the eighth circuit case, as I understand it, did not deal with price fixing. That was an attempt to monopolize.

Mr. SHENEFIELD. Yes. It came up in the context of an exclusive dealing situation which made it arguably less like the situation contemplated by the amendment.

Mr. COOPER. Do you know of any other courts that have applied that case in the price-fixing context?

Mr. SHENEFIELD. My impression is the eighth circuit is the only court that has applied contribution at all in the antitrust context, and that in the only other cases that have been decided it was held inapplicable for one reason or another. Indeed, I don't know whether there is any significance to it, but the only trial judge, sitting on the eighth circuit panel by designation, dissented from the result in that case.

Mr. COOPER. There are two or three pending cases in the court of appeals. Were the district court decisions in favor of contribution or against contribution?

Mr. SHENEFIELD. I am almost certain it was against contribution. Of course, I would assume the eighth circuit's decision will receive a hearing by the Supreme Court.

Mr. COOPER. Has certiorari been applied for?

Mr. SHENEFIELD. I am not certain, but I can't imagine it would not be appealed, and the appeal not be granted. As a matter of fact, we would favor, if asked, that it be granted.

Mr. COOPER. Are you aware of any existing statutes that reduce the plaintiff's potential recovery after a settlement by one or more defendants in that case, in the same manner as Senator Bayh's amendment would? For example, the Uniform Tortfeasors Act.

Mr. SHENEFIELD. I don't know. If that question asks whether there are other statutes that permit or require contribution, I do know that sections 77(k) and 78(i) of title XV do permit it.

Mr. COOPER. But do they require the court to reduce the plaintiff's recovery by some method of determining the damages caused by the selling defendants?

Mr. SHENEFIELD. They don't in their terms set out any standards at all. They leave it to the court.

Senator BAYH [presiding]. But in effect that can be done and has been done, in the way it has been applied.

Mr. SHENEFIELD. Yes. In the securities law area they have gone from pro rata reduction to some sort of comparative harm or comparative fault reduction, and, indeed, to the same kind of share arrangement I believe that your amendment suggests, Senator Bayh.

Mr. COOPER. In the treatment of settlement they have done that.

Mr. SHENEFIELD. I confess to you I have not read all the cases. But the language of the statute doesn't specify one way or the other. Indeed, the eighth circuit decision, if I recall its language, seems to suggest there might be cases in which contribution wouldn't be appro-

appropriate. That opinion says that fairness compels contribution, and it uses the words "under certain circumstances."

Mr. COOPER. Assuming that the Senate enacts some sort of contribution legislation, should we make that legislation prospective? By that I mean not only applying it to cases filed after enactment of the amendment but also only for claims arising after enactment of the amendment.

Mr. SHENEFIELD. I would think you would not want to—and perhaps constitutionally could not—apply such a law to settlements or judgments that have already taken place. I don't have any clear notion of how best to measure the prospective aspect of the law at this point.

In fairness, I would suggest that it ought to be prospective since people would have reordered and terminated their rights based on the existence of the law as they saw it.

Mr. COOPER. With respect to claims as well as filing of suits it should be prospective?

Mr. SHENEFIELD. I would like to think about the implications of that distinction a little further.

Mr. COOPER. All right. Would you let the committee know?

Mr. SHENEFIELD. I would be delighted.

Senator THURMOND. If there is no objection, Mr. Chairman, I wonder if Mr. Shenefield could furnish for the record a copy of the sections he just referred to.

Mr. SHENEFIELD. I would be delighted to.

In the securities law?

Senator THURMOND. Yes, or such other law that you feel is pertinent to this.

Mr. SHENEFIELD. All right, sir.

[The following information was furnished to the committee:]

There are three sections of the securities laws which expressly provided for contribution. These are: Section 11(f) of the Security Act of 1933, 15 U.S.C. § 77k(f); and Sections 9(e) and 18(b) of the Security Exchange Act of 1934, 15 U.S.C. §§ 78i(e) and 78r(b).

Senator BAYH. I don't want to delay your departure. I just thought that from the standpoint of the record, I understand my colleague from Montana raised the question of joint and several liability, which was certainly not the intention, nor do I think is the effect of what we are trying to put in here as to what exists as far as joint and several liability.

Mr. SHENEFIELD. I think that is clear.

Senator BAUCUS. Mr. Shenefield, I take it your greatest concern about this legislation is its potential impact on the deterrent effect of our antitrust laws.

Mr. SHENEFIELD. That is correct. In my present capacity, that is correct.

Senator BAUCUS. Do you think on balance the bill would lead to a significant diminution in deterrence?

Mr. SHENEFIELD. As of my present reading?

Senator BAUCUS. Yes.

Mr. SHENEFIELD. As of my present reading, I think it is impossible to determine. I think the court in the eighth circuit was exactly right.

In some circumstances contribution makes sense; in some circumstances it doesn't make sense.

Senator BAUCUS. But in your capacity as chief officer of the Antitrust Division, you must have some general sense of the number of circumstances where contribution makes sense and others where it won't. Where do you come out?

Mr. SHENEFIELD. I have to reiterate that I don't come out anywhere yet. I am still thinking about it. All the courts that have looked at the contribution issue have come out in differing ways, but only one court has decided it ought to be permitted. Many of the courts came out against it for deterrence reasons.

Senator BAUCUS. Assuming you do come out with the belief that this amendment would be a significant reduction in deterrence, can you give us some suggestions as to how we might adjust the antitrust laws to make up for that lack of deterrence?

Mr. SHENEFIELD. I think one of the things that would be most suitable would be if it were determined to go ahead with something of this sort and everybody agreed there may be some falling off of deterrence and wanted to supplement that—

Senator BAUCUS. The problem is this: I think most of us and you, too, are concerned about the smaller companies. Particularly the innocent smaller companies, who operate at a distinct disadvantage in this area. We are trying to find a remedy to address their problems. If this legislation is passed and if there remains some concern here in the committee that there might be some adverse consequences of the bill, particularly in the area of deterrence, then I think we have an obligation to address that concern. I am asking whether you can come up with some guidelines in this area.

Mr. SHENEFIELD. I would say two things in that regard. One is that the various procedural pieces of legislation that are before this committee or have recently been passed out by the committee to the floor are important parts of that general picture. Senate bill 390 is clearly one part; the *Illinois Brick* bill is clearly another one.

Substantively, I wouldn't suggest, as of this reading, a change in the price-fixing area of the law. My own view is that the attempt to monopolize a portion of the law can be enhanced and made more precise and more realistic.

The Antitrust Review Commission that I chaired made recommendations in this area, and we are preparing provisions that follow along the lines of those recommendations.

The other point is that you may find, in examining the question of contribution, that it would be well to give the courts clear guidance to apply contribution according to the principles of equity as something that the Congress looks with favor upon. Then, in cases where small defendants are in some way being hopelessly manipulated, contribution may be permitted on the basis of equitable principles. This approach may turn out to be the best possible solution.

Senator BAUCUS. When will you be in a position to give us your views?

Mr. SHENEFIELD. On this legislation?

Senator BAUCUS. Yes.

Mr. SHENEFIELD. No, I can't. I would like to be able to read the rest of the record that this committee is developing. This is the first extended examination of this issue that I have seen.

Senator BAUCUS. I very much value your views and encourage you to complete your examination as quickly as you can.

Mr. SHENEFIELD. I appreciate that sentiment, Senator. I am delighted this issue has come up, for it is an important one. We look forward to working with you further.

Senator BAUCUS. Thank you, Mr. Chairman.

Senator BAYH. I appreciate your interest, Senator Baucus. Thank you.

I must say, if I can be convinced there is a significant impact on deterrence here, I would change my perspective on this altogether. We still have the criminal prosecution as well.

Mr. COOPER. Just one question, Mr. Shenefield. It seems in response to some of the questions by Senator Baucus that you almost said that the Department would support a contribution amendment along the lines of the one in the securities laws now. Am I correct?

Mr. SHENEFIELD. We are getting into such fine shadings that perhaps we had better all withdraw and reassess our positions. But my intention was to say if this committee decides contribution is a good thing, perhaps the best resolution of all the questions that have been raised would be to leave flexibility for the triers of fact. I might favor that approach or I might endorse a more precise version. I will be getting to that question as this record is developed.

Mr. COOPER. Thank you.

Senator BAYH. Thank you, Mr. Shenefield. You have been very honest and forthright. Sometimes the toughest thing to say is, "I don't know."

Mr. SHENEFIELD. I say it with increasing frequency. [Laughter.]

Senator BAYH. I think if we look at the complexity of the problems we face today, we all have to do it or ought to do it. Thank you for being with us.

Some of our colleagues who are not here might have some questions they would like to submit for the record. If you have no objections to answering them that way, we would appreciate it.

Mr. SHENEFIELD. Of course. Thank you very much, Senator.

[The prepared statement of John Shenefield follows:]

PREPARED STATEMENT OF JOHN SHENEFIELD

Mr. Chairman, members of the subcommittee: I appreciate the opportunity to be here this morning to discuss on behalf of the Department of Justice possible legislation to allow contribution in antitrust damage cases. This subject certainly merits the close consideration of this subcommittee in view of the crucial importance of the private damage action remedy in antitrust. I hope our comments will be useful to the subcommittee as it begins its inquiry.

At the outset, the Attorney General has asked that I note to Senator Bayh and the subcommittee his view generally in favor of contribution among joint tortfeasors based on a fair share allocation of damages, with a right of recovery over. That general proposition is his starting point, although the Attorney General has not had an opportunity to focus on the specifics of the amendment now being considered. He favors examination of the issues, including those that arise from transplanting rules worked out over time for dealing with the unintentional tort area to the area of intentional criminal behavior.

Contribution is the equitable doctrine which allows all parties liable for damages growing out of a single cause of action to distribute the liability among themselves by requiring each defendant to pay up to his proportionate share of such damages to any defendant who has had to pay more than his proportionate share. As applied in the context of antitrust damage cases, contribution would create a right of action by one defendant against another, or against other parties alleged to share the responsibility for injuries sustained by plaintiffs as a result of an illegal agreement in restraint of trade. Contribution rules also could affect the manner in which the damages a plaintiff may recover from nonsettling defendants are reduced to reflect settlements with other defendants.

Under the proposed antitrust equal enforcement amendment, for example, unless otherwise determined by the court under principles of equity, defendants found liable for damages resulting from a price-fixing conspiracy could claim contribution among themselves on the basis of sales to the antitrust claimant or claimants, either in the same action in which liability is determined or in separate actions. Defendants who settle in good faith with the plaintiff would not be subject to claims for contribution from nonsettling defendants, but any settlements would reduce the amount that a plaintiff can recover from nonsettling defendants by the greatest of the amount of the settlements, any amounts stipulated in the settlements, or the amount of damages that would have been attributable to the settling defendants had they not settled.

Whether or how to allow contribution in private damage actions under the antitrust laws must be considered in light of the significance of the private damage action in the antitrust scheme of things. Private damage actions serve two key purposes—to provide compensation to victims of antitrust conspiracies for their losses, and to deter antitrust violations by seeing not only that antitrust violators are forced to disgorge their ill-gotten gains, but also pay a penalty in the form of trebled damages. Although criminal penalties are important, particularly now that antitrust violations are felonies, the threat of very substantial monetary liability also plays an important role in at least some circumstances in keeping business and industry to the straight and narrow path of lawfulness. As a result, the dynamics of the private damage remedy—its workability and fairness—are a matter of prime importance. Concepts which might have an effect on those dynamics, such as contribution, must accordingly be subjected to close scrutiny to prevent any unnecessary or unintended adverse effects.

What purposes would be served by allowing contribution in antitrust damage cases? What problems would contribution solve? As applied in antitrust cases, contribution can be seen as addressing two problems of fairness. First, it is arguably unfair for any one of several parties jointly responsible for antitrust damages to pay more than a fair share of those damages. Contribution could help prevent this result. Of course, the weight one gives to this argument may depend on the particular factual context in which contribution is claimed; for example, one may be less sympathetic to an antitrust defendant who has been found guilty of committing a Federal felony.

Second, small antitrust defendants may be coerced to settle with plaintiffs, without regard to guilt or innocence, out of fear that if they don't, and large defendants settle for substantially less than their actual liability, they would be potentially liable for large remaining damages. When one considers this from the standpoint of an innocent defendant, which cannot afford to risk putting its innocence to the test, there is indeed apparent unfairness which contribution rules might ameliorate. This is what the Attorney General refers to as the "Robin Hood" approach to justice, which he opposes.

The coercion argument seems less pervasive when advanced by defendants who in fact are guilty of white-collar crime.

We also need to know just how severe perceived fairness problems really are. How often do antitrust defendants, particularly small defendants which may not have been particularly culpable or which derived little benefit from an illegal agreement, get left holding the bag? How frequently are small defendants coerced by plaintiffs into foregoing a legitimate claim of innocence? During my tenure as Chairman of the President's National Commission for the Review of Antitrust Laws and Procedures, neither of these problems was brought to the attention of the Commission as a serious, practical problem. This may be due in part to the use of sharing agreements among antitrust defendants, which would be basically a substitute for a common law or statutory right of contribution. I hope the sub-

committee's inquiry will disclose the extent to which these problems are in fact deep seated, and require legislative change.

As we consider the problems that contribution in antitrust would address, and the severity of those problems, I think we must also pay close attention to any possibility that contribution rules may have deleterious side effects. Certainly, we would not want to adopt any rules that could substantially interfere with the enforcement function presently being performed by private treble damage actions. We need to examine any effects contribution may have with respect to complexity of antitrust litigation, antitrust deterrence, and incentives for both plaintiffs and defendants in antitrust cases to settle their disputes short of litigation. We need to fully appreciate not just the possible benefits, but also the possible costs, of contribution as a concept in antitrust litigation and particularly of the variety of rules and procedures which could govern contribution in antitrust litigation.

The history of the contribution doctrine may provide some insights and guidance in evaluating contribution rules in the antitrust context. The general American common law rule was that no contribution was permitted among joint tortfeasors, whether the tortious conduct was intentional or unintentional. This rule was adopted by the vast majority of State courts and by the Supreme Court in Federal question cases.¹

Partly in response to the perceived unfairness of allowing one of several defendants who were equally, though unintentionally, responsible for causing an injury to bear the entire burden of damages as the result of chance, spite, or collusion, and partly as the result of the developing jurisprudential concept that tort damages were intended to spread losses resulting from injury as widely as possible, State legislatures began adopting laws permitting or requiring contribution among unintentional tortfeasors, or even, in some instances, among both intentional and unintentional tortfeasors. Today, the majority of States have such statutes.

The trend in Federal law toward permitting contribution has been more limited. Of course, in cases arising under diversity jurisdiction, Federal courts have ordered contribution where State law so provides, and in those cases where Federal courts have had to deal with tortious conduct in nondiversity settings they have been disposed to follow the emerging State law trend toward permitting contribution.² Other than Federal decisions analogous to State tort actions, Federal rules concerning contribution have developed largely in two areas: admiralty law and securities law. The common law rules governing admiralty cases have provided for contribution since ancient times. In securities cases, contribution is permitted by statute or implied from comparable statutory provisions.

The general rule of law in antitrust cases has been to deny contribution among defendants.³ Recently, however, a Federal appellate court has ruled, in a split decision, that contribution is available in antitrust litigation where equity so requires.⁴ There can be found in these cases a reasoned debate over the propriety of adopting contribution in antitrust litigation. Several judges have expressed concerns that allowing contribution in antitrust cases would create enforcement problems not found in other areas of the law where contribution has been permitted,⁵ problems that outweigh the benefits that contribution would bring to antitrust defendants. Others have rejected the conclusion that contribution should never be allowed in antitrust cases because of these concerns.

I would like to discuss some of these concerns with you today. The following discussion is by no means exhaustive, but it touches on several of the most difficult areas that must be considered in developing a comprehensive contribution policy in an antitrust context. These areas are:

The type of conduct for which rights of contribution will be allowed. Contribution can be permitted, or prohibited, when conduct is negligent, intentional, criminal, etc.

How defendants' contribution shares will be determined. Rights of contribution can be determined on a simple, equal share, pro rata basis, or on the basis of comparative liability or comparative benefit.

¹ *Union Stockyards Co. v. Chicago, B. & O.R.R.*, 196 U.S. 217, 224 (1905).

² See, e.g., *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967) (court adopts contribution for negligence cases arising in Virgin Islands).

³ See, e.g., *El Camino Glass Co. v. Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp. v. American President Lines Ltd.*, 249 F. Supp. 1339 (S.D.N.Y. 1969).

⁴ *Professional Beauty Supply Inc. v. National Beauty Supply, Inc.*, 1979-1 Trade Cas. ¶ 62,485 (8th Cir. 1979).

⁵ See, e.g., *El Camino Glass*, supra at 72,112.

How to handle settlements. It is possible to deduct only the amount of a settlement from the remaining damages a plaintiff can collect from nonsettling defendants or, alternatively, to deduct the greater of the amount of a settlement or the settling defendant's calculated contribution share (what the defendant would have owed in contribution had he not settled).

What procedures will be followed for claiming contribution? Will cross-claims, counterclaims, and separate actions be permitted or required? Will defendants who have settled be impleaded back into the litigation for the purpose of determining their liability and contribution shares?

Whether a statutory provision allowing contribution should deal specifically with such specific issues as the above or leave them to the courts to decide under principles of equity.

TYPE OF CONDUCT FOR WHICH CONTRIBUTION WILL BE ALLOWED

English common law allowed contribution among unintentional tortfeasors but denied contribution when the tortious conduct was intentional. It was largely the refusal of American judges to make this distinction—and their denial of contribution among either intentional or unintentional tortfeasors—that led to the adoption of State contribution statutes. The general rule today is still to deny contribution among intentional tortfeasors⁹ although a number of States do permit contribution whether the tortious conduct is intentional or unintentional.

The concept of intent is not as determinative in civil antitrust litigation as it is in criminal cases, but there are other ways to describe antitrust violations for the purpose of determining when to allow contribution. Contribution could be allowed for all antitrust violations, only for rule of reason violations, only for noncriminal violations, or only for particular categories of violations. The proposed antitrust equal enforcement amendment, for example, calls only for contribution for price-fixing conspiracies.

Several rationales may be employed in selecting those categories of cases in which contribution is to be allowed. If one wanted to maximize fairness to defendants, contribution might apply to all antitrust violations. If certainty in calculating proportionate shares is paramount, contribution might be applied only in cases of horizontal price-fixing, under a proportionate sales, or benefits, rule. If the goal is easing the burden of defendants found liable for ambiguous conduct but not of defendants found liable for conduct in knowing and perhaps criminal contexts, contribution might be allowed only for rule of reason violations.

Effects on antitrust deterrence should be considered when deciding in which kinds of cases to allow contribution. Permitting contribution in antitrust cases could have either of two consequences for deterrence resulting from private treble damage actions. It could increase the deterrent effect by making it more likely that all the members of an antitrust conspiracy will be sued by somebody—either by the plaintiff or by a defendant seeking contribution—or it could decrease the deterrent effect by both lowering each antitrust conspirator's potential liability and allowing each conspirator to assess more fully in advance his potential exposure, thereby making the cost-benefit analysis of whether to enter into an antitrust violation more predictable. I am not able to say that one of these possible effects will predominate in all antitrust cases under all possible circumstances; nobody could. But I think we should look closely at whether contribution would weaken antitrust deterrence where it is needed most, in conspiracies to fix prices.

As I have noted above, concern on the part of corporate officials that their companies may be subjected to extensive private treble damage liability is a most important deterrent to intentional and knowing antitrust violations such as price-fixing. Such concern helps insure that corporate officials not only refrain from engaging in such behavior themselves but also discourage antitrust violations at all levels of their companies. Where criminal price-fixing conspiracies are entered into for the purpose of increasing profits, it may be more appropriate for conspirators to be held potentially liable for the entire amount of damages caused by the conspiracy. Each potential conspirator is forced to consider the profit to be derived from his participation against the liability incurred by the conspirators as a group. Various participants may be encouraged to drop out of a conspiracy and cooperate with prosecutors to avoid treble damage liability. By amending this system so that each conspirator is liable only for that portion of total dam-

⁹ See Restatement (second) of Torts § 886A (1977).

ages attributable to his own conduct, potential price-fixers may be more able to predict in advance their maximum liability and may have reduced incentives to interfere with the successful functioning of the conspiracy, since a suit by a single plaintiff against any conspirator may well involve all conspirators in suits for contribution.

I think the point here is that I am not certain whether conclusions regarding contribution and deterrence developed in other areas of the law can be readily applied to all types of conspiratorial conduct found in antitrust cases. Contribution is most compelling where the tortious conduct is unintentional; in such situations a lack of contribution would have no deterrent effect. Contribution itself may have a positive deterrent effect where damages are used to galvanize persons into taking action; this is arguably its role under those sections of the securities laws where contribution is used to encourage all persons having responsibility for the preparation of registration statements to be sure of their accuracy.

I think we should consider most closely any proposal applying contribution solely to price-fixing conspiracies. I am concerned that contribution, a doctrine that had its genesis in the area of unintentional conduct, might be applied solely to per se antitrust violations—criminal violations—and would be of no possible benefit to defendants whose conduct may be unknowingly violative of antitrust rules, and so judged unlawful only after a rule of reason analysis.

HOW DEFENDANTS' CONTRIBUTION SHARES WILL BE DETERMINED

There are several methods for computing contribution shares. A commonly used method under State tort law appears to be simple pro rata contribution which divides total liability by the number of liable defendants; each defendant's contribution share is equal. A major benefit of pro rata contribution is ease of computation. There would be no unusual difficulty in calculating pro rata contribution shares in antitrust litigation, but the equal division of damages under pro rata contribution may not always be an acceptable result.

Another method for computing contribution shares is on the basis of comparative fault. The finder of fact determines each defendant's relative culpability and divides total liability accordingly in order to calculate contribution obligations. This is a particularly appropriate method where the damages awarded bear little or no relationship to benefits received by the defendants. It may also have no relation to ability to pay; smaller defendants may end up owing substantially more than larger defendants under certain circumstances.

A third method for computing contribution shares is comparative benefit. The finder of fact determines each defendant's relative benefit and divides total liability according to each defendant's contribution share. This method is really only appropriate where there is a direct connection between benefits received and damages sustained, as will often be the situation in antitrust litigation. Even so, there are various ways to determine the relative benefits received by antitrust defendants.

One possible method is to determine the percentage that each defendant's sales bears to the total sales of all defendants during the course of the conspiracy. This method should work fairly well in most horizontal price-fixing conspiracies but would not work so well in vertical price fixing, where there may be no direct connection between sales made at various levels of the distribution chain and benefits received. There may also be circumstances where relative benefits may be directly related to relative sales—again, as in a horizontal price-fixing conspiracy—but where the unlawful conduct of one conspirator is so egregious that it would be unfair to apportion damages without taking relative fault into consideration.

The point that I wish to make is no one rule for computing contribution shares can be guaranteed to achieve substantial fairness in every case. It seems that considerable equitable discretion should be left to the courts, even if one particular method is generally endorsed, to avoid unintended situations where contribution would be more unfair to defendants than no contribution at all. It might even be best to leave the issue of computing contribution shares entirely to the equitable discretion of the court.

HOW TO HANDLE SETTLEMENTS

Three methods for handling settlement agreements when contribution is available have been generally used. The first method is to deduct only the amount of any settlement from the remaining damages recoverable by the plaintiff from non-

settled defendants, but to allow the nonsettled defendants to recover contribution from settled defendants. The second method is to deduct only the amount of any settlement from the remaining damages recoverable from nonsettled defendants, and to prohibit contribution against settled defendants unless it can be shown that the settlement agreement was not in good faith. The third method is to deduct the greater of either the amount of any settlement or the amount that the settled defendant would have owed after contribution if he had not settled—the settled defendant's theoretical contribution share—from the remaining damages recoverable from nonsettled defendants, and to prohibit entirely contribution from settled defendants.

The current rule in antitrust cases is that the amount of any settlement is deducted from damages recovered by the plaintiff after litigation so as to prevent double recovery of damages.⁷ This creates the possibility that small antitrust defendants might be forced to settle actions that they would prefer to litigate because, should larger defendants begin settling for substantially less than their proportionate share of the damages, the potential joint and several liability of remaining defendants resulting from their alleged participation in the conspiracy will escalate well beyond the point where they can risk putting their innocence to the test. In thinking about the likelihood that plaintiffs do commonly let larger defendants off easy, however, we should ask whether significant numbers of plaintiffs would be willing to risk settling with large, financially sound defendants for a disproportionately small percentage of possible damages in the hope of recovering the balance from small defendants unable or barely able to meet the financial burden.

If settlements unfair to remaining defendants are in fact a significant problem, there are a number of possible solutions. One solution might be increasing judicial supervision over private antitrust settlements to eliminate so-called sweetheart deals. Another would involve increased use of sanctions for vexatious litigation. Yet another solution is to adopt the settlement rule that permits contribution against defendants who have settled with the plaintiff, but only after a judicial determination that the settlement was made in bad faith. This is the solution adopted in the 1955 Uniform Contribution Among Tortfeasors Act.

Another possible solution is to adopt the settlement rule that reduces the amount that plaintiffs can recover from remaining defendants by the amount actually received in settlement or the amount of a settled defendant's theoretical contribution share, whichever is greater. Unfortunately, this solution might reduce the number of all settlements—settlements desired by defendants as well as plaintiffs—and create some new complexities in antitrust litigation.

This settlement rule is not, strictly speaking, a rule of contribution. Contribution allows defendants who have had to pay more than their proportionate share of damages to recover the excess from other defendants who have paid less than their proportionate share. This rule in effect relieves some defendants of the necessity of paying more than their proportionate share of damages whenever another defendant has settled for less than his proportionate share. This rule is also not intended to prevent double recoveries by plaintiffs in favor of simply making them whole for their injuries; rather, it creates a possibility that a plaintiff who enters into a significant number of settlement agreements may ultimately recover less than all of his damages. If a plaintiff receives in settlement from a defendant an amount substantially less than that defendant's theoretical contribution share, the plaintiff loses all chance of recovering the difference from other defendants. While this might be an acceptable result if plaintiffs always knew the amounts they were giving up with each settlement, in practice a plaintiff may be unaware of a defendant's contribution share with any certainty. So, although no defendant risks paying greater than his proportionate share of total damages if he refuses to settle, the plaintiff risks reducing his recoverable damages with each settlement. Even defendants who desperately want to reach a compromise settlement may find plaintiffs reluctant to enter into settlement agreements from fear of losing an unknown portion of their potential recovery.

The American Law Institute cannot reach a consensus concerning which of the three settlement rules is the best, finding that each has its own advantages and disadvantages for tort litigation.⁸ However, when considered in light of the consequences that adopting a settlement rule requiring the deduction of the greater

⁷ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971).

⁸ Restatement (second) of Torts § 886A (1977).

of the amount of a settlement or a settled defendant's theoretical contribution share might have on antitrust litigation, the disadvantages of that settlement rule require closer scrutiny.

PROCEDURES FOR CLAIMING CONTRIBUTION

The settlement rule that deducts the greater of the amount of a settlement or a settled defendant's theoretical contribution share may create a somewhat subtle but potentially serious problem for defendants wishing to settle antitrust litigation. There are usually two reasons why defendants enter into settlement agreements. The first is to lower the costs associated with the case at hand—reducing litigation costs, compromising damages, etc. The second is to avoid a determination of liability that might create problems in cases yet to be filed. Under this settlement rule it may not be possible for defendants to avoid such a determination.

Contribution is a right that one defendant has against other defendants jointly and severally liable for damages arising out of the same cause of action. Thus, it is a requirement of contribution doctrine that before a settled defendant's contribution share can be deducted from remaining damages, it must be shown that he would have been liable for contribution in the event that he had not settled; that is, a settled defendant must be found to have been jointly and severally liable with the nonsettled defendants before there is a contribution share to deduct. Deducting only the amount of a settlement can be done without a finding of liability because it is done only to prevent double recovery by the plaintiff. To go beyond this and deduct greater than the actual amount of a settlement requires a finding that contribution would have been appropriate had a settlement not occurred. Thus, there must either be a finding that the settled defendant was liable or an agreement between the plaintiff and settled defendant to that effect. Otherwise, a plaintiff could never settle with an innocent or marginally culpable defendant. If he did settle, and a court presumed the settled defendant to be liable, the plaintiff's recoverable damages would be unjustifiably reduced.

There is some question whether the settled defendant must be impleaded into the litigation he has just settled so that a finding of liability may be made against him, or whether the issue of liability is one that can be decided entirely between the plaintiffs and remaining defendants. Under the former rule, the settled defendant faces the possibility of collateral estoppel on the issue of liability in later private actions. While this may be of minor consequence in simple tort litigation, it could cause major problems for antitrust defendants who find that they cannot settle a case and avoid a determination of liability that will bind them in subsequent litigation. Under the latter rule there is still a judicial determination that the settled defendant would have been found liable had he not settled, but it lacks collateral estoppel effect. Should additional plaintiffs be waiting to file suit, however, a settled defendant might still be placed at a considerable tactical disadvantage as a result of the litigation concerning his liability and judicial findings that he would have been liable had he not settled, all conducted in his absence. Especially if plaintiffs are encouraged by this settlement rule not to settle for much less than a defendant's theoretical proportionate share of damages, many defendants might feel compelled to litigate anyway, rather than to allow litigation concerning their liability to be conducted in their absence.

Plaintiffs might also face procedural difficulties as a result of this settlement rule. Because the amount of damages recoverable from the nonsettled defendants will depend on the contribution share of those defendants who have settled, plaintiffs will have to wait to collect their damages until all contribution issues are determined. If the procedural rules adopted permit raising claims for contribution through cross-claims or counterclaims, plaintiffs will be faced with the additional complexities that such litigation introduces into the main action.

If the contribution issues are severed from the liability issue or not filed until after the liability action is concluded, plaintiffs will have to await the results of the contribution litigation before they learn just how much they can collect from the remaining defendants. Of course, these plaintiffs will not be standing idly by as disinterested spectators to the contribution litigation; they will be active participants trying to preserve as much of their total recovery as possible against the remaining defendants' attempts to shift as much of the burden as possible to the defendants who have already settled and who are thus

no longer liable for damages to these particular plaintiffs. This additional litigation burden is created essentially by a settlement rule which deducts the amount of a settled defendant's contribution share from plaintiffs' recoverable damages.

SPECIFICITY OF STATUTORY CONTRIBUTION RULES

I hope that my testimony has helped to underscore my concern that quite apart from the issue of whether contribution should be available to antitrust defendants, reaching specific conclusions respecting individual contribution rules is very difficult in an antitrust context. Contribution is essentially an equitable doctrine and understandably so. The successful merging of contribution with antitrust policy may require considerable flexibility in the courts. Both plaintiffs and defendants face a risk of being treated harshly at times by any one contribution rule that must be applied in all circumstances. It may be that any contribution statute in the antitrust field should leave many decisions to the courts to see that justice is done. While this might leave the law unsettled for a period of time, that result might be preferable to adopting absolute rules that would sometimes work a hardship on defendants, plaintiffs, or antitrust policy.

The issues which I have discussed today, and other, perhaps more technical matters, indicate that the application of contribution in any area of the law is not necessarily a simple matter. These issues must be addressed by courts and legislatures' contemplating use of contribution rules generally, or in particular fact situations. Contribution rules are closely related to one another; the choice of one may have a strong influence on the choice of another. Any set of contribution rules must also mesh comfortably with the policies underlying the legal actions in which they are used.

These considerations argue for caution in the application of contribution in antitrust damage cases, caution as to whether contribution should be mandated and as to how it should be applied. State legislatures and State and Federal courts are not consistent in their determinations concerning what types of conduct should give rise to contribution rights, how contribution rules should be tailored when being applied to different types of conduct, or what contribution rules work best within a given area. In securities law, for example, where one might hope to find some useful analogies for antitrust contribution, the courts are still in the initial stages of working out the merger of contribution policy and securities policy. Courts appear to be tailoring their holdings to the particular facts and equities of the cases before them. There are no final determinations, for example, concerning how contribution shares are to be determined or what the settlement rules will be in all securities cases.

That contribution in antitrust damage cases is not an easy matter is, I suppose, to be expected. Matters of potential significance and worth rarely are. Contribution is, basically, an equitable doctrine, a doctrine of fairness. This means fairness all around—fairness as between defendants and as between defendants and plaintiffs. Analogies to other areas of the law are of limited use. There is no substitute for consideration of the effects of contribution in specific antitrust contexts.

Thus, Mr. Chairman, I may summarize my statement today as essentially urging that we take the time necessary to fully understand the need to allow contribution in antitrust damage cases, the likely effects of particular contribution rules in such cases, and the relative merits of making legislative choices or leaving development of the doctrine to a case-by-case approach in the courts. The issue has been under active consideration for but a short time, relative to the history of private damage actions under the antitrust laws. The district courts and courts of appeal are actively considering contribution in antitrust litigation, as the decision of the eighth circuit in *Professional Beauty Supply* makes clear. Cases on contribution should soon be decided in the fifth and tenth circuits. The contribution issue is being studied by the American Bar Association's Antitrust law section which plans to issue a monograph, and discussions concerning contribution and its relationship to antitrust policy are only now beginning to develop. This subcommittee's sincere interest in the issues is additional evidence of their relevance to today's antitrust enforcement policy. We will certainly undertake to work with the subcommittee in exploring this matter and the need for legislation generally endorsing contribution in antitrust cases or providing specific guidance to the courts as to particular contribution rules.

Mr. Chairman, this concludes my prepared statement. I would be happy to address any questions the subcommittee may have.

Senator BAYH. We now have a panel of witnesses: Mr. George Kress, chairman of the board, Green Bay Packaging, Inc., Green Bay, Wis.; and Mr. Thomas R. Long, general counsel of Westvaco Corp., of New York.

Gentlemen, it is good to have you with us. If you would be so kind as to identify yourselves and the other gentlemen that are up here.

STATEMENTS OF GEORGE F. KRESS, CHAIRMAN OF THE BOARD, GREEN BAY PACKAGING, INC., ACCOMPANIED BY BERNARD H. SCHRAMM, GENERAL COUNSEL, AND DON KRESS, VICE PRESIDENT, AND THOMAS R. LONG, GENERAL COUNSEL, WESTVACO CORP.

Mr. KRESS. I am George Kress. I am accompanied by Mr. Bernard Schramm, general counsel, and Don Kress, vice president of Green Bay Packaging.

Mr. LONG. I am Tom Long, general counsel for Westvaco Corp.

Senator BAYH. We appreciate you gentlemen being here. You might give us a little background of your company you have, the kind of experience. Just go ahead. I am sure you have your testimony prepared here. You may give it any way you want. You may summarize it or give it, however you like.

Mr. KRESS. I appreciate this opportunity. From the previous testimony this morning, I think that our experience might be helpful to the committee.

Fifty-three years ago, at the age of 23, I started a company which is today known as Green Bay Packaging. Our company manufactures corrugated boxes and from its beginning has been a family owned and managed business.

This business represents my family's entire assets; in other words, "all our eggs are in this one basket." I am appearing here today to explain to you how antitrust class actions threatened the entire loss of all the work my family and I have done in the past 53 years. My recent experience involving the current antitrust situation may help you to better understand the problems created for a small businessman in a capital-intensive industry.

Green Bay Packaging, Inc., has annual sales of \$125 million in an industry with total sales of \$10 billion annually. There are more than 1,000 companies in this particular industry, with the largest having approximately 6 percent of the total industry sales and Green Bay having 1.5 percent of these sales.

While other much larger corporations in this industry have diversified into other related activities, accounting for their much greater net worth, Green Bay has grown almost entirely in this single business area and currently has a total net worth of approximately \$70 million.

Green Bay employs 1,780 persons in the States of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois, Mississippi, and Oklahoma.

Senator BAYH. How did you miss Indiana there? [Laughter.]

Mr. KRESS. Inland Container is much too strong.

Two years ago Green Bay and 38 others in the same industry received a request from a Federal grand jury investigating antitrust price-fixing conspiracy allegations. Our company responded by furnishing all requested information and witnesses to the Justice Department officials conducting the investigation, for Green Bay has had a longstanding policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system.

At the conclusion of the Justice Department investigation, 13 corporations and individual employees being investigated were indicted for felony or misdemeanor violations of the antitrust laws.

Green Bay was not indicted and none of our employees were named as coconspirators by the Justice Department attorneys conducting the criminal trial. This was fully within our expectations for we knew Green Bay was not guilty of any antitrust violations.

Less than 1 year following the Justice Department investigation, our company was named as a codefendant in more than 25 class action suits, brought against all of the 39 corporations originally investigated by the Justice Department, whether they were indicted or unindicted. They were all included.

Our management didn't feel overly concerned by these actions for having been found not to be involved in the conspiracy alleged by the Justice Department and finding none of its past customers named as a complaining plaintiff in the treble damage class action suits, we concluded that our only concern was to prepare to bear the expense of lengthy litigation to prove our innocence in the civil action. Developments proved this to be a very erroneous conclusion.

Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the civil actions with the plaintiffs by making payments to the plaintiff's attorneys. This settling trend by the indicted defendants was then followed by many of the unindicted defendants entering into settlement agreements with the plaintiffs in the class action.

At this time, mystified by the action on the part of the unindicted companies, Green Bay conducted a detailed analysis of the situation and found as follows:

First: Approximately 80 percent of the defendants had entered into settlement agreements with the class plaintiffs.

Second: The amount contributed by the settling plaintiffs at that time totaled over \$100 million.

Third: Settlements were being arrived at by a formula decided upon solely by the plaintiff's lawyers, having as its base the percentage share of the market times a required dollar figure. Green Bay found that the dollar figure which had been offered to the first settling defendant, \$500,000 per percentage point, had been steadily raised by the attorneys for each succeeding settling defendant, until the amount which was requested from our company for settlement was \$3,700,000 per percentage point, or 7.5 times what the first defendant had gained. Plaintiff's attorneys settlement terms were clear and easily understood.

The stated amount was required to settle at that moment. It would go up later and it was offered "take it or leave it."

Fourth: Settlements in civil class action suits are encouraged by the courts.

Green Bay now 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 law, could be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price-fixing conspiracy.

At the time we made this, there were other people waiting to see the plaintiff's attorneys. We didn't know if that 80 percent would stand firm or not.

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 was possible.

Using a variety of assumptions, which are attached to this statement for your review, in order to arrive at a feasible damage figure which might ultimately be determined by a jury, a damage figure of 5 percent of the total industry annual sales was selected. Subtracting settlements already made, and multiplying the results by 2½ times after taxes, we concluded that we must stand ready to bear the burden of a potential legal liability of \$5 billion if we followed our original decision to defend our innocence of any civil antitrust liability.

This, of course, would wipe out our entire equity and give our legitimate creditors from 1.5 cents to 10 cents on their debt dollar. The attached statements are offered to illustrate the alternatives we faced. The choices available to Green Bay management became clear, and the extortion aspect of civil class action suits was indeed now understood.

Our company was faced with the following choices:

First: Settle the pending class action suits by paying more than \$5.5 million to the plaintiffs' lawyers, and still face the liability of defending the individual antitrust civil suits which might be brought by plaintiff customers who do not wish to participate as members of the present class; or

Second: Stand ready to continue to defend the class action suits and face the burdens of a contingent liability of over \$5 billion. This contingent liability would have to be reported to Green Bay's mortgage holders, and potential lenders, who would be very reluctant to even consider lending additional money to a corporation facing this severe a liability. Our company's borrowing power was voided.

With this threat of insolvency hanging over our corporate heads, the owner-managers and outside directors of Green Bay reluctantly concluded a settlement agreement with the plaintiffs in the class actions. Loss of borrowing power is a killing factor for a small, privately owned corporation involved in a capital-intensive manufacturing industry where a small business must borrow in order to compete. If you look at the statement, our net worth is \$70 million, and we have over \$50 million borrowed.

Attorneys who are instituting class action suits of this nature are well aware of the financial necessities of the defendant parties in such actions; thus their settlement policy, once a few parties are coerced into

early settlement, is to "up the ante" unless the remaining parties settle reasonably soon. There is an attached article which will illustrate that point.

The above cited situation has been repeated many times in the settlement process of the civil class action suits now pending in the corrugated container industry. Realize there were 26 unindicted companies, practically all of whom have settled.

The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over 50 years of effort and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

Senator BAYH. Senator Thurmond?

Senator THURMOND. I want to ask you this question. There are a number of defendants being sued and say all settled but two and they paid an amount to settle. Do you feel that the two who did not settle could be held liable for all that was alleged in the complaint or only the difference between what was paid by those who settled and the difference?

Mr. KRESS. The difference between the two.

Senator THURMOND. In other words, otherwise if the two could be held liable for the entire amount after 8 out of 10, say, have settled, then that would be an enrichment on the part of the plaintiffs that would be very unjust.

Mr. KRESS. The \$5 billion minus the \$300 million made for a \$4.7 billion potential liability.

Senator THURMOND. There is some question about that. I thought I had better clarify your interpretation. Does your lawyer agree with that interpretation?

Mr. SCHRAMM. Yes; I do.

Senator THURMOND. You could only be held for the difference between what the codefendants had paid and the amount alleged in the complaint?

Mr. SCHRAMM. That is correct, Senator.

Mr. KRESS. That figure we calculated when we made the decision. We based the calculation on \$4.7 billion, which is the difference between \$5 billion and \$300 million.

Senator THURMOND. I have no other questions.

Senator BAYH. Let me just ask a couple here, Mr. Kress. You have a \$70 million business with \$50 million borrowed capital to operate.

Mr. KRESS. That is correct.

Senator BAYH. Could you give us some idea of what the impact of the kind of liability you are talking about has on your ability to borrow money? What is the impact on your bankers and auditors as far as this is concerned?

Mr. KRESS. When we took this up at our board meeting, the first board meeting in January, we decided to fight the case. When we created this analysis in our March meeting, one of our outside directors who was a president of a very large insurance company and does a great deal of lending said, "Your friends at M. & I. are very good

friends, but there is no way they can go along with you with this kind of a potential liability."

Senator BAYH. In other words, they cut your money off.

Mr. KRESS. That is correct.

Senator BAYH. Or threatened to.

Mr. KRESS. Well, what they would have done—I didn't take it to them. I have been on the board of directors of banks myself. I knew what my decision would have been if I were on a bank board and this situation happened to one of our customers. I would have said, "We can't gamble on what a jury might do."

Senator BAYH. Is it fair to say, or is this an oversimplification, in a situation like this they might be prepared to loan you the money to pay the damages but weren't willing to loan you the money to stay in business with this kind of a broader liability hanging over your head of a questionable nature?

Mr. KRESS. I can't conceive of anyone loaning us any money that would then leave us viable. If we had a liability of \$4.7 billion, nothing they could do would help us in any shape or manner. No matter how much money they threw in there, it is a bottomless well.

Senator BAYH. One of the concerns we have here is deterrence. The antitrust law is supposed to deter people from getting involved in this illegal activity.

The way I understand your question here is that some of the indicted conspirators that were major culprits in the conspiracy settled at a much less figure than some of the nonindicted people. What sort of deterrence is that?

Mr. KRESS. The people who thought they were innocent got caught at the high end of the stick. There is no question about that.

Senator BAYH. That is not much of a deterrence, is it, to not participate in the future?

Mr. KRESS. I have a friend involved in another case who was sent to prison. He is a broken man. He is having real emotional problems. Nothing with respect to the corrugated case at all.

Senator BAYH. Let me ask you this: Your final cost was \$5.5 million?

Mr. KRESS. That is right; \$5¾ million.

Senator BAYH. In the early stages, you were being asked to pay \$500,000 per percentage, which would have been roughly \$800,000. Why didn't you settle for \$800,000?

Mr. KRESS. Because we didn't realize, first, that they were upping the ante. We had no knowledge this was going on until we woke up in February. The thing that woke us up was one of our neighbors, who we knew was not into price-fixing because we knew what he does, he settled and we were absolutely mystified. That is when we started to make this calculation. This is when we woke up.

Senator BAYH. Is it fair to assume that at least one of the reasons was why pay \$800,000 if you are innocent?

Mr. KRESS. That is correct.

Senator BAYH. But the way this whole system works now, it goes back to what I said a moment ago. The guilty party who realizes he is guilty has more of an incentive to settle early and get it over

with, and the innocent person who is indignant and wants to defend his good name and his company's good name by fighting that really ends up paying more.

Mr. KRESS. That is precisely what happened in not only my case but I think you will find it in 20 to 25 other cases in the corrugated container case.

Senator BAYH. I think your case is an excellent example of the problem we are trying to deal with.

Senator BAUCUS?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Kress, I am trying to fully understand this. It is complicated. Why if you think you are innocent don't you just litigate?

Mr. KRESS. Because we would have to pay, we figure, \$50 million to creditors before this case would come to trial. There is no possible way we could operate.

Senator BAUCUS. Just so I fully understand—I appreciate your prior testimony on this point—but could you explain why you would have to pay \$50 million to creditors?

Mr. KRESS. If you are a man of integrity, you put your creditors ahead of yourself. There is no way you are going to let those creditors suffer losing that \$50 million, if you have to turn all of your assets over to them or whatever you have to do. Then you are out of business.

Senator BAUCUS. I am sorry; I am missing the point. Which creditors are you talking about?

Mr. KRESS. The people we owe \$50 million to.

Senator BAUCUS. Are you saying you can't get additional credit because of—

Mr. KRESS. I am not talking about only additional credit. I am talking about creditors I presently owe.

Senator BAYH. If the Senator would yield just a moment. This is a very capital-intensive business, as I understand it, where you have to borrow millions in credit to operate. If that credit expires, lenders will not renew loans. The alternative is to go into the capital structure of the corporation to pay off the creditors. Does that help corporate growth and development?

Senator BAUCUS. The difficulty is refinancing? Is that the basic point?

Mr. KRESS. The basic point is they all have clauses and they are protective clauses. When this thing hits, they have the right to scramble for cover, and they are entitled to it.

Senator BAUCUS. The only alternative open to you is to settle?

Mr. KRESS. That is correct. It was a hard one to settle.

Senator BAUCUS. What other options did you consider? What options are open to smaller companies who are defendants in these kinds of cases, other than litigation and settlement? Were merger or selling to a larger company other alternatives that you looked at and why did you discard them?

Mr. KRESS. If you could sell under those circumstances to a bigger company that could finance this thing. But I can't conceive of anybody buying out until this was settled. This is an option now, if we don't want to face this in the future. If we don't want to risk everything

we built in 53 years, the other alternative I could see, if this legislation doesn't protect us, is to sell. We can't risk private attorneys who are not responsible to anyone representing clients who never bought from us having the power of life and death over us. That is what is existing today.

Senator BAUCUS. I asked Mr. Shenefield what changes have occurred in or society since 1914 that have created the need for this legislation. You heard his answer. I am curious what your reaction would be to that question. What are the changed circumstances that have created a need for this legislation?

Mr. KRESS. In 1933, they passed a National Recovery Act. The industry lost 60 percent of its invested capital. I think I am one of the few left from that era in industry.

The Government required a price level to be fixed which was profitable and anyone was punished who sold below it. He didn't dare sell below it. Presumably there have not been any class action suits on antitrust during that period.

Senator BAUCUS. Excuse me. What period is that?

Mr. KRESS. I say in 1933. You have a whole historical period here. I can give you one incident in there when the Government's policy was absolutely opposite antitrust. They were trying to save industry from going completely broke. They set a price level and said anyone who sells below it is violating and subject to penalty. That didn't stop the prices from going down under the table.

Senator BAUCUS. Thank you very much, Mr. Kress. Thank you, Mr. Chairman. I have no further questions.

Mr. COOPER. Mr. Chairman, I have a couple questions.

I want to find out precisely what your concern is in this particular case. Was it joint and several liability, the fact that it was a class action, or the fact it was a treble damages suit?

Mr. KRESS. It was the relationship of the potential damages to my net worth. I didn't base it on any legal thing at all, just the fact I had a potential liability to net worth.

Mr. COOPER. Did your company make any efforts to settle the suit prior to the class action certification?

Mr. KRESS. I will have to have my attorney answer that. I think we asked to be dismissed from it by the judge, on the basis we were not indicted.

Mr. SCHRAMM. That is correct. We objected to the class action certification because we did not at that time have any customers who were complaining plaintiffs.

Mr. COOPER. But you made no effort to settle before the class action certification?

Mr. SCHRAMM. No.

Mr. KRESS. I explained the reason for that in this document. We were innocent and we were sure that the Government knew we were innocent and that the plaintiffs' attorney knew we were innocent. We didn't anticipate that.

Mr. COOPER. You were aware that the value of the suit would have increased immeasurably once there was class action certification?

Mr. KRESS. No; I was not. I wasn't aware of that.

Mr. COOPER. You weren't aware of that risk

Mr. KRESS. No.

Mr. COOPER. About the amount of the settlement, I believe you settled fairly recently, right?

Mr. KRESS. We settled for \$5¾ million. I don't know what the top was.

Mr. COOPER. The total was about \$5¼ million?

Mr. KRESS. About \$5¾ million.

Mr. COOPER. That is tax deductible, right?

Mr. KRESS. That is tax deductible.

Mr. COOPER. Could you tell me what your net income was in 1977 for the company as a whole?

Mr. KRESS. After tax?

Mr. COOPER. After tax, yes.

Mr. KRESS. I think \$8.5 million.

Mr. COOPER. That is all the questions I have.

Senator BAUCUS. Mr. Chairman, I have one question.

Senator BAYH. Yes.

Senator BAUCUS. It has been suggested to me that maybe one difference between present conditions in America as compared with 1914 is that in 1914 when the Clayton Act was enacted, there were few firms in an industry. Today there are often many firms of many sizes in one industry. This compounds the kinds of problems that occur in class action suits and cases involving treble damages.

Based on your recollection of American history, is that a fair statement or not?

Mr. KRESS. The corrugated box industry really got started in about 1920 or 1921. It was small, with 29 or 30. There are over 1,000 companies today in the corrugated box business. I can't remember how many there were in 1929 or 1930 or 1933, but there probably weren't 100.

Senator BAUCUS. What effect if any has the recent wave of mergers had on these trends?

Mr. KRESS. The mergers are not occurring so much between box companies themselves as—

Senator BAUCUS. By oil companies.

Mr. KRESS [continuing]. By oil companies and tiny corporations and Exxon and that type of thing.

Senator BAUCUS. Thank you very much. Thank you, Mr. Chairman.

Senator BAYH. Thank you, Mr. Kress.

Mr. Long?

Mr. LONG. Senator Bayh, Senator Thurmond, Senator Baucus, members of the subcommittee: I am pleased to be here today to discuss this important issue. Westvaco Corp. is a major producer of paper, packaging and chemicals, with annual sales in excess of \$1 billion.

As someone has described us, we are the largest of the small and the smallest of the large. We have 14,000 U.S. employees. The employees are citizens in 87 congressional districts. Our primary mills are located in South Carolina, Virginia, Pennsylvania, and Kentucky. We do have operations in Indiana. Senator.

Senator BAUCUS. That is what I said. [Laughter.]

Mr. Long. I am here today to support the antitrust equal enforcement amendment. I think this legislation is badly needed. We urge its approval.

As general counsel for Westvaco, I am presently involved in defending two major class actions which we believe are without merit. I can speak first-hand on the practical need for such legislation.

I would like to add that Westvaco has a spotless record with respect to antitrust compliance. The company for many years has had an extensive and effective antitrust compliance program. It has never been indicted, never settled a treble damage class action, and has never been held liable for damages by a court.

I am not trying to brag here. I know it is always dangerous to brag. This is an effort to show the committee we are committed to vigorous enforcement of the antitrust laws. We are doing everything to further that goal. We think this law will serve that goal.

The amendment should be evaluated against the realities of treble damage antitrust litigation as it exists in America today. Although the private treble damage antitrust action was established in 1890, it wasn't until the midsixties when combined with the development of class actions that such litigation became significant.

The compounding effect of class actions and an active and aggressive plaintiffs' bar has resulted in incredibly massive and complex nationwide litigation involving literally hundreds of thousands of claimants and billions of dollars of sales by multiple defendants.

One of the class actions we are defending is a consolidation of 50 suits involving 37 defendants with market shares ranging from less than 1 percent to 6 percent, and working capital ranging from a negative amount to half a billion dollars. There are potentially over 300,000 claimants. The plaintiffs lawyers' claims for damages range from approximately \$200 million to well over \$1 billion. By some calculations it is as much as \$5 billion. This is the setting in which we are fighting.

The potential fees for lead counsel in a class action are enormous, and there is a very strong incentive to initiate a lawsuit today. On the other hand, there is virtually no risk in bringing a lawsuit. Class actions can be commenced with a form complaint, a directory of companies in the industry, and a hope that extensive discovery or a governmental investigation will turn up incriminating facts.

As a practical matter, there are no legal tools available to enable an innocent defendant to get out of a class action or recover legal fees, and consequently, there is no alternative but to stand the enormous costs of defense or settle.

In this kind of environment, antitrust class action defendants, particularly innocent defendants, are under tremendous pressures. Typically the cases involve innocent parties, some parties more culpable than others, complex issues which a jury may not understand, dragnet discovery on a nationwide basis with great diversion of management time, legal fees in the millions, without a rule of contribution the threat of joint and several liability for tremendous sums and the possibility of qualified financial statements, with possibly impaired credit and great disclosure problems. It is no wonder a company may be driven to settle, no matter how sincere its belief that it is innocent.

Plaintiff's lawyers have been quick to take advantage of this situation. A "divide and conquer" with "escalation of demands" strategy, designed to isolate defendant companies and force each to make a separate and costly settlement without regard to the merits of the case, is being employed with remarkable success.

