Department of Justice

STATEMENT OF

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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

JOINT & SEVERAL LIABILITY
AND CLAIM REDUCTION
IN ANTITRUST DAMAGE CASES

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Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before you to present the Administration's views on damage allocation in antitrust litigation. The question of how best to allocate liability for damages among antitrust defendants has been before this Committee numerous times in the last 7 years, and I hope that my remarks today will assist you in determining how best finally to resolve this continuing dilemma.

In light of the Committee's obvious familiarity with this area of antitrust policy, I will greatly abbreviate my remarks on the need for some legislation. 1/ The question we face is whether antitrust defendants are, in certain instances, being treated unfairly by the convergence of joint and several liability for antitrust damages with treble-damage liability, plaintiffs' attorneys' fees, and class-action litigation. Because of joint and several liability, antitrust plaintiffs have the ability to sue and recover all of their damages from

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1/ A full discussion of the history of joint and several liability in antitrust and the potential problems that can arise as a result can be found in the testimony of William F. Baxter, Assistant Attorney General for Antitrust, before the Senate Comm. on the Judiciary Concerning S. 995 (April 22, 1981) and of Charles F. Rule, Acting Assistant Attorney General for Antitrust, before the Senate Comm. on the Judiciary Concerning S. 1300 (July 29, 1985).

some rather than all of the persons that have participated in an antitrust conspiracy, or to collect an antitrust judgment from less than all liable defendants, or to enter into settlement agreements with some defendants for relatively small sums and shift the balance of those defendants' damage liability to nonsettling defendants, who then face increased pressure to settle rather than litigate regardless of the merits of their defense--the "whipsaw" settlement problem. The extent to which any of these scenarios are causing significant difficulties in antitrust litigation, and how best to alleviate such difficulties, have been the subject of congressional hearings, scholarly articles, and intense debate within the antitrust bar.

The Administration believes that whipsaw settlements can and do result in unwarranted and unintended unfairness to antitrust defendants and should, to the greatest extent practicable consistent with antitrust law enforcement goals, be eliminated.

The Committee currently has before it for consideration two bills that would solve the whipsaw settlement problem: S. 1300 and S. 2162. S. 1300 would eliminate joint and several liability in horizontal price-fixing cases. By making defendants liable only for treble the damages caused by their

individual sales or purchases, S. 1300 would also eliminate the possibility of whipsaw settlements in those cases to which it applies.

The Administration's proposal, S. 2162, would make a number of improvements in antitrust remedies. It would restrict punitive treble damages to those cases where the conduct involved is highly likely to be anticompetitive, and would provide defendants' attorneys' fees for truly frivolous or bad faith antitrust lawsuits. Both of these changes would reduce, to some extent, the impact of whipsaw settlements. Most important in this regard, however, Title IV of S. 2162 would provide a right of claim reduction for all antitrust damage cases. Claim reduction requires a court to deduct from a plaintiff's remaining claim the damages fairly allocable to any person whom the plaintiff has released from liability if that amount is greater than the actual settlement amount. This would substantially eliminate the possibility of whipsaw settlements.

While both S. 1300 and S. 2162 would address the problem of whipsaw settlements and thereby increase the fairness of the antitrust damage remedy, the Administration opposes the approach taken by S. 1300. Although increasing fairness in antitrust litigation is an important consideration, the

Administration's first concern must be to maintain appropriate levels of deterrence. The entire thrust behind S. 2162 is to adjust antitrust remedies to preserve or increase deterrence of hard-core antitrust offenses while reducing deterrence of potentially procompetitive conduct. In our view, S. 1300's elimination of joint and several liability would decrease deterrence of hard-core antitrust violations to an unacceptable degree--a problem avoided by the claim reduction proposal in S. 2162.

As previously discussed before the Committee by Mr. Rule in his testimony on S. 1300 in July 1985, deterrence depends upon a person's perception of his or her expected liability from committing an offense as well as the variability of that liability (the range between the lowest and highest possible penalty). As expected liability and variability increase, so too does deterrence of risk averse firms.