Financial rewards are offered to those companies which settle first, often the largest and most culpable. The price of each settlement becomes more costly than the one before, creating a panic environment and shattering joint defense efforts.

In addition, settlement agreements provide that the settlers will cooperate against the remaining defendants and nonsettlers will continue to be jointly and severally liable for the total amount of treble damages applicable to the class, reduced only by the amount of the settlement.

Thus, as the number of defendants narrows, the risk and cost of defense escalates dramatically. It is not surprising, when confronted with such a choice, many companies capitulate.

You already hear the scenario with respect to corrugated boxes so I will not go through that again.

A system which would tolerate such extortion pressures is unjust to innocent defendants who may be forced to pay more in settlement and defense costs than those who are culpable. Such a system is unfair to the class since culpable defendants pay less than their proper share of damages. There can be no assurance that cheap settlements can be made up as the litigation progresses. It is also contrary to the public interest in that the purposes of the antitrust law are undermined.

Either by legislative action or judicial decision it has already become recognized that fairness requires that the right of contribution exist in most litigation. This same trend is already underway in the antitrust field. You have all heard of the eight circuit's decision in the *Professional Beauty* case. There are other decisions pending in other courts.

As a company which believes it is innocent with a strong belief that the antitrust laws should be enforced vigorously but equally, we strongly support the amendment.

I would like to take a few minutes to refute some of the statements made by Mr. Shenefield and comment on the plaintiffs' bar.

Senator BAYH. I hate to interrupt, Mr. Long, but we were hoping you might summarize the statement, because of time constraints. I would very much appreciate it if you could hit the high spots only. We have some witnesses who are going to have to leave.

Mr. LONG. Let me see if I can just hit the high spots.

Senator BAYH. Everything will go in the record. I hate to interrupt, but somebody has to play policeman here or we are going to run out of time.

Mr. LONG. Let me conclude at this point, and I will be glad to answer any questions you may have.

Senator BAYH. I really want to read the rebuttals. I appreciate your doing that. I apologize for this. We have questions. We would ask that you provide answers in writing.

Just one question on my own mind, because I think you pretty well hit the high spots. What is the dragnet process of discovery?

Mr. LONG. Typically in these class actions you will get enormous requests from the plaintiffs' lawyers to go through every piece of paper in corporate headquarters and plant locations. In one particular instance recently, we had 135 boxes of records in one location where plaintiffs' lawyers came in and poured through it.

It also involves deposing huge numbers of employees, everyone from the president on down to the secretaries. This is on a nationwide basis. These class actions are nationwide class actions. We have a number of defendants involved, a number of locations involved. We have to watch everything. We have to anticipate everything. It is a huge effort.

Senator BAYH. Thank you. Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Would you tell me, sir, to what degree is the problem you are outlining attributable to the availability of treble damages, to what degree to the existence joint and several liability, to what degree to the availability of class actions, and to what degree to the fact contribution is not available to you? How would you rank each of these four factors according to the problems that they have caused for you? By "you" I mean the innocent smaller firm just trying to do a good job, trying to run a good, clean business.

Mr. LONG. I think the real problem is the lack of a clear law that provides for contribution or, if there is a settlement, that those who settle take their share of the liability out of the case. Enormous pressure is put on defendants due to the fact that presently some of the defendants settle out of a case but don't take their liability with them. Many times these are the most guilty and the largest companies. A company can be left in the lawsuit standing virtually alone, carrying the burden of the whole industry.

I don't have any trouble with joint and several liability. I think that is a reasonable notion. I think the plaintiffs should be assured of collecting their judgment, and they should be free to collect it anywhere they can find the funds. But I do believe that those that have contributed to liability should pay their fair share.

Senator BAUCUS. So you think that the fact that you cannot seek contributions is more harmful to you than the availability of treble damages?

Mr. LONG. I have no trouble with treble damages. There has to be a deterrent to antitrust violations. If it is 2 times, 3 times, 4 times, I don't particularly care. I think the people who violate the law should be punished, and most especially price-fixers.

Senator BAUCUS. The availability of class actions isn't part of the problem?

Mr. LONG. That creates the setting for this. Class actions in today's world are a necessary way to administer justice.

Senator BAUCUS. Thank you.

One quick question, Mr. Kress. If this amendment has been in effect since 1914, would it have addressed the problems you were faced with? Would you have had any of the problems that you are addressing here today?

Mr. KRESS. I feel it is good legislation and I am supporting it. Though it would not solve my problem, it is a step in the right direction.

Senator BAUCUS. Why would it not solve your problem?

Mr. KRESS. Because my liability would still be \$75 million to \$80 million, so I would be faced with a decision. My creditors would be off my back. I wouldn't have to worry about them. But the family eggs would all be put out on what the jury might do. I am afraid if I were faced with that, I would still have to settle.

Senator BAUCUS. Thank you very much. Thank you, Mr. Chairman.

Mr. COOPER. I have a question for both of you. Have either of your companies been plaintiffs in antitrust cases?

Mr. KRESS. No.

Mr. LONG. We have been a member of a class. We have not initiated it.

Mr. COOPER. Mr. Long, what are the two cases that Westvaco is currently defending?

Mr. LONG. We are involved in the corrugated box cases. We are involved in the five paper cases. We are not involved in the folding carton cases.

Mr. COOPER. There are three of them?

Mr. LONG. No. I said there is another major set of cases, the folding carton cases, which we are not involved in.

Mr. COOPER. Am I correct that in the corrugated container case your company moved for contribution?

Mr. LONG. Yes.

Mr. COOPER. That motion was denied on May 16?

Mr. LONG. That is correct. We appealed the denial of that motion.

Mr. COOPER. Am I also correct that Green Bay, Mr. Kress' company, opposed that motion?

Mr. LONG. I believe that is correct.

Mr. COOPER. Thank you. That is all I have.

[The prepared statements of Messrs. Kress and Long follow:]

PREPARED STATEMENT OF GEORGE KRESS

My name is George Kress of Green Bay, Wis. Fifty-three years ago, at the age of 23, I started a company which is today known as Green Bay Packaging Inc. Our company manufactures corrugated boxes and from its beginning has been a family-owned and managed business. This business represents my family's entire assets—in other words—"all our eggs are in this one basket." I am appearing here today to explain to you how antitrust class actions threatened the entire loss of all the work my family and I have done in the past 53 years. My recent experience involving the current antitrust situation may help you to better understand the problems created for a small businessman in a capital-intensive industry.

Green Bay Packaging Inc. (Green Bay) has annual sales of \$125 million in an industry with total sales of \$10 billion annually. There are more than 1,000 companies in this particular industry, with largest having approximately 6 percent of the total industry sales and Green Bay having 1.5 percent of these sales. While other much larger corporations in this industry have diversified into other related activities (accounting for their much greater net worth), Green Bay has grown almost entirely in this single business area and currently has a total net worth of approximately \$70 million. Green Bay employs 1,780 persons in the states of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois, Mississippi, and Oklahoma.

Two-years-ago, Green Bay and 38 others in the same industry received a request from a Federal grand jury investigating antitrust price-fixing conspiracy allegations. Our company responded by furnishing all requested information and witnesses to the Justice Department officials conducting the investigation, with no

real concern, for Green Bay has had a long-standing policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system. At the conclusion of the Justice Department investigation, some of the other corporations and individual employees being investigated were indicted for felony or misdemeanor violations of the antitrust laws—8 corporate felony indictments, 5 corporate misdemeanor indictments, 17 individual misdemeanor indictments, 9 individual felony indictments—Green Bay was not indicted, and none of our employees were named as coconspirators by the Justice Department attorneys conducting the criminal trial. This was fully within our expectations for we knew Green Bay was not guilty of any antitrust violations.

Less than 1 year following the Justice Department investigation, our company was named as a codefendant in more than 25 class action suits, brought against all of the 39 corporations originally investigated by the Justice Department. Our management didn't feel overly concerned by these actions, for having been found not to be involved in the conspiracy alleged by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action suits, we concluded that our only concern was to prepare to bear the expense of lengthy litigation to prove our innocence in the civil actions. Developments provide this to be a very erroneous conclusion.

Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the civil actions with the plaintiffs by making payments to the plaintiffs' attorneys. This settling trend by the indicted defendants was then followed by many of the unindicted defendants entering into settlement agreements with the plaintiffs in the class actions. At this time, Green Bay conducted a detailed analysis of the situation and found as follows:

1. Approximately 80 percent of the defendants had entered into settlement agreements with the class plaintiffs.

2. The amount contributed by the settling plaintiffs at that time totaled over \$100 million.

3. Settlements were being arrived at by a formula decided upon solely by the plaintiffs' lawyers, having as its base, the percentage share of the market, times a required dollar figure. Green Bay found that the dollar figure which had been offered to the first settling defendant, \$500,000 per percentage point, had been steadily raised by the attorneys for each succeeding settling defendant, until the amount which was requested from our company for settlement was \$3,700,000 per percentage point. Plaintiffs' attorneys settlement terms were clear and easily understood. The stated amount was required to settle at that moment—it would go up later and it was offered "take it or leave it."

4. Settlements in civil class action suits are encouraged by the courts.

Green Bay now 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 law, could be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price fixing conspiracy.

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 was possible. Using a variety of assumptions, in order to arrive at a feasible damage figure which might ultimately be determined by a jury, a damage figure of 5 percent of the total industry annual sales was selected—subtracting settlements already made, and multiplying the results by 3 (because the law provided for treble damages in such cases), we concluded that we must stand ready to bear the burden of a potential legal liability of \$5 billion if we followed our original decision to defend our innocence of any civil antitrust liability. This, of course, would wipe out our entire equity and give our legitimate creditors from 1½ cents to 10 cents on their debt dollar. The attached statements are offered to illustrate the alternatives we faced. The choices available to Green Bay management became clear—and the extortion aspect of civil class action suits was indeed now understood. Our company was faced with the following choices:

1. Settle the pending class action suits by paying more than \$5.5 million to the plaintiffs' lawyers (and still face the liability of defending the individual antitrust civil suits which might be brought by plaintiff customers who do not wish to participate as members of the present class), or

2. Stand ready to continue to defend the class action suits and face the burdens of a contingent liability of over \$5 billion. This contingent liability would have to be reported to Green Bay's mortgage holders, and potential lenders, who would be very reluctant to even consider lending additional money to a corporation facing this severe a liability. Our company's borrowing power was voided.

With this threat of insolvency hanging over our corporate heads, the owner-managers and outside directors of Green Bay reluctantly concluded a settlement agreement with the plaintiffs in the class action. Loss of borrowing power is a killing factor for a small privately owned corporation involved in a capital intensive manufacturing industry where a small business must borrow in order to compete. Attorneys who are instituting class action suits of this nature are well aware of the financial necessities of the defendant parties in such actions, thus their settlement policy, once a few parties are coerced into early settlement is to "up the ante" unless the remaining parties settle reasonably soon. It has been said that settlements ignore the due process aspect of our system of justice—this would certainly seem to illustrate that point.

The above cited situation has been repeated many times in the settlement process of the civil class action suits now pending in the corrugated container industry. The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over 50 years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence. [See appendix for additional material submitted by Mr. Kress.]

PREPARED STATEMENT OF THOMAS R. LONG

Senator Bayh, members of the subcommittee, I am pleased to be here to discuss this important issue. My name is Thomas R. Long and I am general counsel of Westvaco Corp.

Westvaco Corp. is a major producer of paper, packaging and chemicals with annual sales exceeding a billion dollars. We, along with over 14,000 U.S. employees, are citizens in 87 congressional districts. Our primary paper and paper-board mills in this country are located in Charleston, S.C.; Covington, Va.; Luke, Md.; Tyrone, Pa.; and Wickliffe, Ky. Timberlands, converting plants, chemical plants and other operations are located in many other States including Indiana, Ohio, Alabama and Arizona.

I am here today to support the antitrust equal enforcement amendment. Such legislation is badly needed and we urge its approval by the committee. The amendment would protect a non-settling defendant in an antitrust case, who elects to go to trial, from the inequity of being held liable for damages attributable to others which, in the setting of today's massive class action litigation, could amount to billions of dollars. It is fair to the plaintiffs and settling defendants. But most importantly, it furthers the policy of vigorous antitrust enforcement by insuring that culpable defendants cannot escape their obligations.

As general counsel for Westvaco I am presently involved in defending two major class actions, which we believe are without merit. I can speak first-hand on the practical need for such legislation. I should also add that Westvaco has a spotless record with respect to antitrust compliance. The company for many years has had an extensive and effective antitrust compliance program. It has never been indicted, never settled a treble damage class action, and has never been held liable for damages by a court. This should not be construed as bragging. Rather it is an effort to show the committee we are here firmly committed to vigorous enforcement of the antitrust laws.

As part of our defense effort we have researched the law on contribution extensively and we are prepared to make this research available to the committee.

The amendment should be evaluated against the realities of treble damage antitrust litigation as it exists today. Although the private treble damage antitrust action was established in 1890, it wasn't until the mid-sixties, when combined with the development of class actions, that such litigation became significant. The compounding effect of class actions and an active and aggressive plaintiffs' bar has resulted in incredibly massive and complex nationwide litiga-

tion involving literally hundreds of thousands of claimants and billions of dollars of sales by multiple defendants.

One of the class actions we are defending is a consolidation of over 50 cases involving 37 defendants with market shares ranging from less than 1 to 6 percent and working capital ranging from a negative amount to over half a billion dollars. There are potentially over 300,000 claimants. The plaintiffs' lawyers claim for damages range from approximately \$200 million to over \$1 billion.

Potential fees for lead counsel in a class action are enormous and there is a strong incentive to initiate a lawsuit. On the other hand, there is virtually no risk in bringing a lawsuit. Class actions can be commenced with a form complaint, a directory of companies in the industry and a hope that extensive discovery or a governmental investigation will turn up incriminating facts. As a practical matter there are no legal tools available to enable an innocent defendant to get out of a class action or recover legal fees and consequently there is no alternative but to stand the enormous costs of defense or settle.

In this kind of environment, antitrust class action defendants, particularly innocent defendants, are under tremendous pressures. Typically the cases involve innocent parties, some parties more culpable than others, complex issues which a jury may not understand, dragnet discovery with diversion of management time, legal fees in the millions, without a rule of contribution the threat of joint and several liability for tremendous sums and the possibility of qualified financial statements, with possibly impaired credit and disclosure problems. A company may be driven to settle no matter how sincere its belief that it is innocent.

Plaintiffs' lawyers have taken advantage of this situation. A "divide and conquer" with "escalation of demands" strategy, designed to isolate defendant companies and force each to make a separate and costly settlement without regard to the merits of the case, is being employed with remarkable success. Financial rewards are offered to those companies which settle first, often the largest and most culpable. The price of each successive settlement becomes more costly than the one before creating a panic environment and shattering joint defense efforts. In addition, settlement agreements provide that the settlors will cooperate against the remaining defendants and non-settlors will continue to be jointly and severally liable for the total amount of treble damages applicable to the class (reduced only by the amount of the settlement). I believe these tactics are widespread. If not, then they are emerging tactics which should be "nipped in the bud." Thus as the number of defendants narrows, the risk and cost of defense escalates dramatically. It is not surprising when confronted with such a choice, many companies capitulate.

In the class action I referred to earlier, 23 defendants representing approximately 80 percent of the market have entered into settlement agreements for a total amount of almost \$300 million, the largest amount ever. The plaintiffs' lawyers contend that the remaining defendants remain liable for not only their market share but also the entire market share of those who settled out of the case. This could be an enormous sum. I should also add that the public record in this case provides ample documentation of the use of "divide and conquer" tactics and the resulting panic by defendants to settle.

A system which would tolerate such extortion pressures is unjust to innocent defendants who may be forced to pay more in settlement and defense costs than those who are culpable. Such a system is unfair to the class since culpable defendants pay less than their proper share of damages. These can be no assurance that cheap settlements can be made up as the litigation progresses. It is contrary to the public interest in that the purposes of the antitrust law are undermined.

Either by legislative action or judicial decision it has already become recognized that fairness requires that the right of contribution exist in most litigation. This same trend is already under way in the antitrust field. As you know on February 27, 1979 in *Professional Beauty Supply Inc. v. National Beauty Supply, Inc.* No. 78-1229, the eight circuit court of appeals held that an antitrust defendant was entitled to assert a claim for contribution. Cases are pending in other circuits on the same and related issues.

As a company which believes it is innocent with a strong belief that the antitrust laws should be enforced vigorously but equally, we strongly support the amendment.

I would like to now refute contentions made by Mr. Shenefield and the plaintiffs' bar regarding the antitrust equal enforcement amendment.

There is ample precedent in other areas of the law, either by statute or otherwise for the proposition of claim reduction on account of settlements as provided by the amendment.

In practice the amendment will not unduly increase the complexity of an antitrust case nor deny plaintiffs control over litigation. Contribution is permitted and is working in other equally complex areas of the law. The only control the plaintiffs' lawyers will lose is their ability to manipulate the litigation to bring about unconscionable results. Plaintiffs' lawyers do not get involved in litigating appropriate contribution shares nor does contribution add to the factual questions presented in the case. No new issues would be involved.

I would like to take strong issue with Mr. Shenefields statements with respect to settlers. The amendment will not discourage settlements nor necessarily reduce the amount of damages recoverable by the class. By assuring a settling defendant of being able to purchase "peace" without fear of further liability for contribution, the amendment in fact will promote orderly settlements on the merits. The amendment clearly provides that there can be no recovery by non-settling defendants from settling defendants. The amendment will insure that claims are settled on the basis of an evaluation of the merits of the case against each defendant, not some arbitrary standard. Bargain settlements for strategic reasons will be discouraged and the damages recoverable by the class increased proportionately. The plaintiffs' lawyers will only lose the ability to manipulate settlements through coercion, whim, spite or collusion with other wrongdoers.

Mr. Shenefield's comment that a right of contribution would facilitate a cost benefit analysis of whether to violate the antitrust laws is also not persuasive. Given the stringent criminal penalties involved, it is very unlikely that the management of any company is making such an analysis. But more relevant, without a right of contribution, and proportionate reduction in damages for settlements, antitrust violators will have an incentive and a means of entering into "sweetheart" settlements with plaintiffs' lawyers thereby, time and time again, avoiding the treble damage penalty provided by Congress.

Most importantly from the standpoint of the Justice Department, we believe the amendment will promote the policies of the antitrust laws and their enforcement. A contribution rule serves the deterrent purpose of assuring that the guilty will not escape paying by entering into bargain settlements. The risk and expense of violating the antitrust laws should be spread among all members of the conspiracy. No one should get off "scot-free" as would be the case if a no-contribution rule prevailed. A no-contribution rule could lead to a lessening of competition. Innocent competitors in an industry find themselves threatened with devastating liability or settlements which threaten their financial viability. Settling companies, by allying themselves through settlement agreements with the plaintiffs' lawyers create enormous financial pressures on non-settling competitors which the antitrust laws should never counteract. From a policy standpoint self-selected private persons, members of the plaintiffs' bar, should not have the power to decide unilaterally which company in an industry shall survive and prosper.

Since the amendment serves an antitrust deterrent effect I can perceive no policy reason to distinguish between intentional and unintentional acts in applying the amendment.

Comments made against the amendment by plaintiffs' lawyers should be examined very carefully. A prominent member of the plaintiffs' bar for example, is reported to have stated that contribution is "sheer insanity" because it will be inhibited because there will be no threat of defendants settling out leaving the remainder "holding the bag." I would submit this statement is typical of the current thinking of the plaintiffs' bar and clearly demonstrates the need for the Bayh amendment. A system which is just must not start with the presumption that everyone sued for antitrust treble damages is guilty or should pay something in settlement to expedite litigation. Our system of justice must protect the innocent parties' right to a day in court as well as penalize the guilty. It should not balance the equities in favor of one set of parties at the expense of others. It should always be a fair fight. The amendment goes a long way toward balancing the scales of justice.

The only effect on the plaintiffs' bar of the amendment is to impose an obligation that all settlements be fair and reasonable based on an evaluation of the

merits of the claim against a particular defendant. In other words, they will have to work harder. The amendment would not have any effect on joint and several liability. Consequently, collectability of treble damage judgments would not be changed.

Last, I would like to comment briefly on effective dates. We believe that as in most other areas of the law, there is a clear trend developing in antitrust litigation permitting contribution and protection for settling defendants with proportionate claim reduction for settlements. We believe the proposed amendment is consistent with existing law and urge that the committee make the legislation effective for all pending cases. This would provide badly needed certainty for all parties concerned, avoid continued litigation and be demonstrably fair to all parties concerned. I can understand the concern defendants which have settled at bargain rates might have that the plaintiffs' lawyers would try to reopen the settlements and obtain more money. The amendment should provide protection for existing settlements. At the very least the committee should exercise extreme care not to imply the amendment changes existing law.

There are some other technical questions such as whether contribution should be pro rata or by market share or some other rule. We will provide technical comment to the staff. I generally believe the courts are best able to deal with the specifics and the amendment should only establish the basic concepts.

Visual aids which dramatize the seriousness of the problem are attached. I have found that a serious and complicated problem, like contribution, can be better understood if it is stripped of lawyers rhetoric.

We appreciate the opportunity you have afforded us to present our views.

SUMMARY

1. EXAMPLE

The amendment, by creating a right of "contribution," would require each defendant in a treble damage antitrust case, who elects to go to trial and is found guilty, to pay a proportionate share of the damages. Defendants who settle before trial would be relieved of any liability for contribution. The amount the plaintiffs could recover from the nonsettling defendants would be reduced by the damages attributable to the settling defendant. For example, P sues A, B & C, each having one-third of the market. A settles for \$500,000. B & C go to trial. Jury finds A, B & C conspired to fix prices and that the impact was \$1 million for each before being trebled. The plaintiff elects to collect the judgment solely from B. Without contribution B must pay \$8.5 million ($\$3,000,000 \times 3 - \$500,000$) and has no claim against A or C. Under the amendment B pays \$6 million ($\$2,000,000 \times 3$) to the plaintiffs and would have a claim over against C for \$3 million. A pays nothing additional.

2. REASONS TO SUPPORT THE AMENDMENT

The amendment does not create unique law. Rather, it reflects the trend of existing law generally.

Antitrust enforcement and deterrence will be promoted by assuring that the guilty do not escape without paying.

Fairness requires the amendment. The threat of being left "holding the bag" for huge amounts and escalation of settlement demands presently can force a company to settle that believes it is innocent.

Settlement will not be discouraged. Settling defendants are not liable for contribution and will be out of the case.

The amendment will not complicate antitrust litigation. No new issues are created. In fact, by creating certainty the amendment will reduce litigation.

The amendment should apply to antitrust litigation arising from intentional as well as unintentional conduct. The innocent are protected and antitrust deterrence promoted by the amendment.

Pending cases should be covered by the amendment and existing settlements should be protected.

Senator BAYH. Thank you very much, gentlemen. We appreciate your studying this. There is a time problem for a couple of our panel members.

If it would be convenient for Mr. Taylor and Mr. Kempf, we would like very much to permit Mr. Shapiro and Mr. Sachnoff to testify. Is there any objection to switching the panels?

Mr. TAYLOR. I have no objection.

Mr. KEMPF. I have no objection.

Senator BAYH. Thank you, gentlemen. I appreciate your willingness to help.

Gentlemen, there is no set order. Proceed as you wish.

**STATEMENTS OF DAVID SHAPIRO, AND LOWELL E. SACHNOFF,
ATTORNEYS**

Mr. SACHNOFF. Good morning. My name is Lowell Sachnoff. I am a lawyer practicing in Chicago with the firm of Sachnoff, Schragger, Jones, Weaver & Rubenstein. In our law firm I represent both plaintiffs and defendants in antitrust and securities litigation.

I have a statement that I prepared which has been distributed beforehand in which I have outlined my views and the reasons why I believe that the proposed amendment which would permit contribution claim reduction has serious flaws and should be defeated.

I would like to, rather than just go through these arguments, which I think are made plain in the papers I have submitted, talk about some of the things I have heard this morning, some of the concerns that have been expressed, and I think quite legitimately, about the plight of small and allegedly innocent defendants in price-fixing litigation.

I think there has been a distortion in the perspective of the evidence that has been presented before this subcommittee this morning, Senator Bayh, because what we are really dealing with in violations of section 1, price-fixing activities, among competitors, is certainly one of the most serious vices, one of the most serious threats to the American competitive free enterprise system.

I don't say that to be overly dramatic, because I deal in this area every day of my life. I advise people on compliance programs, how not to be embroiled in the antitrust laws. At the same time, I litigate both representing plaintiffs and defendants in these areas.

In the folding carton antitrust litigation, in which the Justice Department granted immunity to 22 witnesses who testified under grants of immunity, I took the deposition of a major officer of a relatively minor defendant in the case who for 4 days, with the grant of immunity, testified as to 40 different occasions in which he and his competitors either sat down in rooms or talked on the telephone or trade association meetings and over a period of 12 years fixed the prices of one of the major commodities or major industries in our country. It was shocking. It was blatant. It was distressing. But for the grant of immunity that was given to the witnesses in that case, the whole sordid episode came out of companies fixing prices, so that the middleman and ultimately the consumer ended up paying inflated, supercompetitive prices that have a corrosive effect on our entire economy.

One of the reasons you are well aware of, Senator Bayh, is that of inefficient, outmoded plant equipment. The economics of price fixing means there is a subsidy granted effect to outmoded, obsolete, inefficient production.

I want to take a moment to talk about the background here because I would like all of you Senators and staff who are looking at this amendment to turn your attention to why these antitrust laws were passed.

They were passed to prevent the kind of behavior we have seen as rampant in many industries in this country—

Senator BAYH. Excuse me for interrupting. Inasmuch as we are under time constraints, if I might be so bold as to suggest that I can speak for the only Senator present because I am the only one here. I really don't think we need too much of an emphasis on how bad price fixing is. It is bad. The strategy of 40 meetings is unconscionable. People who do that kind of thing ought to be punished.

This legislation in no way deals with the grant of immunity in the indictment process. If you could confine your observations to the issue at hand please, we will put your statement in the record.

If you can confine your remarks to antitrust price-fixing violations today, we can see how bad it is. Tell us how contribution makes the situation more difficult to deal with from an enforcement standpoint, would you?

Mr. SACHNOFF. I was about to change the focus to say that given the fact price fixing occurs and its blatant, this proposed amendment to allow contribution claim reduction would violate the three basic principles that the antitrust legislation is designed to promote: namely, deterrence, compensation of the victims of price fixing, as well as the promotion of competition among the businesses and these industries, and would do it in the following way.

With contribution, the same businessman who can sit down with his competitors and fix prices for a product can simply add another item on the agenda; that is, since we can get contribution, if we are caught, we can then lay off another cost of business, among our competitors, because we aren't faced with the serious penalty of joint and several liability. It is joint and several liability that your amendment, Senator Bayh, would do away with.

It does away with that by saying any guilty party may look to his coconspirators for help in paying a judgment. Look at how that would work in litigation? I think your amendment would make it difficult to settle complex litigation. It would mean more litigation would have to go to trial. If more private litigation went to trial, the ultimate effect would be seriously anticompetitive for the following reasons:

If a case goes to trial against 10 defendants, let us say, and they are all found guilty jointly and severally, if there is contribution among these defendants, the plaintiffs of course will look to recover their judgment from that defendant who is best financially able to pay it, the richest defendant. That defendant in turn would then seek contribution, will cross-claim over, against the other defendants who have also been found guilty of price fixing or bring in other competitors as defendants on his cross-claim, and in asserting claims for contribution, that powerful defendant can then drive smaller and less financially

able competitors out of the industry by the use of contribution claims after a judgment has been rendered.

I know, Senator Bayh, that is not your intention, but that is the necessary logical result of this bill.

Senator BAYH. I don't even recognize the bill you are describing.

Mr. SACHNOFF. What I am saying is your bill, your amendment, permits defendants who settle to be insulated from cross-claims for liability. I think that that is correct and proper. That is what it should be. If the defendant settles a case like this, he should not be dragged back into the litigation to defend the very same claims he has settled and brought peace for.

But your bill, in terms of contribution, doesn't affect the situation where the case goes to trial, where there is a judgment, a treble damage judgment that is found or levied against the 10 different defendants.

One of those defendants may well pay the whole judgment and then can use the weapon of contribution to literally drive his competitors out of business. That is what would happen if these cases were litigated and huge judgments were levied. That is just one flaw that I believe is inherent in the bill.

Senator BAYH. If a case is litigated, there is going to be a determination that somebody is guilty before he is blackmailed into settling or has to pay anything. Right now these people are being driven out of business without any determination of guilt or innocence.

Excuse me for interrupting. I want to get your thoughts. I will try to be patient.

Mr. SACHNOFF. I am trying to focus as best I can on the practical—

Senator BAYH. I am just interrupting here.

Mr. SACHNOFF [continuing]. That is all right, Senator, because I would like to try to answer the question.

Second, the notion that innocent defendants are harassed and beleaguered in this litigation I believe is overstated. If Westvaco is innocent in the forest products cases, it can defend this litigation. If they have a means to defend it. That is what our courts and jury system are for. Innocent persons will be acquitted as the defendants were in the recent case that my colleague, Mr. Shapiro, tried in Judge Magory's court where the defendants were found innocent, as in other cases.

If there really is no liability, I have great faith in our system of justice. I believe if there is no liability, no innocent defendants are going to be subjected to huge judgments or penalties for violating the antitrust laws if they didn't do it. My experience teaches me that, including people I have defended in these cases.

A point I would like to make which was touched on earlier has to do with a difference between the securities laws and antitrust laws, a point that I see Mr. Shenefield raised when one of the Senators asked what was Mr. Bell's view on this bill.

Mr. Bell said he was concerned about the fact that the amendment was transplanting rules that grew up in the context of unintentional torts into the area of intentional torts. I want to share that concern with you. Under our common law contribution has traditionally been allowed among unintentional tort-feasors but not among intentional

wrongdoers. The Bayh amendment would do away with this district.

In the area of intentional torts people get together and willfully violate the antitrust laws. In most securities cases, where Congress has specifically provided for contribution, there is generally one principal wrongdoer, who is generally the issuer of security who has intentionally or recklessly deceived or misled shareholders and others in a prospectus, press release, proxy statement, or the like.

The other defendants in securities litigation, Senator Bayh, are generally what are called secondary parties which are liable by reasons of being aiders or abettors. However, aiders and abettors are usually lawyers, accountants, underwriters, actuaries, they never sit with the likes of Stanley Goldman in the *Equity Funding* case and plan more wrongdoing. They don't sit with corrupt management, as in *Equity Funding*, and say we are all going to phony up insurance policies. That never happens.

If a company and some of its officers do something wrong, the secondary defendants may be liable for negligence or even recklessness in aiding and abetting that wrong. But they are never intentional wrongdoers. That is the difference. That is the reason for the distribution between the securities laws permitting contribution and the anti-trust laws which to this day have not. Every business that violates the mandate of section 1 and every businessman who fixes prices is an intentional wrongdoer. He is not a negligent or unintentioned wrongdoer. That is a serious harm in the marketplace that is vastly different from the kinds of unintentional or technical violations under the secretaries laws for which Congress has permitted contribution.

That distinction ought to be stressed, ought to be preserved. I would like to answer any questions that you may have, any of your colleagues. I could talk for a long time.

Senator BAYH. I am going to resist temptation.

I may submit some questions for you to answer in the event I want clarification of your testimony. Would you answer such questions for the record?

Mr. SACHNOFF. I will be pleased to do that.

Senator BAYH. We appreciate your being here. Why don't we let Mr. Shapiro speak and we address questions to both of you.

Mr. SHAPIRO. Senator Bayh, my name is David I. Shapiro, with the law firm of Dickstein, Shapiro, Morin here in Washington, D.C. I have represented plaintiffs and defendants in the antitrust litigation for now almost 25 years.

I am quoted in the BNA's ATTR as having said that in my judgment this bill is sheer nonsense. I stand by that quotation and I would like, if I could, the opportunity, Senator, to attempt to change your mind in regard to the bill.

This bill, I think, does two things in terms of the real world, First, what it will do in practical terms is not aid, it is going to hurt the small defendant and, second, what it will do in the real world is complicate already unbelievably complicated antitrust litigation beyond our wildest imaginings. Let me tell you how it works in the real world.

Let's take a situation, a very recent one, one of my own experience and in which a group of defendants together with a group of other defendants engaged in price fixing in terms of a basic foodstuff. In this

particular case it happened to be chicken. There were defendants in that case that had a very large market share as compared to the other defendants, but didn't have a net worth that was equivalent to their market share.

These small defendants, small in terms of net worth but large in terms of market share, came to the plaintiffs in that case and said:

Look, we recognize that we have been guilty here in a practical sense, there is a question of damage, there is really a mistake of law case. We got onto this because of bad legal advice and what have you. We want to be able to get out of this case but there is no way that we can sit down with our codefendants who have a much larger ability to pay than we do and get them to agree as to what our proportionate share of the settlement should be. They have the money to pay it, we don't. Will you help us get out of the case on a basis we can afford to live with?

The plaintiffs' lawyers said in that case:

Certainly we recognize that, despite the fact that you have a large market share, you have a deficient ability to pay and because of that we will tailor your early settlement so that you will get a cheaper settlement rate per pound of chicken than those with a greater net worth or greater ability to pay and by reason of your getting out early and helping us with the rest of this litigation, we will give you a cheaper deal.

The result is—that case is now being settled, Senator, the settlement is up for approval—the case has been entirely settled. Those who are able to pay the most are in fact paying the most per pound. Those who are unable to pay the most are paying lesser amounts per pound. The litigation is now for all practical purposes over. If your bill had been law, there wouldn't have been any opportunity or any incentive for the plaintiffs to sit down with these poorer defendants and settle their case. The result would have been that we would have gone to trial with all the defendants. We would have secured a verdict against all of the defendants and the smaller companies with the larger market share under your bill would for all practical purposes have been put out of business.

We would have increased concentration in the chicken industry and as a result we would have had less competition, a result I am sure that nobody in this room would have wanted.

So when I say that the result of this particular bill would be anti-competitive, antiprosettlement, I think I can speak with some assurance to that particular point. I recognize and nobody is going to sweep the issue under the rug, that there are situations in which a culpable defendant with a large market share and a large ability to pay will attempt to get out of a case at an early stage at a cheap price.

I would think that sophisticated counsel representing that defendant would clearly attempt to make that deal as early as possible and yet I would think that sophisticated plaintiff's counsel would attempt to resist that kind of deal at the expense of those who had a lesser ability to pay unless there was a total resistance along the line to achieving some kind of settlement in the litigation, because the problem with settlements in these cases has as much to do with the question of the defendants negotiating among themselves in determining how much each should pay—what is known as a sharing agreement—as it is in terms of how much the defendants should pay as a gross amount to the plaintiffs.

The negotiations between the defendants themselves are as often as bitter and protracted and chiseling as the negotiations between the defendants on the one hand and the plaintiffs on the other.

What happens is this: I will give you another concrete example. The situation happened in the chemical dyestuffs litigation a few years back. Here were some 12 to 15 defendants on the one side and the plaintiffs on the other, and there was a general understanding between some of the counsel for the plaintiffs on the one side and some of the more sophisticated counsel for the defendants on the other side that, given the nature of this litigation, the total settlement ought to be in the neighborhood of something like \$15 million for the entire case.

It turned out that one of the counsel for one of the defendants, either because he didn't want to settle the case or had been disappointed in his negotiations with the other defendants as to what his share of the so-called sharing agreement ought to be, was the lone holdout. He was holding out in the litigation and on the basis of the representations that the plaintiffs had made to the defendants, the notion was abroad among defense counsel that this was going to be an all or nothing settlement, either everybody was going to settle for \$15 million or the litigation was going to be on and nobody was going to settle.

The result was the negotiations became protracted. During the course of these negotiations it became obvious that this one defendant was trying to better his particular share vis-a-vis the other defendants so that in effect he would have to pay less. The negotiations got to a point where it seemed that everything was about to blow up, litigation would continue, the case might still, for all anybody knows, still have been in the courts as of this date, until one thing happened.

Once it became obvious that this defendant was in effect attempting to chisel a better deal from his other defendants, plaintiffs' counsel said to this defendant, "All right, it is obvious that you are holding up everybody else from settling this litigation. You leave. We won't settle with you. We are going to settle with everybody else. We will take whatever you would have paid under your sharing agreement off the face amount of the settlement and reduce it accordingly and then we are going to go after you alone, not only for the damages that you caused but for everybody else's damages; times three less the amount of the settlement. Goodbye; we are not going to talk to you any more." He left the room.

Settlement discussions continued. Half an hour he came back and he said, "OK. I am in. The case is now settled."

Following that discussion, this particular lawyer came over to me and he said, "You know, Dave, until you did that I really had a chance as against my other defendants of reducing my liability under the sharing agreement. You really pulled the plug on me."

This goes on every day of the week in the real world in terms of litigation and in terms of settlement discussions.

What happens under this kind of situation? The particular lawyer involved, the particular company involved, would have been in the position to say, if contribution had been permitted, "Go ahead. Go ahead and settle if you want to but I am telling you what I am going to do. You are never going to get total peace if you settle with these

plaintiffs and the reason is if you settle, I am going to turn around and bring you right back into the litigation, either under rule 14 or 15 of the Federal Rules of Civil Procedure." So instead of getting total peace in this case, you will still be litigating it. You still will be paying very expensive counsel fees, and you will be involved in this litigation until the time of settlement at which time I will be in the position of getting you either to agree to let me off the hook in terms of what my sharing percentage ought to be, and not what you say it ought to be.

That is the real world of what is going to happen if this bill is going to become law. It will in practical terms make it increasingly difficult for there to be any kind of settlements at all in these cases unless all defendants agree at the same time to settle with the plaintiffs and that very rarely happens.

Let's take a look at it from the other point of view. I will talk to you about this in terms of my own position representing two corporate defendants in a recent bid-rigging case in which the Department of Justice was on the other side. We are now talking seriously about the problem of deterrence.

There were maybe 10 to 15 defendants in that case. It seemed obvious to me, based on the information we had, that this was a case that ought to be settled, that every defendant ought to settle the case. Some defendants were much more culpable, some defendants were much less culpable, but clearly in terms of joint and several liability, in terms of the kind of evidence that comes in in conspiracy cases, it seemed obvious that everybody was going to go down the tube in that case.

So in terms of representing my clients I suggested to the entire group:

Look, let's all get together, work out some sort of sharing agreement, come up with a pot of money. We may be able to satisfy the Department of Justice with regard to our civil liability which could possibly run into the billions of dollars, and then reduce our exposure to the Department of Justice in this particular case. But let's see if we can do it.

There were sophisticated lawyers in this group, unsophisticated lawyers in this group, and lawyers who were simply interested in doing no more than running the meter on their clients. The result is we never would have been able to have obtained a sharing agreement for the entire group of defendants. As a result, several of us went in and settled with the Department of Justice on our own. We went in and we made what we thought was a reasonably good deal for our particular defendants.

The result of that was that we were out of the civil damage case at a price my clients were able to afford, and at a price which enabled them to stay in business. But I tell you this: if the Bayh amendment had been law at the time that deal was being made, the Department of Justice would have had no incentive to settle with us and we never would have been able to settle. A failure on our part to settle, of course, would, in turn, have made the Department of Justice's attempt to secure enforcement in this particular field a much more difficult job.

For all of these reasons, and for the additional reason that once one defendant is permitted to bring in other defendants in antitrust

cases on the basis of contribution, either under rule 14 or 15 of the Federal Rules of Civil Procedure, you have complicated what is already a very difficult and complex problem so that, instead of the case being—if it is going to go to trial, simply going to trial for 5 years and having actually tried for 6 months or so, it will not go to trial for over a period of perhaps 7 to 10 years.

Maybe the trial will take—instead of 6 months—a year or perhaps two, and instead of having cases which we can get rid of in 3 or 4 weeks, we are going to have a repetition of what is going on in the southern district of New York in the IBM litigation. I say, for these reasons that while it is necessary to focus on the problem of the small defendant with the small market share who is put in the position where he is being put up against it by reason of a culpable defendant who has the wherewithal to pay the judgment, coming in and settling quickly and in effect leaving the small defendant holding the bag, this bill is not the solution.

What you have got here is the situation, unfortunately, of throwing the baby out with the bath water, because in attempting to cure one problem the problems you are going to create by this bill in terms of antitrust enforcement are going to be much more serious, much more severe.

We may have to come back here in a couple of years and say, "Senator Bayh, these are the problems that this bill has created. Help us resolve those."

I don't think anybody wants that to happen. I think we have got to look at this problem in real world terms, to try to focus on this issue. I haven't got a solution as to how to solve this particular problem that you, Senator, are concerned with and rightly so. I don't have a solution and I certainly don't have one off the top of my head. But I do know that this bill creates more problems than it solves. That is my testimony.

Senator BAYH. Mr. Shapiro. I want to go back and reread this record. Did you have prepared testimony?

Mr. SHAPIRO. No. I don't have any written testimony.

Senator BAYH. I must say that you have made a very eloquent presentation. I must confess, in just hearing it once, you had an excellent argument on one side of the coin and then flipped it over and made just exactly the opposite on the other side, which to me means you are a hell of a lawyer.

Mr. SHAPIRO. I would like to think so, Senator. [Laughter.]

Senator BAYH. As I say, I want to go back and read this.

We have, just to look at the specifics here, the question of keeping people tangled up in the litigation. We thought we had been able to deal with that problem by the last sentence in our amendment that says the "release of covenant received in good faith, relieve such person from liability to any other person for contribution."

Mr. SACHNOFF. Senator Bayh, that only relates to circumstances in which there is a settlement. I think that is clear. It says a release really means a release that is given to plaintiffs in settling context. If it is intended to cover situations that arise when cases are litigated fully and judgments are rendered, then the language is ambiguous and ought

to be cured because I would have no objection at all and, as I stated before, that in settlement in the litigation context, if somebody settles, they ought to buy peace.

Senator BAYH. Let's clarify that because we want flexibility to reach any agreement that the parties feel are in their best interest with the understanding that once they have reached that agreement, both parties recognize that that is the end of the ball game.

Mr. SACHNOFF. Senator Bayh, your bill does that. There is no question about the fact that your bill does insulate persons who settle from cross-claims for contribution and in that sense, the bill certainly is laudable and I would favor it entirely.

The problem with the bill arises in circumstances in which there is a settlement with some defendants and there is later an attempt to reduce a judgment against others under the judgment reduction provision of the bill. That is what the bill that entangles and then makes so complicated, overly complicated, in any litigation that results. I can put it to you very simply.

If there are 10 defendants in the civil case, 5 settle, you go to trial with 5 others, I am sure that your intention in drafting this legislation is to make certain that the persons who settle are given peace. Yet even though they are not subject to claims for contribution, their liability, their damages are kept in the case. That is the problem. They are kept in because the judgment reduction or claim reduction feature of the bill says that you have to compute their damages. You have to compute the damages of the settling defendants, then subtract these from any overall judgment. You have to do that. They stay in the case until the bitter end.

Senator BAYH. That is not the way we perceived it. Perhaps we can continue this discussion looking at the language of the amendment and a conversation over the phone or something, because perhaps we need to change the language a bit was to say that that ability to bring that defendant back in depends upon the agreement reached with the plaintiff. If the case goes on to trial, then that ability to bring that defendant back into the case could have been foreclosed by the agreement that the defendant insisted upon in the initial stages.

Mr. Shapiro.

Mr. SHAPIRO. I don't have any problem with that, Senator. The basic problem I have is with little "3" in the second paragraph of the bill.

Mr. SACHNOFF. I concur in that.

Mr. SHAPIRO. That is where the real problem is in terms of this particular bill. What happens is, as I tried to indicate, that the little defendant, little in the sense of net worth, but big in terms of market share in any particular industry, and that is where these problems arise in terms of getting all the defendants together in terms of the sharing agreement, because the larger defendants normally say, "We are not going to get together on anything other than market share—we are not going to take into account your problems in terms of ability to pay." So a small defendant, net worth small but having a big market share in a particular industry—and in the days of conglomerates this is a normal kind of situation—is really up against it because no plaintiff in

his right mind is going to settle with a defendant with a small net worth and a large market share, by so doing he is going to take 30 or 40 or 50 percent of the market out of the case as a result of which he will be going to trial against a defendant—who doesn't have the ability to pay the judgment. If you do get a judgment against him, what you are going to be doing, instead of settling with him on some basis that he could afford to pay, is in effect driving him out of business, which nobody in his right mind on the plaintiff's side really wants to do and no sophisticated lawyer on the defense side wants to put his client in the position of being in.

Senator BAYH. I think we are talking the same language, we are talking about the percentage of sales of the price-fixed item.

Mr. SHAPIRO. That is right.

Senator BAYH. It seem to me that both of you gentlemen are very sophisticated and experienced in the business of defending and prosecuting. Your perspective has been directed at the defendants and plaintiffs and their positions. I understand that.

Some of us over here have to think in terms of the broad policy. I must say I am a little bit concerned about an antitrust policy based on the philosophy or the ability to pay instead of the amount of damage you do to the public at large, which is what you are suggesting.

Mr. SHAPIRO. No. Let's talk to that for just a moment.

Senator BAYH. If you have a company that is near bankruptcy, that is one thing. You can't get blood out of a turnip. But it would seem to me that I would think in terms of the company that has the largest liability, has the largest percentage of sales and thus does the largest amount of damage to the public generally by price fixing, not necessarily the company that has the largest net worth.

Mr. SHAPIRO. It doesn't always work that way. It may very well be that you have got what is a passive or a "go-along" kind of defendant, or one who is on the fringe of the antitrust violation, but is still culpable under normal, everyday circumstances.

Senator BAYH. Everyone would permit that to be assessed by the judge.

Mr. SHAPIRO. You have this kind of problem where you have a defendant who has a large market share. Let's say he has a limited ability to pay but a large market share. Yet, you have other defendants in the case who have a smaller market share, but who are nonetheless active at the core of the conspiracy. One cannot draw, in view of the different kinds of situations that arise, Senator, a bill which is going to focus this public interest thing we are talking about in terms of anything other than two basic concepts, at least in settlement terms. Those are market share and net worth, because one can find a large defendant with a small market share who is at the heart of the conspiracy and one can find just the opposite kind of situation where the defendant is on the periphery of the conspiracy.

It is difficult at this stage of the game under normal antitrust principles to be able to decide where somebody's culpability starts and where somebody else's leaves off.

Senator BAYH. Let me ask you, very naively, to use Sam Ervin's term, a "country lawyer" type of question here.

You have seen a lot of defendants represented, and you've represented them very well, I am sure, both of you gentlemen, as well as plaintiffs. It is realistic to suggest that a defendant which has a small percentage of the market is going to be more interested in putting together a conspiracy than a defendant who has a large share of the market?

Mr. SHAPIRO. You had better believe it. I have seen it happen time and again.

Senator BAYH. It seems to me to be rather unreasonable. But you say you have seen it?

Mr. SHAPIRO. Time and again. Part of the reason is maybe he is trying to get a bigger market share. I have seen it.

Senator BAYH. Do you have any specific situations? Think about it and you can let us have the examples.

Mr. SHAPIRO. As a matter of fact, I do. I feel a little bit about discussing these examples publicly, but I will be glad to give them to you in confidence.

Senator BAYH. I understand.

Mr. SHAPIRO. But I would be pleased to give you chapter and verse.

Senator BAYH. I mentioned to Mr. Shenefield, and I don't know whether you were here this morning, about possibly changing the equity provision under section (ii) there, to permit the judge to take into consideration the amount of the complicity as well as the size of the market. If there is someone who is a casual participant, and had a larger share, that the degree of culpability might be determined in meting out the damages. You have both been very kind and raised some interesting points. I would like to proceed. From the standpoint of time, I know you are busy, Mr. Shapiro; you have to leave—

Mr. COOPER. I just have one question. What would you gentlemen think of a contribution amendment which would have basically the following elements: First, we permit contribution along some formula that the court would deem equitable in a particular case; second, we would reduce the plaintiff's actual damages, not treble damages but actual damages, by the amount paid by the settling party or the amount stipulated in release—in other words, he could recover the remainder of the actual damages from the nonsettling defendants if he went to trial; third, we would immunize the party who enters into a settlement agreement in good faith from contribution?

Mr. SHAPIRO. Counsel, I think you have lost me around one of the turns with regard to the question, the part about contribution, limited to his damage but not as to the treble feature. Because under the law as it stands now what happens is, is that the damages—let's say everybody else settles but there is only one defendant left. So you take the entire industry sales and the remaining defendant is liable for all of them, for all of the damages times three, less the amount of the settlements. If what you are suggesting is that he is still liable for two times—

Mr. COOPER. No. What you would reduce, instead of taking the industry damages and trebling them and then deducting, you would reduce the single damages and then treble it for the remaining defendants.

Mr. SACHNOFF. I think that goes a long way toward avoiding some of the problems of the bill. You have to recognize one thing. You are

giving with one hand and taking away with the other, because you are allowing contribution yet at the same time not allowing it in the case of settlement. You are saying to the defendant who settles, who is insulated from claims against him by his coconspirators, you still have the problem of what do you do if the case is litigated. You permit contribution. Is that right?

Mr. COOPER. Right.

Mr. SACHNOFF. Again, you solve the problem of reducing the treble damage which is the most serious concern in the bill. But I think a country lawyer, Sam Ervin would probably say that "if the thing ain't broke, don't fix it." I think the thing really isn't broke right now.

I think the concerns of innocent, allegedly innocent defendants, could be handled in the normal process of our judicial procedure, which is that they establish their innocence at trial, or they convince plaintiffs' lawyers, who are reasonable folks, that they are innocent. [Laughter.]

Mr. SACHNOFF. Well, I sort of wanted to see if anybody is still listening.

Senator BAYH. That was the plaintiff part of you talking.

Mr. SACHNOFF. I wanted to see if anyone was still listening. But let me make one last comment about that. I am on the plaintiffs' steering committee in this monstrous, corrugated antitrust litigation in Houston of which there is \$300 million in settlement. The idea that plaintiffs' lawyers are somehow hellbent in every circumstance to get the last cent out of any defendant, no matter what the degree of culpability or his ability to pay, really doesn't square with the facts as that case shows.

There is a small defendant, Consolidated Packaging Corp., in that case, small, financially troubled, probably at the very fringe of the conspiracy in that case in terms of the criminal case, where they pleaded nolo and got light sentences. We settled with Consolidated Packaging for the relatively small amount of \$400,000; I think their market share was about 1 percent. So you are talking about a settlement in the range of 8 to 10 percent of those settlements that were made with other more culpable financially able defendants.

The plaintiffs' lawyers in that case had absolutely no intention of hurting that company, putting it out of business, whatever. After studying very carefully, with the help of a CPA, their financial statements, we recognized that they couldn't pay the same kind of settlement share that other huge companies could pay who were otherwise in the same boat. We settled for \$400,000, which was fair and equitable under all the circumstances.

I think that is illustrative of what will happen, or what has happened in the past, and that will continue to happen in the future under the current state of the law with small, less culpable defendants; small, less culpable defendants will pay a lot less than large, more culpable defendants. That is how the world goes.

Senator BAYH. I suppose plaintiffs' lawyers are just like that roomful of defendants' attorneys Mr. Shapiro described, and go from one degree of sophistication to the other, as well as those who just let the clock run. There are some people who say, well, that is sort of the same with U.S. Senators. I wouldn't want to be quoted on that.

Do either of you gentlemen—can we arrive at a general proposition that perhaps we ought to be concerned with and try to resolve the problem where you have an indicted party, in the criminal sense; where there are indicted conspirators paying a lesser penalty than unindicted parties.

Mr. SHAPIRO. Let me say this to you. I know exactly what you are driving at with that notion. I think in a moral sense that would go a long way toward solving a problem. Technically, how one works this out, if you have a situation where the Department of Justice indicts 10 companies in an industry and then the private plaintiffs come along and bring suits against 20, the 10 that were indicted, and 10 others who for one reason or another, including perhaps cooperation with the Department of Justice, were left out of the indictment, I don't know. I simply do not know how one would be able to solve that problem from a drafting point of view.

But from the point of view of it appearing to be unfair for an indicted coconspirator to get off cheaper than a defendant who is brought in as a coconspirator in a later civil case, you are moving in the right direction in terms of what my grandmother would say, "what is fittin' and what ain't fittin'."

If you are moving in that direction, I think that makes a certain amount of sense. But it is a difficult problem to get one's hands on in terms of drafting for that kind of purpose.

Senator BAYH. Why don't you help us with that?

Mr. SHAPIRO. It is a move in the right direction.

Senator BAYH. Why don't you help us? With your experience, it is "fittin' and it ain't fittin'."

Mr. SACHNOFF. I would be glad to accept your suggestion. I would be glad to meet with your staff or anybody to help resolve these problems because I have some ideas. I am concerned like Mr. Shapiro and anybody else about unindicted coconspirators in these cases. Some of them are major culprits. It is a serious problem that has to be addressed.

I don't think, in all due respect, that your bill does the job. It does throw out the baby, sort of, with the bath water.

Senator BAYH. I am prepared to go back and look at what you gentlemen said, study it; and I appreciate your taking the time to be with us. I hope we can at least communicate with you to see if we can find some way to refine the language to deal with the problems you have raised.

Mr. SHAPIRO. Senator, I am right down the street.

Mr. SACHNOFF. I am an hour and a half away in Chicago.

[The prepared statement of Mr. Sachnoff follows:]

STATEMENT OF LOWELL E. SACHNOFF

Mr. Chairman, I welcome the opportunity to present my views on the proposed amendment to S. 390 which would permit contribution among defendants accused of price fixing under the Clayton Act. In my opinion, based upon my experience in antitrust litigation representing both plaintiffs and defendants the proposed contribution amendment contains serious flaws and, for the following reasons, should be defeated:

First: A change in the antitrust laws permitting contribution among price-fixing defendants would seriously erode the basic policies underlying the anti-

trust laws, which are to preserve and promote competition and the free market economic system in our country. Price fixing, long held to be a per se violation of the antitrust laws, is perhaps the most serious threat to the health of our competitive economic system. That is why for over 80 years Congress and the courts have recognized the need for severe penalties for those persons and businesses who intentionally violate the antitrust laws and destroy competition by price fixing. The lode star of these penalties is joint and several liability of all coconspirators for treble damages resulting from their price-fixing activities. The contribution amendment would, by permitting price fixers to lay off a portion of their liability on other conspirators, strip joint and several liability from the antitrust laws, and thus severely impair the policy goals of these laws, namely (1) to deter future violators, (2) to compensate the victims of the price fix, and (3) to deprive the violators of the fruits of their unlawful conduct.

Second: in practice the contribution amendment would give comfort to price fixers by assuring them that the economic risks of their anticompetitive conduct is substantially reduced. Contribution puts a ceiling on a violator's damages because of his claims over against others. If a price-fixing case is litigated, each violator will know in advance that he can reduce his liability by claiming over against his fellow conspirators. Thus the deterrent effect of exposure to trebled damages for industrywide violations is removed. The business decision to measure price-fixing damages as just another cost of doing business will be far more attractive. Furthermore, this cost will be discounted because of the procedural morass that contribution will create in litigated antitrust cases; the confusion to the jury flowing from the multiple claims and cross-claims can only work to the advantage of culpable defendants in these complex cases.

Third: Contribution would likely have precisely the effect of diminishing competition which the antitrust laws were designed to prevent. In most industries in which price fixing occurs, there are some companies which are prosperous and others which are financially troubled. Successful plaintiffs are likely to seek to collect their judgments against those entities which can better satisfy those judgments. Permitting a right of contribution to be asserted by those entities which are more prosperous will have the direct result of driving the poorer companies over the edge to insolvency, regardless of the degree of fault or the benefits reaped by the conspiracy. This result cannot be countenanced.

Fourth: In a settlement context, although settling defendants are protected from claims over by nonsettling defendants, thus removing the chilling effect on settlements contribution would otherwise cause, the claim reduction provision of the amendment would cause great mischief. At present the law is clear that settlements reduce the amount of trebled damages ultimately assessed by the dollar amounts of the settlements paid. The amendment would require a reduction of any treble damage award by an amount treble the portion of damages directly or indirectly attributable to the earlier settling defendant. This is a wholly unacceptable result. The amendment contains no guidelines for determining how "damages" are calculated for earlier settling defendants. Does it mean or include market share, sales, size of the company, ability to pay, relative culpability, or what? This provision means that every price-fixing case that goes to trial must include a complete evidentiary case against each and every defendant who has previously settled. Plaintiffs must make this case to assure that the damage reductions are as small as possible; non-settling defendants must try to prove that these shares are as large as possible. Settlements would be seriously discouraged because no settling defendant could ever be free of entanglement in the litigation by paying his fair share of the damages.

Fifth: The procedural morass caused by this proposed claim reduction on settlement will sharply interfere with a plaintiff's ability to manage the litigation efficiently and inexpensively, thus deterring lawsuits which are necessary for effective enforcement of the antitrust laws. The Supreme Court has stressed the necessity of making litigation attractive to private parties, *Hawaii v. Standard Oil of California*, 405 U.S. 251, 262 (1972), and has sought to prevent complications in private litigation by limiting claims to those persons or entities purchasing directly from a conspirator, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977) and by disallowing defenses relating to the passing-on of costs. *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968). The Supreme Court has understood that, as a practical matter, it is important to establish clear and simple rules for application by the courts. Permitting claim reduction and cross-claims defeats this goal.

Sixth: Claim reduction on settlement will markedly reduce compensation to price-fixing victims in most situations. In most industries, the hard-core price fixers are companies with smaller market shares and lower profit margins; they are most culpable. If for example a settlement is reached with a defendant with the largest market share, the damages assessed against the smaller but more culpable remaining defendants will be very substantially reduced by reason of the large market share of the settled defendant. This reduction will occur even though the nonsettling defendants later held liable at trial are more culpable, caused greater damage, and may have better ability to compensate the victims. Such a result thwarts all the basic goals of antitrust enforcement and is unacceptable.

Finally: The different circumstances between the Federal securities and antitrust laws must be underscored. The securities laws generally allow contribution among violators, thus causing some difficulty in the management of litigation as well as in settlements. However, unlike the antitrust laws, most securities cases involve one primary wrongdoer, usually an issuer of securities, who is an intentional tortfeasor. The other defendants are parties secondarily liable as aiders and abettors; these persons are not intentional tortfeasors but are usually accountants, underwriters, outside directors or lawyers who are liable by reason of reckless, but not intentional, misconduct. In these situations, contribution among unintentional violators has traditionally been allowed and is consistent with their far lesser level of culpability.

For intentional price fixing Congress and the courts have long decreed that more severe penalties, trebled damages, are necessary to serve the cause of deterrence and compensation to victims of price fixing. The key distinction is that price fixers are guilty of intentional wrongdoing. They meet in covert ways to block the natural forces of competition which is the underpinning of our free enterprise system. They do so with full knowledge of the consequences of their actions. They are not innocent, negligent or even reckless wrongdoers. They intend to conspire to break the laws and as such should remain subject to the more severe penalty of joint and several liability for the damages they cause, without contribution or claim reduction rights.

Senator BAYH. Our last panel, Mr. Robert P. Taylor, Pillsbury, Madison & Sutro; and Donald G. Kempf, Jr., Kirkland & Ellis.

STATEMENTS OF ROBERT P. TAYLOR, AND DONALD G. KEMPF, JR., ATTORNEYS, ACCOMPANIED BY DAVID GARTEN

Mr. KEMPF. Mr. Chairman, I would like to thank the subcommittee for the opportunity to appear today. My name is Don Kempf from the Kirkland & Ellis law firm in Chicago, and with me this morning is my associate, Mr. David Garten.

I participate, as the prior panel did, in antitrust litigation on a day-to-day basis, and I and my firm have been involved in many cases where the underlying concerns which led to the introduction of the Bayh amendment have been present.

I would like this morning to address three main points.

Senator BAYH. You are a little late to do that. You may do that this afternoon, however.

Mr. KEMPF. Are we going to adjourn?

Senator BAYH. No. We are in the afternoon. You confined your remarks to this morning.

Mr. KEMPF. I got so carried away in the excitement I didn't see the clock move.

Senator BAYH. I am going to have to leave shortly and our counsel will continue the hearing. I will have a chance to study the record.

I really do appreciate you coming from Chicago, and you coming from San Francisco. That is quite a sacrifice; I appreciate it.

Mr. KEMPF. The three main points are these: First, because of the risks created by the whipsaw tactics permissible as things now stand, defendants may be compelled to settle price-fixing lawsuits for vast sums whether or not there has been any improper conduct by the defendant or any damage suffered by the plaintiffs. The second point I want to make this morning is that the legislation designed to remedy this inequitable situation would not involve any special rule but would merely bring the price-fixing area into harmony with what is the present trend of the law generally.

The third point I would like to make this morning is that such legislation is not complicated and would not detract from antitrust enforcement but rather would enhance antitrust enforcement while removing some of the present inequities.

Senator BAYH. I wish we had been wise enough to structure this dialog so that you two gentlemen could have been sitting on one side of the table and Mr. Shapiro and Mr. Sachnoff could have been sitting on the other. I would like to have had a chance to hear you discuss this because you both make absolutely unequivocal statements on absolutely opposite sides of the question.

Mr. KEMPF. I agree with that. There are times when I had to sort of hold myself in the chair back there. I will try to address myself to some of the points and specifically some of the case examples they gave. For example, Mr. Sachnoff mentioned the *Nissan* case by name and I think that is a good example of why your bill makes sense. I will cover that.

Let me start with my first point, the injustices, inequities that are all too real at the present time. The fact of the matter is that today antitrust settlements are being entered into which bear no necessary relationship to whether the defendants have engaged in any improper conduct or whether the plaintiffs have suffered any damage. To make matters worse, it may be the largest or most culpable defendants who pay the least while the smallest or least culpable defendants pay the most.

Let me explain why this happens. When these broad price-fixing charges are filed against an entire industry, in a class action, on behalf of all buyers, each company in the industry is faced with the risk of potential liability for three times the amount alleged. That includes liability not only for his actions but for the actions of all the alleged coconspirators in the industry. The amount of damages faced by a single company is just staggering. Only last week, one of the Federal judges presiding over the kind of case that we are talking about this morning put it this way.

Let me quote this because I think it is instructive:

Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial. Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking exposure by going to trial.

Astute plaintiffs' counsel like Mr. Shapiro and Mr. Sachnoff recognize this. What they have done in trying to dispose of these cases is to turn not to an evaluation of the evidence but to classic game theory. Here is how that works.

In order to get the ball rolling, they look at the defendants as a group, and they single out likely prospects for settlement. Then they go to them and they offer a double-barreled inducement to settle: A hefty discount for being one of the first to settle, and a promise that everybody after them will pay more so that the settler in effect will look good, as it were, by hindsight.

Ask yourself which defendants are likely to find this most attractive? In many situations it is the large defendant, or the one who is most culpable who knows if he goes to trial he faces a particularly high risk of being held in the liability that is at stake here, the massive liability. When such a defendant settles those that are left face an ever increasing risk of liability. The price of the next settlement goes up, the scenario continues. One by one the defendants settle with the ante being upped in each round. Pretty soon what happens is the sense of panic, and that is just what it is, panic, sets in. The smaller companies in particular become fearful that unless they, too, settle at a higher price, they will soon find themselves liable, facing a risk of liability I should say, for a share of market which is 100 percent, tripled.

There is no deduction of market shares as things now stand and only the actual dollars paid in settlement are subtracted. Even if defendants believe themselves to be innocent, with strong defenses, they have a fear of what evidence might be used against them. You have heard the testimony this morning about how sometimes there are 40 companies as defendants in these suits. They have a natural fear in that settling that even if they are innocent they get lost in the shuffle and evidence against someone else may rub off against them.

On top of this there is the ever-present fear that there may be jury confusion, particularly when there are so many parties involved. As each defendant settles, the pressure gets greater, more money can be demanded, and because of the ever-increasing risk exposure, it can be secured.

There are other scenarios that are equally inequitable which I think are important to your amendment, Senator. A price-fixing suit can be filed not only against a major manufacturer, but against hundreds of small businessmen who are in the distribution chain as well.

The present rules may induce a plaintiffs' attorney to view these small businesses as a ready source of a war chest. Even though they are innocent, each of these small distributors may choose to pay thousands of dollars to avoid the risk of huge liability. If the remaining defendants prove at trial—the larger defendants—that they are innocent, there is, of course, no refund to that small businessman who financed the lawsuit.

Senator BAYH. If you will forgive me, I will have to go to a place where I should have been 45 minutes ago. I will read this with a great deal of interest because it is the difference of opinion between the two groups that feel very strongly, and I am sure very sincerely about the merits of the cases. I think it is important for us to refine our efforts. I am going to ask our counsel if she will conduct the record and it can be conducted as if I was present.

Mr. KEMPF. We appreciate very much the opportunity.

Senator BAYH. I am sorry. I thought we could move this along. But I was guilty as anyone getting involved in pursuing questions. As I say, we will keep the record and have a chance to go back over it.

Mr. KEMPF. I hope that is the case because I think both Mr. Taylor and myself address a number of the questions that the Senator himself expressed concern about this morning.

Senator BAYH. I don't want you to think you came all of this way on a wild goose chase. I will have a chance to read it.

Mr. Kempf.

Mr. KEMPF. In view of the length of the time, counsel, I had planned and hoped that we might for the benefit of those attending, hit all of the highlights of the presentation. In view of the time, I think my preference at this stage would be to submit the entire statement in the record.

Mr. KEMPF. After addressing the comment that Mr. Sachnoff made, then I will let Mr. Taylor make some comments and after that, perhaps, address a few of the specific subjects that came up on the record this morning.

Mr. Sachnoff this morning raised the *Nissan* case as an example where an innocent defendant can indeed go to trial and vindicate himself. But I think that the *Nissan* case, while it does show that, provides powerful support for the Bayh amendment. In that class action the plaintiffs alleged that there was a price-fixing scheme involving both the manufacturer of Datsun automobiles and small independent Datsun dealers across the country. A jury in Miami eventually found that the manufacturer was not guilty of any of the charges that had been made against it.

[The prepared statements of Messrs. Kempf and Taylor follow:]

PREPARED STATEMENT OF DONALD G. KEMPF, JR.

Mr. Chairman, I would like to thank the subcommittee for the opportunity to appear today. My name is Donald G. Kempf, Jr. and I am a partner in the law firm of Kirkland & Ellis in Chicago. I participate in antitrust litigation on a day-to-day basis, and my firm and I have been involved in many cases where the underlying concerns which prompted the introduction of this amendment have been present.

I want to address three main points this morning:

First: Because of the risks created by whipsaw tactics permissible as things now stand, defendants may be compelled to settle price-fixing lawsuits for vast sums, and never have their day in court, whether or not there has been any improper conduct by the defendant or damage to the plaintiffs.

Second: Legislation designed to remedy this inequitable situation would not involve any special rule, but would merely bring the price-fixing area into harmony with the present trend of the law generally.

Third: Such legislation would not complicate or detract from antitrust enforcement but rather would enhance antitrust enforcement while eliminating present injustices and inequities which undermine effective enforcement.

In talking about these three points, I will also address some of the comments that have been made in opposition to the proposed amendment.

1. UNJUST RESULTS UNDER THE PRESENT SCHEME

Let me start with my first point, the injustices and inequities that are all too real at the present time. The fact of the matter is that today antitrust settlements are being entered into which bear no necessary relationship to whether or not the defendants engaged in any improper conduct or whether or not the plaintiffs suffered any damage. To make matters even worse, it may be the largest

or most culpable defendants who pay the least while the smaller or wholly innocent defendants pay the most.

Let me explain why this happens. When broad price-fixing charges are made against an entire industry in a class action on behalf of all buyers, each company in that industry is faced with the risk of potential liability for three times the amount of damage alleged. But the alleged damage to be trebled is not only that resulting from a defendant's own actions but also that caused by the actions of every other member of the alleged industrywide conspiracy as well. The potential exposure to a single company is staggering. Even where a defending company considers itself innocent and has strong defenses, the downside risk is immense. One Federal judge presiding over a large price-fixing case put it this way only last week: "Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial."

Astute plaintiffs' counsel have recognized these realities. In seeking to dispose of these cases, they have turned, not to the evidence, but to classic "game theory." How does this game theory work? In order to get the ball rolling, the plaintiffs' attorneys single out likely prospective settlers from among the defendants. Plaintiffs then offer a double barrel inducement to settle: a hefty discount for being among the first to settle, and a promise that everyone who comes after them will have to pay more. Which defendants are likely to find such a proposal attractive? In many situations it is the largest or most culpable defendants—those that know they face a particularly high risk if the case goes to trial. When such a defendant settles, those that are left face an increased risk of liability, and the price for the next settlement goes up. So the scenario continues. One by one defendants settle, with the ante being upped in each successive round.

Soon a sense of panic—and that is just what it is—sets in. Smaller companies in particular become fearful that, unless they too settle, at a higher amount, they will soon find themselves facing the risk of liability for 100 percent of the market. No reduction is made for the share of the triple liability caused by the settling defendant, and only the dollars paid in settlement are subtracted. Moreover, even if the remaining defendants believe themselves to be innocent, they fear that the evidence against others may rub off on them as alleged coconspirators, where the specific evidence against them alone would be clearly insufficient. On top of this, there is the ever present fear of jury confusion. As each defendant settles, the pressure on the next becomes greater.

More money can be demanded, and, because of the ever-increasing exposure risk, secured.

There are other scenarios that are equally inequitable. A price-fixing law suit may be filed not only against a few major manufacturing firms, but against the hundreds of small businesses in the distribution chain as well. The present rules may induce a plaintiffs' attorney to view these small businessmen as a ready source of "war chest" money. Even though they know they are innocent, each of these small distributors may choose to pay thousands of dollars to avoid the risk of huge liability. If the remaining larger defendants prove at trial that there was no price-fixing conspiracy, there is, of course, no refund to the small businessman.

I have been describing certain possible situations, and you may be saying to yourself, "Do they really happen?" The answer is "yes." Consider a recent case against Nissan Motors, for instance. The class action plaintiffs alleged that there was a price-fixing scheme involving both the manufacturer of Datsun automobiles and small, independent Datsun dealers across the country. A jury in Miami eventually found the manufacturer not guilty of any of the charges against it. However, by that time the hundreds of individual Datsun dealers in Iowa, Arizona and elsewhere throughout the country were long gone from the lawsuit. Under the present scheme, each one of these small dealers faced potential liability for all sales of Datsuns in America—a staggering sum. Their innocence in fact had become irrelevant, because the small dealers could not risk a trial under those circumstances. They had agreed to pay a collective total of hundreds of thousands of dollars rather than run the risk of the potential liability involved. Only the big company could go to trial and ultimately prove its innocence.

Another case that comes to mind is the current *Corrugated Shipping Container* litigation in Houston, where the antitrust settlements are the largest ever, nearly \$300 million to date. Of the nearly 40 defendants, those who have settled so far

account for about 80 percent of the sales of the products involved. The settlement whipsaw began when the class action plaintiffs offered to settle with one of the largest companies in the industry, a company that had been indicted on felony price-fixing charges in the related Government criminal action. The plaintiffs offered to let the big company settle for \$1 million for each percentage point of market share that that company's sales represented. Since the company accounted for about 8 percent of the market, it paid about \$8 million. Within a matter of months, because of the game-theory whipsawing tactics I mentioned earlier, small companies that had not been indicted at all were faced with intolerable downside risks. In short, they were left with no practical alternative but to pay more—indeed, up to four times as much as the early-settling indicted company, or \$4 million for each percentage point of market share of sales—in order to escape the risk involved. I emphasize that there wasn't even enough evidence to indict these companies that paid some of the higher settlements.

Those companies that have not yet settled, many of them small companies, are presently faced with an awesome—even if remote—risk. They face the risk of full liability for everyone's sales—including the companies that have already settled—even though these remaining defendants account for only about 20 percent of total sales.

All of these millions of dollars in settlements, by the way, were secured before a single deposition was taken in the case. Moreover, after these settlements were secured, it took a jury in Houston less than a half of a day to find those defendants who stood trial in the related criminal case not guilty, even though the Government had taken 2 months to put in its case. Significantly, one of the companies acquitted by the jury had already paid more money per point of market share than any other defendant in the case, \$6.5 million for each point of market share the company's sales represented. The reason: the whipsaw, game theory tactics we've been talking about.

As you can see, the practicalities of the situation are such that, increasingly, businessmen are concluding that they have no real option but to settle such antitrust claims, even when they are confident that they did nothing wrong and have a solid defense. To be sure, on occasion some companies will run the risks involved. The automotive industry, for example, declined to settle class actions alleging antitrust conspiracies to withhold auto pollution devices and to eliminate discounts to fleet buyers, although the liability risk ran into many millions of dollars. Ultimately, by the way, they were successful in their defense of those charges.

But how many companies—and, in particular, how many small and medium-sized businesses—will or can take such risks—even when they similarly believe that they would ultimately prevail? Not very many, and fewer every day. The Federal judiciary has recognized that the mere possibility of enormous damages being assessed against an individual company in such cases has a coercive impact, and generates settlements without regard to either culpability or possible damage caused. Indeed, as the Federal judge in the Houston shipping container cases put it: "That this possibility is inherently coercive is undisputable. * * *"

Legislation which would enable antitrust charges to be addressed and settled—or litigated—on the merits is desperately needed. The legislation needed would remove—or "carve out," as it were—a settling defendant's share of the market from the liability of those who go to trial. The legislation under consideration today does that. Without such legislation, astute plaintiffs' lawyers will continue, through the use of "game theory" tactics, to whipsaw defendants generally, and small businesses in particular. The result will be huge antitrust settlements that bear no relationship to whether or not there was any improper conduct or damage suffered.

I do not fault the plaintiffs' antitrust bar, by the way, for their adroit use of these "game theory" tactics. They are simply taking advantage of certain outdated legal principles. The outdated rules which are the source of the current problem were concocted in medieval England, and have now been discarded in most areas of the law. They are thus increasingly peculiar to the field of antitrust law. That brings me to my second point.

2. CORRECTIVE LEGISLATION INVOLVES NO DEPARTURE FROM THE LAW GENERALLY

I would like to put one incorrect notion immediately to rest, and that is the idea that corrective legislation will represent some special exception to be applied in antitrust cases only. Far from it.

The principle involved is that one defendant should not be allowed to reduce its liability by a quick "sweetheart" settlement that leaves the other defendants holding the bag for acts that they allegedly did together. Such a rule has been adopted by the courts in many cases. In those cases, the courts have held that where a plaintiff chooses to settle with one of several joint defendants, the settling defendant has bought his peace and is out of the case, but in such a case it would be unjust to allow the plaintiff to recover from other defendants for the damages caused by the defendant with whom plaintiff settled. The Federal appeals court for the third circuit explained it this way:

"There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. *Gomes v. Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1968)."

This is not a new approach. The language I just quoted is from a case decided a decade ago. Twenty-five years ago Justice Brennan, one of the more liberal justices on the U.S. Supreme Court today, adopted this same approach in a case decided when he was on the New Jersey Supreme Court. *Judson v. Peoples Bank and Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954). Justice Brennan there pointed out that removing a settling defendant's share of damages from the potential amount recoverable from the remaining defendants reconciles the need for fairness to all parties and the policy favoring settlements.

The U.S. Supreme Court has more recently held that these principles of fairness should govern Federal cases generally. As the Court stated "a 'more equal distribution of justice' can be best achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974) (citations omitted).

This principle is now the rule in some 38 jurisdictions in this country. The idea that it is of recent origin or would represent a special rule for antitrust cases is incorrect. Increasingly, the present rule is unique to antitrust cases, and is even beginning to fade there as courts examine the problem. Thus, earlier this year the only Federal appellate court to hold squarely on the issue to date moved to bring the antitrust field into line with the general development of the law by adopting this principle as the rule in antitrust cases. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 1979-1 Trade Cas. ¶62,485 (8th Cir. 1979).

Thus, this bill simply brings the antitrust field into line with the law generally. This is especially necessary in the price-fixing area, where the injustices occasioned by the lack of such legislation are especially acute, and all the conditions for whipsawing at its worst are present. The risk involved in terms of potential liability is astronomical. By contract, in the price-fixing cases, the market share of any defendant typically is quite small. Thus, the risks faced by a company with even an outside possibility of having to pay for damage due to someone else's action is particularly great.

3. CORRECTIVE LEGISLATION SERVES THE PURPOSES OF THE ANTITRUST LAWS

My third and final point is that legislation to eliminate the injustices and inequities we've been discussing serves the two-fold purposes of the antitrust laws: to compensate victims and to deter violators.

The suggestion has been made that such legislation "might" complicate lawsuits. I believe just the reverse will occur. First of all, such legislation is not inherently complicated or complicating. Indeed, as I mentioned, its principles are already at work every day in other areas of the law—including the field of securities law, surely as difficult an area as price fixing. More importantly, this bill will eliminate what threatens to be a long and confusing period during which the courts bring the antitrust area into accord with the law generally. Far from complicating the situation, such legislation provides a simple, workable way to avoid substantial confusion and complication.

This legislation also improves the deterrent force of our price-fixing laws. Violators will not go unpunished, as they can now. Violators will not be able to buy their way out cheap with a quick "sweetheart" settlement, while the small or innocent are left holding the bag of potential liability for the actions of the settlers.

The only Federal appeals court squarely to rule on the issue came to the conclusion that: "*** on balance a rule allowing contribution is actually a greater deterrent. The fact that one [violator] may be held liable for all the damages arising from the antitrust violation necessarily means that other joint [violators] may go "scot free." This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

This possibility significantly increases where a large or powerful [violator] has sufficient economic influence to prevent a plaintiff from including it as a defendant. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 1979-1 Trade Cas. ¶62,485 (8th Cir. 1979). (Emphasis added.)

CONCLUSION

In conclusion, I believe there are strong reasons why this is a good bill. The bill remedies, in a fair way, a terrible injustice currently present in this area of antitrust law. The principles embodied in this bill are not a departure from the general trend of the law, but are in harmony with it. Finally, the bill does not complicate antitrust cases. Instead it enhances the deterrent force of the law by ensuring that any violators are brought to justice.

For all of these reasons, I respectfully urge that the subcommittee recommend that this bill be enacted into law.

Thank you again for giving me his opportunity to appear before the subcommittee. I would, of course, be happy to respond to any questions the Senators might wish to raise.

PREPARED STATEMENT OF ROBERT P. TAYLOR

My name is Robert P. Taylor. I have been an antitrust practitioner for nearly all of my 11 years of practice. For the last 5 or 6 years, I have been active in the antitrust section of the American Bar Association and was recently appointed to direct a task force organized to study contribution in antitrust cases. The task force is comprised of members of the civil practice and procedure committee of the antitrust section.¹

In general, I support the amendment to S. 390 proposed by Senator Bayh, although I will suggest several revisions which I believe are important from the standpoint of judicial administration. In my view, Senator Bay's amendment will provide immediate relief to a number of companies, usually smaller ones, which are currently being subjected to extreme prejudice as a result of having been swept into large class action proceedings along with other companies in their particular industry and left to face disproportionately large exposure to liability after other defendants have settled.

The mechanics by which such large exposure comes about is the result of the interaction of several rules that courts apply to antitrust cases. First, the liberal use of class actions gives rise in antitrust cases to massive liability to the class as a whole. It is not unusual for plaintiffs in a large industrywide class action to claim damages running to hundreds of millions of dollars.²

Second, under present practice each defendant coconspirator in a price-fixing case is said to be jointly and severally liable to the plaintiff (or plaintiff class) for treble the total of all overcharges on all sales by all coconspirators, not just for overcharges on its own sales. This means that the problem of massive exposure to liability exists, in the abstract at least, even before anyone has settled. The problem becomes concrete, however, as the number of defendants is

¹ The antitrust section of the ABA has previously taken a position opposing certain aspects of S. 390. David L. Foster, chairman of the civil practice and procedure committee of that section, has similarly testified. I concur in both. Accordingly, my remarks here are directed solely to the Bayh amendment to S. 390. The officers of the antitrust section have also advised the committee that they believe enactment of a contribution rule would be premature at this time. I believe that the Bayh amendment can be adopted without doing violence to that admonition, but that view is my own and is not represented as the view of the ABA or the antitrust section.

² In the *Corrugated Container* litigation (MDL-310), for example, the court recently noted that total damages have been estimated in the range of \$200 million to \$1 billion, before trebling (Singleton, J., order of May 30, 1979). In the *Plywood* litigation, three companies that did not settle face, by the estimates of plaintiffs' counsel, over \$1.5 billion in potential exposure based on a formula approved by the jury.

reduced by settlement and the likelihood of enforcement against a particular defendant is increased. Under present practice, the only effect on any given defendant's exposure to liability when another defendant settles is that the dollar amount of the settlement will be deducted from the total judgment.³

That deduction is often of little help. Taking a hypothetical, but typical case, plaintiffs might assert claims against an entire industry for \$200 million in overcharges, trebled to \$600 million. Plaintiffs might then settle for \$50 million with the larger defendants who represent 90 percent of all sales transactions in dispute. Those plaintiffs can then confront the remaining defendants, who had only 10 percent of the industry's sales, with a claim for \$550 million. To smaller companies, exposure of that magnitude can exceed their net worth by many, many times. Even a large company must think twice before undertaking that sort of exposure. Thus, it is not surprising that even the most innocent company may decide to settle instead of run the risk of trial when exposed to such liability. That, I submit, is a result which severely perverts the purpose of the antitrust laws.

In my view, the proposed legislation—if modified along the lines I will suggest—is a simple, effective and relatively noncontroversial means for dealing with the problem. The Bayh amendment does not involve any real change in the relationship between plaintiffs and defendants, and instead concentrates on the relative rights and liabilities of defendants, vis-a-vis one another, by abolishing, for price-fixing cases alone, the rule against contribution.

The legislation proposed by Senator Bayh addresses only a narrow aspect of the overall subject of contribution in antitrust cases, and it does so in such a way as to avoid the complexities and consequences which might attend a bill dealing with contribution more generally. This is accomplished by limiting its focus to price-fixing cases and by establishing a simple formula for its operation. Indeed, the proposed legislation does little more than to provide, by operation of law, precisely what defendants in some cases have been able to do by agreement. Where defendants are few, of comparable size, and of comparable innocence or guilt, it is not uncommon for them to enter into a judgment sharing agreement. Although such agreements are diverse, typically they provide that a judgment, if any, in favor of the plaintiff will be shared on some preestablished basis, often by market share, and second that if some signatory defendant should settle, that defendant must require the plaintiff to reduce any judgment against the other signatories by the settling defendant's stated percentage under the agreement or alternatively the settling defendant must remain liable to the other signatories for any settling difference. Judgment sharing agreements avoid the egregious situations to which the Bayh amendment is directed, because they prevent a nonsettling defendant from being confronted with liability based upon sales by others.

The need for the proposed legislation arises in those many situations in which a sharing agreement is not possible, either because of disparities in culpability, disparities in the size of companies relative to their market share, or simply because one or more defendants feels that it works to their advantage to have no such agreement. The proposed legislation does no more than to create a comparable bargaining position for an innocent defendant in a suit where others may be guilty, to a small defendant in a suit where others are large, and to all parties in proceedings where the defendants are too numerous or otherwise unable to achieve a suitable sharing agreement.

One of the first lawsuits I worked on was the *Western Asphalt* litigation, a multidistrict proceeding in which plaintiffs included six Western States and a number of cities and counties in those States. Defendants were mostly large oil companies, but there were also one or two small companies. The claim was that defendants had conspired over many years to overcharge plaintiffs for asphalt. In the suit brought by Oregon there were no small defendants with disproportionate market shares, and a sharing agreement was readily entered into. In the suit brought by Arizona, however, the Sahuaro Petroleum and Asphalt Co., an asphalt broker in Phoenix, was named along with Standard Oil Co. of Cali-

³ That was the holding in *Flintkote Company v. Lysfjord* (9 Cir. 1957) 246 F.2d 368, 397-398, and is generally followed unless the settlement agreement provides to the contrary. From an abundance of caution on the part of plaintiffs, however, settlement agreements with one defendant often include a express provision that plaintiff is free to pursue other defendants for his full damages.

fornia, Union Oil Co. of California, Shell Oil Co., Arco, American Petrofina, Continental and Gulf.

Compared with the other defendants, Sahuaro was diminutive, yet Sahuaro had made nearly 30 percent of the asphalt sales in dispute in Arizona during the later years. Anything approaching 30 percent of a possible judgment, however, would have put Sahuaro into bankruptcy, and because of that the defendants were unable to work out a sharing agreement. In 1975, the major defendants all settled the case prior to trial, but Sahuaro's management was adamant that they had done nothing wrong and were unwilling as well as financially unable to settle on a comparable basis. Later on, when further proceedings failed to result in dismissal of Sahuaro from the case, the company faced liability far exceeding its net worth and was forced to settle. Much of the liability facing Sahuaro was made up of claims based upon sales by the larger settling defendants. Counsel for Sahuaro informed me that a major reason why his client chose to settle that case instead of try it was because of that enormous exposure. The basis on which Sahuaro finally settled was less than that of the other defendants, but it represented a far greater portion of the net worth of the company.

Nor is Sahuaro an isolated case. The experience of that company has been repeated time and again in a number of industries. My partner, Francis R. Kirkham, testified last year in connection with S. 1874, and described the problems confronting our client, the Utah-Idaho Sugar Co. Utah-Idaho was one of the smaller companies in the *Western Sugar* litigation, with some 7 or 8 percent of the Western market. Although some of the defendants had been indicted for price fixing, Utah-Idaho had not. Because Utah-Idaho believed itself to be totally innocent of wrongdoing, the company was extremely reluctant to enter into a judgment sharing agreement based upon sales. As a consequence no such agreement was in existence when the first three defendants settled. Plaintiffs selected one defendant who had been twice indicted and offered it a "bargain" settlement. Some of the other defendants, including Utah-Idaho, quickly abandoned their objections to a judgment-sharing agreement, but their total exposure had already been increased significantly because defendants representing some 40 percent of total sales had settled leaving their transactions to continue as part of the plaintiffs' claims. Thus, in spite of what it considered a meritorious defense, Utah-Idaho felt forced to settle.

A number of arguments have been asserted against the proposed legislation which are worthy of comment. In general, I believe that the discretion of the trial court to deal with procedural problems, together with the inherent narrowness of the proposed legislation, avoid virtually all these problems, providing that the amendment is modified as I will suggest. The concern, for example, that the plaintiff will lose control of its lawsuit is not justified. If plaintiffs choose to sue less than all of those responsible for their asserted damages, it is not unfair to add as defendants those whose transactions with the plaintiffs give rise to their claims. The trial court has ample discretion under the Federal Rules of Civil Procedure to protect those plaintiffs from any abuse that might arise through defendants' impleading third party defendants or otherwise seeking to expand the scope of litigation. Rule 14, which establishes the procedure for adding third parties to an ongoing proceeding, expressly provides: "Any party may move to strike the third party claim, or for its severance or separate trial."

This provision was added when the rule was amended in 1963 to emphasize that the addition of third parties is purely discretionary with the court. Thus, in my judgment the fear that a plaintiff will lose control of his lawsuit is simply not well founded.

Another argument sometimes advanced in opposition to a contribution rule is that it will burden the plaintiff by making the lawsuit more complex. This argument apparently stems from an envisioned need for the court to hear additional evidence in order to decide the amounts for contribution among defendants. Even where the basis for contribution is itself a complex problem, however, that would normally not affect the plaintiff. Such evidence can be heard by the court after judgment, and indeed that is routinely done in other cases involving indemnity and contribution. As noted below, I believe the legislative history of the amendment should make very clear that the Congress intends contribution to be decided by the court alone.

The second reason why the proposed legislation will not complicate the proceeding is that under the scheme of the Bayh amendment, contribution is simply

arrived at. The formula for contribution will reflect only the ratio of damages allegedly attributable to a given defendant to the damages as a whole. In most cases, this will require little more than an accounting task to affix each defendant's respective share of a judgment. Under the usual kinds of damage theories used in price-fixing cases, relative liability among defendants will be based upon relative sales to the plaintiff or plaintiff class, but even where some different theory is proposed, the plaintiff himself still must prove he has been damaged, and that proof will provide the basis for contribution.

It has been suggested by some that any rule favoring contribution is wrong, because it may dilute the deterrent effect of treble damage suits. This argument proceeds from an assumption that deterrence is automatically enhanced by arbitrarily and endlessly increasing the exposure to liability faced by any defendant. To begin with, I disagree with that assumption. A large judgment, representing treble the damages caused by a given defendant alone, when added to the criminal sanctions, is itself a substantial impetus for compliance with the law. Moreover, within a given organization a very real deterrent to future misconduct arises from the tremendous expense and inconvenience of the lawsuit itself, i.e., from losing employee time to prepare the defense of litigation, having to retain large numbers of lawyers and legal assistants over a long period of time, having a company's files disrupted, and seeing large legal bills month after month. In that sense, the presence of a large antitrust suit works its internal effects throughout the course of litigation and long before a case goes to judgment.

I have serious doubts whether any businessman has ever decided to forego an effort to fix prices out of fear that he would be required to pay damages caused by others in addition to those he caused. Moreover, one must consider the very real danger that limitless exposure to liability will deter desirable, procompetitive business behavior, simply from an overabundance of caution. The massive liability being seen today must necessarily make businessmen and their lawyers think twice before deciding, for example, to imitate the practices of a competitor even though such imitation might be the very best way to aggressively compete for the customers of that competitor. In *United States v. United States Gypsum* (1978) 98 Sup. Ct. 2864, the Supreme Court noted the danger of "over-deterrence" in the context of strict criminal liability. I believe that the same observations are equally applicable to massive civil liability: "[There exists] the distinct possibility of over-deterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment" (98 Sup. Ct. 2875-2876).

In a footnote, the Court continued: "* * * where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessary redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose" (98 Sup. Ct. 2876).

There is yet another reason that I reject the theoretical argument that deterrence is entrenched by proceeding arbitrarily against only one of several wrongdoers. It is at least as logical to assume, still theoretically, that deterrence will be *diminished* if some wrongdoers are permitted to walk away, not only unscathed by the penal aspect of the lawsuit but unjustly enriched by having been permitted to retain their unlawfully obtained overcharges. At the very least one must conclude that what does or does not deter unlawful conduct proceeds from a highly speculative and theoretical analysis and provides no rational basis for a rule so manifestly unfair in many situations.

The final argument in opposition to contribution is that it will deter settlements. The Bayh amendment, however, will not deter any settlements that are just and equitable. Under its provisions, a defendant can still settle with the plaintiff for whatever value he and the plaintiff can agree, and the only real change that the amendment would make is to preclude the plaintiff from then asking some other defendant to pay damages based by formula on the sales of the settling defendant. Thus, the effect of the amendment is simply to put this later settling defendant on the same footing with those, possibly more culpable, defendants who settle early. Indeed, by putting exposure to liability on

a more rational basis, the effect may be to enhance the prospect for settlement.

I mentioned at the outset that I am generally in favor of the Bayh amendment, but that I would like to propose some changes.

To begin with, I strongly urge that the amendment be made prospective, i.e. expressly applicable to conduct occurring only after the date of enactment.

Second: I believe that both occurrences of the words "directly or indirectly" might be stricken following the word "attributable." While I think that the word "indirectly" is intended to provide for consequential harm from an overcharge, as opposed to the overcharge itself, I think there is some danger that a court might construe that as a congressional endorsement of damages by remote purchasers in the chain of distribution. That matter, of course, is currently before this same Congress in a highly controversial bill, and I see no need to raise the issue by indirection in connection with this proposed legislation. The words "directly or indirectly" are superfluous to the proposed legislation, and the amendment works exactly as intended without them. Accordingly, I would delete them, or at the very least, make certain that the report of this committee properly reflects their meaning.

Third: I believe that the proposed legislation should require that when a complaint is filed in an antitrust action, any defendant that seeks contribution must file its cross-claim or third party complaint within a short period after it has been served. Absent such a requirement, a defendant could delay filing its third party complaint until long after the principal action had been commenced, thus substantially prejudicing the ability of the third party defendant to conduct a proper defense. For the same reason, the amendment should make plain that separate actions for contribution are not permitted. Otherwise a defendant could wait until judgment was rendered against it and then pursue other parties in an attempt to obtain contribution. Because these new parties would not have been involved in the trial of the first action, the entire case might have to be retried on the merits. The result would be a prodigious waste of judicial and private resources and substantial prejudice to the new defendant. Thus, the elimination of a separate action does much to answer those concerned with increasing the complexity of litigation.

Fourth: Most urgently, I would strike the parenthetical "including purchases from or sales to nonconspirators" from the second paragraph. To begin with, the phrase is ambiguous because it suggests that sales by those not even alleged as coconspirators should be added to sales by each settling defendant to ascertain the amount by which a judgment should be reduced when that defendant settles. As I analyze the matter, this will distort the settlement picture to the plaintiffs' detriment to the extent that such sales by nonconspirators are proven.

More important, however, the U.S. Court of Appeals for the Third Circuit, in *Mid-West Paper Products Co. v. Continental Group, Inc.* (CCH Trade Reg. Rptr., 1979 Trade Cases ¶62,531), recently ruled that sales by nonconspirators cannot provide the basis for a claim for overcharges against price fixers in the same industry. That holding is likely to stir up some lively debate, and I think it would be most unfortunate for Congress to prejudge the issue as part of the proposed legislation without careful consideration. There is no real need for the parenthetical phrase, because if such damages are held to be proper, they would automatically become part of the "total" damages. Stated differently, the proposed legislation will work exactly as intended without the phrase.

Finally, the proposed legislation should make explicit that a judgment for money damages must be returned against a defendant before that defendant can seek contribution from others. Settling defendants should not be permitted to compel others to contribute to paying the settlement which the settling defendant itself negotiated.

However, by that time, the hundreds of individual Datsun dealers in Iowa, Arizona, elsewhere across the country were long gone from the lawsuit. Under the present scheme, each one of these small dealers faced potential liability for all sales of Datsuns in America, a staggering sum. Their innocence in fact had become irrelevant because the small dealers simply could not take the risk of a trial under those circumstances.

Instead, they had agreed to pay a collective total of hundreds of thousands of dollars rather than run the potential risk of the huge

liability involved. Only the big company could go to trial and ultimately prove its innocence as it did.

With that, I think I would like to let the balance of the statement just be entered into the record and I would like to let Mr. Taylor take over.

Mr. TAYLOR. My name is Robert P. Taylor, and I am with the San Francisco law firm of Pillsbury, Madison & Sutro.

I, too, would like my written statement be entered into the record.

Ms. JOSEPHSON. Without objection.

Mr. TAYLOR. I would like to address two of the arguments that I have heard this morning and then answer questions you may have.

Mr. Shapiro made the argument that a small defendant with a large market share might well be hurt by the enactment of the Bayh amendment. To support that argument, he alluded to occasions when plaintiff's counsel have given special consideration in that situation to settling with small defendants at some sort of a lower rate than they settled with the larger defendants.

The important point is that under the present state of the law any defendant can be subjected to the whimsical application of the overall effect of one of these proceedings, be it small or large. Under the present state of the law that same small defendant that Mr. Shapiro was referring to is susceptible of being injured now, and it is only the existence of a given occasion where one defendant in that situation was not injured that he supports his argument. The law ought not to provide that kind of power to a private group to inflict damage on some other private group.

Mr. Shenefield in his statement this morning made a reference to the fact that in his experience the plight of small defendants has not been one that has come to his attention on many occasions.

I think that it is quite important to note that it is not just small defendants that can be injured and subjected to extraordinary pressures to settle a case in spite of their innocence. The dynamics of settlement are the same whether the defendant is large or small. The way that a businessman looks at the settling any piece of litigation is to ask his lawyer what the likelihood is that he is going to lose? He tried to develop, for the framework of his analysis, some kind of a percentage figure. Then he asks, what is my exposure to liability if I do lose? Then it is a relatively simple matter to multiply the percentage figure times the exposure to liability and come up with a number that—other considerations aside, for example setting aside the cost of the case, and the likelihood that he will be able to get others to share it—gives him a ceiling at which he might start thinking seriously about settling the litigation.

No lawyer can tell his client, the point that has been emphasized before, even though he is absolutely innocent, that he stands a 100-percent chance of winning a large antitrust case or any other kind of a case. The imperfections in the judicial process just don't permit that kind of certainty. I hear estimates running from 5 percent to 25 percent, for the most completely foundationless lawsuit, in terms of the likelihood that it might be lost under the right circumstances before the right jury or before the right judge. Given those kinds of uncertainties, it is the massive exposure to liability that creates the problem.

There are a number of factors that contribute to massive liability—the trebling provision, the existence since 1966 of a class action rule in which class members are required to opt out of the class as opposed to opting into the class, which was the procedure prior to 1966, and of course, joint and several liability.

In any event, I think the record should reflect a concern at least on my part for more than just that of a small defendant. I think that any defendant can be subjected to this same process because it is subject, in many respects, to exactly the same dynamics for settlement.

One of the points that was emphasized by the subcommittee this morning is a concern about the impact that the Bayh amendment may have with respect to the deterrent effect of treble damage litigation on compliance with the antitrust laws. I deal with that subject at some length in my written statement.

I would like to add, though, the point that I disagree with those who take the view that a businessman can make a calculation before entering into some kind of an illegal agreement and assess risks versus possible benefits. Damage theories emerge from litigation; normally they are not the product of any calculus employed in the business world. I am not familiar with any situation, and I doubt seriously that any exist in which a businessman has sat down and made such a calculation and then decided to forego an illegal agreement because he might be subjected to possible liability caused by other parties to that agreement. I just do not think businessmen approach problems in that fashion.

Mr. Shenefield made reference this morning to the subject of price fixing in the context of being an intentional tort. I think that it should be emphasized that price fixing, of course, may be an intentional violation of the law, but many, many of the cases which come before the judiciary which can be characterized as price-fixing cases do not involve any intentional violation of the law and often quite to the contrary.

One that comes to mind immediately is the cases which have arisen in the aftermath of *United States v. Container Corp.* in which companies in an attempt to aggressively compete in an industry have pursued efforts to obtain information about the prices in the marketplace, even by asking employees of their competitors. In some cases those efforts were occasioned out of the advice of counsel that the company needed specific price information in order to comply with the Robinson-Patman Act.

Recently the U.S. Supreme Court found it necessary to address whether or not such efforts to acquire price information are consistent with the *Container* doctrine, and the Supreme Court has said that they are not.

But I call to the attention of the subcommittee that several circuit courts, in the interval between 1969 when the Supreme Court decided *Container* and 1978 when it decided *Gypsum*, several circuit courts held that such efforts were perfectly proper and consistent with competition.

So that I think one has to be very careful before concluding that cases which some characterize as price fixing, as a general proposition, always involve an intentional tort.

I would like also to urge that the subcommittee pay special attention to the suggested changes which I have proposed in my written statement. If anyone has questions I will be happy to try to answer them.

Ms. JOSEPHSON. I would like to address a few questions to the panel as a whole.

Mr. Shapiro said, and I want to elucidate on some of his ideas that he, in his role as plaintiff's lawyer, would not have settled in a certain case if the Bayh amendment were in effect. I would like one of you, perhaps Mr. Taylor, to address that issue as Mr. Shapiro positioned it. I didn't quite understand why he wouldn't. I really did not see how the Bayh amendment would deter him from settling.

Therefore, would you explain to me why you think the Bayh amendment would or would not encourage settlement and what you think Mr. Shapiro's particular objections are? Do you think they are valid?

Mr. TAYLOR. I didn't fully understand his analysis either. I don't think that the Bayh amendment will deter settlement. To the contrary, I think that by putting any given defendant's liability on a more rational basis it is likely to enhance the prospects for settlement.

Under the Bayh amendment, and this is a point that I address quite specifically in my written statement, the Bayh amendment really does no more than what some defendants in some industries are able to do by sharing agreements. I haven't found that sharing agreements have deterred the settlement of litigation. To the contrary, they provide everyone with a much more realistic measure of overall exposure to liability, and so they provide a better basis for making the calculations that I mentioned earlier.

Ms. JOSEPHSON. Do you think that is the end of it? He discussed it in several different areas. Could you expand on what you just stated?

Mr. TAYLOR. I think Mr. Shapiro was of the view that the last sentence of the Bayh amendment did not cover a settlement. That was my understanding from an exchange which took place between him and Mr. Sachnoff. So he may have been under some misapprehension as to what was intended.

Ms. JOSEPHSON. Does it appear to you that that last sentence does cover settlement or should we redraft it?

Mr. TAYLOR. I read it that way. But if you wanted to add "covenant not to sue or received in a good faith settlement" that would make it explicit.

Mr. KEMPF. I may suffer from, I think, knowing what Mr. Shapiro was driving at. I don't understand having the problem with the last sentence, but what is triple "i" in the second paragraph?

Ms. JOSEPHSON. Isn't that another issue?

Mr. KEMPF. I think that is the issue he was addressing. I think he had a one-of-a-kind case he was describing. I don't think it is widespread. I don't think it stops settlement. What he was suggesting was the unusual, and if I must say so, in my experience a singular proposition where you have a defendant who has a very large share of the market who didn't do anything and doesn't have any money and a very small person with a small percentage of the market who did an awful lot of things and has a ton of money. I think the Senator very effectively pointed out that that struck him as being remote. I have been there like Mr. Shapiro, as he kept saying, in the real world, and I have never seen it before.

In any event, on the broader question which you are raising of will this bill discourage settlements generally, my view on that is the answer is no. The only settlements that this bill is going to discourage are those settlements under which a culpable or more culpable defendant, particularly a large one, makes an early sweetheart settlement and escapes liability and the other settlements it might discourage are the inequitable settlements that Mr. Kress described of the innocent defendant who finds himself late in the litigation facing this monumental risk of liability, and under the pressure of his creditors he just cannot run the risk of proving his innocence at trial.

It is like the *Nissan* situation, where the large company could run those risks and could prove its innocence but the small companies pay hundreds of thousands of dollars in a case where the charges were later found not guilty. They didn't get a refund and only the large company was vindicated.

Mr. Sachnoff also referred to Mr. Shapiro's experience in the fleet discount case. There are occasions when someone does run the litigation risk. Examples of that in the automotive industry are the auto pollution cases out in Los Angeles where there was an alleged conspiracy to withhold devices from the markets and the allegation against the auto industry that there was a conspiracy to deny discounts to fleet buyers of automobiles. That is the fleet discount case that Mr. Shapiro tried and Mr. Sachnoff referred to.

In both of those cases at the trial or the proceedings as they went forward, the defendants ultimately prevailed. But how many companies and especially how many small- and medium-sized companies can run those risks, even if they, too, believe that they might ultimately prevail? The answer is that there aren't very many and that there are fewer everyday.

Mr. COOPER. May I ask one question? Would you describe what a "sweetheart" settlement is?

Mr. KEMPF. A "sweetheart" settlement is a settlement where someone is approached early in the litigation, and what happens is the plaintiff's counsel—you heard the testimony this morning, Mr. Cooper, how there could be up to 40 people in these proceedings. The plaintiff's attorneys, people like Mr. Sachnoff and Mr. Shapiro, are very sophisticated. They took a look at the defendants and they say, "We want to get the ball rolling up, we want to get it up at a high level. Who are the likely candidates to settle?" They are going to those candidates and they say, "We will give you a double-barrel incentive to settle right now: (1) a heavy discount for being first in line; (2) we will promise you that nobody else who comes after you is going to pay less." Who do you think is going to find that attractive? The culpable defendant, particularly one with a large market share. So they can use that to get going. From that defendant's perspective, if he is indeed culpable, that is what is known as a "sweetheart" settlement.

He is the guilty, large person and he gets off cheap. Someone like Mr. Kress is standing there. He thinks he is innocent. He doesn't know what went on in this thing. He is a bystander in something that may or may not involve others, and all of a sudden he is looking

at a situation where he is facing astronomical liability because there has been no carveout, and he has creditors who say you can't realistically roll the dice on this.

Even if you are innocent you can't do it. I want to make one other point on this thing and that is this: One thing you have to bear in mind about this \$300 million settlement pot that Mr. Sachnoff referred to, all of those settlements were achieved before a single deposition was taken in the case. More significantly than that, however, after the settlements were achieved, they held a related criminal trial. All of the defendants who stood trial against the criminal charges were found not guilty. The defendant who in the civil case settled earlier had paid more than any of the other defendants who settled, was one of the companies found not guilty.

Running throughout this discussion this morning is a bit of a tone that I detect from those who are opposing the bill that says these people are all guilty anyway. You don't need to have any sympathy for them. The fact of the matter is that, in many of the cases where someone has had the guts to run the risk of going to trial, they have been found innocent and in related criminal cases they have been found innocent.

The civil case, the risk is too high that you have to face the staggering sums that the present scheme may allow you to face. That is what leads to these settlements of many companies.

Mr. COOPER. The standard of proof is different in a civil case. Is that right?

Mr. KEMPF. That is true.

Ms. JOSEPHSON. I would like to ask you a question about the issue of the frequency of occurrence of these situations. Mr. Shenefield, and I think Mr. Shapiro, indicated that there were not that many small- and medium-sized companies who are really in a position where they would be held liable in antitrust cases. How many examples of or what is the number of cases of these small- or medium-sized companies being dragged into litigation? Is this a common practice? Could you tell us about the incidence of this kind of thing?

Mr. Shenefield said specifically that this issue had not been brought up in the antitrust group that he headed to revise antitrust laws, that nobody had brought up this as a problem of small- and medium-sized companies. Could you address yourself to that question?

Mr. KEMPF. Yes. I had it in my notes as something to raise. Mr. Shenefield did question how severe the problem was, and he also, and particularly under questioning by Mr. Cooper and Senator Baucus, said that his primary concern with the legislation, he was unsure how it impacted, was this whole question of the deterrence. I think the two are interrelated. In my experience, the problem is present in every case, where price fixing charge is raised. The problem is more aggravated as you have a class action on behalf of an ever-larger group of purchasers on the one hand and as the industry itself becomes larger in magnitude on the other. So that I think the problem is always present.

The thing that you raise about the small businessman is particularly important to the question. Here is why: In the situation where the in-

dustry is more fragmented, there are increasing opportunities for these whipsawing tactics, whereby the more guilty get out earlier and the innocent are left later to pay dramatically higher dollars for something they may not have even been involved in at all.

The reason for that is simply the law of numbers. If you have a situation hypothetically where you have two people in the industry and one has a 70-percent market share, he is already looking at the bulk of the liability. It is when you have industries that are dominated by small businessmen that, with small market shares, that you get an increasing seriousness of the problem. So that the industries that are less concentrated and that are dominated by small businessmen have a higher degree of seriousness to the problem, because of the very nature of those industries.

One other point and that is this: On the deterrent question, how that impacts it, if indeed there is a concern that having this rule may enable businessmen to sit down and make a cold risk-return analysis calculation, as it were, to have a better fix on what their exposure is, and thereby encourage violations. That is nonsense. An antitrust would-be violator already faces severe personal criminal sanctions, substantial corporate fines, and the threat of treble damages. Moreover, if they wanted to sit down and make this calculation, they could do that under the present arrangement and sit down and draw up a sharing agreement ahead of time.