Eliminating joint and several liability would reduce the probability that a violation would be detected and pursued through damage actions by reducing the expected recoveries of potential plaintiffs. With individual treble-damage liability, plaintiffs would have to name and successfully collect damages from each person liable for their injury, and bear increased litigation costs if they lose. Given a reduction in expected

recoveries, potential plaintiffs' incentives to detect and prosecute violations would decrease.

For basically the same reasons that eliminating joint and several liability would dampen plaintiffs' incentives to detect and pursue violations, it would also, and to the same extent, reduce defendants' expected liability ex ante (i.e., before engaging in unlawful conduct). Eliminating joint and several liability also would clearly reduce the variability of liability, since a single firm could no longer be potentially liable for the entire amount of the plaintiff's damages. If firms are risk averse, as virtually all economists believe, then this would further reduce deterrence.

Claim reduction would not reduce deterrence to the same extent as eliminating joint and several liability. Claim reduction would not prevent a plaintiff from recovering all of its damages from any one defendant. It could require the plaintiff to litigate over the assignment of liability among defendants, but only in cases in which the plaintiff is unable to reach a global settlement. Because claim reduction eliminates the possibility of a defendant's actual, out-of-pocket liability being magnified by sweetheart settlements, claim reduction would reduce the variability of liability, but again not to the same extent as eliminating joint and several liability. Thus, claim reduction would have

a lesser effect on deterrence than eliminating joint and several liability while substantially eliminating whipsaw possibilities.

We also compared the additional burdens that eliminating joint and several liability and providing a right of claim reduction might impose on the judicial system. Each alternative would increase somewhat the litigation that might be required to resolve antitrust disputes.

Eliminating joint and several liability would necessarily require plaintiffs to file individual lawsuits against each of the many parties that may be responsible for their injury. In addition, defendants would be less likely to settle if their maximum liability were fixed at treble the damages caused by their own conduct, thus again increasing the litigation burden on the judicial system.

The only additional litigation that could arise from claim reduction would be over a settled defendant's fair share of the plaintiff's damages, in order that that amount might be deducted from the plaintiff's remaining claim. Such litigation would be relatively simple where shares are sales-based, but more complicated where relative fault and relative benefit are used. For this reason, we intend that courts use the sales-based formula in our proposal whenever it would result in

a fair allocation. Since the great majority of cases are settled completely before the damage phase is reached, of course, in the typical case no additional litigation would be required by claim reduction. In short, claim reduction is preferable to eliminating joint and several liability as far as increased judicial burdens are concerned.

In sum, claim reduction is a preferable solution to the whipsaw settlement problem from both the deterrence and judicial burden standpoints.

This is not to say, of course, that any solution--including S. 2162--is perfect. For instance, we have heard the concern raised that S. 2162 might not adequately remedy the whipsaw problem if plaintiffs changed their whipsaw tactics and simply chose not to sue or settle with some culpable parties. Some leaders of the antitrust bar tell me that the dynamics of damage litigation would operate to alleviate this concern if plaintiffs were required to join all culpable parties as defendants in price-fixing treble-damage actions. Such joinder could facilitate fair settlements with accompanying claim reduction, or fair sharing agreements that would frustrate unfair whipsaw settlement tactics.

The Department would have no objection to modification of the Administration's claim reduction proposal to require plaintiffs to join as defendants culpable parties whose sales figure into their damage calculations or else face reduction of their claims by the fair share of damages attributable to such parties. In fact, our assessment of the relative costs and benefits of claim reduction as a solution to the whipsaw problem--in terms of deterrence and increased burdens on the judicial system--has largely assumed that plaintiffs will typically sue all culpable parties. Thus, such a modification really would not change what we believe to be the best solution to the fairness concerns that have been raised as a result of the joint and several liability antitrust damage rules, but would alleviate any unfairness problem plaintiffs could create by suing only some of the appropriate defendants. We would be happy to work with the Committee in perfecting the appropriate language.

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