To the extent they want to do that, they can already do it. So that this legislation would have no impact on that at all. It would, however, benefit the small businessmen where there are these diffuse industries—I think Mr. Kress said there were a thousand in his industry—where the risks are so great based on such a small market share.

Ms. JOSEPHSON. Would you comment on Mr. Shapiro's contention that larger companies could use the existence of contribution to drive smaller companies out of business?

Mr. TAYLOR. I think that under the present state of the law, that would be a greater possibility. I don't know of any instances where that has happened, but if you put yourself in the position of the Westvaco Co.—and I use them as purely a hypothetical example but taking certain facts out of their brief. The Westvaco Co. filed a brief seeking contribution before the court in Houston. They were in the position of being one of a handful of companies that had made about 20 percent of the sales in disputes. I think their brief said they alone make 3 percent of the sales and yet they were facing 80 percent of the liability in the industry.

Again, let me emphasize, I am using them only as a hypothetical example. But if a large defendant wanted to put one of its smaller competitors in a position that was absolutely untenable from a business point of view, that would be a way to do it and a way to do it with the sanction, indeed the assistance, of the judicial process.

So I think that to the extent that there is a problem here, the very least that can be said is that it works both ways.

Ms. JOSEPHSON. I have another question. Mr. Shapiro spoke about the likelihood of some of the plaintiffs' rights to sue or to get what they are supposed to get under the law being abrogated. Would you care to comment on that? That is, how plaintiffs' rights will be dealt with

under the Bayh amendment? Do you think they will be abrogated in any severe or substantive fashion?

Mr. TAYLOR. No. For starters, the Bayh amendment does not address itself to the problem of joint and several liability. I have intentionally not complicated my statement by trying to address that. I think we are at a point in the development of the antitrust laws—in part brought on by the massive liability that we are beginning to see in civil cases—where we might seriously reexamine whether the courts are correct in concluding that all defendants in a large industrywide case have responsibility for the injury to all plaintiffs. I think that question really needs serious reexamination. But the Bayh amendment doesn't address itself to that. The only thing the Bayh amendment seeks to do is reorder the rights and liabilities as among the defendants.

Mr. KEMPF. Let me add a comment to that. The question whether plaintiffs in effect lose control of the lawsuit, I believe is just a boogeyman that has been raised by those attacking the bill. In other fields of law we already have contribution schemes similar to the Bayh amendment, and in all of those situations, we now have 38 jurisdictions, for example, that provide for contribution, the plaintiffs haven't lost control over their suit and they have still been able to resolve them in a litigation or settlement context as is appropriate. Particularly in the Federal securities area, which is an area certainly as complex and complicated as antitrust law, we have contribution.

I don't see the plaintiffs losing control of their suit. I don't see them unable to be worked out in a reasonable settlement fashion when that is appropriate. I don't think that there will be any change in the antitrust area as well. As far as the question of joint and several liability, again, in this area the Bayh amendment does not impact the plaintiffs at all. They can still sue whomever they want and collect from whomever they want.

Ms. JOSEPHSON. Mr. Chumbris?

Mr. CHUMBRIS. I was going to make one observation, and that is the point that Chairman Bayh made. Perhaps it would have been better to put you two on this side and the other two, Mr. Shapiro and Mr. Sachnoff, on the other side, and make a debate of it. You might want to go back and then submit for the record some points that rebut, maybe on the quick questions and answers that you didn't have an opportunity to do so. That should be reserved also for the two gentlemen who preceded you to have that same opportunity.

Mr. KEMPF. That is a good idea. I would like to make a few comments that I noted about some of the things that were said this morning. First of all, the only laughter we got this morning I guess was when Mr. Sachnoff talked about how reasonable his colleagues in the Plaintiffs Executive Committee are. But the example he gave with Consolidated Packaging is a phoney one. Let me tell you why. There what they did is they sat down and they made a calculation, as he said, with the aid of their accountants to see how much money they could get from Consolidated.

There is an old saying, "you can't get blood from stone." They recognized the dire straits Consolidated was in. That is what they

did. In Mr. Kress' example, his company was not in those dire straits and the plaintiffs' attorneys could look at a financial analysis and say, "we can get up to several million dollars from this guy." So their willingness to not get the last dollar that will break a company does not address the problem of their willingness to extract large sums that bear no relationship whatever to whether that defendant did or did not engage in improper conduct or to whether the plaintiffs suffered any damage. That is not addressed by the comments.

Another thing I would like to address is something that both Mr. Shenefield and Senator Bayh were sort of groping for. That is that while the present bill addresses the price-fixing area perhaps it ought to be broadened to include other areas as well. I think Assistant Attorney General Shenefield at one point said, "Well, gentlemen, maybe what might be the best resolution is not to have a bill that addresses price fixing but rather a bill that gives a guiding general principle that says, in effect Congress believes contribution to be a good idea, and the courts ought to implement it in particular cases as appropriate."

At one point Senator Bayh referred to moving down the clause from the beginning of the first paragraph, the one that is there now, to the start of the second paragraph, as perhaps a move in the direction of indicating a general approval of the principle of contribution.

I agree that there should be a move in that direction. I don't think that shifting the clause as Senator Bayh suggested be considered achieves it. I think you need two things. I think you need to address the problem specifically in the price-fixing area, plus give general guidance for other areas. The reason you need to do it in the price-fixing area, and the reason I think you need to have better language than merely pulling that introductory clause that is presently on the first paragraph down to the second paragraph is that the smaller companies in particular need guidance in this area.

Let me say that any of these approaches are decided steps forward. But making the change that was sort of thought about out loud this morning really helps the big companies' problems probably more than the small companies' problem. The reason I say that is this: The large companies can live with a rule that says, "Well, except as otherwise determined here is the rule," a lot easier than a small company. A small company goes to his banker and says, "I think I've got contribution here but there is this clause at the front end that says, 'except otherwise as provided'." The banker is going to say to him, "What does that mean? I am looking to make you a loan and we need some certainty here." So I think in the price-fixing area, for the benefit of the small businessman when he is facing the staggering risk of liability even if innocent, he has to have some recognition that there is a need for certainty that enables him to survive or, if he wants to, stand up and have his day in court. I think one of the worse things about the present system is that the defendant is oftentimes deprived of any effective or real opportunity to have his day in court, to go in and say, "Gosh, I think I am innocent; I am going to roll the dice and try to prove my innocence to that jury." What happens, where there is no carve out such as the Bayh amendment would provide for, he faces these staggering outlying sums and he comes under tremendous pressure, partic-

ularly by his creditors, not to take that chance and to pay something, to relieve himself of the simple risk.

Another question that has been raised is the matter of prospectivity. I have given some language to the staff. I think it is important that however the matter is resolved, it not be done in the way that would interfere with the ability of the courts to address the problems of people currently in litigation.

My own view is that the proposed legislation should not be made prospective only, but at the same time there should be preservation of settlement agreements for those who have made settlement agreements and thought they bought their peace. There should be a recognition through language to protect those accomplished results.

Mr. COOPER. You would just reduce the plaintiff's potential for recovery, in pending suits, but require the plaintiff to honor settlements made before the effective date of the amendment.

Mr. KEMPF. There are several versions of the language, some which would have that and some which would not.

Mr. COOPER. I just have a few questions.

I take it both of you gentlemen primarily represent defendants?

Mr. TAYLOR. That is correct.

Mr. KEMPF. That is correct in my case.

Mr. COOPER. Have either of you ever recommended that a defendant who you represented accept a "sweetheart" settlement?

Mr. KEMPF. Have either of us?

Mr. COOPER. Yes.

Mr. KEMPF. I have tried to persuade clients that because of the outlying risks involved, they should try to be early without any regard to whether they have any liability or not, not in the context of a "sweetheart" settlement, not in recognition of any guilt, but recognizing that this panic and whipsawing is going to set in and if they don't move early and fast they are going to come later in line at a higher price.

I had it happen to me where a defendant will look me in the eye and say to me, "I didn't do it, I am not going down there." What will happen, 2, 3 weeks later he will say to me, "You know, I could have settled for maybe one-half, one-third, one-quarter of what I will now have to pay but I see it going up everyday and I want you now to go down there. My views haven't changed but it is getting too scary. My board is putting pressure on me. We have to bail out."

Mr. TAYLOR. I guess my response to the question is that whenever I am confronted with a settlement offer of any kind, I try to help the client evaluate it from a business point of view. I described earlier what I consider to be an appropriate settlement calculus, and in my experience, that is the way virtually all businessmen approach this sort of thing. A businessman tends to look at litigation as a contingent liability very much like any other contingent liability, and they tend to approach it that way. If a settlement looks like something that is good from a business point of view, then anyone is likely to take it.

Mr. KEMPF. Let me make another comment that addresses that point. As I pointed out earlier, all of the settlements in the corrugated case that are presently down there were made before a single deposition was taken.

Mr COOPER. Are they all "sweetheart" settlements?

Mr. KEMPF. No. Decidedly not. In light of the jury verdict, it suggests that there are no "sweetheart" settlements there, in the sense that no one went into that saying to himself, "I am guilty, therefore I've got to settle early." What they do is they have a practical problem. I want to expand on my earlier answer to your point. You can't stand around to find out. You say to yourself, if there is someone guilty, he is going down. I may not have even talked to anybody yet and I say, look, realistically the whipsawing is going to start and the question is whether you come early or come late or make the draw right now before you have looked at all of the documents, talked to the people, listened to what other people have to say, that you are going to stand the risk of trial. A carve-out, contribution and carve-out rule like the Bayh amendment, would enable people to have their day in court, to find out whether these people who are colored as being price fixers of the worse sort, whether that is true or not. It gives them the chance if they believe they are innocent to have their day in court. They don't have what they now have, the unrealistic alternative of saying, well, I take my chance, I may be tainted by the evidence of 40 other defendants and I find myself running the risk of liability for everyone, not just my own sales.

Mr. COOPER. I think Mr. Kempf mentioned several times the relationship of Senator Bayh's amendment to existing law. Do you know of any existing statute that has a provision equivalent to little triple "i" in the second paragraph of Senator Bayh's amendment?

Mr. KEMPF. You asked that question before and I am glad you re-raised it because I did mean to address it.

Mr. COOPER. Do you have a good answer? [Laughter.]

Mr. KEMPF. There are two answers to it. You have to look at two kinds of lawsuits, those that come under specific legislation and those that come under the common law. The answer is under the common law there are a wide variety of jurisdictions that do have systems that, while they may not be identical, are similar in approach. There is also now legislation that has been proposed that again while it does not adopt an all-fours approach is very, very close. That is the Uniform Comparative Fault Act which was drafted in 1977 by the National Conference of Commissioners on Uniform State Laws. It was approved by them. It has been recommended for enactment in all of the States.

Mr. COOPER. It deals with settlement the same way little triple "i" does?

Mr. KEMPF. In somewhat the same way. Let me just read for the record what I have in mind.

Mr. COOPER. You can submit it for the record.

Mr. KEMPF. It is section 6 where it says a release, covenant not to sue or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with another provision of the act.

So as you can see it is very similar to the Bayh amendment.

Mr. COOPER. Has that been adopted by any States?

Mr. KEMPF. I have not taken a look. I don't believe it has. The reason I say that is I think one of my colleagues would have told me if it had been.

Mr. COOPER. Both of you are members of the ABA Antitrust Section?

Mr. KEMPF. I am a recent member.

Mr. TAYLOR. I am.

Mr. COOPER. I take it both of you disagree with Mr. Holmes' letter urging the committee to defer contribution legislation pending a thorough study which he says will be completed in August. I think Mr. Taylor is involved in one of those studies, right?

Mr. TAYLOR. I am.

Mr. KEMPF. We both are.

Mr. TAYLOR. The question, do I disagree with the letter?

Mr. COOPER. Do you disagree with his suggestion that we defer consideration of this particular issue until you finish your study?

Mr. TAYLOR. I think that the amendment proposed by Senator Bayh addresses itself to a problem which is right now urgently calling for relief. As set forth in my written statement, I think that one can separate the question of whether there should be contribution as a general proposition in all antitrust cases from the question of whether there should be the Bayh amendment.

The Bayh amendment as drafted is directly addressed to a certain specific kind of problem that exists and, as I set forth in my written statement, I think it operates in principle precisely like a sharing agreement. It is relatively simple in its operation, so that I think the Bayh amendment can be adopted without doing violence to the admonition in Mr. Holmes' letter that the general subject of contribution is one requiring a great deal of study.

Mr. COOPER. Do you try to achieve sharing agreements in all of your price-fixing cases?

Mr. TAYLOR. I think that is one of the first things that occurs to a defendant in a case where there is a charge that he and other defendants have conspired to injure the plaintiff. It is a very natural byproduct of the joint and several liability, particularly when that is coupled with the massive liability that potentially results from the class action device.

Mr. COOPER. I take it you fail to get them in some cases, defendants do enter into early settlements and maybe even "sweetheart" settlements?

Mr. KEMPF. It is harder to get a sharing agreement when you have a large diffuse industry than where you have an industry dominated by a few large companies. The more small companies there are in the large industry, it is like anything else; it is harder to get an agreement when there are more people. So that is the fact.

Mr. CHUMBRIS. Would you point out what you consider few in number?

Mr. KEMPF. Few would be four or five, for example. There it might be easier, I think, to put together a sharing agreement than something like the *Corrugated* case where there are, say, 40 defendants or so.

Mr. COOPER. Price fixing is more common in industries that are diffuse. Isn't that true?

Mr. KEMPF. Price fixing is more common what? Industries where there are fewer people?

Mr. COOPER. More people.

Mr. KEMPF. More companies.

Mr. COOPER. Price-fixing conspiracies are more likely in industries where there are a greater number of competitors?

Mr. KEMPF. It depends on how you look at it. In many cases one can say the most price-fixed industry in America is the American farmer because of the intervention of the Federal Government, and yet that is the most diffuse industry there is.

So my own view is that the best way to effect a price conspiracy is to bring in the Federal Government. I myself feel very strongly that one of the most serious problems you can have in the economy is price fixing, yet I do have some sympathy for the businessman who might have as his neighbor a dairy company, a trucking company, and until recently an airline executive, and the four of them were out one evening and they all go to the same meeting, they all fix prices, the only difference is that three of them are sponsored by the Government and the fourth one goes to jail. So he is in a bit of a confused state because of the present situation. So I think the most serious price fixing occurs because of Government regulation. I have not seen any definitive studies as to whether absent that it is more effective in smaller versus larger, but again it would seem to me that if you are going to have tacit collusion, with fewer people it may be more effective.

As far as the ABA study is concerned, of course, they will address the broader question that both Senator Bayh and Mr. Shenefield raised, perhaps contribution is a good idea in a wide area of antitrust law. Mr. Taylor and I are both on that ABA task force. We will give that serious thought. I, speaking for myself only, not as an ABA spokesman or member of the committee, other than my own personal views, I don't need that kind of discussion for the price-fixing areas. I have lived through too many years, too many examples of this; I know it is desperately needed. I know it is needed now.

The time to set that in motion is now, and it is through this amendment.

The other question—I have a note, but I have lost it.

Mr. TAYLOR. Mr. Cooper, just so that the record here is clear, I have to make the same disclaimer as is made in my written statement. I am speaking only as an individual and certainly not on behalf of nor am I representing my views as those of the ABA or of the Anti-trust Division.

Mr. KEMPF. I do remember what my other note was. I understand that there is a second letter that has been sent to Senator Bayh from Mr. Holms, further amplifying and clarifying his prior communication.

Mr. COOPER. Thank you.

Mr. KEMPF. I would like to address your comment to me, Mr. Cooper, what you said, when I pointed out there were two possible ways to address the finality of the settlements question. Of the pro-

posed languages, both of them would protect the finality, from both the defendants' and plaintiffs' perspective, of achieved settlements. One version of the language would leave the remaining defendants still liable retrospectively for the entire amount and the other would not.

You said to me in passing that this would just leave them staring at a lot less liability. I think the question that might follow up to me is, which do you favor? I favor the second one. Here is why, because that strikes me as being fair. It strikes me as being decidedly unfair that companies like Westvaco that very dramatically believe themselves innocent must choose whether they stare that 100-percent liability in the face or whether they are going to have a chance to say, no; the only thing I am running the risk of is the share of the market that I account for and what I get. I am responsible for what I did and I want to have my day in court to prove myself innocent. I think they ought to have that chance if they believe strongly in that, and I am fearful under language that would not achieve that carveout that they would be deprived of that. That does concern me.

Ms. JOSEPHSON. Any more questions? Thank you very much for coming. We appreciate all that you have done for us.

We again solicit your help in drafting this amendment, and we welcome any suggestions that you may have. Thank you very much.

The meeting is now adjourned.

[Whereupon, at 1:45 p.m., the committee was recessed, to reconvene subject to the call of the Chair.]

ANTITRUST EQUAL ENFORCEMENT ACT OF 1979,
S. 1468

TUESDAY, JUNE 12, 1979

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLY
AND BUSINESS RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:32 a.m. in room 5110, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum, Bayh, Baucus, and Thurmond.

Also present: J. Michael Cooper, counsel; Thomas Susman, general counsel; Marilyn Falksen, staff assistant; Nels J. Ackerson, counsel; Kevin O. Faley, chief counsel; Mary Jolly, staff director; Linda Rogers-Kingbury, chief clerk; Jessica Josephson, counsel; Harry Wiles, counsel; Ken Kay, counsel; Peter Chumbris, minority counsel, Al Regnery, minority counsel; Joel Mandelman, minority counsel; Joe Lanham, minority economist; and Art Briskman, counsel.

Senator METZENBAUM. The hearing will come to order.

OPENING STATEMENT OF SENATOR METZENBAUM

Today the subcommittee continues its consideration of an amendment to the Antitrust Procedural Improvements Act which was proposed by Senator Bayh on May 15. This amendment would require that price fixers share the financial responsibility for their joint wrongdoing. It would also reduce the total potential monetary recovery available to the victims of price-fixing conspiracies after settlement with one or more price fixers.

I share Senator Bayh's deep concern for the small business company, perhaps innocent of any wrongdoing, which is suddenly exposed to potential liability far exceeding its net worth because other price-fixing defendants settle class action, treble damage lawsuits. A small business must be protected against damage liability far out of proportion to the benefits it might have derived from any illegal activity or to its relative culpability. On the other hand, all businesses and the American consumer must continue to be protected against the most deplorable of all antitrust violations, price fixing. Since the enactment of the Sherman Act in 1890, the antitrust laws have been particularly effective in deterring price fixing.

Consumer groups have indicated to the subcommittee that they have serious problems with contribution in price-fixing cases and intend to write letters to the subcommittee expressing their concerns. I, as the chairman of the committee, do not intend nor will I support any measure which will weaken the ability of businesses and consumers to protect themselves against price fixing. I know that the Senator from Indiana, Senator Bayh, who has been a strong advocate of anti-trust legislation, also shares these concerns.

I hope that we can address the concern for the small business caught in the settlement squeeze which Senator Bayh has articulated so well and at the same time continue to protect businesses and the consumer from the extortionary behavior of the price fixers. I am afraid, however, that if we tamper too hastily with the principle of joint and several liability which has worked so well for nearly a century, those of us who regard the antitrust laws as one of the bulwarks of our free enterprise economy may come to regret our actions.

I plan to examine in detail the record from last Friday's hearings and to pay close attention to the testimony of today's witnesses with these and other questions in mind.

Is it common for small businesses to be caught in the settlement squeeze described by Mr. Kress of Green Bay Packaging last Friday?

Do we need legislation or do the Federal courts already have authority to prevent billion-dollar recoveries against small businesses?

What impact will the various contribution proposals have on the deterrent effect of the antitrust laws?

Will contribution and claim reduction after settlement, as Senator Bayh proposes, discourage the settlement of complex antitrust cases?

Will the availability of contribution make already complex and protracted cases even more complex and protracted?

Today, we have with us three distinguished antitrust lawyers to discuss contribution in price-fixing cases: Harold Kohn of Philadelphia, who primarily represents plaintiffs; and Thomas Scanlon of Indianapolis and Donald Hibner of Los Angeles, who primarily represent defendants.

The Chair is particularly interested in hearing from these three witnesses who are experts in their field, and I know the subcommittee finds itself in a situation where the Bayh amendment creates problems as far as the passage of S. 390, the Antitrust Procedural Improvements Act, is concerned.

I hope that from these hearings we may be able to come up with some answers that resolve the problems for those who are advocates of contribution and those who are very much concerned about a viable and effective enforcement of antitrust laws in the future. Absent that, I am afraid that it would be difficult to pass the Antitrust Procedural Improvements Act this year, under this Senator's sponsorship.

I do want to say to all of the witnesses that at 11 o'clock, I must excuse myself for an important meeting, but we hope to be able to go forward at that time with either Senator Bayh or Senator Baucus in the chair.

Mr. Kohn, we are very happy to hear from you this morning.

STATEMENT OF HAROLD E. KOHN, ATTORNEY

Mr. KOHN. Thank you, sir.

Senator METZENBAUM. The Chair will ask each of the witnesses to limit themselves to no more than 10 minutes' oral presentation and leave the balance available for questioning.

The entire statement of each of the witnesses will be included in the record.

Mr. KOHN. Senator Metzenbaum, I have filed a statement which was sent some time ago to the committee. You do have that. That statement deals with what I would refer to as matters of principle.

Before I conclude, I do want to discuss some of the problems incident to the particular piece of legislation, proposed legislation—I hope it never becomes legislation—that you do have before you, and I think it is important because the bill, I think, is not only ill conceived, but ill drafted. I will refer to that at some greater length.

First, a brief statement of my experience and biases. I think biases are extremely important in considering this proposal and the views of both the proponents and the opponents.

I have been practicing law for something in excess of 40 years. Approximately 25 years of that time I have had very extensive antitrust experience. I was associated for a long time with the firm of Mayor Dillworth, of Philadelphia. I think the Senator is familiar with that firm.

My own firm has been practicing now for some 10 years, both in Washington, D.C., and in Philadelphia.

During that time, I have been involved in many of the more significant antitrust cases which have been before the courts. I think I am generally referred to, as Senator Metzenbaum indicated, as primarily representing plaintiffs, but I must point out that I have, over a considerable period of time, represented defendants, including major defendants in the publishing industry and including those who have been joint defendants in matters involving Time, Inc.

During that period, I think that I have endeavored to develop a balanced view of the antitrust laws. I have testified on many occasions during the past 15 years before this committee and before the comparable committee in the House.

I think my feeling is that the antitrust laws are significant in a sense, while nobody would derogate the Bill of Rights and the Constitution. They correspond in our economic life to what the Bill of Rights, that is, the antitrust laws correspond to what I think the Bill of Rights endeavors to do in our political life in this country.

With that introduction, let me proceed to discuss both the general principles underlying the bill and the language of the bill itself.

Senator METZENBAUM. I am certain that you are actually referring to the Bayh amendment and not to the bill, because the bill is the Antitrust Procedure Improvements Act.

Mr. KOHN. Senate bill 390 is, I think, the most significant contribution to the improvement of the antitrust laws in the 15 years I have been before your committee. Much as I love 390, and I testified before

the Commission for the Improvement of the Antitrust Laws favoring many of the proposals in 390, I would rather see 390 not adopted, if there has to be adopted as part of 390, Senator Bayh's amendment.

The net result would be absolute retrogression, and perhaps that's the reason why 390 has been amended. I hope not, but let me proceed. When I refer to the proposed legislation, I am referring to Senator Bayh's amendment on contribution, or the contribution amendment.

I was taking a shower this morning and it occurred to me that perhaps the answer to this is what Blackstone or somebody said some 300 years ago, "The courts do not adjudicate the accounts of highwaymen."

Don't forget we are dealing with people who have violated a criminal law. These are not people who failed to pay damages under a contract. These are people who willfully and intentionally violated the criminal laws of the United States.

As a matter of fact, price fixing is regarded as so heinous an offense that it is a per se violation in civil cases under the antitrust laws. The third circuit recently held that when somebody has been charged with and shown to have conspired to fix prices, that in itself satisfies the necessary criminal intent and you need proceed no further, because obviously they know the ends which led to their combination.

I think that for that reason, you have to make a sharp differentiation between this and other contribution situations.

It is my considered opinion that if this contribution amendment were passed, it would deal a very serious blow to the enforcement of the antitrust laws. I think we should all be interested in seeing that they are vigorously enforced.

It would make almost impossible the orderly administration of suits brought to recover damages for price fixing.

I hate to get into this, but it would be even worse than the passage of the legislation overruling *Illinois Brick*.

You would have a situation where there would be the greatest deterrent to the settlement of such litigation. Without settlements the litigation itself cannot proceed in an expeditious manner. Most of these cases are settled. There are some which have been tried; I have tried some myself. Other people have tried some, but the overwhelming majority are settled ultimately as business matters.

If this bill, if this proposed amendment were to become law, you would have, I think, these serious effects. First, no plaintiff would want to settle with a willing, settling defendant if he were required to deduct from the ultimate recovery the amounts referred to in the second and third sentence of the bill dealing with the effect of a release.

The contribution litigation would itself I think dwarf in complexity the basic antitrust litigation. I think it is highly significant that since the *Beauty* case in the eighth circuit, which has suddenly given interest in contribution, those defendants who have settled or who are about to settle, vigorously and violently oppose contribution and cost cross-claims.

Those who want to stonewall it and fight a bitter rearguard action vigorously propose the right of contribution and cross-claim.

So, I think it is evident from the actions, and in some cases, you will find the same business entity on both sides or occasionally as

happened recently in a case up in Philadelphia, on three sides of the issue, you will find the same law firms taking different positions in different cases, depending upon whether they represent in the particular litigation, a settling or a nonsettling defendant. I don't think that is healthy. I don't think it is good. It will not contribute to the efficient enforcement of the antitrust laws.

So that I think you will find that there will be less deterrent to the violations of the antitrust laws, and more deterrent to effective litigation to redress violations.

Now let's look at this act itself. I do think every once in a while, as I said before when testifying before this subcommittee, we have to remember that we are lawyers and that what you pass, particularly if it is to amend legislation which has been in effect for 80 or 90 years, ought to be very carefully drawn and not just thrown into the hopper haphazardly.

I don't know who the Indianapolis lawyer was who was responsible for drafting it, but he should have been more considerate of the Senator from Indiana.

Let's go down the legislation sentence by sentence.

It starts off: "Except as may otherwise be determined by the court in accordance with principles of equity, two or more persons who are subject to liability for damages attributable to an agreement to fix or stabilize prices may claim contribution directly or indirectly attributable to each such person's sales to or purchases from."

Now what does the first introductory clause mean, "Except as may otherwise be determined by the court in accordance with principles of equity."

First of all, as I noted, the ancient maxim is: "Equity is not concerned about contributions among persons who are engaged in an illegal activity."

So, is it meaningless? If it is to have some meaning, what is the meaning to be attributed to it? Does a court have carte blanche to say, "Because I like you, you don't have to contribute. Because I don't like you, you do have to contribute, or because you are prosperous or not prosperous, because you are big, because you are small." What does it mean?

It starts off with something which may be either negative, or may be completely inapplicable if the ancient maxim is correct, and I think it is. It is still applied by the courts today. Let's go to the next phrase. "May claim contribution according to damages attributable directly or indirectly." What does the "indirectly" mean, particularly in view of *Illinois Brick*? How do you indirectly get damaged by a violation of antitrust laws when you sue for price fixing, in view of the Supreme Court's decision in *Illinois Brick*. Does the word "indirectly" have any meaning? Is it simply one more example of careless draftsmanship? What is the purpose of it?

The next phrase, "Such person's sales to or purchases from." What do you do about a conspiracy to fix the prices for personal services? By purchases? By sales? The word "purchase" and the word "sale" have exact meaning in the law. It means the transfer of title of a chattel. If they meant to say "all payments," they should have said "all payments." They shouldn't have said "purchases" or "sales."

There is other language, I don't know what the purpose of this particular phrase is, but there is other language which could in a lawyer-like way state exactly what they mean.

Do they mean to exempt from this legislation conspiracies by architects, engineers, lawyers, doctors who don't sell personal property but who perform services?

Now the next is a real horror. "A claim for contribution may be asserted," just to continue on, "whether or not action has been brought or a judgment rendered against the person from whom contribution is sought."

Does that mean that before there is a price-fixing case in which the person who is damaged sues the other person; that two of the coconspirators can sue each other?

Suppose there is never a suit brought by the person who is damaged. Does that mean conspirator A can recover damages from conspirator B because they are both subject to liability? It won't do to say well, it is obvious what it means, or the courts can interpret it, or whatever, because the courts can now do whatever they want by way of contribution in cases where they think it is appropriate. There is no problem with respect to what the courts can do.

If you are going to have enabling legislation the legislation ought to clarify and not confuse, which is what this does.

Once again, in the next sentence, you have "attributable directly or indirectly" and this, once again, I think is another confusion. It says, "Applying the percentage that the damages, including purchases from or sales to nonconspirators, attributable directly or indirectly to the settling person bears to the total damages."

The purchases or sales are not damages. The purchases or sales are merely the transaction out of which the damage arises.

Does it mean it is to be strictly in accordance with the amount of purchases or the amount of the sales, or is it something else?

Senator METZENBAUM. Mr. Kohn, I wonder if I could ask a few questions, if you please.

Is it important for plaintiffs to reach settlement agreements with some conspirators early in the litigation of a price-fixing case, and if your answer is in the affirmative, why?

Mr. KOHN. The answer is in the affirmative. I think it is vital. Because the only way these cases ever get settled, and in the interest of speed, let me be candid and immodest, I am participating as lead counsel in practically every one of the major price-fixing cases which is pending today. Other members of my firm—when I say "I," I mean my firm.

I can tell you that not one of those cases would have begun to be settled had it not been for the ability to break the solid phalanx of the defendants, and to settle first with one defendant who is willing to step out of line in order to initiate the settlement process. That is true in the *Corrugated* case where we have \$300 million, and in the *Folding Carton* case where they have \$200 million. I can name another half dozen cases and amounts ranging from \$2 million to \$100 million. I think it is vital. There is no other way to get these cases settled, and the reason that the defense bar and the major corporations want this

kind of an amendment is to prevent that sort of initiation of the settlement process, so that the hard liners can keep the others in line.

Senator METZENBAUM. Is it important for plaintiffs to be able to negotiate settlement agreements separately with individual defendants in price fixing?

Mr. KOHN. Yes, for much the same reason. I think if you have to—and I have participated in these negotiations personally over a period of 15 years; I have been in a half dozen of them in the last 2 years; I can state to you, Senator, as a fact, that if it were not for the ability to negotiate with one or two of several defendants, there would be no settlements. If there were no settlements we would never be able to get rid of this litigation.

Senator METZENBAUM. Do you think the proposed amendment will make early settlements with individual defendants less likely?

Mr. KOHN. I don't want to engage in too much hyperbole here, but I think it is not only going to make it less likely, I think in many instances it is going to be impossible, sir. No plaintiff with any common-sense is going to want to bind himself to what happens in the—what happens to him if the release portion of this proposed amendment goes into effect.

People are much concerned about the small businessman. Let's take the small businessman. We have been settling cases with small businessmen who happen to be caught up in a conspiracy involving larger businessmen. We invariably settle for a much lesser figure with the small businessman. There is no need for this legislation, in the sense that there has been an evil condition in the past.

In the *Folding Carton* case, let me illustrate. We settled with one small defendant for some \$400,000, just 2 or 3 weeks ago. On a proportionate basis, he would have had to pay several millions of dollars. In that settlement from major defendants we received settlements as high as \$25 million, and \$27 million from one defendant.

In the *Corrugated* case the settlements went up to as high as \$35 million.

Now, if at the outset, in order to relieve that defendant of the expenses of litigation, and believe me, they are burdensome, not only to the plaintiffs but to defendants, if we settled early with him and he happened, although he was a small businessman, to have had a substantial share of the market, that would have meant that 10, 15, or 20, or 30 percent of our claim might be cut out. Now, we simply wouldn't settle with him under those conditions.

But enjoying the flexibility that we do have now, experience has shown, and I challenge anybody to show me an exception to this, that when we do come to the major defendant with whom we do have discretion and as to whom we are not bound by rigid legislation, we do not require him to pay much more than his proportionate share. There hasn't been one who has had to do that.

So that there has been no evil arise in the past, and there is no evil threatened for the future if we don't have this amendment passed. We have taken care of the small businessman who happens to be a defendant.

Senator METZENBAUM. On Friday, Mr. Kemp, from Kirkland & Ellis, and Mr. Taylor from Pillsbury, Madison, & Sutro, referred to

sweetheart settlements and whipsawing tactics of plaintiff's counsel.

Would you care to comment on such matters?

Mr. KOHN. How much time would you want me to spend, 5 minutes or 5 hours?

Senator METZENBAUM. Just take about 1 minute.

Mr. KOHN. I know Mr. Kemp. He is a very good friend of mine. He didn't tell you what a sweetheart settlement was, did he? Did he participate in a sweetheart settlement? Has he ever admitted he has participated in one or had one?

I think what he means by "sweetheart settlements" is a settlement with a defendant in a case where his senior partner, Hammond Chaffetz, who is antediluvian in his attitude—and I repeat only what Mr. Kemp and others have told us in a case in which Mr. Chaffetz was in the litigation in the beginning and they superseded him later on—does not want to settle, but settlement is made because somebody else breaks the ranks, and they don't hold out until the end. That is what they call a "sweetheart settlement."

I defy Mr. Kemp or any of his associates or anybody else to point out to me any sweetheart settlements we have made.

I recently settled two cases with Mr. Kemp before other people settled. In one of the cases, in the *Fine Paper* case, he was the fourth or fifth in 15 or 18 defendants. Does he think or does he say he made a "sweetheart settlement" with me when he paid his \$6 or \$7 million? I mean, that is just hot air. Permit me to speak in the vernacular of the trial lawyer in the courtroom. Mr. Kemp can't point to a single instance of a "sweetheart settlement" in any of the major cases, and he is in every one of them.

I have talked about this subject with Mr. Kemp for many hours.

Senator METZENBAUM. Well, I am glad you sugar-coated it. [Laughter.]

And he knows my attitude, so I said nothing that I haven't said publicly to his face. Go ahead.

Senator METZENBAUM. Can you give us some specific examples of cases which would have been substantially more complicated or lengthened if Senator Bayh's contribution proposal had been law?

Mr. KOHN. Yes; it is my considered judgment, Senators, that if this bill had been law 5 years ago, we would not have the settlements that we have in the *Western Sugar* cases where we received over \$60 million, in the *Gypsum* cases where the settlements were over \$70 or \$75 million, in the *Corrugated* cases where the settlements are \$300 million, in the *Folding Carton* cases where they are \$200 million, and in a series of other settlements.

The reasons are these. Each one of those cases was broken because one defendant was willing to come in and make a settlement. That defendant would not have come in and the plaintiff would not have been able to settle with him if this legislation had been in effect.

The purpose of this legislation is, and the people who are proposing it have as their sole goal here, to prevent that kind of settlement procedure which is the only kind which has any possibility of success.

I have been in cases where we settled the entire case in one fell swoop. Those are rare indeed, not 1 in 10. We would prefer to do it that way,

obviously. I think the more sensible and forward-looking defendants would prefer to do it that way, but unfortunately, there is a tight phalanx that does it only when it is obliged to do it. And those have to be lured into the settlements when one of their fellows breaks ranks with them. This bill would prevent that.

Senator METZENBAUM. How would you propose that we protect the small firm named as a defendant in a price-fixing case against liability far out of proportion to its net worth or to its relative culpabilities?

Mr. KOHN. Legislation should be enacted when there is a need for it. The class suit price-fixing cases which the defendants say they are most in awe of, and which require or which they say coerce them into settlements, have been in effect for some 10 years. There is not one recorded or unrecorded instance where any small businessman was put out of business by any price-fixing case or any settlement in a price-fixing case.

I have given you several examples in the *Folding Carton* case. I can give you examples in other cases. In the *Water Heater* case, for example, which we have in Philadelphia now, we are settling with people who had 10 or 20 percent of the market for \$500,000, which is probably 10 percent of what we are getting on a proportional basis from affluent defendants, because we know that they are unable to respond in damages to a greater amount. That has been taken care of in the practical give-and-take of settlement. There is no more sophisticated art than settling cases. It takes a great deal more ability and a great deal more experience to settle cases than it does to try them, believe me. It has been worked out on a practical basis. There is no instance where anybody has been hurt by it.

Going back to—if I can just refer to one more example—I was in the *Electrical* cases and tried the first of two or three that were tried. We received a very substantial judgment of \$30 million or so. One of the companies, I think it was Allis Chalmers at the time, was less prosperous than the others. When we came to settle that case, even after we had a judgment, we took less money than the amount of the judgment, and we took into account the ability of those companies to pay. Allis Chalmers did not pay as much proportionately or otherwise as General Electric paid.

The IT Circuit Breaker Co., which was a smaller company in Philadelphia, simply did not pay as much as the more affluent and culpable companies paid. So that there has been no problem. People aren't—people who settle these cases aren't absurd. They realize all of the considerations that have to go into settlement. One of the considerations is very definitely the capacity to pay.

On the other hand, if this bill were passed, there is nothing to keep a judge from saying that a company which is on the ropes and which made very little money but happens to have a larger share of the market shouldn't pay its very affluent coconspirator one-tenth or one-fifth or one-quarter or one-third of the total judgment.

That is what I think you would find. You would find that the company that is responsible, the prosperous and powerful company, using the contribution statute, as a weapon against the smaller competitor.

Senator METZENBAUM. Mr. Kohn, I have just one other item and then I am going to excuse myself and ask Senator Bayh to take over. I think all four of the members of the committee who are present here today are cosponsors of the Antitrust Procedural Improvements Act.

You made a statement at the very inception, before any of them were present, concerning your views with respect to that legislation and the impact of this amendment on it.

Would you care to repeat it very briefly?

Mr. KOHN. Yes. I stated something along the general lines of this—that in my opinion, and I have been testifying before this subcommittee for 15 years, going way back to Senator Hart's time, there is no legislation that I can think of that is more helpful or is likely to be more helpful in promoting vigorous and effective enforcement of the antitrust laws than the basic improvement bill, 390.

I testified and many other lawyers testified in favor of some of the proposals which are in there when we appeared before the President's Commission to improve the antitrust laws. Some of them are almost exactly the same proposals.

I think every one of those measures is important. The recalcitrant, the dilatory tactics of lawyers, the collateral estoppel, the avoidance of duplication in discovery and so on. I would say, as much as I like that bill and would like to see it get passed, I would rather see it defeated if, in order to get passed, it has to have this amendment with respect to contribution. I think the net effect of the whole bill then, including this amendment, would be a retrogressive step backward. I don't think this subcommittee should be gutting legislation which has the beneficial effect on the economy that the antitrust laws generally have.

I do feel very strongly about it and I think those views are shared by practically every competent and experienced plaintiff's antitrust lawyer to whom I have talked.

They are also shared, that is the accuracy of them, are shared by many of the defendants' lawyers too.

Senator METZENBAUM. Thank you, Mr. Kohn. The other members of the committee, I am sure, have questions. I am going to excuse myself and turn the meeting over to Senator Bayh. I will be back, Senator Bayh, but I do have an appointment for 15 or 20 minutes.

I had indicated at the inception that I would ask each of the witnesses to confine their oral presentation to 10 minutes. So, if you finish with the questioning of Mr. Kohn, I would be grateful if you would carry on.

Mr. KOHN. Thank you.

Senator BAYH. Thank you, Mr. Chairman. Unfortunately, we have an Appropriations Committee meeting going on right now marking up the supplemental bill. I have a responsibility to be present at the markup. I apologize for not being able to be here to hear your testimony, Mr. Kohn. Unfortunately, I am going to have to slip back there and will try to keep the hearings going.

I have more often than not found myself on the side of Mr. Kohn. I was well aware before we met here today of his reputation and the role that he has played in the development of antitrust legislation and litigation.

I understand that you are basically a plaintiffs' lawyer and Mr. Hibner and Mr. Scanlon have had perhaps more experience in the defense end.

I hear you have described the importance of your role in many cases brought against price fixers and I wonder if maybe we don't need several more.

Mr. KOHN. I think, Senator, I started out by saying in the interest of speed I was going to be very immodest.

Senator BAYH. Well, I think you succeeded.

Mr. KOHN. Thank you.

Senator BAYH. That doesn't mean you aren't accurate. You have been an expert witness before this subcommittee. We are glad to have your views on the subject of antitrust law. I am sure that it would be a shame if we on the Judiciary Committee couldn't move forward to provide the tools that you feel we need to better enforce our antitrust laws. I certainly am not prepared to suggest if we can't do it the right way, we should go ahead and do it anyhow. So the suggestion that you have made that we should not pass the Illinois Brick bill if we can't get rid of the contribution amendment, is not going to cause me any sleepless nights. I frankly feel that we need to give some attention to the problem of contribution in antitrust price-fixing cases. I have never tried an antitrust case. I don't know if there is a member of this committee who has tried an antitrust case; I doubt it.

Let us hear what Mr. Hibner and Mr. Scanlon have to say on the subject of the value of contribution in price-fixing cases.

You made some rather broad statements that flew totally in the face of a witness' testimony given at the prior hearing.

Mr. KOHN. Who was that, sir?

Senator BAYH. Mr. Kress from the Green Bay Packing who was involved in the container litigation. It seems to me you don't have to be an expert antitrust lawyer to understand the concept of equity. There has to be something which distresses you when a criminal case has been brought and there is an unindicted party who pays about six or seven times more per point in settlement than an indicted coconspirator.

That is the kind of a thing we are talking about. Do you deny that happened? You said you didn't know about any situation where a fellow had been run out of business. Here you have a relatively small firm, which wasn't indicted, and yet, ended up paying significantly more per point than one of the parties that was indicted.

Mr. KOHN. What happened there, sir, was that the first people who came in received the best settlement proposals whether they were indicted or nonindicted. You are talking about the *Corrugated* case?

Senator BAYH. That's right.

Mr. KOHN. There was a rapid escalation in those settlement figures. I would say though that this legislation would do small companies who are unindicted no good whatsoever, because as this legislation proceeds, it is on the basis of their sales not whether they were indicted or not.

If he had a certain percentage of the market, indicted or unindicted, those who pay \$40 and \$50 million like Weyerhaeuser and some of the

major companies, Container Corp. of America and so on, would have had the right to proceed against them there.

The problem in that case was that some people lagged behind and didn't come in until too late. This bill has nothing whatever to do with that. It would give him no protection.

Senator BAYH. Frankly, I think it does. Plaintiffs' lawyers are quite understandably concerned about getting the highest amount of return for their clients, whoever they are.

Mr. KOHN. That's right.

Senator BAYH. And it seems that the guilt or innocence of the party involved really doesn't make much difference as long as you can coerce the alleged conspirators—and I want to emphasize alleged—into a position where they are going to go bankrupt if they don't capitulate to your terms of settlement.

That is what especially concerns me. If you have a big firm or a small firm, and if they are guilty of an antitrust violation, I want to get them in every way we can, hang them up to dry, do whatever we have to do, because I am against violators of the law and you know I have consistently supported a strong and vigorous enforcement program against antitrust violators.

But when the way the process works, and those of you who are very skilled, and I say that positively, in using it to the best interests of your client, are able to put people who aren't guilty in a less favorable position than people who are, I have to say that is entirely inequitable and unacceptable to me.

Mr. KOHN. Well, when you say "guilty," the fact that a particular defendant is not indicted does not mean that it did not participate in the price-fixing conspiracy. There are a variety of reasons why people don't get indicted. Some of them don't get indicted because they in effect turn state's evidence and contribute to the investigation.

Senator BAYH. That wasn't the case with Mr. Kress, was it?

Mr. KOHN. I don't know why he wasn't indicted. The Government does not say.

Senator BAYH. He didn't turn state's evidence.

Mr. KOHN. No. I don't know why he wasn't indicted.

Senator BAYH. Couldn't it be that there wasn't a case? That is also a reason why people aren't indicted. Our system of law states that a defendant is innocent until proven guilty.

Mr. KOHN. There may very well be not a criminal case that the Government thinks it can prove. That doesn't mean that there isn't a civil violation. I can point out case after case where people, including, we are talking about Mr. Kemp a while ago, people whom he has represented, who when they felt they weren't guilty, took the case to trial and won.

In the *Corrugated* case, for example, a company that was indicted, Mead, took the criminal case to a trial and it was faced with no civil liability in that case, and anybody could have done it who was indicted, and they were acquitted.

In the *Potash* case the defendants were acquitted.

In the *Steel Pipe* case in the South, the plaintiffs in the civil case lost that.

In the *Nissan* case in the South, in Florida, the civil plaintiffs lost that case.

Anybody who really thinks that he is not guilty can litigate it and there have been just as many cases decided in favor of defendants when they have been litigated in the civil damage case as there have been cases decided in favor of plaintiff.

I know of nobody who has been "coerced." As I was saying, I think right before you came in the room, Senator, at the end of Senator Metzenbaum's presiding, I have been in cases where we have had judgments against people who had less ability to pay, and we took less from those people than we took from the people who were more or had a greater ability to pay.

Let me just say one other thing. I think in fairness to the other people I ought to say something. I talked about the defects in the act itself. I think the act is most poorly drawn and I gave very specific illustrations.

Senator BAYH. I know you referred to an Indianapolis lawyer. I wish you would tell us the name of that lawyer because if he participated in it, I don't know who he was. My staff doesn't know who he was. The Indianapolis lawyer who is here probably would have done a hell of a better job if we consulted him in advance, because he is a top antitrust person.

Mr. KOHN. I think he would.

Senator BAYH. Do you know who this Indianapolis lawyer was.

Mr. KOHN. No. No. Let me say one thing here.

Senator BAYH. You suggested it was sloppily drawn by an Indianapolis lawyer. Do you know who that was?

Mr. KOHN. I do not know who drew it, no. I would think that it was drawn by lawyers in Indianapolis. Mr. Scanlon's firm represents Inland Container which is one of the defendants in the *Corrugated* case. They are a subsidiary of Time, Inc. I would have thought that and, he has been a—I think he was the chairman of the antitrust section of the American Bar Association, I would think that legislation of this kind would have the attention of people like himself. He is here to testify today.

Senator BAYH. I must say to you, Mr. Kohn, he did not participate in the drafting. I don't know of anybody in Indianapolis who did.

Mr. KOHN. It would be better if he had.

You are dealing here with 390, with a procedural bill. Good legislative policy, it would seem to me, would not confuse and incorporate in the same legislation a bill which affects the substantive rights of people as this does. It should be, if it is going to be proposed, and get a fair hearing, it should be proposed as separate legislation, independent of and not as part of 390. It really isn't fair when you consider the procedural improvements which 390 is expected and hoped to achieve, to confuse it and confound it with legislation which has the opposition of so many people who are so strongly in favor of 390. I do think in fairness it should be separated, just as there are other bills pending, the Illinois Brick bill for example, separate from the procedural improvements bill. I happen to be one who opposes the Illinois Brick legislation for some of the same reasons as I have advanced

here. I think it will import elements of confusion rather than clarity into the enforcement of the antitrust law.

So, at the very least, it should be taken out of here and considered on its merits with a properly and carefully drawn piece of legislation which will cover some of the problems which I think this legislation will give rise to.

I don't want to say any more at this time.

Senator BAYH. One other observation. I am only raising these questions with you because our chairman did the same and I may be called back to the Appropriations Committee at any time. I am not wed to one vehicle or another to try to solve this problem which I feel is a very significant problem. I am realistic enough to know that a measure like this probably has very little chance of getting serious consideration unless it is appended to something that is going to fly and going to go through the whole legislative process.

And that is something that maybe I am in a little better position to judge than some of you who are in a lot better position to judge the substantive antitrust implications of the legislation before us than am I.

I am returning to my concerns; you have raised them. I think it is a question of my point of view versus yours. Deterrence is a critical part of antitrust law whether it manifested a civil or criminal penalty. The ability to settle a case and get it over is very important. I am anxious to see what Mr. Scanlon and Mr. Hibner have to say about settlement.

As I understand it, contribution among defendants in antitrust price-fixing cases does not make it less likely to settle; but this view could be a very real difference of opinion. I want to return to the question that I posed to you earlier, where you have an unindicted party who pays about \$3 million per point, because first of all, they were small in the context of the market share, and second, they claimed to be innocent, and had every reason to believe so because they hadn't been indicted. They weren't willing to capitulate early on when the first major coconspirator or major participant settled for \$500,000 per point. Therefore, the unindicted party had to settle for about \$3 million per point. Under these circumstances, it seems to me that demonstrates the need for equitable adjustments in the antitrust enforcement process. That kind of situation does exist and that very much concerns me.

Mr. KOHN. I think the first settlements sir, were probably about \$1 million a point in that case. I have forgotten now precisely what Green Bay paid. I do remember the first settlements. I think they were about \$1 million a point in the *Corrugated* case.

Senator BAYH. We were told by previous witnesses it was about \$500,000. In fact, it was \$500,000, by defense attorneys that were involved in that. If you have a different figure—

Mr. KOHN. Well, it depends upon what the plaintiffs understood were the market shares. We have to rely on the defendants, obviously, for the information.

I think the St. Regis and International settlements were the first two in that case. I thought they were about \$1 million a point. That is just relying on memory.

Senator BAYH. The difference between \$1 million and \$3 million per point is still rather significant, wouldn't you agree?

Mr. KOHN. It is still significant. I have forgotten what it was that Green Bay paid.

Senator BAYH. I know what it was that Green Bay paid.

Mr. KOHN. How much was it?

Senator BAYH. About \$5.5 million.

Mr. KOHN. How much?

Senator BAYH. \$5.5 million which came out to about \$3 million per point, perhaps a little bit better than that.

Compared to some of these other large companies, Green Bay is small; I guess Mr. Kress would feel complimented if we called him a "mom-and-pop operation," because it has been a family operation.

Mr. KOHN. Look at this, Senator, though, at \$300 million, which is where they are now, and they still have about a quarter of the case to go, if he had roughly 1½ or 2 percent of the market, which I take it he would have on a \$5 million settlement at \$3 million a point, he would be paying the same amount under this legislation.

Senator BAYH. Not if he—

Mr. KOHN. I know, for example, in the *Folding Carton* case, in the last settlements we made, a defendant represented by King & Spaulding, I think it was Gulf States, we took much less than we would have taken from some of the major defendants because they were a minor factor in the business. We did take that into account, even though they came late. So you just don't consider one factor. You do consider several factors.

Senator BAYH. Mr. Kohn, the difference with a fellow like Kress, as he describes it, is where you have a \$70 million company, \$50 million of it supported by paper, by credit that has to be renewed. It is a lot easier to get that paper renewed if you are innocent and you only have a possible liability of \$5.5 million hanging over your head than it is if you have a possible liability of \$300 million or perhaps \$1 billion hanging over your head, which is the way the present law spreads liability.

Mr. KOHN. Except that as a practical matter every businessman and banker knows that you don't have that real liability hanging over your head, and it is only recently that they have even begun to put a qualifying note in the financial statements of publicly held corporations.

I have a judgment for several billions of dollars, when it is put finally into specific dollars as distinguished from the measure of damages, in the *Plywood* case against Weyerhaeuser, Georgia Pacific, and Willamette. They finally got to the point where their accountants thought they ought to put something in the financial statements by way of a footnote. It hasn't had a ripple of effect on the affairs of those companies and their ability to borrow money, and it hasn't at the other end of the spectrum had any effect either.

Senator BAYH. Mr. Kohn, with all due respect, sir, I can't refute that, but when you talk about Weyerhaeuser, one of the biggest corporations in America, that is a devil of a lot different than talking about Green Bay Packing which is one of the smallest.

As to the large corporations which are implicated in antitrust violations, I say, go get them and let's keep the law strong, but let's not ignore the problems of smaller companies. I have never sat on a bank

board which has been confronted with this type of a commercial problem. I have consulted with some people who have. They say flat out that they aren't going to renew loans for small corporations where they have a \$300 million possible liability hanging over a \$70 million company.

Mr. KOHN. I will subside after this remark.

Senator BAYH. I am as guilty as you. I mean, I am being the provocateur.

Mr. KOHN. I have been in cases, seriously, over the past 10 years, which must have involved a total of at least 150 or 200 defendants. Many of them were and are very small. Some of them are really on the verge of chapter 11 or chapter 10. I have yet to see one single case where the credit of that company was cut off by its lending agencies. I have yet to see one single case where the company went bankrupt or was forced into reorganization, and some of those cases have been in such litigation for 4 years.

For example, I mentioned the *Folding Carton* case where we recently settled with another company, Consolidated Package, for \$400,000. That company is on the verge of bankruptcy; it was when the litigation started; it is now, but nothing ever happened to it and they endured 4 years of litigation, and they weren't put out of business, and nobody stopped their loans.

I think the important thing is to look at the record; as a very distinguished gentleman in public affairs used to say, "Let's look at the record," and you will see that this fear which they trot across here is something which has never, and I use the term advisedly, has never materialized in the sense that there was any untoward circumstance which put out of business or seriously threatened to put out of business any single company which was a defendant in these cases. That is the important thing.

Senator BAUCUS. Mr. Kohn—

Senator BAYH. Excuse me.

Senator BAUCUS. Go ahead.

Senator BAYH. I think if we look at the record, quite frankly, we will find people who were in a different position, who will look at it differently than you.

Mr. KOHN. Right.

Senator BAYH. I think that is probably what makes the world go around. Again, I just happen to have an old-fashioned feeling that if you have a company, large or small, and if they are involved in a conspiracy for restraint of trade and price fixing, we need to nab them.

Equally as strong, I feel that we ought to be doing a better job of enforcement, but I am not going to ignore the fact that just because you don't put a small company totally out of business, if you intimidate them, and I don't use that word in a negative context, that is a fact of how coercive pressure works. If you are a small business person, you think to yourself, you know, I had better settle whether I am guilty or not. The list of those you say fought the case, the Meads and the others, and won, were large corporations which could afford that kind of financial drain.

Small companies which are not guilty, and I point to the Kress situation, where there is an unindicted party paying three or four times as

much per point as an indicted coconspirator, is the inequity that I would hope that we could address and deal with, and do so in such a way as to insure that we don't throw the baby out with the bath water, and make it impossible for people like yourself and others to really put the hammer on the culprits.

Senator BAUCUS. Thank you very much, Mr. Chairman.

Mr. Kohn, you said that you have been in cases where you represented or litigated against 250 defendants, some of them quite small.

Mr. KOHN. I said in the total number of cases that I have been. I said I think there have been a total probably of 150 to 200 defendants, some large and some small.

Senator BAUCUS. 150 to 200 defendants, some large, some small, and some even on the verge of chapter 10 or chapter 11. And you state that you can't recall a single case where one of those defendants has gone out of business.

Well, isn't the point that these smaller defendants are forced to settle? Isn't that the whole point here?

Mr. KOHN. No; they are not forced to settle. They settle because they find that it is in their overall business interest to settle, for a variety of reasons. I gave you case after case where defendants, large and small, have litigated and have won. They litigated because they thought they could win the case, and they were right. This very small company that I told you about in the *Folding Carton* case, Consolidated, which we settled with for \$400,000, was the only one of some 20 defendants which litigated the criminal case. They were convicted. They litigated the criminal case. Why? Don't ask me, because the amount they spent litigating that is probably more than we settled for at the end.

So, I do very stoutly maintain that I am correct in what I said with respect to that. Now, you can use the word "forced." You can use the word "coerced." I don't know what you mean by it. But nobody under our judicial system is forced into a settlement.

Senator BAUCUS. I have no more questions. Thank you.

Senator BAYH. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Kohn, we are glad to have you with us. It is always a pleasure to hear you testify. You are certainly an expert on antitrust areas.

I am a little disturbed about this *Kress* case that I believe Senator Bayh referred to, Mr. George Kress of Green Bay, Wis. I have a copy of his testimony here. On page 5, he said this:

Our company was faced with the following choices. One, settle the pending class action suits by paying more than \$5.5 million to the plaintiff's lawyers, and still face the liability of defending the individual antitrust civil suits which might be brought by plaintiff customers who do not wish to participate as members of the present class; or two, stand ready to continue to defend the class action suits and face the burdens of a contingent liability of over \$5 billion. This continued liability would have to be reported to Green Bay's mortgage holders and potential lenders who would be very reluctant to even consider lending additional money to a corporation facing this severe a liability. Our company's borrowing power is void.

You can see the position, I think, which Mr. Kress found himself. I am just wondering what advice could you give a man like that if he is in that position.

In the beginning of his statement he said that 53 years ago, at the age of 23, he founded this company. The company manufactures corrugated boxes, and it has been a family owned and managed business.

The business represents my family's entire assets. In other words, all our eggs are in this one basket.

"I am appearing here today to explain to you how antitrust class actions threaten the entire loss of all the work my family and I have done in the past 53 years. My recent experience involving the current antitrust situation may help you to better understand the problems created for the small businessman in a capital-intensive industry.

I could picture this man, his whole work for 53 years is in one basket here. Now he has been sued and he is running the risk and could lose it all; he says he would be subjected to liability of several billion dollars.

Now, this case has been repeated many times in the settlement process he says, in the civil class action suits now pending in the corrugated container industry.

He goes on to say that the effect of this extorted settlement practice upon a small family owned and managed business is catastrophic. "We were threatened with a loss of over 50 years of effort and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence."

Now, you are one of the leading antitrust lawyers in the United States. If you were representing this man, what advice would you give him or what could be done to prevent such a terrific liability as he says he was subjected to?

Mr. KOHN. Senator, let me answer the specific question. It is a very serious problem which you pinpoint. The antitrust laws are enacted, were enacted largely to protect independent businessmen like him. I have the utmost sympathy for his situation.

I don't mean, and I participated in the *Corrugated* case, or rather Jerry Cohen who used to be the Executive Director or counsel for this Commission, participated in it. He heads our Washington office. If I were he, that defendant, I would do what many lawyers have done who represented clients of that kind. They came in very early. They make precisely the presentation to plaintiff's counsel at the outset of the litigation that this gentleman made to this committee, and that you repeated so effectively just a few minutes ago. I have yet to see the situation where if he had done that there would not have been an early settlement on a basis as favorable to him as the first settlements made in that case, which I thought were about \$1 million a point which Senator Bayh thought were somewhere in the neighborhood of \$500,000 a point.

I have done it myself. I am doing it today in the *Water Heater* litigation where we have precisely that situation where a company which is not affluent, which has as large a share of the market as a major conglomerate has, we are taking \$500,000 from them. We have refused \$8.9 million from the conglomerate and they will pay more, and get the case settled.

We are not monsters. We don't kill the goose that lays the golden egg, so to speak. These arguments are made every day by effective counsel and they are heeded. That is what I would urge him to do. Come in and discuss it as a practical business situation. Not so to speak,

and I don't mean to be harsh or to use language which is hard, but don't try to be a member of the club, if you can't afford the dues. Break ranks with the fellow conspirators and come in and take care of yourself. Do not worry about the big boys in the business and you won't have to pay a disproportionate share.

Basically, as I told Senator Bayh, this legislation, in the final analysis, if that litigation closes out at more than \$300 million, which it already is, would require Green Bay, under a contribution statute, to pay precisely as much.

Under a judgment statute, he might have to pay more. What he is complaining about, basically, is the antitrust laws. What he says as a small businessman who happens to be caught up voluntarily or involuntarily in a price-fixing conspiracy with major factors in the industry is that he is being harshly dealt with when he has to pay the piper.

Well, the remedy, and I represent a lot of defendants, and a lot of big businesses, too. We have programs in every—in the offices of every client I represent to prevent their participation in antitrust conspiracies. That is the sort of a thing that he should be looking at. Stay out of the thing in the first instance. Keep his skirts clear. That may sound like Pollyanish advice, but it is practical. What he is complaining about basically is that small people ought to be allowed to violate the antitrust laws with impunity. Well, unfortunately, you can't administer the antitrust laws that way.

Senator THURMOND. If he is innocent, what advice would you give him? Fight it out? Run the risk of losing or having a judgment of several billions of dollars which he says he would.

Mr. KOHN. If he really is innocent in the sense that he did not participate in the price-fixing conspiracy, I just don't believe that he could be found guilty in a civil case or a criminal case.

There have been many cases, as I have given. I gave a list of four or five in the past 2 years where defendants have been acquitted in criminal cases and have won judgments in civil cases.

Juries carefully weigh the evidence. Judges carefully weigh the evidence. If there is insufficient evidence to find him guilty, he should litigate. Or, if he feels it is not worth the expense of litigation, he should try to make a settlement on the most advantageous basis possible very early in the litigation.

I have seen cases which could have been settled by small defendants in this matter for less than they had to pay for counsel to litigate the thing and settle for a higher amount later on.

I think they have to look at it unemotionally at the beginning as a business problem just as they look unemotionally when they decided that it was in their interest to participate in a price-fixing conspiracy because the chances of getting caught were minor compared to the profits they make and so on.

It is a business matter. They ought to look at it unemotionally. They ought to decide to cut their losses and get out of it quick. That is the advice that I would give any one of those small businessmen and those whose lawyers so advise them have come out of these cases very early, unscathed, with relatively modest amounts, considering the total involved possible.

Senator THURMOND. As I construe then what you are saying, to summarize, would be that if you really feel you are innocent that he ought to fight it out. But if there is a question there about his being held liable, then he better make the best settlement he can early.

Mr. KOHN. Georgia-Pacific is one of the biggest and richest forest products company in the world, not only in the United States. In the *Folding Carton* case, late in the day, there was a settlement with Georgia-Pacific for \$500,000 when other conspirators were paying \$25 million and \$27 million because we, plaintiff's counsel, were convinced we had no case or a very weak case against Georgia-Pacific. So that these equities are considered. The probable success or failure of the litigation is considered. Georgia-Pacific was represented by the same Mr. Kemp who testified here before. Was that a sweetheart settlement? It came late in the day, because we were convinced by an objective review of the evidence that they were not guilty.

On the other hand, I just tried a case against Georgia-Pacific and I am going to try to collect that \$1 billion judgment I got against them because there, they were guilty.

Senator THURMOND. Let me ask you this. If you were convinced Georgia-Pacific was not guilty, why didn't you drop the case against them instead of taking \$500,000 of their money?

Mr. KOHN. Because we weren't convinced beyond a reasonable doubt. We do have fiduciary relationships and some of us felt that a jury would have found Georgia-Pacific guilty on the doctrine, on the doctrine of parallel action. Now that is a disputed doctrine in the law. We had no direct evidence that they participated in a conspiracy. It did seem to us that they were guilty of parallel action and parallel action, some courts have held, is enough. Some courts have held parallel action plus whatever that means, is enough. We felt that they couldn't simply be let go because they weren't that pure. They would probably have won the case, but you don't settle cases for nothing because somebody will probably beat you, any more than they settle for 100 cents on the dollar because probably we would beat them.

Senator THURMOND. I am sure you feel though that the lawyer feels or should feel that the case is brought and then, if there is not evidence to show guilt, that the lawyer ought to frankly dismiss the case and not try to hold somebody liable simply because they could be held liable for a judgment and made to pay a judgment.

I am sure that you feel that way; don't you?

Mr. KOHN. Well, I think so. Yes, and in some cases you do after you have maintained a case for a while just drop the case and walk away from it.

I was in an antitrust case in the milk industry. I didn't start the case. I was brought into it halfway through, a case up in New England about 10 years ago. I looked at the facts and I dropped the case, although it was against a very solvent defendant because I was convinced there was no reasonable likelihood of success.

So, we have all been in situations of that kind.

Senator THURMOND. Thank you, Mr. Kohn. I have another engagement.

Senator METZENBAUM. Thank you, Senator Thurmond.

Just a couple of brief questions. We are talking about the difficulties of Kress or Green Bay Packaging. Actually, Green Bay Packaging has been described as such a small company, Are you aware of the fact the company earned about \$9 million after tax on \$20 million of shareholders equity in 1977, so that the settlement of \$5.5 million which was tax deductible really did not force the family that developed the company to give it up.

I suppose the other argument is they made the settlement because they were concerned with the greater exposure if they went to trial. But it really did not destroy the company in any way at all.

Mr. KOHN. I certainly agree with you, Senator. Senator Bayh and Senator Thurmond seemed to feel so strongly about this company, I didn't want to challenge the sincerity of their feelings. But I did say I know of no company, including this one, which has ever been destroyed or ever been threatened with destruction as a result either of the litigation or the settlement. I agree with you 100 percent. A company with \$70 million and \$7 million or \$8 million a year is not, even in these days of hectic and frenzied financing, penniless. They should pay their proportionate part.

As I said, if they want to be part of the club, they have to pay the dues.

[The prepared statement of Mr. Kohn follows:]

PREPARED STATEMENT OF HAROLD E. KOHN

The proposed amendment to S. 390, which amendment would provide for contribution and for the reduction in recoverable damages against one defendant where another defendant has settled, is extremely ill advised and should not be adopted.

The proposed amendment would change substantive and procedural rules which have been in effect for almost a century, since the adoption of the antitrust laws, and which have worked extremely well during that period. It has always been understood that there is no right of contribution on the part of one joint antitrust defendant against another. See, e.g., *Goldlaur, Inc. v. Shubert*, 276 F. 2d 614 (3d Cir. 1960).

This principle has encouraged the settlement of such litigation, a factor of major importance because of the complexity of antitrust litigation, and has been a factor in discouraging violations of the law because of the amount of the monetary risk entailed.

Recently, the Court of Appeals for the Eighth Circuit in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 1979-1 CCH Trade Cases ¶ 62485 (8th Cir, February 27, 1979), held that there should be a right of contribution. That case represented a very peculiar fact situation of little or no general application. In essence, it appears that the principal defendant, who was primarily responsible for a monopoly violation, had conspired with the plaintiff to effect a release for a relatively modest monetary consideration because of other mutual interests. The less guilty codefendant was then made the principal subject of the suit for damages, and the court thought there should be some equitable contribution between the two defendants to adjust a patently inequitable and collusive situation.

The situation in the ordinary price-fixing case, the most typical kind of section 1 violation, and the violation of most immediate concern at the present time, is entirely different. The conspirators are all on a par and there is no monopolization claimed.

Several courts have already recognized this distinction. For example, as appears in exhibit A, a portion of the transcript in the pending *Folding Carton Antitrust Litigation*, MDL 250, Judges Will and Robson, who are generally regarded as among the leading jurists in this field of litigation, both being on the board of

editors of the "Manual for Complex Litigation," stated that in their opinion, the *Professional Beauty* rule had no application in price-fixing cases.

In a similar situation, Judge Singleton in the Northern District of Texas in the *Corrugated Container Antitrust Litigation*, MDL 310, held to the same effect refusing to permit claims among the defendants for contribution. See exhibit B.

In a somewhat analogous situation, Judge Cahn in the Eastern District of Pennsylvania refused to permit the filing of such a claim on the ground that it was not timely, citing another decision of the Eighth Circuit, *In Re Cessna Distributorship Antitrust Litigation*, 532 F. 2d. 64 (8th Cir. 1976). See exhibit C.

The primary effect of such legislation establishing a right of contribution, which has uniformly been rejected by the ablest Courts, would be to deter settlement. The most concrete evidence of this is the position taken by major defendants in the pending price-fixing litigation such as *Folding Carton Antitrust Litigation*; *Corrugated Container Antitrust Litigation*; *Eastern Sugar Antitrust Litigation*, MDL 201A; and *Fine Paper Antitrust Litigation*, MDL 323.

Those defendants who do not wish to settle and who have opposed strenuously the settlements by other defendants have filed cross-claims seeking contribution, and those who have settled or who want to settle have opposed such claims and are contending that there is no such right of contribution. It is particularly significant that in some situations the same corporation which has an interest in settling one case, but not another, has followed this pattern, making conflicting positions in the two cases, and law firms which represent two different defendants in two different cases have been equally inconsistent.

The second paragraph of the proposed amendment will likewise discourage settlement because no plaintiff will accept an amount from one defendant which would adversely affect his right to recover against the remaining defendants. At the present time, and again the system has worked extremely well for almost a century, the only deduction from the trebled judgment is the actual amount received from the settling defendants. There is no reason whatsoever why any greater amount should be deducted or why treble the proportion should be deducted, except to make life easier for those who contemplate violating the antitrust laws. The only practical deterrent to violation, in view of the tremendous profits received by violators, is the treble damage liability. To weaken it at this time in any way would be a retrogressive measure which could have the approval only of the most predatory element of the business community.

As the Courts have recognized, price fixing and related violations of the antitrust laws are totally different from negligence cases and other litigation, as to which various states have enacted joint tort-feasor statutes. Those are not intentional injuries, the amounts involved are totally different, and the litigation is much less complex and is more routine.

Accordingly, because the proposed amendment would militate against the deterrent effect of the antitrust laws, and would discourage settlement of such litigation, your committee is respectfully urged not to approve the amendment.

[See appendix for exhibits attached to this proposed statement.]

Senator METZENBAUM. Thank you very much, Mr. Kohn.

The hour is running extremely late. I am apologetic to Mr. Scanlon and Mr. Hibner.

Mr. Scanlon, may we hear from you first. I think you are involved in a particular case down in Indiana that has led to so much concern.

STATEMENT OF THOMAS M. SCANLON, ATTORNEY

Mr. SCANLON. Thank you, Senator.

First, let me say something about myself as Mr. Kohn did. I have been practicing almost 45 years. I am a general practitioner, a trial lawyer. I have tried all kinds of cases. In the last few years I have been engaged mostly in antitrust and business-type litigating.

I am a member of the American Law Institute, the American College of Trial Lawyers. I am a past president of my State bar

association and the 7th Circuit Bar Association and past chairman of the antitrust section of the American Bar Association.

I recommend the approval of the Bayh amendment for the fundamental reasons that it is fair and right, and it will bring some justice to an unfair situation.

I think this committee has now heard sufficient testimony to recognize that the present situation where a defendant can be threatened with total liability if he doesn't settle now on plaintiff's terms is an unfair situation.

The question is: Does this amendment bring some fairness to that unfair situation?

Mr. Kohn did not say anything about whether the present situation was fair. He said it was a situation whereby plaintiffs that he represents can get settlements. That was his theme.

He says that the present law of no right to contribution is a deterrent to antitrust violations, but he did not defend it as fair. Senator Bayh tried to interrogate him on that, but he avoided the question.

This committee ought to be concerned with fairness. These other considerations, argued by Mr. Kohn, are secondary and most speculative.

Mr. Kohn is a strong advocate and he makes sweeping predictions about what will happen. I could make even stronger arguments concerning these factors from a defendant's point of view if I had equal time.

The fact that I can make such arguments to you that this amendment will actually aid in deterrence and persuade you on the other factors argued by Mr. Kohn, I don't believe, however, is the point.

The real point is that this committee cannot foretell whether his or my speculation will prove to be correct. But available to you is the considered judgment of an unquestionably unbiased, experienced prestigious body—the Court of Appeals for the Eighth Federal Circuit in the *Professional Beauty Supply Co.* case decided in February of this year.

Now, here is a court of law, a Federal circuit court, dealing in antitrust matters every day. They studied briefs and heard arguments from lawyers for the plaintiff and lawyers for the defendant on these very issues we are discussing here today. This was an antitrust case. The question was whether or not a cross-complaint, bringing in a third-party defendant and asserting a theory of contribution, had been properly dismissed by the trial court.

The eighth circuit gave full consideration to the arguments made by the plaintiff in that case and usually made by the opponents of right of contribution: That allowing contribution will interfere with the plaintiff's ability to maintain control of his lawsuit; that contribution might serve as a possible deterrent to settlement; that it is unwise to further complicate an already complex lawsuit by adding the issue of contribution among defendants; that contribution will diminish the deterrent to violations and held:

The result of automatically prohibiting contribution among antitrust defendants in all circumstances would be to allow a significant number of antitrust violators to escape liability for their wrongdoing and thereby undermine the policy of the antitrust laws.

The court held that in any event none of the above factors was a deciding factor. The opinion says:

The deciding factor in our decision is fairness between the parties—fairness requires that the right of contribution exist among joint tort feasons, at least under certain circumstances.

The court concluded that even absent congressional action, that the deterrent quality of the antitrust laws itself requires that joint tort-feasons have a right of contribution against other defendants.

It further said:

There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible, to be placed upon one alone because of the plaintiff's whim or spite or his collusion with other wrongdoers.

Now that is not Tom Scanlon, the defendant's lawyer, talking. That is a court of law. With all due respect to the members of this subcommittee, that court knows more about the antitrust workings than this subcommittee.

From whom can this committee expect to receive an unbiased expert opinion? Not from Mr. Kohn, the advocate, and perhaps not from Tom Scanlon, the advocate. But you can get it from the eighth circuit.

You may ask the question, well, now, this present law has been in effect for a long time. It is part of the common law. Why should it be changed now? The answer is, that in years past, prior to class actions, judgments were small, and the question of the right of contribution between tort-feasons usually arose in negligence cases and matters of that sort. It was then not too consequential.

Now we have class actions. We have antitrust treble damages. The total potential liability for many classes is absolutely horrendous. Under these circumstances when you say any one defendant can be liable for the total damages with no right to contribution, that is patently unjust.

Senator METZENBAUM. Mr. Scanlon, the *Professional Beauty Supply* case, the opinion you quoted, was a conspiracy to monopolize case, not a price-fixing case.

Isn't it the fact that the courts both before and after *Professional Beauty Supply* have denied contribution in antitrust cases?

Mr. SCANLON. It is the only case by any Federal court of appeals that I know of. The eighth circuit says this in its opinion that this is a case bringing this issue for the first time before a court of appeals. They do cite four district court cases that have held no right of contribution in an antitrust case.

But, Senator Metzenbaum, every one of those district court cases, as pointed out by the eighth circuit, states clearly that the inequity in the present law is obvious, but Congress hasn't acted. But the eighth circuit says even though Congress hasn't acted, the present situation demands that right of contribution be recognized in spite of the district court cases, which of course, as you know, are inferior courts to the eighth circuit.

Senator METZENBAUM. Let me ask you this question. You represent Inland Container. Isn't Inland Container resisting contribution in the *Corrugated Container* case?

Mr. SCANLON. I am not representing Inland Container actively in the Houston case. I put in an appearance in the first instance, but I told them the best service that I could render to them as a client was to get them the best Houston lawyer I could find to represent them, and I did that. I recommended Leroy Jeffers. He represents them, and while my appearance is on, I have—they have not consulted with me about that case. I have not written any briefs or pleadings.

Senator METZENBAUM. But it is the fact that your client is resisting contribution. Now you are saying that contribution is the only fair way. My question is: Isn't this an inconsistency?

Mr. SCANLON. I don't know that they are doing that.

Senator METZENBAUM. I think that is the fact, according to—

Mr. SCANLON. Well, I would say that what they are doing in that case is the responsibility of Mr. Jeffers and the client. I am here representing my views as to what ought to be done as a trial lawyer, not representing Inland Container Corp. or any other client.

Our firm happens to have Inland, be fortunate enough to have Inland among our clients, but I am here as Tom Scanlon. I am speaking as Tom Scanlon.

Senator METZENBAUM. Mr. Scanlon, are you aware of any contribution statute which provides for claim reduction after settlement in the manner of the proposed amendment that we are presently considering?

Mr. SCANLON. I do know that in the eighth circuit opinion you will find a footnote that comments that the right to contribution is an idea whose time has come and that 22 States have adopted statutes providing for contribution. I have not read those statutes, Senator. So, I can't answer that question.

Senator METZENBAUM. I am asking about recognizing claim reduction after settlement. Do you know of any situation where that presently exists?

Mr. SCANLON. I do not, because I have not read any one of those 22 statutes.

Senator METZENBAUM. Is it common for contribution to be allowed among intentional, perhaps criminal wrongdoers?

Mr. SCANLON. The eighth circuit dealt with that in the *Professional Beauty* case. The seventh circuit has approved, in airplane crash cases, a right of contribution, based upon liability or percent of fault.

Senator METZENBAUM. In airplane crash cases it is not intentional wrongdoing, is it?

Mr. SCANLON. That is right.

Senator METZENBAUM. That is negligence.

Mr. SCANLON. Yes, I think that is right.

Senator METZENBAUM. The eighth circuit didn't deal with settlement at all, did it?

Mr. SCANLON. Yes, it did. The eighth circuit said, after considering all the various factors, the ones discussed here by Mr. Kohn, said, "We are not convinced that a holding permitting contribution need undermine the judicial policy in favor of settlement. The problem of how to treat a joint tort-feasor who has settled in good faith, is not in the present case." They did say it was not in the present case.

Senator METZENBAUM. Settlements were not part of the case, so that whatever the court might have said was obvious obiter dictum?

Mr. SCANLON. No, I don't think it was obiter. I think it was a—

Senator METZENBAUM. Was it dictum?

Mr. SCANLON. It was a part of the opinion which showed the bases upon which they rested their ultimate conclusion. It was one of the arguments made by the plaintiff in that case against the right of contribution, the real issue.

What they said was that "The deciding factor in our decision is fairness between the parties. We conclude that fairness requires that the right of contribution exists among joint tort-feasors, at least under certain circumstances."

Senator METZENBAUM. Well, the question I am asking is whether or not that reference to the matter of settlement, being an element in the contribution question, was purely dictum in their opinion, since there were no settlements made in that case. You said, no, you didn't agree.

I would just like you to tell me how that language relating to settlement was needed at all in order to arrive at the conclusion in the case since there were no settlements.

Mr. SCANLON. Because the argument was made in that case, just as Mr. Kohn makes here, that if that court adopted in that decision a rule, which it did, permitting contribution, it would adversely affect settlements.

It was the lawyer who had successfully got the dismissal of the cross-claims in that case, that argued that matter. The court said that was not sufficient to justify them not recognizing the overriding fairness doctrine that required them to recognize contribution.

Senator METZENBAUM. How would you feel then about an amendment which just indicates the congressional intent not to prohibit contribution in antitrust cases and doesn't deal with the settlement question at all?

Mr. SCANLON. Well, it is pretty hard for me to envision a statute that would say that Congress does not declare any policy against right of contribution, because the present law, except for the eighth circuit, says that there is no right.

So, if Congress is going to do anything, it ought to decide one way or the other.

Senator METZENBAUM. What I am saying is, how would you feel if the Bayh amendment dealt only with the element of contribution and eliminated totally the question of settlements, the whole issue of what impact settlements might have on the contribution question?

Mr. SCANLON. I—

Senator METZENBAUM. Like the securities laws.

Mr. SCANLON. If you mean if the statute were amended to provide for right of contribution in a litigated case, and provided for only contribution in that instance, and did not make any provision for what effect that right of contribution would have on settlements, then I think it would be a half measure. I think the right of contribution has to be recognized in the entire litigation.

Senator BAYH. Would the Senator yield?

Senator METZENBAUM. Yes.

Senator BAYH. Could I ask if Mr. Scanlon could share his thoughts with us since there could be a relationship between the approach of contribution in antitrust which is basically designed to serve as a deterrent as well as a regulatory function? Is there a comparison there with the contribution that has been available for some period of time under the SEC statute?

Mr. SCANLON. All I can say is that I frankly have not had experience in the SEC situation. Perhaps Don Hibner has.

[The prepared statement of Mr. Scanlon follows:]

PREPARED STATEMENT OF THOMAS M. SCANLON

BACKGROUND

First let me give you some information so that the opinions I give may be better evaluated. Almost all of my 45 years of practice has been as a trial lawyer, including trials in personal injury, malpractice, libel, antitrust and all other types of business litigation. I am a member of the American College of Trial Lawyers, the American Law Institute, past chairman of the Antitrust Section of the American Bar Association and past president of the Indiana State Bar Association and the Seventh Circuit Bar Association. With my partner Hubert Hickam, I coauthored the American Law Institute book on "Preparation for Trial."

RECOMMENDATION REGARDING SENATOR BAYH'S AMENDMENT TO S. 390

I strongly recommend the subcommittee approve Senator Bayh's amendment to S. 390 because it will bring justice and fairness to an unjust and unfair situation. Almost everyone recognizes that the lack of rights to contribution is unjust and unfair, even those who oppose the amendment. The critics oppose the amendment, not on the ground it would be unjust, but on the grounds that (1) it will complicate such litigation which is already complex, (2) plaintiffs will lose control of cases, (3) it will result in a lessening of deterrence of violation, and (4) it will be a deterrent to settlement.

The arguments with respect to these factors are highly speculative. Equally strong, if not stronger, arguments can be made in support of the amendment but in the last analysis all these factors are relatively unimportant and too speculative to be of consequence. The only real factor to be considered is whether the amendment will result in a more just and fair adjudication of the controversy.

THE MERITS OF THE AMENDMENT SHOULD BE DETERMINED ALMOST ENTIRELY BY DETERMINING WHETHER IT WILL RESULT IN EQUITY AND FAIRNESS

As Senator Bayh has stated, the amendment is "a matter of equity." As he stated the essence of amendment is "the damages you pay ought to be in direct proportion to the damages you do, times three." By the amendment, Congress would recognize and correct an inequity long recognized by legal scholars and the courts. Professor Prosser, for example, states:

"There is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiffs' whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." Prosser, *Law of Torts*, § 50 (4th ed. 1971)

Most recently the Court of Appeals, Eighth Circuit put it this way: "There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer."¹ The court held: "Fairness requires that the right of con-

¹ *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.* 1979-1 Trade Cases ¶ 62485.

tribution exist among joint tort feasons" in antitrust cases. The deciding factor which prompted that court to that conclusion should be precisely the same deciding factor that should prompt this subcommittee to approve the amendment. The analysis of that court in that opinion of the arguments against contribution are shown (by the analysis of the Court) to be relatively unimportant compared to the deciding factor of fairness. The opinion quotes Professor Prosser and repeats: "The deciding factor in our decision is fairness between the parties." I respectfully submit the same is true for this subcommittee. The deciding factor and the all important factor in your decision is also fairness.

Years ago when verdicts in tort cases were small and class actions were unknown, the law of no contribution did not seem unreasonable. Gradually as verdicts became larger and class actions proliferated, the unfairness that one defendant may have to pay or threatened he will have to pay for all has been increasingly recognized. A minimum of 23 States has enacted statutes which permit at least limited contribution. In some other States contribution has been recognized by case law.

Examples of unfairness have reached the extreme degree in class-action price-fixing cases because of the extremely large amounts of money involved with some companies facing financial ruin as a result of the present law. Those decisions which have ruled against contribution in recent years have given recognition to the unfairness but have asserted the problem should be corrected by Congress² not by the courts.

THE AMENDMENT WILL NOT ADD TO COMPLEXITY

Opponents argue already complex litigation will be made more complex because additional defendants will mean additional issues, and more discovery. If it is just for all wrongdoers to be joined and their liability, if any, established, it obviously is more efficient to do so in one action. In fact, third party defendant practice rule, the total litigation can be adjudicated in one case where prior to the adoption of the third party practice rules, the initial litigation had to be concluded before suit could then be initiated against others who were also allegedly liable.

OPPONENTS' ARGUMENT THAT PLAINTIFF WILL LOSE CONTROL OF CASE IS NOT VALID

Opponents make this argument because they prefer being able to cast the litigation to plaintiffs' greatest advantage even though, and perhaps because, this puts the named defendants at the greatest disadvantage. The complete answer to this argument is, as the eighth circuit has held, fairness demands that all potential defendants be joined and that court's comment. "[W]e are confident that such problems can be avoided by the district court's prudent use of its power to sever where necessary to insure justice."

THE AMENDMENT WILL NOT DECREASE DETERRENCE OF VIOLATION

The eighth circuit stated this question of deterrence cuts both ways and on balance a rule allowing contribution is actually a greater deterrent. Drawing on its vast experience in antitrust litigation, the eighth circuit points out the factors it considered and then held: "Because of the deterrent policy of the antitrust laws, even intentional tort feasons may obtain contribution so that other tort feasons will not escape liability."

THE AMENDMENT WILL BRING FAIRNESS TO SETTLEMENTS

The opponents of the amendment desire to preserve the status quo. It is agreed by substantially all observers except a few lawyers specializing in plaintiff's class action antitrust litigation that it is unfair to threaten a relatively weak defendant with total liability if he does not settle on plaintiff's terms. I urge the subcommittee to apply the standard of fairness not the test of whether the amendment will increase or decrease the number of settlements. The proper question is, "Will it result in fair settlements?" The answer to that question is obvious.

² See *Professional Beauty Supply* case above, cited p. 76847.

CONCLUSION

In the *Professional Beauty* case, the court considered all factors now before the subcommittee. While proponents and opponents of the amendment may be charged with bias or lack of experience, such a charge cannot be made as to that court. It arrived at its opinion after considering all factors. I respectfully submit that opinion is the best guide for this subcommittee.

Senator BAYH. I don't want to interrupt. I just thought you might—

Mr. HIBNER. Let me just make one comment, if I may, Senator. I think Mr. Scanlon is entirely correct that in securities cases we have developed case law with certain of the sections of the Securities Act that provide for contribution. The 10(b)(5) cases are—

Senator BAYH. Excuse me, Mr. Hibner, we also have contribution permitted under the SEC statutes in those parts of the statute which is does not mention contribution.

Mr. HIBNER. That is correct, Senator. I believe we can take administrative notice that those cases are inherently as complex as most antitrust cases. They can have multiparties. We can have the same complexities and problems in those cases.

Contribution has not made those cases more difficult, to my knowledge, to dispose of. I think it is a fair and equitable solution. Let's also note that those are intentional tort-type cases.

Senator METZENBAUM. Mr. Kohn, would you care to comment briefly on the issue of contribution being permitted under the securities laws, without the statutes mentioning the treatment of settlements?

Mr. KOHN. We are in a case that is probably the leading case that rose out of the District of Delaware. It is called *Gould v. American Hawaiian Steamship Company*. It is reported in 378 F. Supp. 163. It went up to the court of appeals. It was affirmed in part and reversed in part, but not having anything to do with the contribution part of it.

There are certain sections of the Securities law which do provide for contribution. It is not this kind of statute. It says: "Contribution as in contract cases." It deals with the unintentional violation. It does not deal with 10(b)(5), although there has been considerable discussion whether it should be imported into 10(b)(5).

The fact is though, that it is almost impossible to find a case where any judge has ever awarded contribution. In this case, after a very scholarly discussion of contribution and what the statute provides, Chief Judge Wright held that there was no contribution because what each of them was required to pay after the jury verdict was fair on its face and there was no need for contribution.

So that I say in the securities cases, while there is a provision in the statute, it is a dead letter, because for all practical purposes it hasn't been applied. It does, in those cases, militate against settlements.

I have been in cases where cross-claims were filed on the eve of trial, because a nonsettling defendant or two nonsettling defendants wanted to prevent the case from going to trial and they say all the issues have to be decided together, and the fact that somebody else has settled is no reason why they should not now, 2 years later, file their cross-claim.

So, it has interfered, even though, for all practical purposes, it has been a dead letter. If anyone is interested, I think that is the most recent discussion in 1974 or 1975.

Senator METZENBAUM. Mr. Hibner, we have a few minutes left. I would like to hear from you before we conclude. I know that Senators Bayh and Baucus may have questions of Mr. Scanlon. You have come a long distance, and I do want to be certain that you have an opportunity to be heard.

STATEMENT OF DONALD T. HIBNER, ATTORNEY

Mr. HIBNER. Thank you, Senator. You have my statement. Let me say at the outset that I have only been practicing antitrust law for 16 years and not 40, so perhaps I can be very brief.

I have been listening with great interest to what my brother Kohn has had here to say. I was perhaps chaffing at the bit to comment, but since most of the questions were of a cross-examination type of nature of Mr. Kohn, I was quite happy to sit here and listen to the responses.

Let me say that I am speaking here as a private citizen and not as a member of the ABA or my section which is the private litigation committee of the antitrust section which is currently working on a position paper for the ABA that will be submitted, hopefully, after our August meeting.

Because of what Mr. Scanlon has had here to say, I will be very brief. I would just like to ask myself certain questions and then answer them.

From my experience, has noncontribution, the present state of the law, been a deterrent. I would say, definitely not. Most businessmen are not aware of contribution or noncontribution. What is a deterrent, and what they know about, are treble damages, fines, imprisonment, and class actions. Those are four things that they, by reading the newspapers, know a great deal about.

As we said earlier at the outset of this hearing—and I think it was one of the Senators that made this remark—the antitrust laws really work pretty well. We have massive deterrence whether we have contribution or not. So, let us not delude ourselves into really believing that we make the antitrust laws more effective by having this Khomeini-type ability to annihilate a small defendant. That is what we are really talking about.

We have put people in this situation, because of the increase of jail sentences, class actions, talk about fluid recovery, and *parens patriae*. We have these new arsenals of antitrust enforcement that are sort of in the nature of overkill.

I think, as Mr. Scanlon has brought to bear and as the eighth circuit has announced, what we are talking about is fairness. In my own experience, settlements are being coerced. We are settling cases that probably should not be settled. Yet no defendant, whether moderate or small, can really afford to try these cases.

I do not believe that it can honestly be said, at least for me, because I have a conviction to the contrary that there should be a situation where moderate or small defendants are being coerced into settling cases.

I just read in the paper today, while I was waiting to testify, the latest expression by the Supreme Court on just this type of concern.

I am talking about yesterday's decision in the *Sonotone* case. I am going to quote very briefly from Mr. Chief Justice Burger's statement. It appears in the Business and Finance Section of the Washington Post.

"These are not"—and he is talking about settlements—"unimportant policy considerations, but they are policy considerations more properly addressed to Congress."

This is what the lower courts have been saying on the issue of contribution. This is something upon which Congress should speak.

The Chief Justice said: "The lower courts must be especially alert to identify frivolous claims brought to extort nuisance settlements."

The day after an indictment or the day after the filing of one suit, the day after that hits the newspapers, we can expect now to have plaintiff's lawyers racing each other to the courthouse to see who can file a class action the quickest.

Then they will "lodge" themselves into situations where one would be lead counsel. They will use the coercive power of class actions to "extort" settlements.

I am not going to say that they "extort anyone" in a criminal sense. They are representing their client's interests.

Senator METZENBAUM. Are you then saying that the antitrust laws should be repealed?

Mr. HIBNER. I most certainly do not.

Senator METZENBAUM. I don't know what we are going to do about the fact that lawyers rush to the courthouse to file actions. I don't know what this committee is going to do about that. I think that is a part of the American way of jurisprudence.

Mr. HIBNER. Let me respond to that by saying this, whether you have contribution or not, we are not going to deter the filing of antitrust suits. Of course, we should not. We want to encourage their being filed. But whether we have contribution or not, they will be filed.

Antitrust today is a growth industry. We don't have to worry about the antitrust laws not being enforced by private attorneys general. They will be enforced.

Now, is contribution fair? I think that is the basic consideration. I don't think noncontribution is fair. I think contribution is an issue whose time has come. We will hopefully present that when the ABA takes a position. It is not taking a position, whatever position it takes I will not be the one that is going to present it.

Senator METZENBAUM. Mr. Hibner, there is this division of opinion in the ABA, among both plaintiffs and defendants' lawyers, is there not, with respect to the issue of contribution?

Mr. HIBNER. I suspect that there will certainly be a very strong difference of opinion, even those who represent, shall we say, both sides of the street, as I do myself.

Senator METZENBAUM. Mr. Hibner, we appreciate very much your testimony. Your entire statement will be included in the record.

Mr. HIBNER. Thank you.

Senator METZENBAUM. Senator Bayh and various other members of the committee and Senator Thurmond and the chairman himself, as well as others, may have questions for each of the three members of the panel.

I assume that if we see fit to write to you and ask questions, you will be good enough to respond, and the questions and answers would then be inserted in the record.

The Chair is elsewhere committed. Other members of the committee were elsewhere committed also at this hour. I apologize to you, Mr. Hibner and Mr. Scanlon, for not giving you as much time as I had hoped. But I think you understand the exigencies of the situation and I thank you for your cooperation.

Mr. HIBNER. Thank you, Senator.

[The prepared statement of Mr. Hibner follows:]

PREPARED STATEMENT OF DON T. HIBNER, JR.

My name is Don T. Hibner, Jr. I am a partner in the law firm of Sheppard, Mullin, Richter & Hampton, Los Angeles, Calif. I joined the firm in 1962. I became actively involved in the tail end of the *Electrical Equipment* cases, and have specialized in antitrust law ever since. Since 1967 I have been an active participant in the affairs of the Antitrust Section of the American Bar Association. I am currently the co-vice chairman of its Private Litigation Committee. I am the chairman-elect of this committee. I have written and lectured extensively on antitrust issues.

Because of the interest of the antitrust bar in the developing law of contribution, the Private Litigation Committee has commissioned a panel presentation on this subject for its annual August meeting. It is also preparing a monograph on contribution. In addition, it will join forces with the Civil Practice and Procedure Committee to prepare a report on the proposed amendment to S. 390, being discussed today.

As you know, the Antitrust Section has taken the position that because of the complexity of the issues raised, serious and detailed study is necessary. Allen Holmes, chairman of the section, has asked that any contribution legislation be deferred pending a thorough study.¹

Accordingly, I am appearing here today as a private citizen. I do not represent the antitrust section or any other group. I concur that the issues are complex, and that they are highly controversial among members of the antitrust bar.

As an overview, I support the concept of contribution among joint antitrust tortfeasors. With slight modifications, I can support the amendment to S. 390. The amendment will go a long way toward remedying a serious imbalance of bargaining power between plaintiffs and defendants in certain types of antitrust cases. Noncontribution can create substantial unfairness and can even damage competition policy itself. It is time for a change.

As you know, the "rule" against contribution came into English common law in 1799. In *Merryweather v. Nixan*,² Lord Kenyon held that contribution would not be allowed among joint intentional tort-feasors. The policy reason was that intentional wrongdoing is deterred by refusing to diminish the burden of total liability. See Prosser, "Law of Torts" § 50 (4th Ed. 1971). Until recently, this rule has survived relatively intact. An important corollary of this rule, however, is that every time a wrongdoer is saddled with his guilty cohort's liability, an equally guilty person escapes liability. A plaintiff can have but one recovery. Contribution has evolved as a legal system of Russian roulette.

But Lord Kenyon did not know about the Sherman Act. He did not know about treble damages, class actions, fraudulent concealment, or *parens patriae*. He did not know about million-dollar fines. Noncontribution is no longer necessary in antitrust cases to supply needed deterrence. Treble damages, fines, jail terms and litigation expenses are incredible deterrents in their own right. Where as here the rule is not only not necessary, but also produces unfair and possibly anticompetitive results, it should be abandoned.

There has been a developing practice by class action plaintiffs of picking off cheap, quick settlements in antitrust suits. Inordinate settlement pressure can then be imposed on nonsettling defendants. Even where they believe in good

¹ Letter dated June 4, 1979, from Allen C. Holmes to Senator Birch Bayh.

² 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

faith that they would prevail at trial, they cannot afford the risk of losing. The stakes are too high. If he does go to trial, his former co-conspirator is now a key witness to induce the jury to tag the defendant with his sales. Why? His nonsettling competitor may be severely impaired if not destroyed economically. Here is how we can increase concentration under the guise of antitrust enforcement. This even happened in the long ago days of the *Electrical Equipment* cases. Because of those cases, at least in part, two companies dropped out of the power switch gear market, leaving it to substantially larger co-conspirator rivals. It happened most recently in the *Armored Car* litigation. Brinks, a national company with substantial assets settled all claims in a series of class actions pending in Atlanta. Now, small local companies are being sued on the same sales in California litigation. As a result Brinks may have these local markets to itself.

To avoid these horrors, defendants have been engaging in self-help. Sharing agreements have been utilized for years as a means of spreading the risk of a massive judgment based upon everyone's sales being levied on one company. The agreements generally provide that each company will bear that proportion of any judgment as its sales bear to the total of all defendants' sales. If a defendant settles, he must insure that the plaintiffs will not seek recovery from others based upon alleged overcharges on the settling defendant's sales. If the settling defendant does not "remove his sales from suit" he will be liable to the remaining defendants. These agreements are incredibly complex and difficult to negotiate. Where the defendants are few, of relatively the same size, and have relatively the same degree of innocence or guilt, such agreements are feasible. Where other factors are present, they are not.

As I understand it the Bayh amendment will perform by operation of law what we currently attempt to do by sharing agreements. I believe that there is substantial merit in this proposal. The formula used is a fair and simple one.

The reasons why contribution is an idea whose time has come are well articulated in the recent case of *Professional Beauty Supply v. National Beauty Supply, Inc.*³ There, a wholesaler sued a rival wholesaler for entering into an exclusive distributorship agreement with plaintiff. Defendant National filed a third-party complaint against LaMaur for contribution and indemnification. In an appeal from an order dismissing the third-party complaint, the eighth circuit reversed and held that pro rata contribution was proper. It is important to note that LaMaur and the plaintiff, Professional, were by then back together.

The court held: "The deciding factor in our decision is fairness between the parties. We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances. There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss of which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer"⁴

The court disposed of a number of arguments that undoubtedly will be raised here. Based upon my experience, the court was correct in assessing the pros and cons of these arguments. It is unlikely that the impleading of third-party defendants will interfere with a marginal plaintiff's control of its lawsuit. The trial court has ample tools available. Should any antitrust conspiracy case be tried against less than all of the actors, all of the evidence as to each will come in anyway. Where pro rata contribution and not comparative fault is involved, management problems should be minimal. No problems have occurred, to my knowledge, in securities cases allowing contribution. As a matter of complexity, securities cases should be on a par with Sherman Act cases.

Another argument often advanced is that contribution will deter settlement. In my experience, this should not be a significant factor. Most antitrust cases settle. This is because of the massive risks involved in trial for both plaintiffs and defendants. Even when joint liability is not a factor, the stakes are extremely high. Defendants settle many cases they would otherwise win. Let us also remember that most antitrust cases are won by defendants. This leads me to the inevitable conclusion that many antitrust suits are without merit. Plaintiffs are anxious to settle such cases. Each side has substantial incentives for settlement.

³ 592 F.2d 1179 (1979).

⁴ 592 F.2d at 1185-6.

The only deterrence will be to settlement of new cases before the facts are yet developed. When properly mature, they will settle as they always have. No one should be particularly proud of the current pattern of settlements solely on the basis of disparate bargaining power. As pointed out by Mr. Justice Stewart in "Reliable Transfer":⁵ "But even if this argument were more persuasive than it is, it could hardly be accepted. For at bottom it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations."

Nor is there substance to the argument that plaintiffs will be discouraged from becoming private attorneys general. Antitrust has been and will continue to be a growth business. Contribution notwithstanding, the incentives remain. Suits will be brought.

As I understand it the Bayh amendment provides for pro rata contribution, subject to court discretion in price-fixing cases. It does not mandate contribution in other types of antitrust cases. *Professional Beauty Supply*, for example, would not be within its scope. It should not, I hope, deter the development of the law of contribution in other areas. I view it as a rifle shot designed to provide relief where it is most needed—the broad-spectrum class action. It will provide relief similar in scope and effect to a traditional sharing agreement. As such I favor the amendment.

At the outset, I stated that I would give an overview of the reasons I support this approach. I am not here to mark up the amendment. Nevertheless, let me direct a few comments to its current text. Do you really want district judges to have the discretion to avoid the application of the amendment? Is there a statute of limitations for bringing an action for contribution? Why do you use the phrase "directly or indirectly"? Don't we have enough headaches with *Illinois Brick* now?⁶ Why include nonconspirator sales in determining percentages? In *Mid-West Paper Co. v. Continental Group, Inc.*, 1979-1 Trade Cases ¶ 62,531 (3d Cir. 1979) the court held that purchasers from competitors of alleged price-fixers, lacked standing to sue. This is a correct decision in my view. Many will disagree. We need not fight that battle here. The parenthetical should be deleted.

Senator METZENBAUM. This hearing stands adjourned.

[Whereupon, at 12:07 p.m., the hearing was adjourned, subject to the call of the Chair.]

⁵ *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975).

⁶ *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977).

A P P E N D I X

II

96TH CONGRESS
1ST SESSION

S. 1468

To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

IN THE SENATE OF THE UNITED STATES

JULY 9 (legislative day, JUNE 21), 1979

Mr. BAYH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That the Clayton Act (15 U.S.C. 12 et seq.) is amended by
4 inserting after section 4H the following new section:

5 “SEC. 4I. (a) Two or more persons who are subject to
6 liability for damages attributable to an agreement to fix,
7 maintain, or stabilize prices under section 4, 4A, or 4C of
8 this Act may claim contribution among them according to the

1 damages attributable to each such person's sales or pur-
2 chases of goods or services. A claim for contribution by such
3 person or persons against whom an action has been com-
4 menced may be asserted by cross-claim, counterclaim, third-
5 party claim, or in a separate action, whether or not an action
6 has been brought or a judgment has been rendered against
7 the persons from whom contribution is sought.

8 “(b) A release or a covenant not to sue or not to enforce
9 a judgment received in settlement by one of two or more
10 persons subject to contribution under this section shall not
11 discharge any other persons from liability unless its terms
12 expressly so provide. The court shall reduce the claim of the
13 person giving the release or covenant against other persons
14 subject to liability by the greatest of: (1) any amount stipulat-
15 ed by the release or covenant, (2) the amount of consideration
16 paid for it, or (3) treble the actual damages attributable to the
17 settling person's sales or purchases of goods or services.
18 Under item (3) above, actual damages shall not be trebled in
19 proceedings under section 4A of this Act.

20 “(c) A release or covenant, or an agreement which pro-
21 vides for a release or covenant, entered into in good faith,
22 relieves the recipient from liability to any other person for
23 contribution, with respect to the claim of the person giving
24 the release or covenant, or agreement, unless the settlement

1 provided for in any such release, covenant, or agreement is
2 not consummated.

3 “(d) Nothing in this section shall affect the joint and
4 several liability of any person who enters into an agreement
5 to fix, maintain, or stabilize prices.

6 “(e) This section shall apply only to actions under sec-
7 tion 4, 4A, or 4C of this Act commenced after the date of
8 enactment of this section.”.

ADDITIONAL PREPARED STATEMENTS

STATEMENT OF GEORGE KRESS

Note:

In March of 1979, the attached statement was submitted on behalf of Green Bay Packaging Inc. to the Senate Judiciary Committee by Wisconsin Senator Gaylord Nelson. At that time, it was not possible to reveal that "X Corporation", referenced in the statement, was in reality Green Bay Packaging Inc., due to a federal court "gag" order pending outcome of criminal trials being held in Houston, Texas. These trials are now concluded, and the story of our settlement can now be told.

Senator Strom Thurmond, South Carolina, has also used this same statement in a "Dear Colleague" letter dated April 10, 1979, which was sent to each U. S. Senator, urging opposition to S.300, the so-called Illinois Brick bill, which would vastly expand the scope of the antitrust laws.

Green Bay Packaging Inc.

TO THE SENATE JUDICIARY COMMITTEE

Many of the attorneys who have testified before this Committee have referred to the detrimental effects of clientless consumer class action suits which would benefit only the plaintiff's lawyers, and of exposing business to extortive or blackmail settlements rather than having to face the cost of litigating complex suits. These statements take on new and more vivid meaning when viewed first hand. In order to better understand the real effect of the CURRENT antitrust situation on the small businessman and his business decisions, a first hand report of an actual, current experience is hereby offered. It is not possible to give exact names and figures due to a Court order in pending litigation, however, the following facts regarding X Corporation are true and representative of what has actually happened to one Wisconsin family-owned small manufacturer. (It should be pointed out that this same occurrence has been repeated by other small businesses in the same and other industries, in many other states, as will be hereinafter pointed out.)

X Corporation has annual sales of 125 million dollars in an industry with total sales of 10 billion dollars annually. There are more than 1,000 companies in this particular industry, with the largest having approximately 6% of the total industry sales and X Corporation having 1.5% of these sales. While other much larger corporations in this industry have diversified into other related activities (accounting for their much greater net worth), X has grown almost entirely in this single business area and currently has a total net worth of approximately 70 million dollars. X Corporation employs 1780 persons in the states of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois and Oklahoma.

Two years ago, X Corporation and 38 others in the same industry received a request from a Federal Grand Jury investigating antitrust price fixing conspiracy allegations. X responded by furnishing all requested information and witnesses to the Justice Department officials conducting

the investigation, with no real concern, for X Corporation has had a long-standing policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system. At the conclusion of the Justice Department investigation, some of the corporations and individual employees being investigated were indicted for felony or misdemeanor violations of the antitrust laws. (8 corporate felony indictments, 5 corporate misdemeanor indictments, 17 individual misdemeanor indictments, 9 individual felony indictments) X Corporation was not indicted, and no X Corporation employees were named as co-conspirators by the Justice Department attorneys conducting the criminal trial. This was fully within the expectations of the family-managers of X Corporation, for they knew X Corporation was not guilty of any antitrust violations.

Less than one year following the Justice Department investigation, X Corporation was named as a co-defendant in more than 25 class action suits, brought against all of the 39 corporations originally investigated by the Justice Department. X Corporation management didn't feel overly concerned by these actions, for having been found not to be involved in the conspiracy alleged by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action suits, X Corporation concluded that its only concern was to prepare to bear the expense of lengthy litigation to prove its innocence in the alleged conspiracy civil actions. Developments proved this to be a very erroneous conclusion.

Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the civil actions with the plaintiffs by making payments to the plaintiffs' attorneys. This settling trend by the indicted defendants

were then followed by many of the unindicted defendants in entering into settlement agreements with the plaintiffs in the class actions. At this time, X Corporation conducted a detailed analysis of the situation and found as follows:

1. Approximately 80% of the defendants had entered into settlement agreements with the class plaintiffs;
2. The amount contributed by the settling plaintiffs at that time totaled over 100 million;
3. Settlements were being arrived at by a formula decided upon solely by the plaintiff's lawyers, having as its base, the percentage share of the market, times a required dollar figure. X Corporation found that the dollar figure which had been offered to the first settling defendant, \$500,000 per percentage point, had been steadily rising for each succeeding settling defendant, until the amount which was requested from X Corporation for settlement was \$3,700,000 per percentage point. Plaintiffs' attorneys settlement terms were clear and easily understood. The stated amount was required to settle at that moment - it would go up later and it was offered "take it or leave it."
4. Settlements in civil class action suits are encouraged by the Courts.

X Corporation now realized that it faced a monumental decision....pay the \$5 million plus settlement, or face the possibility that it may ultimately be the only remaining defendant who, under the law, could be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price fixing conspiracy.

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 was possible. Using a time period of 10 years, a damage figure of 1% of the total industry annual sales, subtracting settlements already made, and multiplying the results by 3 (because the law provided for treble damages in such cases) X Corporation concluded that it must stand ready to bear the burden of a potential legal liability of 778 million dollars if it followed its original decision to defend its innocence of any civil antitrust liability. The choices available to X Corporation became clear -- and the extortion aspect of civil class action suits was indeed now understood. X Corporation was faced with the following choices:

1. Settle the pending class action suits by paying more than 5 million dollars to the plaintiffs' lawyers (and still face the liability of defending the individual antitrust civil suits which might be brought by plaintiff customers who do not wish to participate as members of the present class); OR,
2. Stand ready to continue to defend the class action suits and face the possibility of a potential liability of over 778 million dollars. This liability would have to be reported to X Corporation's mortgage holders, and potential lenders, who would be very reluctant to even consider lending additional money to a corporation facing this severe a liability.

X Corporation's borrowing power was voided.

With this threat of insolvency hanging over their corporate heads, the owner-managers of X Corporation reluctantly concluded a settlement agreement with the plaintiffs in the class actions. Loss of borrowing power is a killing factor for a small privately owned corporation involved in a capital

intensive manufacturing industry. Attorneys who are handling class action suits of this nature are well aware of the financial necessities of the defendant parties in such actions, thus their settlement policy, once a few parties are coerced into early settlement is to "up the ante" unless the remaining parties settle reasonably soon. It has been said that settlements ignore the due process aspect of our system of justice -- this would certainly seem to illustrate that point.

The above cited situation is true, and has been repeated many times in the settlement process of the civil class action suits now pending in the referenced industry. In addition, this coercive settlement process has also been used effectively by plaintiff counsel against defendants in the sugar, folding carton, beef and other industries, to cite but a few. Many of these actions are now pending, and it is, therefore, not proper or possible for parties so effected to come before this Committee to tell their story, but names and corporations are available if the Committee desires them.

This Committee is presently considering a bill, S.300, which will expand the scope of class action antitrust suits many times greater than the present. Such an expansion, without some change to forestall the extortive settlement process which presently exists, would seem to be extremely inflationary and indeed a killing blow to a business community which is now burdened with sufficient problems just trying to make a profit without the need to worry about providing a substantial portion of their financial resources to enrich the antitrust lawyers.

What solution to this problem?? No easy answer is present, however, an amendment to the proposed S.300 to eliminate the joint and several liability provision among defendants in such actions might help solve some of the problems. Another might be a provision which would allow the prevailing party to recover his attorney's fees and costs from the losing party. Exact

provisions here are not possible, but of course should come from skilled antitrust lawmakers and attorneys. One thing is certain though, a change to eliminate the present extortive system is desperately needed, and to continue to allow such a situation to exist is indeed a travesty to our basic system of jurisprudence.

Corrected attachment

Four Year
Statute of Limitation if
Concealment Is Not Proven

1974-1977
Sales - \$24,407,954,600

	1%*	5%*	10%*
Class Liability	\$610,198,865	\$3,050,994,325	\$6,101,988,650
Green Bay Packaging Inc. Liability If Class Defended	10,068,283	50,341,408	100,682,813
Settlement to Date-80% of Class	300,000,000	300,000,000	300,000,000
Residual Liability for Class if Green Bay Packaging Inc. is only Defendant	310,198,865	2,750,944,325	5,801,988,650
Green Bay Packaging Inc. Liability if 20% Remaining Defend	25,436,307	225,577,435	475,763,069

* Percentage of total industry sales for period shown.

Sample Calculation to Determine
After Tax Damages

Sales	\$24,407,954,600
10% Damages Deductible = .005	122,039,773
10% Not Deductible	244,079,546
10% Not Deductible	<u>244,079,546</u>
	\$ 610,198,865

Based on 1969
U.S. V. Container Corp.
Notice Period

1969-1977
Sales - \$43,132,865,300

	<u>1%*</u>	<u>5%*</u>	<u>10%*</u>
Class Liability	\$1,078,321,633	\$5,391,608,163	\$10,783,216,325
Green Bay Packaging Inc. Liability if Class Defended	17,792,308	88,961,535	177,923,070
Settlement to Date-80% of Class	300,000,000	300,000,000	300,000,000
Residual Liability for Class if Green Bay Packaging Inc. is only Defendant	778,321,633 (D)	5,091,608,163 (E)	10,483,216,325 (F)
Green Bay Packaging Inc. Liability if 20% Remaining Defend	63,822,374 (A)	417,511,869 (B)	859,623,739 (C)

* Percentage of total industry sales for period shown.

(A-F) See attached Balance Sheet

Sample Calculation to Determine
After Tax Damages

Sales	\$43,132,865,300
5% Damages Deductible = .005	\$ 215,664,327
5% Not Deductible	431,328,653
5% Not Deductible	<u>431,328,653</u>
	\$ 1,078,321,633

	Period For Which Plaintiffs Requested Documents		
	1960-1977		
	Sales - \$63,608,977,100		
	1%*	5%*	10%*
Class Liability	\$1,590,224,428	\$7,951,122,138	\$15,902,244,275
Green Bay Packaging Inc. Liability If Class Defended	26,238,703	131,193,515	262,387,030
Settlement to Date-80% of Class	300,000,000	300,000,000	300,000,000
Residual Liability for Class if Green Bay Packaging Inc. is only Defendant	1,290,224,428	7,651,122,138	15,602,244,275
Green Bay Packaging Inc. Liability if 20% Remaining Defend	105,798,403	627,392,015	1,279,384,031

* Percentage of total industry sales for period shown.

Sample Calculation to Determine
After Tax Damages

Sales	\$63,608,977,100
1% Damages Deductible = .005	318,044,886
1% Not Deductible	636,089,771
1% Not Deductible	636,089,771
	<u>\$ 1,590,224,428</u>

GREEN BAY PACKAGING INC.
CONSOLIDATED BALANCE SHEET

	(A)	(B)	(C)	(D)	(E)	(F)
Assets						
Current Assets:						
Cash and short-term investments	\$ 7,843,000	\$ 7,843,000	\$ 7,843,000	\$ 7,843,000	\$ 7,843,000	\$ 7,843,000
Notes and accounts receivable - net	12,186,000	12,186,000	12,186,000	12,186,000	12,186,000	12,186,000
Inventories	10,967,000	10,967,000	10,967,000	10,967,000	10,967,000	10,967,000
Prepaid expenses	1,155,000	1,155,000	1,155,000	1,155,000	1,155,000	1,155,000
Total Current Assets	32,151,000	32,151,000	32,151,000	32,151,000	32,151,000	32,151,000
Property, Plant & Equipment	149,495,000	149,495,000	149,495,000	149,495,000	149,495,000	149,495,000
Less accumulated depr. & amort.	47,121,000	47,121,000	47,121,000	47,121,000	47,121,000	47,121,000
Property, Plant & Equip.-net	<u>102,374,000</u>	<u>102,374,000</u>	<u>102,374,000</u>	<u>102,374,000</u>	<u>102,374,000</u>	<u>102,374,000</u>
Investment and Other Assets	10,190,000	10,190,000	10,190,000	10,190,000	10,190,000	10,190,000
Total	\$ 144,715,000	\$ 144,715,000	\$ 144,715,000	\$ 144,715,000	\$ 144,715,000	\$ 144,715,000
Liabilities:						
Current Liabilities						
Long Term Debt	\$ 13,112,000	\$ 13,112,000	\$ 13,112,000	\$ 13,112,000	\$ 13,112,000	\$ 13,112,000
Deferred Income Taxes & Misc. Items	35,941,000	35,941,000	35,941,000	35,941,000	35,941,000	35,941,000
Class Action Damages	13,351,000	13,351,000	13,351,000	13,351,000	13,351,000	13,351,000
Shareholders' Equity (Deficit)	63,822,000	417,512,000	859,624,000	778,322,000	5,091,608,000	10,483,216,000
	<u>18,489,000</u>	<u>(335,201,000)</u>	<u>(777,313,000)</u>	<u>(696,011,000)</u>	<u>(5,009,297,000)</u>	<u>(10,400,905,000)</u>
Total	\$ 144,715,000	\$ 144,715,000	\$ 144,715,000	\$ 144,715,000	\$ 144,715,000	\$ 144,715,000
Creditors Recovery	\$1.00/\$	31¢/\$	15¢/\$	17¢/\$	2¢/\$	1¢/\$

STATEMENT OF DONALD J. POLDEN

My name is Donald J. Polden. I am an Associate Professor of Law at Drake University Law School, Des Moines, Iowa, and my academic speciality is antitrust law. I am also of counsel to the law firm of Hawkins and Norris, lead plaintiffs' counsel in the Beef Antitrust cases.

Because of an active academic and professional interest in antitrust policy and practice, I have given careful consideration to the ramifications of S.1468. I have concluded that the substance of the Bill is unwise and will cause a substantial distortion in antitrust policy.

In analyzing the Bill I have considered the principal reasons suggesting the propriety and impropriety of a contribution rule in price-fixing cases. First, the judicial development of contribution rules in situations involving joint tortious conduct. Secondly, the relative utility of a rule permitting contribution in the antitrust context when compared to the transactional costs associated with the rule. And, third, the probable effect of such a rule on the deterrence goals of the antitrust laws.

My conclusion that the Bill is unwise stems from several conclusions. First, judicial or legislative attempts to analogize antitrust actions to tort actions does not provide a normative basis for policy-making because of the incongruity between the nature of these actions. Secondly, the increased trans-

actional costs associated with the contribution rule make it less efficient, in economic and consumer welfare terms, than a rule forbidding contribution in antitrust cases. Third, the marginal returns in deterrent effect created by the rule are outweighed by the probable increase in price-fixing activity caused by the rule.

I. CASE LAW

In cases addressing the issue of contribution among joint antitrust violators, the courts have attempted to analogize the anticompetitive conduct to tort concepts and apply the relatively established rules concerning contribution among joint tortfeasors.* However, and notwithstanding the ultimate decisions in those cases, I believe that tort principles adopting a rule of contribution are predicated upon essentially moral notions of the degree of culpability while the antitrust laws are based upon the actor's intention to commit the offense. Therefore, the body of tort law providing a right of contribution among joint tortfeasors has no normative applicability to antitrust policy.

The basic purposes of tort liability rules are the establishment of social norms, the prevention of future harm to individuals in their dealings with other individuals, and compensation of the person injured through the fault of another. The concept

*See, e.g., Professional Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979); El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Reg. Rep. (CCH) ¶51,533 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, 298 F. Supp. 1339 (S.D.N.Y. 1969).

is, in a strict sense, based on a notion of fault; that is, the culpable party is more blameworthy than the injured party. The culpable party assumes both the risk of causing injury and the risk of providing adequate insurance against the injury. Therefore, it seems the tort laws are concerned with the allocation of fault between the participants and the primary concern is an equitable allocation of risk-taking between the parties to the transaction.

Because of the tort law's concern with degrees of culpability, and the simple recognition that some tortfeasors are more blameworthy than others, some courts and legislatures have been persuaded to treat intentional torts differently than unintentional torts in terms of allocating the risk of injury. Thus, in some situations an unintentional tortfeasor can recover contribution from other joint actors. From a moral perspective, then, a rule permitting contribution among joint wrongdoers serves to accommodate those situations where one wrongdoer's culpability falls below a minimum level of intention to commit the forbidden conduct. Similarly, the reason that most jurisdictions do not provide contribution among intentional tortfeasors is that bearing the full loss is a penalty for more egregious conduct.

On the other hand, the purposes of the antitrust laws are the protection of economic markets and the maximization of consumer welfare. The substantive antitrust laws represent a conscious governmental decision to intervene in and regulate economic markets and to correct imperfections in those markets. Congress enacted section 4 of the Clayton Act primarily to aid public enforcement of the substantive antitrust laws, and

secondarily to provide compensation for injuries occasioned by anticompetitive conduct. Thus, while Section 4 has a compensatory purpose, and is therefore like a tort action, the principle consideration is a fulfillment of the economic purposes of the Sherman Act.

The antitrust laws are unconcerned with degrees of fault or culpability, and are perhaps like strict liability rules. Antitrust violations are by their nature and definition intentional acts. The Sherman Act permits a finding of liability only after proof of an intent to restrain trade or monopolize. Furthermore, the Act proscribes conspiracies or attempts to monopolize or restrain trade, all involving various degrees of intent. Therefore, importing by analogy the tort rules governing the availability of contribution does not resolve the issue in the antitrust context where the purposes are achievement of economic efficiency and consumer welfare and the conduct determinant is the actor's intention. Rather, it is necessary to assess the policy of a contribution rule from the viewpoint of its ability to efficiently enhance consumer welfare.

Parenthetically, I would note that some proponents of S.1468 express concern with the equitable problems of the small scale firm coerced into a price-fixing cartel by a dominant market force and of the firm that violates the antitrust provisions by mistake. I believe that these concerns are important in both an economic and an equitable sense, but it seems to me that a contribution rule does not remedy these situations. Rather, the solution is remedial legislation providing defenses of coercion and mistake, or, possibly, legislation permitting indemnification for the coerced violator.

II. TRANSACTIONAL COSTS

Senate Bill 1468 represents a policy to accord some "rough justice" where one price-fixer is forced to bear the entire penalty for the actions of the cartel. Obviously, from an equitable point of view, a rule permitting contribution does accomplish this policy. However, since the antitrust laws are based upon a policy of maximizing economic efficiency and consumer welfare, the principle inquiry should be whether the contribution rule will achieve its equitable purpose without disproportionately increasing its transactional costs.

I believe S.1468 will significantly increase transactional costs to the federal judiciary and the parties and, ultimately, to consumers. Enhanced transactional costs derive from two sources; increased complexity in price-fixing cases and a diminished potential for settlement.

An action seeking contribution may be filed independent from the price-fixing suit or as a third-party action with the price-fixing suit. If it is an independent action, the federal court will have to manage two lawsuits, two sets of experts addressing the issue of allocation of damages, and will have additional problems tracing damages among a variety of defendants. A pro rata contribution rule, such as suggested in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 (8th Cir. 1979), would ameliorate some of these difficulties, but S.1468 provides for a comparative fault allocation of damages which, while perhaps more equitable, will enhance the complexity and manageability problems to the courts. These manageability concerns were decisive for the federal

district court judges in two recent cases addressing the issue of contribution among antitrust violators. See, Professional Beauty Supply, Inc. v. Nat'l. Beauty Supply, Inc., 594 F.2d 1179, 1189-90 (8th Cir. 1979) (Hanson, J., dissenting); In Re Corrugated Container Antitrust Litigation, M.D.L. No. 310 (S.D. Texas, filed May 30, 1979) (Singleton, J.).

If a defendant responds to a price-fixing charge by filing a third-party action, the plaintiff suddenly faces more adverse parties, an increased potential for venue changes such as into complex multidistrict litigation, and more expensive discovery and litigation time. From the plaintiff's viewpoint, a great deal of control over his lawsuit has been lost when the third-party action is filed. And, again, the federal court must manage a more complex case with increasingly difficult liability and proof of damage issues. Some proponents of S.1468 counter the complexity argument by claiming that the court can merely sever the actions. However, severance is an unrealistic remedy because, while the one price-fixing suit is complex, two or more lawsuits would be more complex and involve proportionately greater expenditures of judicial time. Furthermore, I sincerely doubt a court would grant a severance where there is an inherent similarity between the lawsuits in terms of issues and parties to the price-fixing transactions.

The second type of transactional cost implicated by S.1468 is the impaired settlement potential in price-fixing lawsuits and is inversely related to the complexity costs discussed above. That is, as the possibility of settlement decreases, the costs associated with judicial time, litigation and discovery expense, and issue complexity increase. Further, there are

several reasons S.1468 will impair settlement options and may produce an unfairness to some defendants. First, and most obviously, defendants will be much less willing to buy their peace and settle with the plaintiff if they know that they can and will be brought back into the suit as a third-party defendant and exposed to additional liability. I do not believe the provision in S.1468 which allows a partial setoff to ultimate liability by the amount contributed in settlement will serve as any incentive for named defendants contemplating settlement. They must still shoulder the burden of discovery cost and litigation expense. Second, it seems unlikely that a plaintiff will settle an antitrust case with the most culpable defendants or the defendants that have been dominant in facilitating the price-fixing cartel. Several of the statements introduced in support of S.1468 have argued the unfairness of permitting a small scale violator to shoulder the entire burden of treble damages while permitting the dominant violator to settle out for a small amount. Simply as a matter of litigation strategy, I find it unlikely that a plaintiff would permit such a dominant market force to buy its peace. A strong market power invariably makes a plaintiff's case before the jury in terms of proof of intent to violate the antitrust laws and the substantial gains obtained from the price-fixing activity. Moreover, by reducing the incentive for settlement, S.1468 will in effect deny less culpable defendants the right to pay a reasonable penalty and avoid a potentially disastrous judgment when they must litigate against dominant cartel members in the third-party action.

I believe these heightened transactional costs, when com-

pared to the marginal gains to notions of equity among price-fixers, counsel against enactment of Senate Bill 1468. At present, the vast majority of antitrust lawsuits are settled with minimum judicial expense. The effect of S.1468 will be a decrease in the number of settlements by increasing the complexity of the settlement process and decreasing the incentive to settle.

III. DETERRENCE EFFECT

Perhaps the single greatest purpose of the Sherman Act and section 4 of the Clayton Act is their deterrent effect on planned anticompetitive conduct. The threat of a government antitrust lawsuit and the specter of treble damages had provided a significant deterrence to the formulation and operation of price-fixing cartels. The issue, then, is whether a rule permitting contribution affects the deterrence effect of Section 4.

The deterrence effect of Section 4 lies in a business manager's perception of the risk of detection and the risk of ultimate monetary liability with respect to each market decision. At some point, the risk of detection and the risk of some potential liability become small enough to induce the manager to engage in the transaction. I believe the potential for contribution will affect this calculus and may make price-fixing activity more attractive. However, I also perceive some deterrence enhancing possibilities for a contribution rule.

In the first place, a contribution rule does not seem to significantly affect the risk of detection one way or the other; it will not obscure an injured party's perception of the

injury and the culprit. There are, however, a couple of subtle factors influencing this conclusion. First, a contribution rule increases one cartel member's incentive to disclose the operation of the entire cartel and seek compensation from other cartel members. Obviously, the presence of this incentive fosters the breakdown of cartels and therefore advances the purposes of the antitrust laws. Secondly, and conversely, such an incentive may produce a counterincentive among the cartel members to ensure that any member detected will not inform on the cartel. Thus, by tighter coordination in the cartel agreement and assurances that detected members that do not inform and merely pay the penalty will be permitted back into the cartel, the cartel achieves a greater stability. The detected member returns to the cartel and attempts to recoup the penalty through future supracompetitive profits. While the prospect of such tight cartel coordination is somewhat speculative, it is not fantastic. The history of the antitrust laws reveals several instances of persistent cartel operation, notwithstanding periodic antitrust lawsuits, that suggest the probability of internal coordination as sophisticated as that outlined above.

With respect to this problem of cartel coordination, it seems to me the provision in S.1468 requiring contribution on a comparative basis may increase the transactional costs associated with refining the price-fixing agreement to apportion damages in the event of detection. Cartel members may spend considerable resources to account for individual gains from the collusive conduct and perhaps to devise ways to misallocate damages to weaker cartel members in the event of detection. Transactional costs will be higher, and the dominant cartel members will

have a subtle weapon to ensure that weaker members do not break the cartel.

A rational business decision-maker determines policy by evaluating in monetary terms the risk of liability exposure. Thus, generally, the greater the liability exposure for any investment -- whether in time, resources, capital, etc. -- the greater the risk, and the more risk averse the decision-maker becomes. The issue, then, is whether the decrease in risk caused by sharing of ultimate liability is offset by the increase in risk caused by having more parties pay smaller shares. While a complete answer to this question is intertwined with the issue of detection risk changes, I believe a tentative conclusion is possible. It seems to me that a manager's willingness to engage in price-fixing bears a positive relationship to the ultimate amount of liability; and therefore the greater this liability becomes, the more risk averse a business manager becomes. The business decision-maker will be more reluctant to incur the risk of carrying the entire treble damage penalty and will be less reluctant where the entire penalty can be shared. As some of the statements supporting S.1468 indicate, a full treble damage award against one or a few price-fixers can seriously impair a firm's financial structure. Contribution rights will lower this risk of full liability exposure and provide an incentive to firms at the risk-taking margin to engage in price-fixing agreements by increasing the utility of these agreements.

CONCLUSION

In summation, I believe the probable costs associated with the contribution rule of S.1468 are substantially greater than the equitable benefits to price-fixers. The Bill will subvert the basic policies and intent of the Sherman Act and the Clayton Act without any tangible gains. Moreover, the Bill will, if enacted, unduly complicate antitrust cases, impair the plaintiff's ability to direct the course of litigation and reduce the opportunity for settlement by defendants. Finally, and most important, a contribution rule will impair the deterrence effect of Section 4 and increase the utility of price-fixing arrangements; a price that consumers and our political and economic institutions will have to pay.

STATEMENT OF E. NOBLES LOWE

I am associated with the law firm of Gadsby & Hannah, 630 Fifth Avenue, New York, New York 10020 and have worked extensively in the anti-trust area for many years. I am a member of the Advisory Board of the Antitrust and Trade Regulation Report published by the Bureau of National Affairs, Inc. From 1957-60, I was Chairman of the Trade Regulation Committee of the Association of the Bar of the City of New York and have served on several committees of the anti-trust sections of the American Bar Association and the New York State Bar Association.

I have read Senator Birch Bayh's letter dated May 22, 1979 to John H. Shenefield. It is an excellent summary of the present status of the law relating to contribution among defendants in private anti-trust litigation. The Senator's proposed amendment to the Anti-Trust Procedural Improvement Act of 1979 (S-390) to permit contributions among defendants in private anti-trust litigation is a change that is definitely needed in the interest in fairness and to prevent unwarranted injury to competition.

As the Senator's letter of May 22 points out, contribution is now permitted in some form among wrong-doers in every area of law except private anti-trust actions.

The United States Supreme Court has not ruled on the issue in the anti-trust area but it has permitted contribution in admiralty cases.¹⁾ The only United States Circuit Court to rule on contributions in an anti-trust case is the recent decision of the 8th Circuit in Professional Beauty Supply, Inc. vs. National Beauty Supply, Inc.²⁾ cited in the Senator's letter. About seven U.S. District Courts³⁾ have denied contribution in anti-trust cases and are the basis of a general view that contribution is not permitted in anti-trust cases. At least four of these cases are on appeal to the 5th and 10th circuits.⁴⁾

In the early 1930's, I studied under Professor Robert A. Leflar at the University of Arkansas School of Law while he was writing an article entitled "Contribution and Indemnity between Tort Feasors" which appeared in 81 University of Pennsylvania Law Review (1932)⁵⁾ prior to the general acceptance of contribution in tort cases.

In 1932, Leflar wrote:

"[I]t is urged that the rule of no contribution causes all prospective tortfeasors, whether they contemplate intentional or merely negligent wrongdoing, or even liability by respondeat superior, to guard themselves a little more warily against participation with others in acts which might produce liability in tort, because of a fear of being compelled to pay the entire damages instead of a ratable share of them only. An argument directly opposed to this would be entirely understandable. The fact that one joint tortfeasor may be held for the whole of the damages arising from the tort of course means that the other tortfeasors may go scot-free. This possibility of escaping all liability -- a 'sporting chance' of a type traditionally appealing to wrong-doers as a class -- might cause many to be more willing rather than less willing to engage in the wrongful activity....The truth of the matter seems to be that all along the courts have been assuming something which they did not know. They had the rule of no contribution between tortfeasors, and other related rules, and inasmuch as these rules would be 'well supported in principle' if they served to deter people from participation in legally objectionable activity, the courts proceeded to assume that they did have this deterrent effect, without any actual proof whatever of the fact. On the other hand, there has been no proof that the rules do not have such a deterrent effect. It has merely been guessed that they do not. But this seems at least as intelligent as the old assumption otherwise, and perhaps a little more so. Possibly a study of the 'law in action' could reveal the truth, but so far no such study has been made public."

* * *

"The other reason given is that the courts have no time for, nor interest in, disputes about transactions which flout the very law which the courts are asked to administer. This sounds more like an epithet than a reason. It states a dislike for a certain type of litigation, but it does not say why such causes are not as deserving of decision as are any other kinds of suit. For centuries our common courts have been taking on an increasing volume of work and wider areas of jurisdiction; the argument against overworking the courts, though frequently heard, is not commonly thought to be of sufficient weight to bar substantial causes from adjudication."

Since 1932, contribution has been accepted in most states for most torts either by statute or by judicial decisions. The Federal courts have accepted contribution by joint tortfeasors in most areas except for antitrust cases.

In 1933 and 1934, when writing the Securities Acts,⁶⁾ congress recognized that litigation under those acts could involve large sums and many plaintiffs and defendants, so it provided for contributions among defendants in such cases. There is no evidence

that contribution in securities cases (which can be as complex as any anti-trust case) has discouraged settlements or added complex issues too burdensome for the courts.

When congress established the private right of action for triple damages under the anti-trust laws, it could not have foreseen the massive modern class actions that can involve billions of dollars and numerous defendants of all sizes.

Still the principal arguments against contribution in anti-trust cases are that it will deter settlements and increase the complexity of private triple damage suits. Both arguments are demonstrably false, factually as well as irrelevant legally.

Professor Milton Handler, a recognized dean of anti-trust law, who I have learned to admire and respect, has pointed out that the basic injustice of forced settlements whether under pressure of paying damages that should be assigned to a settling defendant or otherwise. I have chaired several of Professor Handler's annual anti-trust addresses at the Association of the Bar of the City of New York. In his 1971 lecture entitled "The Shift from Substance to Procedural Innovation in Anti-trust Suits-the 23rd Annual Anti-trust Review" (71 Columbia Law Review, 1, 9), he said:

"...Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure--it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits. The distinctions between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace. Furthermore, while the judicial system is less encumbered than it would be if such an action were litigated, the imposition on judicial time is nevertheless substantial.

"I vigorously reject as false the notion that every antitrust defendant, without exception, is guilty as charged in a private complaint and that every plaintiff has suffered recoverable damages.

"Having examined the inequities inherent in overly broad class actions, let us turn to the credit side of the balance sheet. What, if any, are the countervailing advantages? One possible answer is that the in terrorem effect of such suits may provide a salutary deterrent to antitrust infraction. If this were the object, however, it certainly could be achieved by fairer, more discriminating, and administratively less onerous means. If a more severe penalty for violation of the law is appropriate, Congress

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should provide it without sacrificing the viability and integrity of the courts and without exposing defendants to what can be a financial death sentence."

The deterrents to violations of the anti-trust law are so substantial that it is difficult to understand why every business man does not strive for strict compliance. I am confident that most recognize the value of the anti-trust laws and respect the penalties for violations. Many are painfully aware of the staggering costs of legal and related services for grand jury investigation, defense of a criminal trial and litigating complicated private triple damage class actions. These costs which can total millions of dollars are in addition to the drain on the time and energies of officers and many of the employees. If the business man is found guilty of a felony or found liable in a class action, the fines (and possible jail sentences) and triple damages can be large enough to seriously weaken or bankrupt many organizations to the great detriment of employees and stockholders.

Experience has shown that the attorneys for plaintiffs in private anti-trust class actions generally have accepted "bargain" settlements defendants who settle early on the theory that contribution does not apply to anti-trust cases so that the settlements will not reduce the ultimate recovery. If contribution does not apply, the non-settling defendants will make up the difference by being forced to pay triple the full damages less the actual amount paid by the settling defendants. It is clearly in the interest of those who are guilty to settle early and cheaply if that relieves them from further exposure.

Even if all of the defendants are guilty, the law should recognize that it is wrong to permit one or more guilty parties to obtain a "bargain" merely by settling early so as to shift its deserved triple damage liability to other defendants that may be less able to pay and less involved with guilt. This permits the guilty to reap large illegal gains. Punishment should bear a more reasonable relation to the crime.

Excessive judgements against private anti-trust defendants can destroy or severely injure some members of an industry and thus destroy the very competition that the anti-trust laws are intended to foster. This situation is especially pernicious when it is realized that the plaintiffs in a private anti-trust suit chooses which of a number of potential defendants to sue and then chooses which to excuse with "bargain" settlements. These choices by a self appointed plaintiff as a result of collusion, whim or otherwise, and can determine which of the competing defendants to favor and which to weaken.

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By granting the right of contribution under the securities law, congress does not seem to have discouraged or impeded settlements in large class actions involving those laws. The Supreme Court of the United States in United States vs. Reliable Transfer Company, Inc. 421 U.S. 397 (1975) stated that:

"Congestion in the courts cannot justify a rule that produces unjust results in litigation simply to encourage speedy out of court accomodation."

In summary, without contribution in anti-trust cases, the private anti-trust plaintiff is given tremendous power that should be reserved only to regulatory authorities, that is the power to choose the defendants and to choose which defendant it will let off "easy" and which defendant will be weakened as a result of excessive judgements or forced higher settlements. The weakening of such defendants results in injury to competition which anti-trust laws are designed to prevent.

But, most important of all, contribution is fair.

Mainifestedly, contribution would better serve the purposes of the anti-trust law by insuring that no conspirator may expect to escape without paying his appropriate share of triple damages while also assuring that none will be forced to pay an excessive "overkill" penalty grossly disproportionate to the offense and potentially detrimental to future competition in the marketplace.

The Bayh Amendment's proposed procedure for permitting contribution is practical and fair. Several Federal courts by decisions, and many states by statute and court decisions have followed this procedure by determining that a settling defendant is released from further liability and the plaintiff's ultimate judgement is reduced by the total damages attributable to the settling defendant. The plaintiff must evaluate the fair settlement value of what is being settled. The result is no different from a single plaintiff settling a law suit against a single defendant.

I urge adoption of the Amendment proposed by Senator Bayh.

FOOTNOTES

1. United States v. Reliable Transfer Co. Inc. 421 U.S. 397 (1975)
2. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc. 1979 -1 Trade Case (CCH) ¶62,485 (1979)
3. Sabre Shipping Corp. v. American President Lines 298 F.Supp. 1339 (S.D.N.Y. 1969)
El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cases (CCH) ¶61 533 (N.D. Cal. 1977)
Ampecillin Antitrust Litigation 45-70 (order of May 21, 1979 denying motion to amend to assert contributions by Judge Richey, U.S. District Court for the District of Columbia)
The following four cases are on appeal to circuit courts as indicated.
Abraham Constitution Corp. v. Texas Industries, Inc. (No. 78-1788 (5th Circuit docketed April 14, 1978 -argued December 5, 1978)
Iowa Beef Processors, Inc. v. Spencer Foods, Inc. No. 78-3.3.46 (5th Circuit)
Olson Farms, Inc. v. Safeway Stores, Inc. No. 77-2068 (10th Circuit docketed Dec. 20, 1977)
In re Corrugated Container Anti Trust Litigation (S.D. Texas, Houston Division) Memorandum opinion filed May 30, 1979. Appeal filed June 1979 5th Circuit.)
4. See Note 3.
5. 81 University of Pennsylvania Law Review 130 (1932)
6. Securities Act of 1933 48 Stat. 74; 15 U.S. Code 77a-77aa; Sec. 77k(f) Securities Exchange Act of 1934 - 48 Stat 881 15 U.S. Code 78a-78jj Sec 78 i(e) and 78 r(h)

The Continental Group, Inc.
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Edgar O. Bottler
Vice President
and General Counsel

June 20, 1979

Senator Howard M. Metzenbaum
Chairman Antitrust, Monopoly and
Business Rights Subcommittee
Senate Judiciary Committee
A 519 Immigration Building
Washington, DC 20510

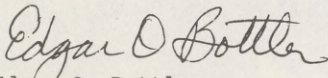
Dear Mr. Chairman:

Your Subcommittee is to be commended for conducting recent hearings on the Bayh Amendment to S. 390. We believe that the Amendment represents an indispensable first step towards modernizing a woefully archaic and unjust system that threatens competition, jobs and rational business planning and behavior. The Continental Group, Inc., the world's leading manufacturer of diversified packaging products, with business interests in financial services and natural resources, would therefore like to submit a written statement for the hearing record in support of the Bayh Amendment.

Attached you will find a copy of our prepared statement and I thank you in advance for your cooperation in this matter.

If we can be of any additional assistance as you consider this legislation, please let me know.

Sincerely,



Edgar O. Bottler

EOB/mp

cc: Senator Birch Bayh ✓
Senator Strom Thurmond

Attachment

TESTIMONY OF

THE CONTINENTAL GROUP, INC.

ON THE BAYH AMENDMENT TO S.390

SUBMITTED TO THE SENATE COMMITTEE ON THE JUDICIARY

June 21, 1979

Statement of The Continental Group, Inc.
On the Bayh Amendment

Summary

The Continental Group, Inc. supports the Antitrust Equal Enforcement Amendment of 1979 as an essential step to introduce fairness into an outmoded and unjust system of assessing damages and thus to bring the antitrust laws in line with modern developments affecting other federal and state laws.

1) The current system of joint and several liability with no right of contribution can literally deprive a defendant of its day in court, as happened to Continental, which was coerced into paying out \$27 million in a private settlement before it was acquitted in the Government cases involving the same charges. Current law can thus punish defendants who are ultimately cleared of wrongdoing far more severely than those who admit complicity.

2) The consequences go far beyond a simple question of fairness. The irrational and unequal damage exposure, which bears no relationship to guilt or market share, threatens the basis of competition itself by depriving some companies of working capital needed for productivity and other capital improvements, threatening the viability of some enterprises, encouraging concentration and inhibiting pro-competitive business activity.

3) Current law actually operates to reduce deterrence where it may be needed most, by permitting plaintiffs to allow the biggest defendants to settle at the cheapest rate in order to extract more costly settlements from those who are often smaller, less able to defend themselves and -- as in the case of Continental -- ultimately cleared of any wrongdoing.

4) Contrary to the complaints by plaintiffs' lawyers, permitting contributions will not deter legitimate settlements. Treble the damages attributable to a defendant's own sales is more than sufficient encouragement to settle for a defendant with a weak defense. The only settlements which the Bayh Amendment will deter are those which the law should never countenance -- i.e., settlements by innocent defendants who cannot afford to assert their innocence.

5) Recent statutory and other developments permitting contribution in securities, admiralty, state tort law and even some antitrust cases demonstrate the need for contribution to enhance both fairness and deterrence and provide no basis for speculation that contribution will inhibit legitimate settlements or introduce complexities into antitrust enforcement.

This statement in support of the Bayh Amendment is filed on behalf of The Continental Group, Inc., the worlds leading manufacturer of diversified packaging products with business interests in financial services and natural resources. The Continental Group firmly believes that Congress must take steps to eliminate the gross inequities that grow from the vicarious liability of current antitrust law. While it could and should be improved, the Bayh Amendment represents an indispensable first step towards modernizing a woefully archaic and unjust system that threatens competition, jobs and rational business planning and behavior.

The purpose of this statement is to supplement the record with the facts relating to Continental's own experience and on that basis to respond to some of the policy and legal questions that have been raised during the course of the hearings.

Before doing so, one point should be made at the outset on the question of whether the Bayh Amendment should be prospective or retroactive. Continental has no desire to plead as a special interest to rectify what Continental believes was an injustice done it as described below. Retroactivity represents bad public policy as a matter of principle generally, and it could in fact jeopardize the Bayh Amendment specifically. Continental's concern is that the

rules be changed so that what has happened to it and many others in the past cannot happen again in the future.

The Corrugated Cases

The testimony to date from Messrs. Kress, Kempf, Taylor and Long has adequately described both how the Corrugated Container cases were settled and how the absence of contribution in those and other cases has permitted plaintiffs to "whipsaw" or coerce defendants into giving up their right to defend themselves. Accordingly, there is no need here to describe in detail the settlement strategy used in the corrugated cases, in which Continental was also a defendant. As the following brief discussion of Continental's own factual circumstances indicates, however, one additional observation must be made for the record; while current law operates onerously for companies that are small and unindicted, the injustice is by no means limited to them, Continental was acquitted of criminal charges, but only after having been coerced into paying out over \$27 million of its shareholders' funds in settlement of the civil cases allegedly arising out of those criminal charges.

As the earlier testimony has recounted, some 50 private law-suits against 37 defendants (representing over 70% of the corrugated

container market) were consolidated in Houston following indictment of 14 companies and some employees thereof for price-fixing. The criminal and civil cases charged a unified price-fixing conspiracy east of the Rocky Mountains -- an inherently suspect charge in view of the fact that corrugated products are sold on a local basis. For example, Continental's plants sell 75% of their output within a 100-mile radius of the plant location. Continental was as certain as it could be that none of its personnel had engaged in any such conspiracy. Finding no evidence of its involvement in any of the alleged, Continental therefore proceeded to prepare what appeared initially to be a sound and easy defense. For the reasons that will be spelled out, however, Continental soon found that it could not defend the civil cases. Some facts about Continental are relevant in this regard.

Continental is a large company, with pretax earnings for 1973-77 of \$171 million, \$207 million, \$168 million, \$207 million and \$183 million. Its corrugated division, however, is much smaller, reporting earnings (before taxes, interest expense and allocation of general and corporate expense) for the same years of \$10.5 million, \$16.5 million, \$9.1 million, \$2.8 million, (the last year of the alleged conspiracy) and minus \$2.3 million. In terms of market size, the corrugated division is a medium size company, seventh in

market share of the settling defendants with 4.2 percent of the market involved in the civil cases. Needless to say, not even Continental could run the risk of a judgment that could run into the billions. Yet such a potential was precisely what Continental faced after 16 of the 37 defendants settled at rates ranging from \$.5 million to \$6 million per percentage point share of the market involved in the corrugated cases. At that point, Continental literally had no choice but to settle.

Unfortunately, Continental's desire to assert its innocence had cost it quite dearly. The price for settlement had risen and Continental had to settle at the highest rate of any of the settling defendants -- \$6.5 million per percentage point of market share. The result was a loss of over \$27 million, or three-fourths of the corrugated division's pre-tax earnings for 1973-77. As subsequent events made clear, this increase in settlement cost bore no relationship to the facts of Continental's guilt or innocence or its market share. It related solely to the "whipsaw" tactics employed by the plaintiffs and permitted by current law -- and Continental's initial desire to defend itself rather than subject its shareholders and employees to an unjustified settlement that would have implied complicity and wasted corporate assets.

The criminal case, by contrast, did not present such hazards to Continental's shareholders or employees. The potential fines were lower; and more importantly, the individual officer charged was confident enough of his innocence -- and eager enough to clear his own and the company's name -- to risk his own personal freedom for vindication. This was a risk both the company and the officer felt they could take without undue jeopardy to the shareholders and employees they serve. As events bore out, it took the jury less than half a day to acquit defendants of charges the government took two months to present. Nevertheless, the \$27 million was gone, and the size of this settlement causes suspicions to linger concerning Continental's conduct.

The important point of this story is that it is the innocent employees and shareholders directly, and customers and taxpayers indirectly, who will end up paying for this absence of a right to be heard on the civil charges. Given these simple facts, it is possible to make the following observations, some which are in response to questions raised at the hearings and some of which are based on legal analysis in addition to Continental's own experience.

(1) Competition

To the extent that the antitrust laws are designed generally to promote competition, the current system operates to frustrate that

goal. To be sure, The Continental Group itself ran less of a risk of annihilation than, say, Green Bay Packaging. But having to pay out almost all of the corrugated division's recent -- and declining -- profits obviously has dramatically reduced the funds available for making capital and other productivity improvements. The charges and settlement have also had a devastating impact on employee and officer morale in the division involved, and the lawsuits, of course, took up an inordinate amount of management time. Although Continental will stay in the corrugated container business, the civil cases could have resulted in a contraction in the number of smaller and medium (like Continental) competitors. To the extent that concentration increases and competition shrivels as a result of vicarious liability of this kind, there is no way that the rule of joint and several liability could be said to promote competition.

There is another, and more certain consequence of this experience. We can only surmise that Continental, and no doubt many others, were brought into this litigation because the plaintiffs could identify isolated company employees as having attended meetings or engaged in conversations with other persons against whom there was suspicion of conspiratorial activity. Our employees, for example, are engaged in trade association activities whose purpose is to improve the efficiency of our operations and the quality of our products. In addition Continental has a long standing policy that

even routine efforts by sales personnel to scout information about the relationship of a competitor to his customers in order to compete for those customers is prohibited. Because the vicarious nature of joint liability inhibits even the most simple effort to distinguish between legitimate and improper contacts with competitors, it inhibits legitimate, pro-competitive behavior, and the public is the loser.

The concern here is very much the same as the concern voiced by the Supreme Court in United States v. United States Gypsum, 98 Sup. Ct. 2864 (1978), which has already been noted to the Committee but which deserves emphasis. The danger of "over-deterrence" in the context of strict criminal liability is no less in the context of vicarious joint and several liability where contribution from other more directly involved wrong doers is denied. The risk that legitimate activity will be used as an excuse to link that activity with impermissible conduct because both involve interchange between competitors will necessarily cause businessmen to be "excessively cautious" about engaging in the legitimate activity.

Limiting joint and several liability or permitting contribution may not completely solve the problem. Treble damages based on one's own sales can itself create such enormous exposure that the

difference between that or treble damages based on the entire industry's sales is only the difference between death by starvation and death by hanging. But in most cases contribution will permit a more rational assessment of liability and the opportunity to prepare a case that will allow the punishment to fit the violation, if any. All that is needed is breathing room to distinguish between the good and the bad. Permitting contribution or limiting joint and several liability will provide that room in the dynamics of trial preparation and settlement negotiations, and will in the end permit procompetitive conduct to continue.

(2) Deterrence

The primary concern raised by the Department of Justice both in Assistant Attorney General Shenefield's May 14 letter to Senator Metzenbaum and in his testimony is the potentially adverse impact of contribution on deterrence. Shenefield expressed this concern in two ways. First, he pointed to the common law developments that have begun to permit contribution except with respect to intentional tortfeasors. Second, he has postulated that permitting contribution will enable price-fixers to calculate and spread their risks and thus will "make the cost benefit analysis of whether to enter into an antitrust violation more predictable," As both the cases demonstrate, however, permitting contribution will enhance rather than frustrate deterrence.

The development of the law in other areas points in just the opposite direction from that suggested by Shenefield. The notion that assigning full responsibility to each tortfeasor, as well as the theory that contribution would deter settlements, have been "overborne by recognition of possible collusion between settling defendants and plaintiffs and the realization that fundamental fairness demands a sharing by wrongdoers in setting the wrong right." See McLean v. Alexander, 449 F. Supp. 1251, 1266 (D. Del. 978). In the admiralty context, for example, the Supreme Court has largely abandoned its earlier rule against contribution by^{*} realizing that "the interests of safety dictate that where two parties are both in fault, they should bear the damage equally, to make them more careful." See Cooper Stevedoring Co., v. Kopke, Inc., 417 U.S. 106, 111 (1974). The Securities laws, moreover, have long contained express provisions for contribution among intentional wrongdoers, and the courts have even allowed contribution in 10b-5 cases without statutory authorization on the grounds that a prohibition of contribution would dilute the deterrence by allowing certain violators to escape liability. See Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970). The right to contribution in 10b-5 cases is now generally accepted, see Fischer, Contribution in 10b-5 Actions, 33 Bus. Law. 1821 (1978), and is available to intentional tortfeasors.^{**/}

^{*} / Halcyon Lines v. Haenn Ship Corp.,
342 U.S. 282 (1952).

^{**/} Alexander & Baldwin, Inc. v. Peat Marwick, Mitchell & Co.,
385 F. Supp. 230 (S.D.N.Y. 1974).

Deterrence was, of course, one of the principal considerations underlying the Eighth Circuit's decision allowing antitrust contribution in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 1979-1 Trade Cas. 62,485 (8th Cir. 1979). The Court reasoned that some violators can escape liability under a rule prohibiting contribution. The case histories already presented in the hearings, of course, give vivid support to this possibility -- at least to the possibility that the innocent small or medium size companies will pay in settlement at a much higher rate than their larger competitors. It should be clear, therefore, that there is no basis for denying contribution in actions involving intentional wrongdoing such as pricefixing. To the contrary, contribution may be most desirable precisely in the context of intentional wrongs.

In the view of the foregoing, it should also be clear that there is no substance to the concern that contribution will better enable price-fixers to share the risks of price-fixing. As the

testimony has pointed out, defendants can work out sharing agreements after litigation has begun. If companies are indeed serious about price-fixing, they can also work out such sharing agreements at the time the price-fixing agreement itself is reached. Sharing agreements are much less likely in fragmented industries with many producers where even if there is a conspiracy it is unlikely to involve all companies. Accordingly, denying contribution where sharing agreements cannot be worked out has the effect of undermining both deterrence and fairness where they are most needed.

(3) Settlement

It is difficult to see how the Bayh Amendment will deter legitimate settlements. By protecting defendants who have sound defenses against an exposure to an artificially inflated liability so as to permit the risk of trial, the amendment may result in some trials where virtually none occur today, but this is speculative only. The most likely result will be to reduce the extortionate leverage plaintiffs now enjoy, and to permit defendants similarly situated to be treated the same in terms of settlement. If the plaintiffs extract less from the innocent in settlement, or nothing after trial, this is surely a small price for fundamental fairness. And there has been no testimony that contribution will encourage the large guilty defendant to run the risk of trial and thus delay the plaintiffs' recovery and encumber the courts. For a substantial

defendant with a poor defense, the difference between treble damages based on its own sales and those based on the sales of the entire industry is like the difference between a rifle at 50 yards and a cannon: the former can kill just as effectively as the latter.

Plaintiff's attorney David Shapiro in his testimony provided one example to show how contribution based on sales could result either in delayed settlement or unfairness. His example was of a conspiracy where the defendant with the largest market share had the smallest net worth, and the other defendants had substantial net worths but small sales. As Shapiro described it, forcing the large market share defendant to pay his share of the damages would have resulted in bankruptcy, a result he could avoid under current law by giving that defendant an early settlement discount based on net worth. He indicated that he would not provide such a settlement discount under the Bayh Amendment because the amendment would "carve out" that defendant's sales and thus preclude the plaintiffs

from recovering the discount from the deeper pockets. Accordingly, he would not settle in such circumstances under the Bayh Amendment and would let the defendants work out contribution after trial.

As appealing as this example might appear to be on the surface, it should hardly stand in the way of legislation. As Senator Bayh pointed out, a defendant should be required to pay for the damages he causes even if the result is financial jeopardy to the defendant involved. Whether or not he pays and how much surely should not be left to the whim of a plaintiff's attorney. But much of the argument is somewhat beside the point. Examples of the kind described by Shapiro are very rare indeed. They are likely to occur only in high volume, low margin industries which require very little capital investment. This is not to say that there will never be any cases against high volume, low net worth defendants. But when it happens it is most likely to occur where most members of the conspiracy are similarly situated, and where the plaintiff's chance of execution on a judgment is reduced whatever the rules on contribution. Finally, securities litigation, where contribution is permitted, provides ample basis for determining that contribution will not unduly discourage settlement.

(5) Complexity

The final argument voiced by Shenefield in his May 14 letter (and by Shapiro) is that contribution will complicate already complex antitrust litigation. Shenefield appears to have withdrawn this criticism in his testimony. The criticism does not appear to have much validity in any event. Contrary to the May 14 letter, the antitrust courts which have explained their denial of contribution have not relied primarily upon the complexity argument. For example, the court in Sabre Shipping Corp. v. American President Lines, 298 F. Supp. 1339 (S.D.N.Y. 1969) while discussing complexities and deterrence, relied heavily on the general "federal common law rule," particularly as expressed in the Halcyon Lines case, supra, which subsequently was virtually overruled by Cooper Stevedoring, supra. And the court in El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976) after assessing various policy considerations, noted that the "arguments in favor of permitting contribution are persuasive....," */ but denied contribution primarily because of the lack of Congressional direction. Finally, the securities laws again provide a basis for concluding that no insuperable complexities will result. 10b-5 conspiracy cases can be just as complex as antitrust cases, and there the courts have embraced contribution even in the absence of statutory authorization.

None of the foregoing is meant to imply that there are not simpler ways to achieve the increased fairness and deterrence sought

*/ 1977-1 Trade Cas. at 72,112.

by the Bayh Amendment. The ultimate effect of that Amendment is to limit the liability of a defendant to treble the damages attributable to his own sales. Arriving at the result by rules of contribution and "carve-out" may introduce some complexities that would be clearly avoided simply by providing directly that a defendant's exposure cannot exceed that attributable to its own sales. Such an approach might prompt the criticism that it shifts from the defendant to the plaintiffs the burden of finding all of the guilty parties. The plaintiff's it might be said, should not be required to shoulder unreasonable burdens in order to recover compensation for damages caused to them. But whatever validity such an argument might have had in the context of 19th century tort law, 20th century antitrust law with its allowance for class action, nationwide service of process and consolidation, makes it very easy for plaintiffs to sue just about everyone they want and to get all defendants before the same court. Indeed, plaintiffs routinely today sue most possible defendants, as indicated by the Corrugated Container litigation, where 70% of the entire market was brought into the litigation without any difficulty. Plaintiffs would be foolish to ignore a substantial defendant whatever the rules about contribution, and there is little in antitrust or securities litigation to suggest any such foolishness on their part.

STATEMENT OF ROBERT BESHAR

Mr. Chairman and Members of the Subcommittee:

I have read with concern the suggestion that contribution be legislated in antitrust damage cases.

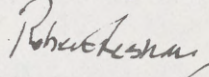
On the surface, such a proposal seems eminently fair. In practice, it could seriously distort the conduct of antitrust litigation. The cold rancid facts are that antitrust cases are often wars of attrition which favor those with the deepest pocket. Since the name of the game is delay, defense counsel have learned to use and abuse discovery. For those who dislike this approach, it is a constant struggle in meetings of defense counsel to suggest that every document and every deposition does not need to be "enhanced" and then "loaded" into a computer, nor does every issue need to be farmed out to teams of economists for elaborate statistical analysis. In short, those representing smaller defendants are often hard pressed to "poor boy" the defense by framing issues quickly and cheaply.

Codified notions of contribution would only increase the pressure on those who want to avoid the complexifying approach to antitrust litigation. Absent a legal basis for contribution, the big spenders still threaten contribution, but it is generally viewed as a bluff. The only real pressure is to say that those

who do not pay cannot use the fruits. Many of us are more than willing to pass up the fruits because the joint defense projects are almost always presented as "per capita" undertakings which favor the bigger defendants.

It would be nice to fine tune the antitrust laws. There is much in the proposed Antitrust Equal Enforcement Amendment to recommend it. Regretably, the codification of contribution is loaded with deleterious side effects, which could have serious consequences on how antitrust cases get tried.

Respectfully submitted,



Robert Beshar

LETTERS

Westvaco

June 14, 1979

The Honorable Birch Bayh
Suite 363
Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Bayh:

I was pleased to have the opportunity to testify June 8 in support of the Antitrust Equal Enforcement Amendment to S.390. I would like to take this opportunity to present additional comments.

It was gratifying to learn of the Attorney General's support generally for contribution and that Mr. Shenefield had more of an open mind on this subject than his reaction indicated. I am hopeful he will realize after more closely examining the issue that the Amendment is consistent with and indeed promotes deterrence and vigorous enforcement of antitrust violations by assuring that the guilty do not escape their obligations.

At page 5 of his written statement Mr. Shenefield mentions the use of sharing agreements as a substitute for a statutory right. My experience tells me that as a practical matter the use of such agreements cannot solve the problem. Sharing agreements are difficult to negotiate, not all defendants will join and consequently do not prevent "cheap settlements," leaving others to absorb the liability of a settling defendant.

At page 7, Mr. Shenefield states the general rule of law in antitrust cases has been to deny contribution among defendants. I believe this overstates the current state of the law in this area somewhat. The Supreme Court has not considered the issue but the trend of its recent decisions could be read to support contribution. The only federal appellate court to consider the issue ruled in favor of contribution. The general trend in the law is to provide for contribution with claim reduction for settlements. Consequently, the Amendment does not

Page 2

provide for any unique or special rules. The few district court decisions which considered the issue and ruled against contribution are of recent vintage. The massive class action and coercive tactics of plaintiff's lawyers which highlight the need for the Amendment are recent developments.

At pages 9-13 Shenefield discusses the type of conduct for which the right of contribution should be allowed. Since the Amendment promotes deterrence as well as fairness, I believe the Amendment should be applicable to all types of antitrust litigation.

In the balance of his statement Mr. Shenefield raised a number of procedural questions. I hope these will not obscure a consideration of the merits of the Amendment. I believe the Amendment should establish general principles, only, and leave it to the courts to see that justice is done on a case by case basis.

At pages 20-23 of his written statement, Mr. Shenefield has raised the possibility of some procedural difficulties in the implementation of the Amendment which we believe will not in fact materialize.

For example, Mr. Shenefield suggests that under the Amendment a plaintiff could not settle with an innocent defendant without either (1) obtaining the settling defendant's concession of liability, or (2) risking a loss of a portion of his legitimate claim (pg. 21). This analysis is incorrect. A plaintiff who settles with an innocent defendant will forego only his claim for damages resulting from the sales of the settling defendant. He still retains his entire claim against the non-settling defendants for the damages that may have been caused by their collective sales. In short, the plaintiff is no worse off, and no better off, than if he had not named the innocent party in the complaint in the first instance.

Mr. Shenefield incorrectly states that plaintiffs might face "procedural difficulties" as a result of the claim reduction settlement rules because the collection of any judgment in their favor would have to await the resolution of "contribution" issues among defendants (pg. 22). In fact, because the settling defendants have bought their "peace" by settlement, the question of relative market shares will not be an issue to resolve among plaintiffs and the non-settling defendants. Moreover, it seems unlikely that a settling defendant's market share will even be

Page 3

in issue. As plaintiffs have the burden of proving damages, presumably they will be required, as part of their affirmative case, to prove the sales of each non-settling defendant. There is simply no reason for either party to offer evidence concerning the sales of a defendant that has settled. Because the Amendment does not change the law of joint and several liability, any cross or third party claims for contribution will also not interfere with the collection of plaintiff's verdict.

Mr. Lowell Sachnoff, an attorney from Chicago, claimed that the Amendment would have anticompetitive effects. Mr. Sachnoff posited the example of a judgment for plaintiffs in a treble damage case against ten defendants, followed by a satisfaction of judgment by the defendant most financially able to pay it. Mr. Sachnoff argued that there would be anticompetitive results if the defendant satisfying the judgment was permitted to seek contribution from the nine codefendants.

We fail to see how there is a threat to competition in Mr. Sachnoff's example. Under the Amendment the defendant that satisfied the judgment could seek contribution from each of the remaining nine defendants only to the extent of that defendant's fair share measured by its sales, but would not be able to threaten a codefendant with liability for the acts of others. Moreover, as you pointed out during the hearings, contribution in the posited example would further deterrence by ensuring that none of the remaining nine defendants, each of which had been adjudged a price-fixer, escapes "scot-free" with its illegal profits.

Mr. Sachnoff argued that there was no need to fear abusive use of the coercive power exercised by the plaintiff's bar in the absence of a contribution rule, citing the example of plaintiff's settlement with Consolidated Packaging Corporation in the Corrugated Container Antitrust Litigation for an amount that Mr. Sachnoff described as being commensurate with Consolidated's limited financial resources. Rather than allaying anyone's fears, Mr. Sachnoff's example only serves to underscore the crying need for the Amendment. In the same litigation that Consolidated, a company that Mr. Sachnoff reports received a "light" sentence after pleading nolo contendere to a felony indictment, paid in settlement an amount satisfactory to plaintiffs and their accountants from an "ability to pay" point of view, Green Bay Packaging, an unindicted party, was coerced into paying about \$6 million in damages, or more than 30 times the amount paid by Consolidated. This gross inequality arises precisely because, in the absence of contribution, plaintiffs are free to take whatever they wish from culpable parties, and seek to recover the full amount from other defendants, no matter how innocent or uninvolved.

Page 4

The short answer to Mr. Sachnoff's position is that our legal system should not condone potential abuses of power on the assurances from those wielding the power that they will exercise it mercifully and in the interests of a competitive economy.

Mr. David I. Shapiro's examples from the "real world" also did not provide persuasive reasons against the wisdom of the Bayh Amendment. Although I am not completely familiar with the Chicken Antitrust Litigation or the Dyestuffs litigation, Mr. Shapiro's examples only served to underscore the point that settlements in class action antitrust cases are often the result of the coercive impact of enormous claims wielded by plaintiff's lawyers, and have little to do with the merits of plaintiff's claims.

I am not in a position to agree or disagree with Mr. Shapiro's representation that those two litigations would not have settled had he not possessed the freedom to direct the full brunt of treble class action damages as he saw fit. I submit, however, that such coerced settlements have no place in our jurisprudence, and that the evidence available from the many areas of law that have operated under principles of contribution for many years indicates that contribution promotes settlements and does not inhibit them. Indeed, Mr. Shapiro's claims that contribution will deter defendants from settling completely overlooks the express language of the Amendment that gives settling defendants "peace" in the continuing litigation.

Mr. Harold Kohn, a plaintiff's lawyer from Philadelphia, states at page 4 of his written statement that the second paragraph of the Amendment (claim reduction on account of settlements) will discourage settlements because no plaintiff will accept an amount from one defendant which would adversely affect his right to recover against remaining defendants. This is simply not true. In other areas of the law where claim reduction is required by statute or judicial decision, settlements continue to be made, it being recognized that by settling the plaintiff has sold part of his claim, presumably for a fair price. Indeed, in antitrust treble damage cases there are examples of settlements being made with claim reduction although this is not the general rule. In the Plywood cases and others, Mr. Kohn himself negotiated such settlements.

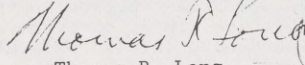
The provisions of (iii) in the second paragraph of the Amendment should be revised in order to avoid possible complexity. As written the implication might be that a settling defendant's sales or market share stays in the lawsuit through trial on

Page 5

the issues of liability and impact. I am sure this was not intended. The ambiguity could be eliminated simply by providing that no liability to the class on the part of non-settling defendants shall arise from a settling defendant's sales or market share.

I trust that these comments may be of some help to you, and I again appreciate the opportunity to express the views of Westvaco Corporation on this important issue.

Very truly yours,



Thomas R. Long

Thomas R. Long

TRL:ef

cc: Members of the Subcommittee
John Shenefield, Esq.
Jessica J. Josephson, Esq.

Westvaco

June 27, 1979

Jessica J. Josephson
Counsel - U.S. Senate
Committee on the Judiciary
Subcommittee on the Constitution
Washington, D.C. 20510

Dear Ms. Josephson:

Attached is a schedule which provides information on the settlement experience and the size of the companies in the corrugated box litigation. The schedule, I believe, documents points which supporters of the Bayh Amendment have been making.

- Net income and net working capital are a good indication of size and ability to pay. You will note that there are a number of small non-indicted companies who were forced to settle out; not just Green Bay. The non-settlers for the most part are larger companies with the resources to fight on principle.
- When you consider that after the Union Camp "ice breaker" settlement occurred about the first of December 1978 and most of the other settlements occurred rapidly in a matter of weeks, the pressure and panic is apparent.
- It is clear the plaintiffs' lawyers engaged in divide and conquer tactics and took advantage of escalation. Note that generally the price of settlement was increased for the next settlor without regard to the merits.
- It is apparent that some large companies were able to make "bargain" or "sweetheart" settlements with the Plaintiffs' lawyers. Not only is this bad from an antitrust compliance standpoint but also consider the weakening of overall competition which occurs when the smaller companies are drained of resources by having to pay large amounts which are disproportionate to those paid by larger and stronger competitors.
- The schedules support claim reduction. The Plaintiffs have settled 80% of the law suit for \$300,000,000 which by their own estimate, is worth a total of \$185,000,000 - \$789,000,000 before trebling. Where is the justice in a system which

Jessica J. Josephson
Counsel
U.S. Senate
Washington, D.C. 20510

June 27, 1979
Page 2

would allow the Plaintiffs to force the remaining defendants to go to trial and risk paying a judgment for the entire industry. The vagaries of the jury in dealing with complex economic issues is well known. Under these circumstances no management can afford to "bet the company" no matter how strong the belief in innocence. There is also the argument that if successful, the plaintiffs would be recovering for the same injury twice and in excess of the statutory amount.

I hope this information is helpful.

Very truly yours,

Thomas R. Long
General Counsel

TRL:al
Attachments

cc: John H. Shenefield
Assistant Attorney General
Justice Department

Corrugated Container Antitrust Litigation
Settlements To Date in Order of Negotiation

<u>Defendant</u>	<u>1972-1976 % of Defs Mkt*</u>	<u>\$1 Million Per Point</u>	<u>Settlement</u>	<u>1977 ** Net Income After Taxes</u>	<u>1977 Net ** Working Capital</u>
St. Regis Paper Company Not indicted	3.97	.428	\$1,700,000	\$106,786,000	\$522,134,000
International Paper Company Felony Indictment, nolo plea	8.3	1.0	8,300,000	233,700,000	574,500,000
Union Camp Corp. Not indicted	3.7	2.0	7,400,000	114,664,000	203,539,000
Diamond International Corp. Not indicted	.5	2.0	1,000,000	46,927,000	164,747,000
Dura Containers, Inc. Not indicted	.375	2.0	750,000	1,211,802	6,302,853
Chesapeake Corp. of Virginia Not indicted	1.26	2.4	3,024,000	10,281,000	19,730,000
Longview Fiber Co. Not indicted	2.58	2.5	6,450,000	27,518,001	24,490,000
Boise Cascade Corporation Misdemeanor Indictment Nolo plea	2.826	3.5	9,891,000	115,610,000	275,129,000
Willamette Industries Inc Not indicted	4.18	2.7	11,286,000	48,123,000	67,155,000
Champion International (Hoerner Waldorf) Felony Indictment. Nolo plea	5.36	4.5	24,120,000	48,123,000	67,155,000

<u>Defendant</u>	<u>1972-1976 % of Defs. Mkt*</u>	<u>\$1 Million Per Point</u>	<u>Settlement</u>	<u>1977 ** Net Income After Taxes</u>	<u>1977 Net ** Working Capital</u>
Menasha Corp. Not indicted	1.67	2.75	\$4,592,250	\$10,100,196	\$32,034,586
Container Corp- oration of America Misdemeanor Indictment Nolo plea	8.56	4.0	34,240,000	55,765,000	187,913,000
Weyerhaeuser Co Felony indict ment. Nolo plea	7.83	5.0	39,150,000	303,891,000	530,239,000
McMillan Bloedel Ltd. Not indicted	2.11	4.0	8,440,000	38,349,000	292,950,000
Owens-Illinois Inc. Felony Indict ment. Nolo plea	5.45	6.0	32,700,000	91,304,000	394,175,000
Olinkraft Inc. Felony Indict ment. Nolo plea	1.225	6.0	7,350,000	34,596,000	46,717,000
The Continental Group, Inc. Felony indict ment. Found innocent by jury	4.22	6.5	27,430,000	143,800,000	321,800,000
Inland Container Corp. Misdemeanor Indictment. Nolo plea	7.29	4.75	34,627,500	21,921,000	46,163,000
Stone Container Corporation Misdemeanor Indictment Nolo plea	3.055	4.75	14,511,250	10,045,000	43,577,000

<u>Defendant</u>	<u>1972-1976 % of Defs Mkt*</u>	<u>\$1 Million Per Point</u>	<u>Settlement</u>	<u>1977 ** Net Income After Taxes</u>	<u>1977 Net ** Working Capital</u>
St. Joe Paper Company Misdemeanor Indictment Nolo plea	2.625	4.75	\$12,468,750	\$23,792,000	\$18,834,388
U.S. Corrugated Fiberbox Co. Not indicted	.76728	4.0	3,069,120	N.A.	3,897,820
Green Bay Pack- aging Inc. Not indicted	1.71	3.25	5,557,500	8,884,214	20,576,884
Consolidated Packaging Corporation Felony Indict ment. Nolo plea	.96	.18	180,000	Loss	Negative
Total	80.52328	-	\$298,237,370		
<u>Non-Settlers</u>					
Alton Box Board Co. Felony Indict ment. Nolo plea	2.86			2,964,067	29,006,938
Crown Zeller- bach Corp. No indicted	4.57			109,152,000	367,055,000
Fiberboard Corp Not indicted	1.91			6,451,000	26,741,000
Georgia-Pacific Corporation Not indicted	2.71			262,000,000	460,000,000
Interstate Container Corp Not indicted	1.08			N.A.	N.A.

<u>Non-Settlers</u>	<u>1972-1976 % of Defs Mkt*</u>	<u>\$1 Million Per Point</u>	<u>Settlement</u>	<u>1977 ** Net Income After Taxes</u>	<u>1977 Net ** Working Capital</u>
The Mead Corporation Felony indictment. Found innocent by jury	3.64			\$98,047,000	\$206,563,000
Packaging Corp of America Not indicted	4.88			21,696,617	3,408,931
Potlatch Corporation Not indicted	.62			61,813,000	108,073,000
Southwest Forest Industries Inc Not indicted	1.51			16,086,000	83,863,000
Westvaco Corporation Not indicted	3.15			61,944,000	225,692,000

* Assuming defendants account for 72% of the total market

**Based on information supplied by plaintiffs' lawyers to the District Court for the Southern District of Texas, Houston Division.

KOHN, SAVETT, MARION & GRAF, P. C.

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MEMBERS
 DISTRICT OF COLUMBIA BAR

June 19, 1979

Howard M. Metzenbaum, Chairman
 Senate Subcommittee on Antitrust and
 Monopoly
 United States Senate
 Washington, D.C. 20510

Dear Senator Metzenbaum:

Pursuant to your kind permission at the hearing on June 12, I would like the record to include the following brief response to the statements of Messrs. Scanlon and Hibner.

If we were to agree with Mr. Scanlon's testimony, at page 55, to the effect that the court "knows more about the antitrust workings than this committee", the issue of contribution should be left with the courts rather than become the subject of legislation.

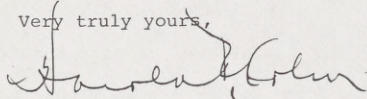
Incidentally, the United States Court of Appeals for the Eighth Circuit, which decided the Professional Beauty case, also happens to have been the Court which held that consumers have no right of action under the anti-trust laws because their "business" is not affected by violations. That decision was recently reversed by the United States Supreme Court in Reiter v. Sonotone Corp., No. 78-690, U.S. Sup. Ct., 6/11/79, 47 Law Week 4672.

KOHN, SAVETT, MARION & GRAF, P. C. CONTINUATION SHEET No. 2 To Senator Howard Metzenbaum
June 19, 1979

Mr. Hibner's statement, at page 66, "I am speaking here as a private citizen" probably ought to be supplemented by a reference to the effect that he is a member of the firm of Sheppard, Mullin, Richter & Hampton, counsel for one of the defendants in the California Armored Car Antitrust Litigation, MDL 387.

Finally, your attention is called to a recent article in the BNA Antitrust & Trade Regulation Report No. 917, page B-1, et seq., titled "Contribution -- Fairness Or Folly In Antitrust Litigation?". A copy of their conclusion is attached as Exhibit A to this letter.

Very truly yours,



HEK/dt
Enclosure

IV. CONCLUSIONS

The Burger Court apparently has been implementing a policy or philosophy to simplify litigation in the federal judiciary. All its decisions on Rule 23 procedures governing class actions and its decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), seem to indicate that the Court wants the judiciary to avoid protracted proceedings involving complex economic issues.

If this assessment is accurate, the *Professional Beauty Supply* decision flies in the face of the Burger Court's policy by injecting complex mini-trials into every antitrust case involving multiple wrongdoers. The proposed amendment to S. 390 would exacerbate, rather than cure, the problems caused by *Professional Beauty Supply*. After all, "rapid" or "expeditious" congressional action to overrule *Illinois Brick* has dragged on for two years already--when, in fact, all Congress has to do is amend the definition of "person" in §1 of the Clayton Act to recognize that one who deals directly or indirectly with a price fixer falls within the class protected by §4. In light of Congress' recent track record, the federal judiciary is probably best suited to resolve the question of contribution in antitrust cases and any consequent problems in administering contribution.

In the event the federal judiciary recognizes a right of contribution in antitrust cases, the conduct of antitrust litigation will be transformed. Expeditious resolution of Sherman Act claims--a goal advocated by the National Commission for the Review of Antitrust Laws and Procedures--will become more difficult to achieve. The cries of an approaching doomsday, accompanying the decision in *Illinois Brick*, proved to be overreactions. The impact of *Professional Beauty Supply* will be substantial and will force antitrust counselors to adopt different strategies and tactics. But antitrust practitioners and the federal judiciary should be able to strike an appropriate balance and not allow the right of contribution to frustrate private antitrust enforcement.

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SAMUEL E. KLEIN
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MEMBERS
DISTRICT OF COLUMBIA BAR

June 22, 1979

Howard M. Metzenbaum, Chairman
Senate Subcommittee on Antitrust and
Monopoly
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

Enclosed is another decision of a federal court denying the right of contribution in class price-fixing antitrust litigation, the Small Bags cases in the forest products industry, to which I alluded in my testimony on June 12, 1979. Hedges Enterprises, et al. v. Continental Group, Inc., et al., United States District Court for the Eastern District of Pennsylvania, #78-1254 and related cases, Order filed June 20, 1979, by the Honorable Louis C. Bechtle, Judge.

Following my testimony, I also made further specific inquiry with respect to the Green Bay settlement in the Corrugated litigation, the subject of considerable discussion during the hearing. The following facts seem to me to be significant and should be placed in the record:

(1) Green Bay, although it was not indicted, was named as a co-conspirator in the Bill of Particulars filed by the Justice Department in the criminal litigation.

Eleven of its officers and employees, operating out of plants in Chicago, Green Bay, Ft. Worth, and Kalamazoo, were also named by the government as co-conspirators.

(2) Green Bay was among the last of the settling defendants to settle. The agreement with it was executed February 16, 1979; the agreement with the first settling defendant was executed July 21, 1978.

(3) Practically every other defendant paid cash in full discharge of the amount agreed upon in settlement, at the time of the execution of the settlement agreement. Green Bay, on the other hand, was permitted to deliver a promissory note which will not be due until March 1, 1981, two years after the settlement date, and was not required to deposit any cash.

(4) Many defendants which settled earlier than Green Bay paid a far larger amount per percentage point of the market production, as well as a much higher total settlement amount in cash. The following are illustrative:

(a) Owens-Illinois - \$6 million per percentage point. Total settlement: \$32.7 million.

(b) Weyerhaeuser - \$5 million per percentage point. Total settlement: \$39,150,000.

(c) Olinkraft - \$6 million per percentage point. Total settlement: \$7.35 million.

(d) Continental Group - \$6.5 million per percentage point. Total settlement: \$27,430,000.

(e) Inland Container - \$4.75 million per percentage point. Total settlement: \$34,627,500.

The Green Bay settlement, in contrast, was at the rate of \$3.25 million per percentage point, and the total settlement is \$5,557,500.

The total settlements to date are in the amount of approximately \$298 million, representing 80% of the production, or approximately \$3.75 million per percentage point of production.

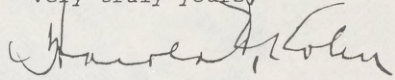
Accordingly, it would appear that Green Bay was given every consideration, indeed more consideration than it would have received under the proposed Bayh contribution amendment. Unlike other defendants, it was not required to pay cash. Its amount per percentage point is less than the average, which means that it would have paid more under the contribution statute. Its total settlement amount was substantially less, indeed only a fraction, of the amounts paid by many other defendants, whereas under the contribution statute, it might be required by a court to pay the same amount as other defendants.

(5) Both Green Bay and Inland Container joined in the Memorandum in the Corrugated case in opposition to the motion for contribution. That motion was filed on behalf of Westvaco, one of the few defendants which has not joined the 22 others which have settled. Westvaco also happens to be the corporation which terminated its supply of paper to one of the plaintiffs in the Fine Paper Anti-trust Litigation, MDL 323, referred to in my letter of February 14, 1978, a copy of which is enclosed herewith.

Presumably the corporations which are chronic violators of the antitrust laws, and the defense oriented members of the Bar who represent them, picked their best

example when Green Bay was brought to testify before your Committee. Under all of the circumstances, their case would not appear to be persuasive.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Harold A. Kohler". The signature is written in dark ink and is positioned to the right of the typed phrase "Very truly yours,".

HEK/dt
Enclosures

KOHN, SAVETT, MARION & GRAF, P. C.

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MEMBERS
 DISTRICT OF COLUMBIA BAR

February 14, 1978

David Boies, Chief Counsel
 Senate Subcommittee on
 Antitrust and Monopoly
 Room 2226, Dirksen Building
 Washington, D. C. 20510

Allen Ransom, Chief Counsel
 House Monopolies and Commercial
 Law Subcommittee
 B-351-B Rayburn House
 Office Building
 Washington, D. C. 20515

Re: S.1874
 (8HR-8359)
Illinois Brick Legislation

Dear Mr. Boies and Mr. Ransom:

Our firm recently filed an antitrust Complaint on behalf of a publishing company, Magazine Management Co., Inc., charging 13 manufacturers with a conspiracy to fix prices of paper.

This is one of a dozen companion suits filed in various federal courts, now before the Multidistrict Panel, MDL No. 323. There are also three other complex antitrust cases pending in the paper industry: Corrugated Containers Antitrust Litigation, pending in the Southern District of Texas, Houston Division, MDL No. 310; Folding Cartons Antitrust Litigation, pending in the Northern District of Illinois, Eastern Division, MDL No. 250, and Small Bags Antitrust Litigation, pending in the Eastern District of Pennsylvania, Civil Action No. 76-3407.

One of the manufacturers who supplies paper to our client is Westvaco Corporation. Less than one month after the Complaint was served on Westvaco, two employees of that company, Mr. Joseph Boyce, a sales manager for Westvaco in the New York area, and Mr. Raymond Kayser, a Westvaco salesman, visited our client's Vice President of Purchasing, Mr. Milton Schiffman, and told him that Westvaco was terminating all sales of paper to our client, because of the antitrust litigation which had been instituted against Westvaco.

We called corporate counsel for Westvaco several times and requested reconsideration of their termination decision, but these efforts were to no avail. In fact, Ralph Fernay, Esquire, Assistant General Counsel to Westvaco Corporation, said that he was "delighted" that the termination occurred.

There is a federal grand jury impanelled in the Eastern District of Pennsylvania which is investigating the Fine Paper industry. According to a subpoena served on a paper manufacturer, one of the subjects being investigated is the shortage of fine paper. This shortage is commonly known throughout the industry, and Westvaco was aware of the difficulty their termination would cause our client, a customer of 20 years standing.

The action of Westvaco is, of course, itself a violation of the law, as set forth in Jacobson & Company, Inc. v. Armstrong Cork Co., 548 F.2d 438 (2d Cir. 1977); Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc., 550 F.2d 189 (4th Cir. 1977); and Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3rd Cir. 1962).

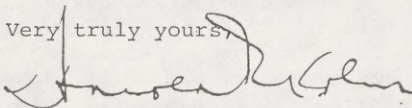
As you may imagine, we read with some chagrin the report of the testimony of Professor Richard Posner when he appeared before the United States House Monopoly Subcommittee.

According to the reports, Professor Posner testified that commercial retaliation for law suits under the antitrust laws is a "complete red herring", and that defendants are "too smart to engage in retaliation".

Our client's experience indicates that commercial retaliation is a harsh reality. We strongly believe that the chilling effect of retaliatory termination on private enforcement of the antitrust laws is substantial and serious. We suggest that these facts be brought to the attention of the Senate and House Committees and that it may be appropriate to subpoena Westvaco personnel so that the Committee may inquire first hand about the tactics employed.

It may also be appropriate to call this matter to the attention of the National Committee for the Review of the Antitrust Laws, established by President Carter's Executive Order No. 12022, dated December 1, 1977.

Very truly yours,



HEK/my

cc: Honorable Edward M. Kennedy, Chairman,
Senate Subcommittee on
Antitrust and Monopoly
Honorable Peter W. Rodino, Chairman,
House Monopolies and Commercial
Law Subcommittee
Honorable John H. Shenefield,
Assistant United States Attorney
General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HEDGES ENTERPRISES	:	CIVIL ACTION
RALSTON PURINA CO.	:	
MIDWEST PAPER PRODUCTS CO.	:	
and HARTZ MOUNTAIN CORP.	:	
V.	:	NO. 78-1254
		77-3092
		76-3935
CONTINENTAL GROUP, INC., <u>et al.</u>	:	77-1931

O R D E R

FILED JUN 20 1979

AND NOW, TO WIT, this 20th day of June, 1979,

IT IS ORDERED that the motion for leave to amend of the defendant American Bag & Paper Corporation, pursuant to Fed.R.Civ.P. 15(a), is hereby denied, on the grounds that:

(1) It is untimely in that it was filed two and one-half years after the commencement of this course of litigation and over two months after the consummation of a proposed settlement with the last of four codefendants. See In re Cessna Distributorship Antitrust Litigation, 532 F.2d 64 (8th Cir. 1976); 6 Wright & Miller, Federal Practice & Procedure, §1488, at 438-439 (1970).

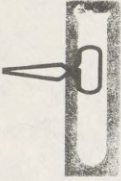
(2) It would unduly prejudice the interests of the plaintiffs and the settling defendants to allow amendment.

(3) It would be futile to allow an amendment because there is no right to contribution as against settling codefendants in antitrust litigation. Foman v. Davis, 371 U.S. 178, 182 (1968); Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960); Olson Farms, Inc. v. Safeway Stores, Inc., 1977 - 2 Trade Cases ¶61, 698 (D.Utah 1977); Sabre Shipping Corp. v. American President Lines, LTD, 298 F.Supp. 1339 (S.D.N.Y. 1969).

TERED: June 21, 1979

CLERK OF COURT

LOUIS C. BECHTLE, J.



CONSUMERS UNION / A NONPROFIT ORGANIZATION / PUBLISHER OF CONSUMER REPORTS
Washington Office: 1714 MASSACHUSETTS AVE., N. W. WASHINGTON, D. C. 20036/202-785-1906

June 14, 1979

Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Antitrust,
Monopoly and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of June 7, 1979, asking Consumers Union's views on the so-called Antitrust Equal Enforcement Amendment to S. 390, the proposed Antitrust Procedural Improvements Act of 1979. For the reasons stated below, Consumers Union is opposed to the Amendment.

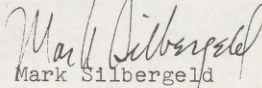
As you know, consumers have a strong interest in full and effective enforcement of the antitrust laws, both by the government and by private plaintiffs. In fact, most antitrust litigation is instituted by private plaintiffs under the provisions of the Clayton Act. These private enforcement actions are important in bringing to bear the pro-competitive, anti-inflationary incentives of the antitrust laws on the economy.

The Equal Enforcement Amendment would create a right of contribution among antitrust defendants in private actions under the Clayton Act. Knowledgeable experts and institutions, including the U.S. Department of Justice, have stated that the Amendment may serve in several ways to weaken private antitrust enforcement. It could reduce incentives for settlement. It could increase the complexities of litigation. And it could permit defendants to pay less than the full damages assessed by trier of fact.

- 2 -

Therefore, we urge that the Senate not risk serious weakening of the federal antitrust laws by adopting the Equal Enforcement Amendment. We hope that this expression of our views will be of assistance to you in evaluating the proposed Amendment.

Sincerely,



Mark Silbergeld
Director
Washington Office

Public
Citizen

July 12, 1979

Honorable Edward Kennedy
Chairman, Senate Judiciary Committee
2226 Dirksen Senate Office Building
Washington, D.C. 20010

Dear Mr. Chairman:

Public Citizen urges rejection of the proposed "Antitrust Equal Enforcement Amendment", which would establish a right of contribution among defendants liable for damages in a price-fixing conspiracy. Though proponents claim that the Amendment could result in a fairer distribution of the damage burden, its potentially significant delay and disruption of private antitrust actions would outweigh, in our view, the speculative benefits. In light of the uncertainties surrounding the effects of contribution in antitrust cases, we believe it premature and unwise to straitjacket the courts by prescribing a uniform contribution rule for all price-fixing cases.

The Amendment may seriously undercut enforcement of the antitrust laws by diluting the deterrent effect of the private treble damage action. Deterrence is increased by preventing defendants from redistributing the costs of an antitrust action. The Amendment's contribution formula, however, would allow defendants to spread the risk of price-fixing conspiracies among themselves, thereby making the economic risks of a conspiracy more predictable and presumably more attractive.

The Amendment's supporters argue that the deterrence goal would actually be advanced by increasing the possibility that all members of a price-fixing conspiracy would have to bear some part of the damage burden. In addition, they contend that there is a danger of "over-deterrence" in the antitrust area; specifically, they claim that a very large exposure to liability will deter beneficial, pro-competitive business behavior since cautious business managers will be hesitant to even approach any possible antitrust violations.

There is clearly no danger of over-deterrence, however, in the area of illegal price-fixing agreements. Price-fixing agreements are per se violations of the law and easy to define. The line between legal and illegal conduct has been obvious for over fifty years, ever since the Trenton Potteries case in 1927. The argument that contribution would actually advance deterrence is also questionable. In addition to the previously mentioned danger of permitting sharing of the risk among co-conspirators, there is a substantial body of economic evidence that indicates that business managers, especially those in large organizations, are generally "risk-averse"; that is, they are deterred more by the slight risk of a large loss than by the greater prospect of a small loss. (see e.g., K. Elzinga & W. Breit, The Antitrust Penalties, 120-129, 1976).

Potential deterrence problems are compounded by the increased complexity of antitrust litigation that would result from allowing contribution among defendants. Defendants could easily promote confusion and delay by impleading whole industries as third party defendants. Plaintiffs, already often exhausted by defendants with "deep pockets," may be overwhelmed by the greatly expanded scope of the litigation. For each alleged conspirator there would have to be two part litigation: first, the defendant would have to prove each alleged conspirator's part in the conspiracy, and second, the market share of each conspirator would have to be determined. Plaintiffs would inevitably be drawn into the contribution aspects of the litigation since they would actively try to protect their total recovery against the defendants' attempts to shift as much of the contribution burden as possible to defendants who have already settled. The ultimate effect of allowing already complex antitrust litigation to become even more lengthy and expensive would be to discourage plaintiff actions and, hence, to undermine the long standing policy in favor of private antitrust suits. Although criminal penalties are, of course, provided for price-fixing, private civil actions, largely because of the lesser burden of proof, are still a very important component of the antitrust deterrence process.

The Amendment's supporters seek to avoid this conclusion by arguing that the trial court, at its discretion, can sever issues and parties if the litigation becomes too complicated. However, potential severances are not likely to reduce the chilling effect on private plaintiffs. The investment of time and money that the plaintiff must make is not significantly reduced. Indeed, the power to sever has been characterized as an uncertain and inadequate remedy by at least two judges. (See Professional Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc., 1979 Trade Cas. P 62, 485 (8th Cir. 1979) slip op. at 22, (Hansen, J., dissenting); El Camino Glass v. Sunglo Glass Co., /1977-1/ Trade Reg. Rep. /CCH/ P61, 533 (N.D. Cal. 1976).) We agree with Senior District Judge Hansen that "Before formulating a rule which permits additional parties and issues to be joined in an antitrust case, we should be sure that we do not thereby counterbalance the motivation to sue provided by the treble damage award." (Prof'l Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc., slip op. at 22, (Hansen, J., dissenting).)

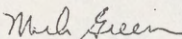
Additionally, a right to contribution could prolong and convolute private antitrust settlements. The most culpable defendants would presumably still want to settle at an early stage, but plaintiffs would have less incentive to settle. Since differences between the settlement amount and actual contribution share based on market percentage cannot later be recaptured, each settlement plaintiffs enter into would potentially reduce the total recovery. As a consequence, plaintiffs would be less willing to enter into any settlements while uncertainty as to market shares existed. Moreover, plaintiffs cannot consider any defendant who has already settled as totally "out" of the case, since they must still defend claims regarding the settling defendants' market share.

Proponents of the Amendment argue that without contribution, "sweetheart" settlements with large defendants result in other defendants becoming potentially liable for disproportionately large damages. This potential exposure supposedly has a coercive impact on non-settling defendants, regardless of true culpability. But lacking evidence, this position is asserted, not proven. And in any event, the force of this argument is offset by the fact that price-fixing is an intentional act. The general rule disallows contribution where intentional

wrongdoing is involved, since contribution is an equitable doctrine. Moreover, price-fixing is more than an intentional tort; it is a federal felony.

In conclusion, Public Citizen believes that the "contribution" amendment would weaken the deterrence of antitrust law and hence undermine the public policy in favor of free market competition. At the least, because of the considerable uncertainty over the impact of allowing contribution in various antitrust cases, courts may need a significant degree of flexibility to deal with the contribution problem on a case-by-case basis. Thus, until the effects of contribution on antitrust enforcement and settlement become more evident, it would be unwise to lay down a bright-line rule in the name of arguable claims of "fairness" to defendants--whatever the corrosive impact on competitive markets.

Sincerely,



Mark Green
Director

cc: Members, Senate Judiciary Committee

Monday, May 14, 1979

Fee for \$10M May Follow \$300M Settlement

SIXTY-TWO law firms may seek \$10 million or more in legal fees following the \$300 million settlement of a class-action suit.

The suit, a price-fixing case brought by 64 plaintiffs against 34 corrugated cardboard manufacturers, was settled in January.

But details of the settlement, reported to be the largest ever in a private antitrust suit, were first disclosed last week.

In a settlement justification brief filed in February, attorneys for the plaintiffs suggested the \$10 million figure, based on a billable rate of \$300 per hour.

The final determination of the fee award will be made by U.S. District Court Judge John V. Singleton, who presided over the case in Houston. The timing of his decision is uncertain, however, since 12 defendant companies have still refused to settle.

According to the plaintiffs' steering committee chairman, Stephen D. Susman of Mandell & Wright in Houston, \$10 million in fees could be

covered simply by the total accrued interest payments on the settlement amount.

But sources close to the case said the attorneys involved are likely to request far more than that because of the considerable time they spent on the case.

Sources said the victorious attorneys also are likely to argue that because the defendants in the case were later acquitted of criminal charges stemming from the alleged price-fixing scheme, the settlement now appears more clearly to be the product of good advocacy, deserving higher compensation.

Besides the Mandell firm, those earning fees are McGovern, Opperman & Paquin of Minneapolis; Fine, Kaplan & Black and Wolf, Block, Schoor & Solis-Cohen, both of Philadelphia; Kohn, Milstein & Cohen and Danzansky, Dickey, Tydings, Quint & Gordon, both of Washington, D.C.; Corinblit, Shapero & Seltzer of Los Angeles; Sachnoff, Schragar, Jones, Weaver & Rubenstein of

Co. of Tacoma, Wash., \$39.1 million; Inland Container Corp. of Indianapolis, \$34.6 million; Container Corp. of America of Chicago, \$34.2 million; and Owens-Illinois Inc. of Toledo, \$32.7 million.

The largest settlements and the companies making them included Continental Group Inc. of Greenwich, Conn., \$27.4 million; Weyerhaeuser

—David Margolick

Judge Blasts Big Firms For Greed

**Calls \$1M Fee Request
'Embarrassing,' Chides
85 Antitrust Lawyers**

By JOSEPH R. TYBOR
National Law Journal Staff Reporter

DRASTICALLY cutting back fee petitions of 20 law firms, a federal judge in Atlanta scolded some of the country's premier antitrust attorneys in what lawyers say is the sharpest worded attack ever on fee requests.

U.S. District Court Judge Richard Freeman said the lawyers' collective fee petition for \$1,127,500 in a class-action suit settled for \$11.8 million was "embarrassingly exorbitant." He cut the request to \$367,330.

The case, *In re Armored Car Antitrust Litigation*, 78-136A (N.D. Ga.), involved consolidated antitrust suits filed against three armored car companies shortly after the government brought criminal antitrust cases against two of them.

Judge Freeman's April 18 order has become the talk of the antitrust bar. A few lawyers familiar with the case have characterized the opinion as "appropriate."

But others fear it could chill the filing of future class actions, particularly those that carry a high risk of failure, could discourage quick settlements and could drive experienced lawyers to defense work. Some lawyers are bitter.

Borrowed Pleadings

Specifically, the order has focused new attention on lawyers who seek large fee awards after settling class-action civil suits, which frequently borrow from — and sometimes rely wholly on — pleadings and discovery developed by the government in its own criminal antitrust case.

Are such lawyers public benefactors for winning large recoveries for persons who otherwise might receive nothing? Or, are they poachers, as sug-

gested in a Harvard Law Review article four years ago?

In the article, Harvard Professor John P. Dawson said any lawyer who, in a class action, wins a fee which exceeds the fair market value of his time and effort — even though the fee is pinned to the amount of recovery — is nothing more than a "poacher on the public domain." 88 Harv. L. Rev. 849.

Citing Mr. Dawson's article and using similarly provocative language, Judge Freeman rebuked 85 lawyers in the 20 firms, including four prestigious lead counsel.

"We are disappointed and even sorely discouraged that an application of this magnitude has been tendered," Judge Freeman wrote. "The applicants have regrettably fulfilled the most dire predictions of wary courts and commentators. What might be overlooked as naive exuberance among fledgling attorneys is not easily forgiven when accomplished in the name of such experienced officers of the court."

One lawyer involved in the litigation summarized the impact of the opinion: "A lot of people have egg on their faces."

Chastised Counsel

Lead counsel were Harold E. Kohn, of Philadelphia's Kohn, Savett, Marlon & Graf, P.C., described by colleagues as the "granddaddy of the antitrust bar;" David Berger of Berger & Montague, P.C., also of Philadelphia, who was the target of a rebuke for his fee request in a leading case two years ago; David I. Shapiro of Dickstein, Shapiro & Morin in Washington, D.C., and John E. Burke of Ross, Hardies, O'Keefe, Babcock & Parsons in Chicago.

Judge Freeman's opinion singled out no one by name except lead counsel, saying in a footnote that Messrs. Berger and Kohn asked for reimbursement at \$250 an hour, Mr. Shapiro at \$200 an hour and Mr. Burke at \$110 an hour. A total of 22 attorneys claimed hourly rates of \$125 and above.

For all the firms, Judge Freeman sharply reduced the number of attorney hours claimed and authorized payment for those hours at an \$80 rate, which even a defense attorney in the case described as "a little thin." Judge Freeman allowed \$50 an hour for what he described as "settlement administration" tasks.

Until Judge Freeman's opinion, lawyers say the sternest rebuke of attorney-fee requests came in 1977 in the so-called *Grinnell II* case involving

'A lot of people have egg on their faces,' says one attorney in the case.

a reduction of Mr. Berger's initial request of \$2.5 million to \$333,073. *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093.

But when compared in terms of harsh language with Judge Freeman's opinion, "*Grinnell II* is like holding a match to a furnace," said John E. Noel, a lawyer in the antitrust division of the Illinois attorney general's office, a plaintiff in the suit.

No Contest

Proposed settlement of the consolidated civil actions was reached April 3, 1978, less than three weeks before Brink's Inc. and Wells Fargo Armored Car Service Corp. pleaded no contest to bid-rigging conspiracy charges contained in a grand jury indictment returned June 21, 1977.

Final settlement of the civil suit was approved in Judge Freeman's April 18 order.

The law firms collectively had requested reimbursement at a rate of about \$300 an hour based on a multiplier of three to a basic \$100 an hour fee, the opinion said. The attorneys requested that the multiplier be applied, in part, because of "the unusual skill requisite to perform legal services so promptly, and counsel's experience, reputation and ability."

Judge Freeman wouldn't buy such a formula.

The civil actions, which named a third armored car company, Furolator Security Inc., were filed within 60 days of the return of the indictment and were "simple parrotings" of the U.S. Justice Department action, Judge Freeman noted.

He said the legal tasks required to conclude the civil cases were "more mundane than masterful . . . more ministerial than legal."

Livid Judge

The judge also disputed the courtroom time claimed by the attorneys.

"We have spent no more than six hours in court in this litigation and have cause to wonder how some individual petitioners propose to bill in excess of 92 hours for this category of work," Judge Freeman wrote.

Continued

Continued

Judge Scolds Firms for Avarice in Seeking Fees

Judge Freeman refuses to talk publicly beyond what he wrote in his order, but friends said he was "livid" about the fee requests.

Judge Freeman was particularly irked last September when plaintiffs' attorneys came into his courtroom with what he described as a "wholly inadequate" 21-page brief in support of terms of the settlement and a brief 10 times as large, neatly bound and carefully indexed, to support their fee requests.

"He was steaming, both literally and figuratively," said a lawyer who was in the courtroom at the time. "Literally, because he sat in his car for two hours in a traffic jam that morning on a hot day. He came out on the bench — two hours late — and slammed these documents down and said, 'I will not approve the settlement.' Things, from the plaintiffs' point of view, were pretty much downhill from that point on."

First Attempt

Judge Freeman said in his opinion that September's attempt to win formal approval of the settlement was a "disaster."

"The acknowledged experience of counsel . . . is a two-edged sword," he wrote. "On the one side, it may account in part for the admirable speed and terms of settlement. On the other hand, it renders most pretrial matters in this litigation routine and it preempts any excuses for the first ill-prepared and undocumented memorandum in support of the settlement."

Here is how the lead counsels' firms were affected by Judge Freeman's order:

- Berger & Montague requested a total of 1,279 attorney hours and fees for 14 attorneys ranging from \$55 an hour to \$250 an hour for Mr. Berger himself. Judge Freeman allowed only 379 attorney hours at the \$80 rate and 24 "settlement administration" hours at the \$50 rate for a total of \$64,437.

- Mr. Kohn's firm requested reimbursement for 668 attorney hours at a rate ranging from \$85 to \$250 an hour. The firm was reimbursed for 278 hours at the \$80 rate and 26 hours at the \$50 rate for a total of \$23,702.

- Ross Hardies claimed 525 attorney hours at a rate ranging from \$40 to \$110 an hour. It was ordered reimbursed for 101 hours at the \$80 rate and 281 hours at the \$50 rate for a total of \$23,239.

- Dickstein Shapiro claimed 913 attorney hours at a rate ranging from \$75 an hour to \$200 an hour. It was reimbursed for 836 attorneys hours and 22 settlement administration hours for a total of \$69,535.

The firms' requests for expenses also were trimmed, but not as drastically.

"If that opinion stands and if it is followed by other judges, my plaintiffs' work which now constitutes about 25 percent of my practice, will disappear," said Mr. Burke. "Basically, I'll

just switch my practice to the defense side."

Mr. Burke was one of the few attorneys involved in the case to comment for the record. He, Mr. Kohn and Mr. Berger have filed a petition for a re-hearing. If that is denied, Mr. Burke said, he will appeal.

If the decision is allowed to stand, Mr. Burke said, the quality of representation in the plaintiffs' antitrust bar will deteriorate as Mr. Kohn and others, who now command \$250 an hour for defense work, will shift more and more of their time to that side.

Discourage Settling

Other attorneys fear the decision, if allowed to stand, will serve to discourage settlements either by lengthening pre-trial processes or by forcing more cases to go to trial.

"People like Shapiro and Kohn aren't interested in \$60,000, \$70,000, \$100,000 fees," said an attorney who defends antitrust actions. "I suppose they would say to themselves, 'The next time we have a case of this kind, it would be best for us to litigate, at least for a while and try to push the defendants around a little bit in order to justify any kind of substantial fee.'"

The filing of class-action civil litigation on the heels of government antitrust action occurs frequently, lawyers in the practice say.

"I know guys who make a living doing nothing else," said one Chicago lawyer. "They just copy the indictment, sit back and wait. They make a very handsome living."

Justice Department lawyers agree. But they and others, including the Chicago lawyer, see nothing sinister about the practice.

Not Poaching

"To say that lawyer-motivated litigation, primarily because of the fees, is poaching . . . is a real disservice."

The lawyers' work was 'mundane,' the judge said, calling their efforts more 'ministerial' than masterful.

vice and a real mischaracterization," said Herbert B. Newburg of Philadelphia, a former partner of Mr. Berger's and author of a six-volume treatise on class-action suits.

"Instead of it being considered a problem, it should be applauded as specifically fulfilling the desire of Congress and the courts in awarding fees to encourage the kinds of cases that are being brought."

Judge Freeman says, however, there is "nothing undesirable" in taking a case such as the armored car litigation.

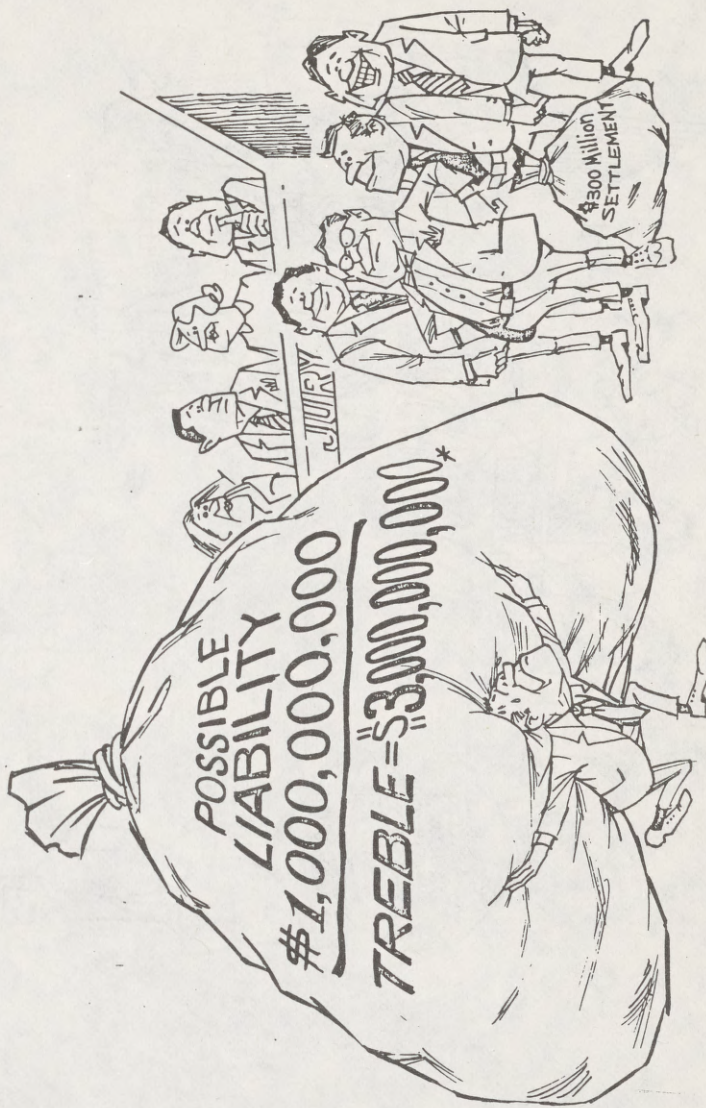
"On the contrary," he wrote, "the fact of 16 different actions with 22 different law firms as counsel of record and with some actions listing as many as four law firms in representation, attests to the financial attractiveness of nationwide antitrust class actions."

It appears clear, however, that Judge Freeman's concern is not with initiation of such civil actions but, like other commentators, with allegedly exaggerated fee requests, which frequently are pinned to the total amount of recovery.

But, as the court in *Grinnell II* noted, the amount of the recovery may have little to do with the expertise of the attorneys and more to do with the number of class members and number of classes. *

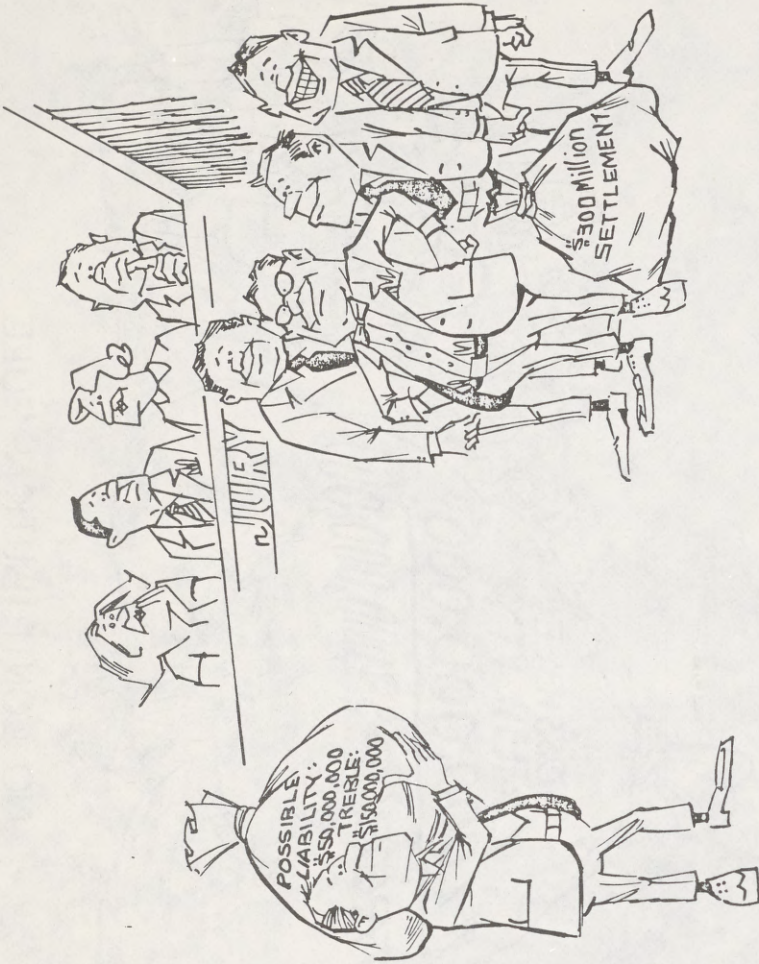


START OF CLASS ACTION



NO CONTRIBUTION RULE

* LESS SETTLEMENT



CONTRIBUTION RULE

LEGAL TIMES

OF WASHINGTON

W. W. LARPS

MONDAY, MAY 7, 1979 VOL. 1, NO. 49

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Panic Aided Record Box Settlements

By Larry Lempert
Legal Times Staff

...last fall, the day before a pretrial conference in the civil antitrust case ...ants, a corrugated container manufacturer, newspapers announced that ...ury in New Orleans had soaked ... leading wood manufacturers But for antitrust judg-

nt. That verdict rocked everyone," ac- ...ding to counsel for one of the corrup- ...ted manufacturers. "It scared the ...ns off the industry," said another. ...ourt documents unsealed in Hous- ...last week showed just how drama- ...ally the pants-less industry had run ...cover—settlements totaling nearly ...\$60 million, involving 22 of the civil ...endants, have been filed for prelim- ...s approval. ...ating rid of the suit was worth ...million to the Weverhaeuser ...\$34.6 million to the Inland Con- ...et Corp., and \$34.2 million to the ...manier Corporation of America. ...muffs' attorneys in the price-fixing ...action called it the largest settle- ...nt ever negotiated in a private anti- ...s suit.

The settlement proposals had been sealed to avoid the possibility of prejudicing the jury in a related criminal case. That jury delivered its verdict in Houston Apr. 27.

It was ironic, given the number of civil defendants willing to settle and the hefty amounts they'd been willing to pay, that the only defendants who went to trial in the criminal case were acquitted. Of 14 corporations facing criminal charges, all five misdemeanor defendants had pleaded guilty and seven of nine felony defendants had pleaded no contest.

Mead Big Winner

The Continental Group, which had settled to the tune of \$27.5 million in the civil action, successfully battled the Justice Department criminally. But the winner at this point in the hair-raising, multimillion dollar sweepstakes appears to be the Mead Corp., which refused to either settle or plead and is now, like Continental, sitting happily with an acquittal.

Lawyers can cull at least one lesson from the corrugated containers cases—twirling the heads on the abacus of risks has become a crucial part of the antitrust lawyer's craft. The costs of losing, particularly in the civil realm—damage awards, are so high that lawyers are increasingly reluctant to recommend playing the game to the finish.

A number of civil suits filed in 1977 were consolidated in Houston as MDL No. 310. The Justice Department filed its case in January 1978, charging the 14 corporations and 26 executives with price-fixing over a 17-year period. With the recent acquittals, the initial question has to be this: were the settling defendants unduly pessimistic?

A member of the plaintiffs' steering committee gave a non-answer that would probably satisfy most of the defendants' attorneys: "Smart trial lawyers don't look back." But various plaintiffs' attorneys argued that the government's case going into the trial was not insubstantial; the case, several said, was lost at trial, where veteran defense counsel outclassed relatively inexperienced government attorneys.

Too Much Evidence
"They overruled the case badly," violating the cardinal rule that "you have to keep the proof simple," said one observer. "They created a huge, seven-week morass of evidence" that detracted from several hard, undisputed instances of price exchanges they could have relied upon, he said.

"The more you put in, the more defendants can refute" was this attorney's contention. In his view, the government played into the hands of the defense by introducing a great deal of evidence on uniform pricing behavior.

There are other reasons why the acquittals do not necessarily mean that other defendants would have done better to hold out on the civil side. The government went for felony convictions against Continental, Mead, and others, but the evidence during the period that the felony statute had been on the books—since 1974—was not the strongest part of the government's case, several attorneys said. Also, a

a class action. As illustrated by the plywood case, the stakes are just too high, he said.

Only two or three class actions have actually come to trial. A case alleging price-fixing in the folding cartons industry is prompting substantial settlements; almost all the defendants in that case have negotiated agreements.

Stephen Susman of Mandell & Wright, Houston, is leading the plaintiffs' steering committee in the class action. Representing Continental and Mead, respectively, in both the civil and criminal actions were W. Donald McSweeney of Schiff Hardin & Waite, Chicago, and Harold Baker of Howrey & Simon.

High settlers in the class action were represented by John Morrison of Kirkland & Ellis (Weyerhaeuser, which was also hit hard in the plywood action); Leroy Jeffers of Vinson & Elkins, Houston (Inland Container Corp.); and John McHugh, of Chadwell, Kayser, Ruggles, McGee & Hastings, Chicago (Container Corporation of America). ■

Indeed, another attorney described the atmosphere after the New Orleans plywood case (*See Legal Times*, Nov. 27, p. 1) as a "scare climate, a panic environment."

An attorney on the plaintiffs' side said that the first class action defendant to settle tends to get a premium, and the last hold-outs tend to have to pay more if they want to end the case. However, he said, it would be simplistic to say that this explained the whole negotiations process.

Toughing It Out

The calculus, from the plaintiffs' point of view, was no simpler. One factor they had in mind was the possibility of legislation that would reverse the *Illinois Brick* decision. Such a statute would open up the action to an entirely new class of purchasers and might substantially reduce the take of the direct purchasers who had initiated the case.

One defense attorney said it is becoming increasingly unlikely that lawyers will recommend toughing it out in

Terribly Disruptive

But it appears that other factors carried greater weight in the balancing decision on settlements. At the bottom line, of course, were the perennial questions of the expense of trying a case and the risk of being subjected to treble-damage awards.

Also, one defense attorney said that the 14-week trial in the criminal case had been terribly disruptive of his client's business—not just during the stage of preparation for trial, but during the trial itself. One top executive, it was said, spent all his days at the trial and conducted business at night. A long civil trial would have been equally disruptive.

Timing, too, seemed to play an important role in the settlement negotiations. According to a defense attorney, the plaintiffs upped the ante each time a defendant settled—each settlement became more costly than the one before it. As the ball started rolling, he said, some companies and some attorneys panicked.

number of lawyers cited the more stringent standard of proof in criminal cases and the need to establish intent as a central element.

As several of the criminal defense attorneys saw it, the government had bitten off too much by trying to allege a conspiracy covering the entire nation east of the Rockies. The defense had argued that the corrugated container business is a fragmented, local one; the attempt to prove a virtually nationwide price-fixing conspiracy was not convincing, they said.

The criminal case against many of their number, standing prominently in the foreground, was bound to have an impact on the attitudes of the defendants in the civil action. For one thing, the defendants knew that plaintiffs would be sitting in the front row throughout the trial, learning more and more each day about the corrugated container industry, one attorney said.

[From the National Law Journal]

TACKLER OF TEXAS TRADITIONS

(By David M. Margolick)

HOUSTON.—Until last month, Steve Susman's most notorious accomplishment in the tight-knit legal community here was hoodwinking his former firm, Fulbright & Jaworski, into offering an associate's position to a bartender with no legal training.

Today, Mr. Susman has a more respectable credential.

The sturdy young attorney, now of Houston's Mandell & Wright, supervised a \$300,000,000 class-action settlement—the largest ever—from corrugated cardboard manufacturers accused of price fixing.

Early in 1977, word leaked that a federal grand jury in Houston was investigating the troubled corrugated cardboard industry. Immediately thereafter, the first of 52 civil suits, largely class actions, was brought in Chicago. Mr. Susman filed a similar complaint for a local client shortly after that.

The case was assigned to Houston by the Federal Multi-District Litigation Panel in November. Largely because he was a local attorney, Steve Susman was elected chairman of the committee of plaintiffs' counsel, in charge of charting the course of the case.

Untried in antitrust litigation of such breadth and magnitude, Mr. Susman soon had a chance to show his stuff. He and his colleagues devised a strategy designed to atomize the defendant companies—one which, they hoped, would force each of them to make a separate, and costly, peace.

To do so, they offered financial inducements to those firms which settled first; raised the ante once the plaintiffs' class had been certified by the court; differentiated between those defendants who had been indicted and those who hadn't and between those indicted for misdemeanors and those for felonies.

In addition, the plaintiffs' lawyers provided in the settlement agreements that all recalcitrant parties be jointly and severally liable for whatever overcharges were attributable to the entire class of corrugated manufacturers.

This "divide and conquer" approach succeeded beyond anyone's expectations. By the time the criminal trial got underway last January, 22 of the 37 defendants, accounting for approximately 80 percent of the defendants' share of the market, had settled for a record amount, \$298,057,370. And those deals became even sweeter last month, when those defendants who had gone to trial on the price-fixing charges were acquitted.

MIXED MARKS

Estimates of Steve Susman's performance in securing the settlements vary among defense counsel.

"He's done a very good job in a very tough case," said one of them. "There aren't too many guys around who could collect \$300,000,000 for their clients."

"The defendants threw in the towel before the bell ever rang," another countered. "It wouldn't have made much difference if it were Steve Susman or John Smith running the case."

Whether or not Mr. Susman succeeded or simply had success thrust upon him, attorneys close to the case say his greatest accomplishment lies in keeping his fellow plaintiffs' counsel from one another's throats long enough to do anything at all.

The corrugated suit, they say, has been a virtual case study of the plaintiffs' antitrust bar—a peculiar corner of the legal profession with intense personal rivalries, tumescent egos, backscratching, IOUs and epic struggles over large and lucrative lawsuits.

Throughout the case, Mr. Susman and his allies have fought bitterly for control with a group of attorneys, based largely in Chicago. Those lawyers, led by Granvil I. Specks of Specks & Goldberg and James B. Sloan of Sloan & Connelly, both of Chicago, have in fact challenged Mr. Susman's settlements, charging they are not "within the range of being fair, reasonable and adequate."

Last May 16, Judge John V. Singleton Jr. preliminarily upheld the settlements, which must now be submitted to the over 300,000 members of the class, largely corporate consumers, for approval. Final hearings are expected sometime this fall, and it is not known whether or not the dissenting attorneys will press their case as at that time.

Franchising

—By Harold Brown—

Contribution Among Joint Tortfeasors

When victims obtain judgment against violators of the antitrust laws, they may collect in whole or in part from each or any of the violators. Each of the violators is



clearly liable, both jointly and severally, for the full amount, including the trebling mandated by the statute. Until 1979, no appellate court had decided whether the violators could sue each other to obtain

either contribution toward payment or indemnification in full on the ground that some were only "secondarily" liable for the violation. Corporations have been allowed to obtain indemnification from those officers who were actually the antitrust perpetrators.¹ On the other hand, a franchisor's contractual claim of indemnification from its franchisee for attorney's fees was held void as against public policy.²

In practice, victims may elect not actually to join all the violators, whether known or not.³ This is often done in order to simplify complex proceedings, such as by avoiding extensive discovery at great distances. So long as an economically viable

violator is joined, others might be surplusage. On the other hand, where numerous violators are joined, it is customary for the victims to alleviate the extreme financial burden by settling with a few violators. Such settlements can only be attractive to the violator if it can obtain relief at a substantial saving below what might be obtained after trial.

Briefly, rather than simply involving compulsory apportionment among the violators, the issue of contribution can have monumental impact on victims. It therefore vitally affects private enforcement of the antitrust laws with their strong underlying public policy.

Eighth Circuit Case

In *Professional Beauty Supply, Inc.*,⁴ the Eighth Circuit Court of Appeals fashioned seminal appellate law on the issues of contribution and indemnification by joint tortfeasors under the Federal antitrust laws. In a case of first impression at that level, it held that contribution was a possibility except in flagrant cases, while it rejected indemnification. In well-reasoned split opinions, the court quickly disposed of the sparse authorities, then embarked on the deductive evaluation of sociological factors. Since several similar appeals are ripe for determination, this issue will predominate in the coming term.

In *Professional Beauty Supply*, the plaintiff-franchisee had asserted that its termination at the hands of its manufacturer-supplier and a competing franchisee constituted monopolization, attempted monopolization, and conspiracy to monopolize under Federal and state antitrust laws, as well as tortious interference with advantageous relations. After brief discovery, the defending franchisee brought a third

party complaint against the manufacturer claiming both contribution in case of any recovery as well as full indemnification on the ground that it could only be "secondarily" liable. Affirming the sustaining of a motion to dismiss the indemnification claim, the court reversed as to contribution, holding that there was indeed a possibility of such recovery.

The identical issue can arise in the context of numerous franchisee claims of combinations in restraint of trade by the franchisor with suppliers, purchasers, and other franchisees. It is more likely to emanate from claims of horizontal price fixing among industrial giants following successful governmental prosecution. Such cases often assert damages in the hundreds of millions of dollars, so that the joint and several liability of tortfeasors can exceed a billion or more dollars for each conspirator.

Many Types of Situations

Factually, one may posit a wide variety of situations with clearly disparate involvement. Assuming there were twenty violators in the combination at the same functional level, there could be wide fluctuation in gross sales of each participant, as well as in the number of years each was involved, the degree of participation in the origination, continuity, policing, and effort to withdraw, plus many other culpability factors and their endless combinations. In many distribution configurations, these could involve several different functional levels, magnifying the disarming simplicity of *Professional Beauty Supply*. As will be seen from the court's reason-

ing, there are numerous other practical considerations.

For background, the ancient aversion of the common law to contribution among joint tortfeasors has gradually receded both by judicial rule and statute, especially for unintentional torts and even for some intentional ones. At the other end of the spectrum, the antitrust laws are not only of the intentional variety, but their violation has now been raised to the felony level.⁶ To be sure, the degree of required intent will vary in criminal and civil prosecution,⁷ as well as under specific portions of the law. For example, in the civil monopolization claims under Section 2 of the Sherman Act, it would be necessary to establish a specific intent to control prices or unreasonably foreclose competition. While it would not be necessary to prove anticompetitive intent in some other misconduct charges, such violations as tying or territorial divisions cannot be sustained on the basis of negligence. At least for the Federal antitrust laws, the propriety of contribution would have to be valued under Federal, rather than state, common law.⁸

Major Arguments Reviewed

In *Professional Beauty Supply*, Judge Stephenson first disposed of the handful of district court cases, all of which rejected contribution. Of the two leading cases,⁹ one rested on dictum that was later overruled; the other relied on the same considerations as those underlying the holding of the Eighth Circuit, but ended with opposite conclusions. The majority therefore reviewed the five principal arguments without the benefit of significant precedents.

As for Congressional inaction, its intention was not felt to be clear. It had specified contribution for some securities violations, but was passive

in the antitrust arena in the face of long standing common law and lower court rejection of contribution. Actually, the courts had been principally responsible for fleshing out the generalities of the antitrust statutes. And the judiciary had been chiefly instrumental in sculpting rules on the abstruse topic of contribution in other fields of law.

Perhaps too briefly, the majority recognized the fact that third party litigation could seriously impact the plaintiff's ability to maintain control of his lawsuit. Such complicating and confusing forces could be handled through "prudent use of the (district court's) power to sever where necessary to insure justice," noting the absence of this plaintiff's objection. For the dissenting district court judge sitting by designation, such glossing simply ignored the risk of enormous compounding of already complex litigation.

With disarming simplicity, the court rejected the argument that contribution could seriously undermine the established policy favoring settlements. Stating that the rights of the "good faith" settlor were not here involved, it postulated that courts could adequately balance such issues as surplus liability for the violator who had settled for less than full liability. The court thus ignored the plain fact that a violator would obtain no benefit through early settlement if it remained liable to the other violators for contribution to an overwhelming verdict. It would therefore avoid settlement regardless of its merit. Compare the approach recently taken by Judge Richey of the District Court for the District of Columbia in *In Re Am-*

*picillin Antitrust Litigation.*¹⁰ In that case after certain co-defendants settled with the plaintiffs and nine years after the action was commenced, the remaining co-defendant, Bristol-Myers Company, moved to amend its answer to plead affirmative defenses as to the effect of any settlement payments made by its co-defendants on any liability which might later be assessed against it. It also sought to assert cross-claims against its co-defendants for indemnification, unjust enrichment and contribution. Denying the motion in all respects, Judge Richey distinguished *Professional Beauty Supply* by stating that there the court limited its holding to circumstances in which contribution might further rather than hamper the deterrent purposes of the antitrust laws. It expressly recognized that it was *not* dealing with a joint tortfeasor who had settled in good faith. In *Ampicillin*, however, contribution against the settling defendant was denied because the settlement was beneficial to the plaintiffs and the defendant would not escape the consequences of its antitrust violation.¹¹

A similar approach was used by Judge Singleton of the District Court for the Southern District of Texas (Houston Div.) in *In Re Corrugated Container Antitrust Litigation.*¹² Their motions were also denied for leave to amend answers to assert cross-claims for contribution against settling defendants. They had agreed to pay nearly three hundred million dollars to end their participation in the litigation. The court reasoned that contribution would have been improper under the circumstances because to allow it would have unduly complicated the litigation procedurally, frustrated settlements by removing incentives therefor, and inhibited joint defense efforts to such an extent that litigation of this complex variety would be virtually impossible to manage. Furthermore, the court found arguments in support

of contribution particularly unpersuasive in the context of intentional torts. It reasoned that such a rule may be proper or fair as between negligent tortfeasors. However, the deterrent policies of the antitrust laws would be best served by retaining a rule which would hold liable any defendant found to have engaged in intentionally wrongful conduct for the full sum of damages caused by its acts and those of its partners.

Thus, the dissenting district court judge in *Professional Beauty Supply* has now been joined by two additional district court judges in rejecting contribution. This unquestionably reflects the strong objections of the sitting trial judge, as contrasted with the deductive reasoning of the appellate jurist who is insulated from the intense complexities of court management. Such inhospitable treatment by trial courts may mean that the possibility of joint contribution is unlikely to materialize.

In *Professional Beauty Supply*, the fourth argument was that the already complex antitrust case would be unduly subjected to further complications. Relying again on the district court's power to sever, it noted that contribution was allowed in equally complex securities cases. In fact, however, the multiparty, multilevel antitrust case can be far more of a challenge, even without the additional complexities of "contribution."

Fourth Argument

The fourth argument was that the already complex antitrust case would be unduly subjected to further complications. Relying again on the district court's power to sever, it noted that contribution was allowed in equally complex securities cases. In fact, however, the multiparty, multilevel antitrust case can be far more of a challenge, even without the

additional complexities of "contribution."

Perhaps the most important claim was that the deterrent effect of the antitrust laws is increased by not permitting violators to redistribute the cost of anticompetitive activity. Simplistically, the court felt that where one conspirator pays in full, others could go "scot free," thereby encouraging wrongful activity. Conceivably, a strong company could also influence its exclusion from suit, as in an on-going situation involving a franchisor. Wherever there is a continuing reliance on supply, such a violator could escape all responsibility for its wrongdoing.

The court then decided that justice and fairness mandated that each violator must remain amenable to full payment for its malfeasance, rather than leaving apportionment to the victim's whim. It did, however, mandate that the possibility of contribution should be a co-efficient of the degree of flagrancy in the individual case. These should include the same factors governing the defense of *pari delicto*, namely, relative responsibility at each stage of the violation; the reasonable expectancies as to who would benefit from the violation; attempted withdrawals and the degree of opposition thereto; and ultimate proof of profit or suffering.¹²

For almost the same reasons, the court rejected indemnification since it would seriously restrict the deterrent effect of the antitrust laws if one of two joint tortfeasors could hope to wrangle out of the effect of its participation based on a claim of primary culpability.

Finally, the court simply cut the knot as to the standard of allocation, opting for "pro rata contribution" instead of allowing assessments based upon exact percentages of fault. Except for unusual circumstances, that rule would prevail, preventing conspiratorial participation by those playing a minor role in the hope of avoiding being called to account.

Only the First Blow

The decision is obviously but the first blow that must develop into a raging battle involving enormous issues. This is evident from the many possible injustices that can occur, regardless of which principle ultimately prevails.

For example, it might be assumed that thirty competitors have combined to fix prices over a period of ten to fifteen years, with a gross impact of one billion dollars. Following conviction, the inevitable civil class action followed and during four years of discovery, half of the violators have settled through a total payment of \$100 million. Assuredly there would have been wide disparity in the total sales, number of years, and degree of participation by the thirty violators. The most culpable might have settled first, based on their clearcut guilt and the availability of a comparatively favorable figure as compared with the risk of full computation subject to trebling.

Those with less, or even contested, liability would have opted to go to trial rather than submit. Some would have settled solely in order to save themselves from total financial ruin in case of full responsibility both for their own share and that of the remaining conspirators.

In the absence of a rule of contribution, a contesting defendant could thereby face judgment for hundreds of millions of dollars even though its conspiratorial participation was minor and its share of gross sales comparatively small. Clearly, the plaintiffs would be entitled to the established joint and several liability of all the tortfeasors. But among the violators, the absence of a right to contribution could be fatal. Rather than allowing such a catastrophe, it might be well to question whether "joint and several liability" necessarily mandated liability for treble the

amount of damages caused by each of the co-conspirators. Such geometric compounding would not be an absolute necessity either to encourage private enforcement or as a deterrent to violation.

Specter of Liability

Without contribution, the terrifying impact of total liability would compel settlement on the best available terms. Foolhardy counsel might face professional liability for allowing a trial ending in a global judgment. The forced settlement could well attain the level of a denial of Due Process either in fact or in spirit.

On the other hand, with contribution, plaintiffs would have almost no hope of obtaining partial settlements since the remaining parties would promptly seek contribution against those who had settled, thereby eliminating the normal motive to settle. In the absence of joint and total settlement by all of the violator, all major antitrust cases would have to be litigated to the bitter end. [Instead of the usual compromise, hundreds of complex cases would threaten an already overburdened judicial system.] Similar repercussions would occur where the victims had not joined all of the violators, whether known or unknown. Counsel for the alleged violators would have little choice but to join every conceivable participant in order to preserve the right of contribution.

Unquestionably, the courts would be flooded with additional "lawsuits within lawsuits." The new issues would be extremely complex since the court would have to determine whether the flagrancy of the violation precluded all contribution among the violators; the numerous factors enumerated by Justice White on the *pari delicto* issues; and the pro rata application of the award among the violators. Where some violators had settled for less than full ex-

posure, the other violators would be able to limit their own liability if they could quantify the savings which the settling parties had garnered.

In simple terms, it would become prohibitively expensive to settle any antitrust suits unless all conceivable violators joined in the settlement on the basis of their private apportionment. The courts would sag under the weight of such primary impact. But that would only be the beginning, since the trial of the contribution issues would require a retrial of the primary issues, plus the new complications. If the cases were not severed, the victims would simply collapse from the litigational burdens. Private enforcement of the antitrust laws would come to an end.

Technically, there is now pending a petition for rehearing in *Professional Beauty Supply*, undoubtedly to be followed by petitions for certiorari to the Supreme Court. The same issue was orally argued on Dec. 5, 1978 before the Fifth Circuit in *Abraham Construction Co. v. Texas Industries*. In the same circuit, oral argument was scheduled in June, 1979, in *In re Beef Industry Antitrust Litigation* (No. 78-3346). And in the Tenth Circuit, the *Olsen Farms, Inc.* case was argued on March 16, 1979.

Proposed Amendment

Congress has already been invited into the fray through an amendment proposed by Senator Birch Bayh to the pending measure to reverse *Illinois Brick Co. v. State of Illinois*.¹² Under that proposal, in price stabilization cases, there would be a statutorily established right to contribution among the violators. Further, the release of a settling violator would not discharge that party for the extra damages attributable to its participation.

The U.S. Antitrust Division is strenuously opposed to the contribution concept mandated in *Professional Beauty Supply* and as proposed by Senator Bayh. Its prin-

cipal objection to the increased complexity of private enforcement would lie in the additional challenge to the victim's relief, with extended discovery, distortion, and probable overwhelming of the litigational effort. Further, contribution would effectively restrict settlements other than with all defendants simultaneously, thereby limiting recovery and forcing the victim into negotiations as to the share to be carried by each violator. By clarifying the exposure of conspirators who knowingly participate in felonious conduct, the proposal would encourage such criminal activity by providing predictability in the "cost benefit" analysis as to whether to join in the deliberate conspiracy. Finally, the Division stressed the unfairness to victims and the deleterious impact on the public interest. The Division reported that the Antitrust Section of the ABA is preparing a monograph on "contribution."

The impact of "contribution" is apparently contrary to the reasoning of the U.S. Supreme Court in the *Illinois Brick* case. Because of the need for simplification in complex antitrust litigation, the court confined recovery to direct purchasers. Whatever the merit of relieving both victims and the courts from excessive litigational burdens, the proposed rule on contribution appears to flout those principles. Understandably, it is reported that contribution is now the universal topic of discussion among antitrust litigants in the camps of both the victims and the violators.

(1) Cf. dictum in *Goldlawr, Inc. v. Shubert*, 276 F. 2d 614, 616 (3rd Cir. 1960) (passing reference to "federal law - with no right of contribution").

(2) *Wilshire Oil Co. v. Riffe*, 409 F. 2d 1277 (10th Cir. 1969).

(3) *Cohen v. Commodore Plaza at Century 21*

1979) 1979-1 T.C. Para. 62,515; *Weave*, American Oil Company, 276 NE 2d 144 (Ind. 1971).

(4) Such non-joinder is allowed as a general rule. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F. 2d 1320 (3rd Cir. 1975).

(5) *Professional Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc. et al.*, (8th Cir. 1979) 1979-1 T.C. Para. 62,485.

(6) See 15 USC 1 (effective Dec. 21, 1974).

(7) See *United States Gypsum Co. v. U.S.*, 98 S. Ct. 2864 (1978); H. Brown, "Anticompetitive Intent," NYLJ Jan. 9, 1979.

(8) *Soia Elect. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

(9) *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339 (SDNY 1969); *El Cammo Glass v. Sungio Glass Co.*, (ND Cal. 1976) 1977-1 T.C. Para. 61,533.

(10) In *Re Ampicillin Antitrust Litigation*, M.D.L. Docket No. 50, 917 ATRR at E 1-2 (June 7, 1979).

(11) For another recent analysis of the contribution issue in antitrust litigation, see "Contribution - Fairness or Folly in Antitrust Litigation," 917 ATRR at B 1-6 (June 7, 1979).

(12) M.D.L. Docket No. 310, 919 ATRR at E 1-2 (June 21, 1979).

(13) Quoted from the concurring opinion of Justice White in *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. at 146-147 (1968).

(14) See 431 U.S. 720, 97 S. Ct. 2061 (1977). The mandate of private suit only by a direct purchaser would be reversed by S. 390 (96th Cong., 1st Sess.).

Harold Brown, who writes this column as a regular feature of the *Law Journal*, is a partner of the Boston firm of Brown, Prifti, Leighton & Cohen. A second edition of his book, *Franchising: Realities & Remedies*, is published by the *Law Journal Press*.

SUBMISSION OF HAROLD E. KOHN

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION

IN RE:)
)
 FOLDING CARTON ANTITRUST) MDL 250
 LITIGATION,)

TRANSCRIPT OF PROCEEDINGS

in the above-entitled cause before the Honorable
 HUBERT L. WILL, and Honorable EDWIN A. ROBSON, Judges of
 said court, in the United States District Courthouse,
 at Chicago, Illinois, on March 30, 1979, at the hour
 of 2:00 p.m.

PRESENT:

MR. PERRY GOLDBERG
 MR. JAMES B. SLOAN
 MR. GARY SPECKS
 MR. JACK L. CHESTNUT
 MR. JOHN A. COCHRANE
 MR. HAROLD E. KOHN
 MR. ROBERT A. SKIRNICK
 MR. LAWRENCE WALNER
 MR. GUIDO SAVERI

on behalf of class plaintiffs,

MR. FRANCIS J. MCCONNELL
 MR. LEE FREEMAN, SR.

on behalf of opt-out plaintiffs,

PRESENT: (Continued)

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MR. DONALD G. KEMPF, JR.
MR. JOHN J. MC HUGH
MR. DAVID P. LIST
MR. JAMES A. HARDGROVE
MR. STEPHEN C. SHAMBERG
MR. MICHAEL H. KING
MR. ROGER HARRIS
MS. SUSAN A. HENDERSON
MR. HAROLD F. BAKER
MR. GEORGE COLLINS
MR. E. HOUSTON HARSHA
MR. ROBERT GOLDBERG
MR. PATRICK W. O'BRIEN
on behalf of defendants.

MR. THOMAS DECKER
MR. ROBERT CUMMINS

on behalf of the witness Longnecker

MR. JAMES R. CUSACK

on behalf of witness Wellener and Westvaco

51-370 474

LA 10

1 THE CLERK: MDL 250, in re: Folding Carton Antitrust
2 litigation.

3 JUDGE WILL: Does everybody have an agenda?

4 MR. KEMPF: I believe a joint suggested agenda was
5 submitted to the Court.

6 The first item on that relates to a motion by Contain
7 Corporation.

8 MR. MC HUGH: Yes, your Honors. I think it was at the las
9 pretrial, your Honor suggested that you had jurisdiction of
10 these proceedings, especially with respect to the class issue
11 and the class for all purposes.

12 Last Thursday, a week ago yesterday, I received a
13 rumor to the effect that counsel, or that one of the co-defenda
14 in this litigation was contemplating the filing of an action
15 premised on contribution, and that this action was to be filed
16 not before this Court, but before some court in the 8th
17 Circuit, up, I believe, in the District Court of St. Paul.

18 I suspect that some of the reasons for this is the
19 recent decision by the 8th Circuit Court of Appeals which is
20 referred to there in the motion that I submitted.

21 With that thought in mind, I thought rather than
22 present -- well, in order to try to prevent a multiplicity of
23 litigation, I would notice this motion for hearing by your
24 Honors to the effect that if these co-defendants were, indeed,
25 going to try to assert contribution, that since this Court had

1 jurisdiction for all purposes, that they should be required
2 to do so before your Honors.

3 With that thought in mind, I prepared and served
4 this motion. I orally advised Mr. List, counsel for Brown of
5 this fact.

6 Mr. List, at that time, did advise me that he believed
7 his client was looking around in St Paul. I asked him if he
8 would be kind enough to telephone his client and advise his
9 client of this motion.

10 Since that time I don't know what, in fact, has
11 happened. I felt that with the character of counsel that we were
12 dealing with, and the protracted period of time we have been
13 before this Court, it would be unnecessary to come before
14 your Honors on an emergency basis with that thought in mind,
15 but I must tell your Honors that I thought the motion would be
16 sufficient, and I believe that perhaps such an action has been
17 filed, but I don't know.

18 That was the reason for the motion, your Honors.

19 JUDGE WILL: There is Mr. List. Let us find out.

20 MR. LIST: David List. The action has been filed. It was
21 filed this morning, by separate counsel in Minnesota. We
22 believe it is entirely appropriate.

23 I am, perhaps, in violation of Mr. McHugh's TRO. Not
24 I, but Brown, but the action has been filed. If it comes down
25 here, it will come.

1 JUDGE WILL: I assume it will. I can't imagine the
2 Multidistrict Panel is going to let one case which is related
3 to the bundle that they have delivered to us before, lie up
4 in St. Paul. I assume it is going to come down here.

5 MR. LIST: I believe it was filed in Minncapolis.

6 JUDGE WILL: Wherever it was filed. What do we have to
7 enjoin?

8 MR. MC HUGH: Well, there is nothing apparently left to
9 enjoin, as such, your Honor. I wasn't asking for an injunction.
10 I was asking for an order originally. Now I am sure the Court
11 is entirely familiar with the leading case of Martin versus
12 Greybar Electric which is in the Seventh Circuit here, a case
13 in which Sidley and Austin did participate, which certainly
14 gives this Court the inherent, and I underscore the following
15 words, discretionary power to prevent a multiplicity of law
16 suits, and does empower this Court to instruct and order a
17 defendant over whom you have in personem jurisdiction, to
18 dismiss that law suit and file it here.

19 And I would so request.

20 JUDGE WILL: Order them to dismiss the case?

21 MR. MC HUGH: And file it here.

22 JUDGE ROBSON: Wouldn't the same result be achieved if
23 the Panel on Milidistrict Litigation transfers that action
24 here?

25 MR. LIST: Of course.

1 MR. MC HUGH: No question about it, but that was the
2 purpose of my motion in the first instance. It seems to me
3 to be an unnecessary imposition on the judicial panel.

4 JUDGE ROBSON: If Mr. List wants to take this type of
5 action --

6 MR. LIST: Let me emphasize we did not take it. There is
7 separate counsel engaged.

8 JUDGE WILL: Mr. List, I really don't think you ought to
9 attempt to establish that your client is to be immunized
10 from its conduct that it took because it hired a separate set of
11 lawyers to do it.

12 MR. LIST: I don't think there is anything inappropriate
13 with their conduct.

14 JUDGE WILL: You are forum shopping, very clearly.

15 MR. LIST: Of course. We have every right to do that.

16 JUDGE WILL: Now the question is, what implications do you
17 draw from forum shopping. Certainly, you don't consider us
18 friendly if you are forum shopping for somebody else.

19 MR. LIST: I consider the law in the Eighth Circuit is
20 pretty friendly right now.

21 JUDGE WILL: At least friendlier than we are.

22 MR. LIST: Well, I don't know that.

23 JUDGE WILL: I read the Eighth Circuit case and I have
24 grave doubts that is applicable to this situation, for what it
25 is worth.

1 MR. LIST: So I would assume my client did have to do a
2 little forum shopping.

3 JUDGE WILL: I would assume your client has not success-
4 fully forum shopped, but as Judge Robson and I have said many
5 times, you are entitled to your maneuvers. It is our job to
6 see justice is done notwithstanding.

7 MR. LIST: I am sure it will be.

8 JUDGE WILL: I hope so.

9 Okay, that takes care of your motion I think, right?

10 MR. MC HUGH: Well, it really moots it. If you like, I
11 can withdraw it.

12 JUDGEWILL: Why don't you do that, and I assume that
13 the Multipanel District will have the case reassigned down here
14 in due course, and any other such cases which may be filed in
15 Kansas City, or Omaha, or St. Louis, or wherever it may be.

16 MR. MC HUGH: Just out of courtesy to Judge Robson, and
17 the other fine members of the Panel, I wonder if the Court --

18 JUDGE WILL: He won't vote on that.

19 MR. MCHUGH: I wasn't suggesting that you would. Just out
20 of consideration of your work load, to reconsider as far as
21 the future is concerned, your inherent powers that you do have
22 based upon that decision I referred to.

23 JUDGE WILL: I think, Mr. McHugh, that rather than enter
24 some mandatory order --

25 MR. MC HUGH: I am not suggesting you should in the

1 abstract.

2 JUDGE WILL: -- that no defendant in this case may file a
3 suit in any other district court in the United States without
4 leave of court, or something of that order, involving subject
5 matters of MDL 250 -- I would like to see how many of them
6 try it. I think it is not irrelevant to find out how many
7 Browns there are in this bag.

8 MR. MC HUGH: Well, your Honor --

9 JUDGE WILL: I am not going to give anybody the protection
10 of prohibiting them from exhibiting their character.

11 MR. MC HUGH: Your Honor, it has been called to my
12 attention that maybe just as a procedural matter because of
13 the Supreme Court decision in *Feret* versus Van Duesen, perhaps
14 it would be unwise for me to withdraw the motion. I recognize
15 what the outcome of this would be.

16 MR. KEMPF: I think we would like to have it noted and
17 continued.

18 I think we want to take a look at some of the questions
19 about which law applies to make sure there aren't any obstacles
20 there we need to address by way of the motion.

21 JUDGE WILL: All right. Let it pend, but I think it is
22 in fact mooted.

23 MR. KEMPF: I think your Honor is correct, but I think --

24 JUDGE WILL: Or, will be. Let me put it that way.

25 MR. KEMPF: We would like to double check a question of

1 conflict of law.

2 JUDGE WILL: We will enter and continue it, and if, in fact,
3 by strange chance the Multidistrict Panel reassigns that case
4 here and thereby moots the motion, we will dismiss it as moot.

5 MR. MC HUGH: Yes, sir.

6 MR. LIST: I guess you are still talking about my case.

7 MR. MC HUGH: I understood you were not counsel in the
8 case.

9 JUDGE WILL: Not having fooled anybody he now acknowledges.
10 Go ahead, tell us about your case.

11 MR. LIST: I couldn't hear what John was saying.
12 If he is talking about briefing a motion that first he withdraws
13 and now he is reinstating, which is moot?

14 JUDGE WILL: No, he is saying he intends to continue
15 to let the motion pend while they do some research as to the
16 implications of whether or not the Eighth Circuit's decision has
17 other than precedential significance, if the case is transferred
18 from there rather than that case being treated separately.

19 MR. LIST: The law is clear on that.

20 JUDGE WILL: On what?

21 MR. LIST: That the transferee court is bound by the
22 law

23 JUDGE WILL: Mr. List, you forget one thing. There is
24 a subject of contribution which involves the defendants who are
25 in this court, and your client, who is also in this court,

1 MR. LIST: Yes, but there are nine cases filed, your Honor,
2 in St Paul and Minncapolis.

3 JUDGE WILL: Nine cases?

4 MR. LIST: Yes, at least, nine of the class actions.

5 JUDGE WILL: Wait a minute. Nine separate cases?

6 MR. LIST: That were transferred down here.

7 JUDGE WILL: No, I am not talking about that. I am
8 talking about the cases that were transferred down here
9 initially.

10 MR. LIST: I think the law is pretty clear.

11 JUDGE WILL: They are all here.

12 MR. LIST: This Circuit is bound by the law as enunciated
13 in the Eighth Circuit.

14 JUDGE WILL: Mr. List, if you are warming the cockles of
15 your heart with the belief that the Eighth Circuit decision gives
16 you a right of contribution in this case in this court, don't
17 automatically assume that the light may not go out.

18 MR. LIST: I won't spend money on it. I don't see any
19 sense in briefing it.

20 JUDGE WILL: Nothing to brief.

21 MR. KEMPF: In light of his comments in particular, I think
22 we do want to examine whether we would urge the Court exercise
23 its discretionary power and pursue the route Mr. McHugh earlier
24 suggested.

25 MR. LIST: Now we have an oral motion.

1 JUDGE ROBSON: It is my understanding this case is still
2 pending on a petition for rehearing en banc.

3 MR. KEMPF: That is correct.

4 JUDGE ROBSON: In the Eighth Circuit.

5 MR. KEMPF: That is correct.

6 JUDGE WILL: We have all kinds of bridges to cross before
7 we get to the question as to whether or not you are entitled
8 to any contribution, assuming you don't join the settlement,
9 and for all I know you may have settled by the time we get around
10 to that point.

11 I hope your client doesn't think it has bought an
12 insurance policy.

13 MR. LIST: I will make no comment.

14 MR. MC HUGH: Thank you.

15 JUDGE WILL: Now we have got the next motion, which is for
16 sactions on Mead.

17 MR. GOLDBERG: That has been briefed on the plaintiffs'
18 side. I take it what we really are in court for now is dates.
19 If they want to respond, and for our reply to any response
20 they might want to make, if your Honors need a response.

21 JUDGE WILL: I am not quite clear as to whether or not this
22 is still a viable motion.

23 MR. GOLDBERG: Yes, this is a new motion, your Honor.
24 This is a motion that comes after their responses, after your
25 orders. In our view they defied your orders.

1 JUDGE WILL: That isn't what I was talking about.
2 I thought there was some discussion of them as potential
3 settlers in the case.

4 MR. GOLDBERG: No.

5 JUDGE WILL: Has that not happened?

6 MR. GOLDBERG: No, it has not happened.

7 JUDGE WILL: Then we need some briefs.

8 MR. GOLDBERG: I would suggest ten and five.

9 JUDGE WILL: All right. You have got a memorandum
10 in support of the motion?

11 MR. GOLDBERG: Correct.

12 JUDGE WILL: So it is their next move.

13 MR. GOLDBERG: Correct.

14 JUDGE WILL: Ten days for Mead.

15 MR. BAKER: Harold Baker for the Mead Corporation.

16 We are willing to take a briefing schedule.

17 I do think, your Honors, it was a misunderstanding;
18 that we have answered, and it could be cleared up very
19 simply, but we will set the briefing schedule.

20 JUDGE WILL: Let me just ask you this. Why isn't
21 the right solution of this for plaintiffs' counsel to
22 just go look through the Mead files?

23 MR. BAKER: We all read the files. We said, business
24 plans and profit and loss statements.

25 JUDGE WILL: You know, from my point of view,

1 what it is you don't like about them.

2 I think the way it stands now, we
3 are compelled as class representatives
4 to maximize the recovery for the class
5 in settlements and maximize the potential
6 recovery to the class in any trial in this
7 case. And that's what we have done to date
8 and that's what the defendants would have
9 Your Honor really viscerate by means of
10 these motions.

11 I really have nothing else to say,
12 but I would be glad to answer questions
13 of Your Honor if you have them.

14 THE COURT: Well, I have wrestled
15 with this proposition and listened to all
16 these arguments by the outstanding attor-
17 neys.

18 I'm going to deny leave to amend
19 to assert the right of contribution. I
20 will write something on it, but generally
21 speaking, there are really five reasons
22 why I'm going to deny it.

23 One is that, as I read the law,
24 there has been only one circuit that has
25 held that there is a right of contribution

1 in an antitrust case such as this. That
2 is, of course, the Eighth Circuit case.

3 I don't know that the Eighth Cir-
4 cuit case is binding law on this court
5 in this circuit at this time. By that
6 I mean I'm not precedentially bound to
7 follow it and so I'm not going to follow
8 that case.

9 I think it's -- the facts of the
10 case are readily distinguishable from the
11 facts of this case. I'm not at all con-
12 vinced from reading that Beauty Supply
13 case that, if the Eighth Circuit were
14 faced with this case, that they would have
15 reached the same result.

16 Two, even if I were to allow
17 contribution in an antitrust case, in my
18 judgment, this is not a proper case for it.
19 There have been settlements already entered
20 into and I shouldn't retroactively apply
21 the right of contribution and in a sense
22 upset those settlements, even if I were
23 to approve them.

24 I am convinced, as I indicated a
25 while ago, that even if the Fifth Circuit

1 in these pending cases were to follow the
2 Eighth Circuit, I'm just convinced in my
3 judicial mind that they would not apply
4 it retroactively. It would be a prospec-
5 tive ruling.

6 Contribution in this case would
7 extremely complicate this case. It would
8 complicate it beyond all reaches of my
9 mind. And it would discourage the
10 possibility of any future settlements in
11 this case. And to some extent, I'm per-
12 suaded that the non-settling defendants
13 participated in joint defense efforts, not
14 necessary Westvaco, but some of them with-
15 out revealing their plans to allege --
16 to claim contribution.

17 Those are generally speaking the
18 five reasons why I'm going to deny leave
19 to amend to set up the right of contribu-
20 tion.

21 I think it probably goes without
22 saying that with respect to taking out
23 the settling defendants' shares, probably
24 the same reasoning applies, although I
25 think that determination comes down later

1 when we talk about approving the settlements,
2 because I can't approve the settlements, at
3 least I don't see how I can approve the
4 settlements even tentatively, if I'm going
5 to say that that provision of those settle-
6 ments is not applicable. I don't see how
7 I could -- I'm sure I have the power to
8 do that, but I don't think it would be
9 right and just so to speak for me to do
10 that.

11 MR. DILWORTH: Your Honor, may I
12 have a comment?

13 I'm a few minutes late. I'm
14 reluctant to say anything, but particu-
15 larly I can't quite hear it.

16 THE COURT: You can read it,
17 Mr. Dilworth.

18 MR. DILWORTH: The microphone is
19 not working.

20 MR. SACHNOFF: We have one that's
21 working here, Judge, if you want to hear it.

22 THE COURT: I'll speak louder.

23 Well, anyway, I didn't say anything
24 great, Mr. Dilworth. I'm really not sure
25 I said anything worth repeating, although

Exhibit C

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In re CESSNA DISTRIBUTORSHIP
ANTITRUST LITIGATION.

The CESSNA AIRCRAFT COMPANY
et al., Appellants,

v.

SKYWAYS, INC., et al., Appellees.

The CESSNA AIRCRAFT COMPANY
et al., Petitioners,

v.

The Honorable William H. BECKER, United
States District Judge for the Western
District of Missouri, Respondent.

Nos. 75-1745, 75-1785.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 13, 1976.

Decided March 2, 1976.

Three years after institution of a complicated antitrust proceeding, certain of the defendants moved for leave to file a cross claim against their codefendants. The United States District Court for the Western District of Missouri, William H. Becker, Chief Judge, denied the motion, and defendants appealed and sought mandamus. The Court of Appeals, Webster, Circuit Judge, held that the order in question was appealable and that the trial court did not abuse its discretion in denying permission to amend by filing cross claims.

Affirmed and petition for writ of mandamus denied.

1. Courts ⇐405(14.8)

Trial court's order denying leave to amend answers in complex antitrust action so as to file cross claims against codefendants was appealable without certification by district court and despite fact that order presented no unsettled questions of law of importance beyond particular case. Fed. Rules Civ.Proc. rules 15(a), 54(b), 28 U.S.C.A.; 28 U.S.C.A. § 1292(b).

2. Federal Civil Procedure ⇐786

Where more than 20 days had expired since defendants in antitrust action filed their answer, leave of court was required to file cross claims against codefendants. Fed. Rules Civ.Proc. rule 15(a), 28 U.S.C.A.

3. Federal Civil Procedure ⇐847

Where more than three years had expired since filing of complex antitrust action when defendants moved for leave to amend answer so as to file cross claims against codefendants, trial court did not abuse its discretion in denying leave to amend on grounds of prejudice to opposing parties. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f); 28 U.S.C.A. § 1292(b); Fed.Rules Civ.Proc. rules 7(a), 12(b), 13(g), 15(a), 54(b), 28 U.S.C.A.

4. Mandamus ⇐39

Mandamus was inappropriate remedy to require district court to grant leave to defendants to amend answer so as to assert cross claims against codefendants, in view of discretionary nature of court's ruling on such motion. Fed.Rules Civ.Proc. rule 15(a), 28 U.S.C.A.

5. Mandamus ⇐28

Remedy of mandamus is available only in those circumstances where district court exceeds sphere of its discretionary power.

6. Mandamus ⇐1

Mandamus is extraordinary remedy reserved only for extraordinary situations.

Thomas E. Deacy, Jr., Deacy & Deacy, Kansas City, Mo., for appellants. Thomas E. Deacy, Jr. and Donald C. Bollard, III, Deacy & Deacy, Kansas City, Mo., and Don H. Reuben, E. Houston Harsha and Richard B. Rogers, Kirkland & Ellis, Chicago, Ill., on brief and reply brief and Appendix in No. 75-1745, and on petition for writ of mandamus in No. 75-1785.

Joseph M. David, Jr., Kansas City, Mo., for appellee, Airflite. Lawrence R. Brown and Joseph M. David, Jr., Kansas City, Mo.,

IN RE CESSNA DISTRIBUTORSHIP ANTITRUST LITIGATION

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Cite as 532 F.2d 64 (1976)

and Edwin Freston, Los Angeles, Cal., on brief.

Don M. Jackson, Kansas City, Mo., for A. F. Liquidating, etc., appellee. Don M. Jackson and Paul L. Wickens, Kansas City, Mo., and Fred F. Gregory, Gibson, Dunn & Crutcher, Los Angeles, Cal., on brief.

Robert E. Ackerberg, Schiff, Hardin & Waite, Chicago, Ill., for appellee, Skyways, Inc.; Susan A. Henderson and W. Donald McSweeney, William A. Montgomery and Robert E. Ackerberg, Schiff, Hardin & Waite, Chicago, Ill., and Robert H. Bingham and James P. Zakoura, Kansas City, Kan., on brief.

Edward A. McConwell, Overland Park, Kan., for Class (appellees).

Before HEANEY, ROSS and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

This antitrust class action is before us for a second time.¹ Certain of the defendants moved in the District Court² for leave to file a cross-claim against their codefendants. Their motion was denied, and they appeal. Alternatively, they petition for a writ of mandamus compelling the District Court to grant leave to file the cross-claim.

A review of the proceedings in the District Court is necessary to an understanding of the issues presented.

This litigation began in April, 1972, when White Industries, Inc. (White), a dealer in Cessna products, initiated two antitrust actions. In the first, *White Industries, Inc. v. Cessna Aircraft Co.*, No. 20245-4 (W.D.Mo. filed April 6, 1972), White alleged that Cessna and certain of its distributors, which were also named as defendants, had entered into a combination and conspiracy to establish and maintain a dual pricing system so that the distributors would pay a lower

price for Cessna products than would Cessna dealers. White alleged that this combination, which had allegedly existed since 1960, violated both Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 2(a) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(f). White contended that Cessna and the distributors had fraudulently concealed the existence of this combination.

In the second action, *White Industries, Inc. v. Roskam*, No. KC-3518 (D.Kan. April 10, 1972), White charged other distributors and Cessna's president with engaging in this same combination.³ In both actions, White sought to represent a class including all Cessna dealers.

In May, 1973, the Judicial Panel on Multidistrict Litigation consolidated the actions for pre-trial proceedings in the Western District of Missouri. More than a year was then spent litigating the question whether the action should proceed as a class action. An order allowing class status was entered June 5, 1974, from which Cessna unsuccessfully appealed. *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), cert. denied, 423 U.S. 947, 96 S.Ct. 363, 46 L.Ed.2d 282 (1975). This Court's opinion holding that the order granting class standing was not appealable was filed June 23, 1975. Shortly thereafter, the District Court acted to move the litigation forward by directing the parties to submit proposed timetables for the pre-trial process and by scheduling a pre-trial conference for September 10, 1975.

From late 1972 onward, the various distributor defendants had been conducting settlement negotiations with White, the representative of the plaintiff class. Separate settlement plans had been negotiated involving the various defendants and a settlement class was formed. A major factor

1. See *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), cert. denied, 423 U.S. 947, 96 S.Ct. 363, 46 L.Ed.2d 282 (1975).

2. The Honorable William H. Becker, Chief Judge, United States District Court for the Western District of Missouri.

3. Both actions were subsequently amended, and certain Cessna officers and companies affiliated with Cessna were brought into the litigation.

leading the distributor defendants to negotiate these settlements was their desire to be relieved of the burden of defending themselves in what promised to be protracted and expensive litigation.

On the morning of the pre-trial conference, the "Cessna defendants" (Cessna Aircraft Company and certain of its officers and affiliated corporations) filed a three count cross-claim against the distributor defendants. In this cross-claim, Cessna admitted that it charged the distributors lower prices for its products than it charged the dealers. It asserted, however, that the differences in price were based on the distributors' performance of bona fide wholesale functions. Cessna alleged that even if the distributors did not perform this function, but instead sold in direct competition with the dealers, then they did so without Cessna's knowledge. Consequently, Cessna contended that the distributors must indemnify the Cessna defendants for any liability in the main action and that the distributors were liable to Cessna for breach of contract and for violation of Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f).

The Cessna defendants initially filed their cross-claim without obtaining leave of the District Court. When the court discovered this, it ordered the filing stricken. It then allowed the Cessna defendants to move orally at the September 10th conference for leave to file the cross-claim. They so moved, and the court then heard oral arguments by respective counsel on the propriety of allowing the cross-claim.

Cessna argued principally that the cross-claim could be filed at that stage of the litigation as of right. Alternatively, it contended that leave to file the cross-claim should be granted because discovery on the merits and had not yet begun and the cross-claim was closely related to the principal action.

The distributor defendants argued that they would be prejudiced if the cross-claim were filed. They noted that three years

had passed since the start of the litigation and that during this time they had invested both time and money in attempting to settle with the plaintiff class and withdraw from the suit. In anticipation of their dismissal, they had refrained from participating in earlier discovery and in the first appeal. White also opposed the cross-claim, asserting that trying the cross-claim with the main action would impede the discovery process. The distributors and White pointed out that the cross-claim could be maintained as an independent action.

In order to expedite the proceedings, the District Court promptly ruled orally on the motion for leave to file. It held that leave of court was required to file the cross-claim. It then denied leave to file, giving weight to the following factors: (1) the case was an unduly delayed case as defined by this Circuit's standards; (2) the prejudice which would result to the parties who had proceeded on the assumption that no cross-claims would be filed; and (3) the filing of the cross-claim would "create a disorderly processing of [the] suit contrary to the interests of justice". The court made it clear to the Cessna defendants that they could move to vacate the order of denial. They did not do so. Rather, they filed a notice of appeal from the denial of leave and an alternative petition for writ of mandamus.

I

[1] The first issue to be resolved is whether the order of the District Court denying leave to amend is appealable, absent a Fed.R.Civ.P. 54(b) finding or 28 U.S.C. § 1292(b) certification by the District Court. While the issue is not entirely free from doubt, we think it appropriate under the facts presented to treat the order as appealable under the collateral order doctrine.⁴ See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528, 1535-36 (1949); *United States v. Barket*, 530 F.2d 181, 185-186 (8th Cir. 1975); *Roach v.*

the appeal and the petition for mandamus must be judged.

4. As will be demonstrated, a determination of appealability in this case requires reference to the same facts upon which both the merits of

IN RE CESSNA DISTRIBUTORSHIP ANTITRUST LITIGATION

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Churchman, 457 F.2d 1101, 1103-04 (8th Cir. 1972). The applicability of the *Cohen* collateral order doctrine depends upon three tests:

(1) the order must be a final determination of a claim of right "separable from, and collateral to," rights asserted in the action; (2) it must be "too important to be denied review," in the sense that it "presents a serious and unsettled question"; and (3) its review cannot, in the nature of the question that it presents, await final judgment because "when that time comes, it will be too late effectively to review the . . . order and rights conferred . . . will have been lost, probably irreparably."

9 J. Moore, *Federal Practice* ¶ 110.10, at 133 (2d ed. 1975) (footnote omitted).

The first and third requirements are plainly satisfied by the order of the District Court. The order is the District Court's final determination of appellants' claimed right to try the cross-claim with the main action, and it is collateral to and separable from the rights asserted in the main action since it may be reviewed on appeal without examination of the merits of any of the substantive claims. Also, review cannot await final judgment because, at that time, any benefit from trying the claims in one suit will be lost.

The only doubt about the applicability of the doctrine stems from the requirement that the order be "too important to be denied review" in the sense that it "presents a serious and unsettled question". The order in this case denying leave to amend presents no unsettled question of law of importance beyond this particular

case. There are, however, cases which have found an order to be "collateral" although the importance of the question presented outside the case was not considered.⁵ Those cases apparently hold that an order is "too important to be denied review" if it decides a question of special importance to the parties even if the question is not one of general interest. As the Supreme Court noted in *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546, 69 S.Ct. at 1225, 93 L.Ed. at 1536, we must take a practical rather than a technical approach to the issue. In this case, the right of the appellants to assert their cross-claim against the appellees in this action is of special importance to them since the granting of the motion to amend in order to allow the cross-claim would materially reduce the range and cost of litigation, a primary purpose of Fed.R.Civ.P. 13(g). The potentially substantial savings in judicial time gives added weight to the claim that the order appealed from presents a question of special importance.⁶

For these reasons, we assume jurisdiction to hear this appeal as an appeal from a collateral order. We emphasize, however, that this conclusion is limited to the particular facts of this case and we in no way indicate a desire to expand the reach of the collateral order doctrine beyond these facts.

II

[2] The District Court's conclusion that leave of court was required to file the cross-claim was correct. Appellants could assert the cross-claim only in their answer.⁷ The answer could be amended without leave only within twenty days of service. Fed.R.

5. See, e.g., *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951) (order refusing to reduce bail); *Roberts v. United States District Court*, 339 U.S. 844, 70 S.Ct. 954, 94 L.Ed. 1326 (1950) (order denying leave to proceed in forma pauperis); *Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971) (order staying civil suit until plaintiff released from prison). See 9 J. Moore, *Federal Practice* ¶ 110.10, at 133-34 (2d ed. 1975).

As in *Stack v. Boyle* and *Roberts v. United States District Court*, appealability here is justifiable on a basis other than the *Cohen* rationale. Unlike the order in *Cohen*, the present order effectively terminates not simply a collat-

eral claim but the entire claim asserted by appellants.

6. Appellants estimate that as many as fifteen separate suits may be required to vindicate the claims asserted in their cross-claim. Litigation in many jurisdictions will require substantial duplication in discovery, and conflicting results may obtain.

7. A cross-claim must be stated in a pleading. See Fed.R.Civ.P. 12(b) and 13(g). At the same time, it is not itself a pleading. See Fed.R.Civ.P. 7(a). The only pleading filed by the Cessna defendants here was their answer.

Civ.P. 15(a). The twenty day period had long since expired. Thus, leave of court was necessary. See *United States v. Eight Tracts of Land*, 270 F.Supp. 160, 163-64 (E.D.N.Y.1967).

[3] The granting of leave to amend under Rule 15(a) is a matter within the discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L.Ed.2d 77, 87 (1971); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225-226 (1962); *Weigand v. Afton View Apartments*, 473 F.2d 545, 549 (8th Cir. 1973). The question presented is whether the District Court abused its discretion in denying leave to amend. We hold that it did not, and affirm the order.

In deciding whether to permit amendment, a district court must consider whether the amendment, if allowed, would prejudice the party opposing it. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra*, 401 U.S. at 330-31, 91 S.Ct. at 802, 28 L.Ed.2d at 87-8. The District Court in this case considered the possible prejudice and accorded it controlling importance. It found that the harm to the distributor defendants, particularly the loss of time and money spent in attempting to settle the claims against them in order to be dismissed from the suit, outweighed any prejudice to appellants which would result from a refusal to allow the cross-claim.⁸ We cannot say that it erred in so finding, especially in light of appellants' three year delay in asserting the cross-claim and the ongoing availability to appellants of relief in an independent action or actions against appellees. The record supports the conclusion that the District Court acted well within the area committed to its sound discretion.

III

[4-6] Finally, it is apparent from what has been said that mandamus is inappropriate.

8. Appellants maintain that the settlements would be effective between White and the distributors regardless of whether the cross-claim were permitted. Thus, even if the cross-claim were allowed, the time and expense involved in negotiating the settlements would not be lost.

ate. The remedy of mandamus is available only in those circumstances where the district court exceeds "the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104, 88 S.Ct. 269, 278, 19 L.Ed.2d 305, 315 (1967). See *In re Cessna Aircraft Distributorship Antitrust Litigation*, *supra*, 518 F.2d at 216; *Pfizer Inc. v. Lord*, 456 F.2d 545, 547-48 (8th Cir. 1972). See also *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 775 (2d Cir. 1972). Mandamus is an extraordinary remedy reserved only for extraordinary situations. *Stein v. Collinson*, 499 F.2d 91, 95 (8th Cir. 1974); *Gialde v. Time, Inc.*, 480 F.2d 1295, 1302 (8th Cir. 1973). The possibility of error in allowing or denying an amendment to the pleadings is not ordinarily reviewable by mandamus or other extraordinary writ. *Hartford Fire Insurance Co. v. Herral*, 434 F.2d 638, 639 (9th Cir. 1970). In this case, where we have already determined that the District Court did not abuse its discretion in refusing to allow the cross-claim as an amendment to the pleadings and where there has been no showing of abuse of judicial power, the drastic remedy of mandamus is clearly inappropriate. See *In re Cessna Aircraft Distributorship Antitrust Litigation*, *supra*, 518 F.2d at 217.

The order of the District Court is affirmed, and the petition for writ of mandamus is denied.



Even if appellants' interpretation of the settlements is correct however, allowing the cross-claim would frustrate the distributors' major purpose in negotiating the settlements: removing themselves from this litigation.

