Summary of Comments of Division 2 to Senate Judiciary Committee on S. 1300, the Individual Treble Damages Liability Act of 1985

S. 1300 is designed to eliminate joint and several liability for defendants in civil antitrust cases who have participated in horizontal conspiracies that have an "impact on price." Under the bill, an individual defendant, while still subject to treble damage liability, would be liable only for such damages as are "attributable to such person's purchases or sales of goods or services." This would change the current law, which provides that each defendant in an antitrust case is potentially liable for all damages caused by the conspiracy.

The comments on S. 1300 oppose the bill, because it would significantly decrease the deterrent effect of treble damage liability for violations of the antitrust laws. In addition, joint and several liability encourages early settlement of antitrust cases. The bill would only apply to the most serious of antitrust violations, those with an impact on price. Thus, price fixers, for example, would be treated differently (and more leniently) from firms found to have violated other provisions of the antitrust laws. The comments also point out that because a price-fixing cartel cannot be effective without the participation of all co-conspirators, each participant is equally responsible for the success of the conspiracy. In addition, the comments note a loophole in the language of the bill. Because it would only apply to firms who actually purchases or sells goods, such conspirators as trade associations or bid riggers would be immune entirely from treble damage liability.

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 1300: Joint and Several Liability in Antitrust Litigation

Dear Mr. Chairman:

The Antitrust, Trade Regulation and Consumer Affairs Division (Division 2) of the District of Columbia Bar[1] opposes S. 1300, a bill "[t]o provide for antitrust law violators to be subject to individual responsibility for treble the amount of damages attributable to their violations, and to assure fairness in the allocation and award of antitrust damages." S. 1300 would decrease the deterrent effect of treble damage liability for the most serious violations of the antitrust laws: horizontal conspiracies that affect price.

S. 1300 is designed to eliminate joint and several liability for defendants in civil antitrust cases who have participated in horizontal conspiracies that have an "impact on price." Under the bill, an individual defendant, while still subject to treble damage liability, would be liable only for such damages as are "attributable to such person's purchases or sales of goods or services." The only exceptions to this standard are for damages attributable to defendants who are "beyond the jurisdiction of the United States district courts" or financially unable to satisfy a judgment.

Joint and several liability serves as a strong deterrent to persons contemplating entering into horizontal price fixing conspiracies and other concerted action that has an impact on price. The costs to an individual firm of losing an antitrust suit could be extremely high, because under existing law, each participant in an antitrust conspiracy is individually liable for all of the damages caused by the unlawful agreement.[2] Moreover, under a system of joint and several liability, the likelihood of being sued for price fixing is higher than it would be if S. 1300 were to become law. Plaintiffs are more likely to bring suit when

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1 The views presented in this letter represent those of Division 2 and not those of the D.C. Bar or its Board of Governors.

2 City of Atlanta v. Chattanooga Foundry and Pipeworks, 127 F. 23, 26 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906).

full recovery can be obtained without identifying, suing, and proving damages against every participant in the conspiracy.

Eliminating joint and several liability would thus have the unfortunate effect of decreasing the deterrence created by treble damage liability. Not only would the risks to individual firms of entering into an unlawful agreement be lower, but also the costs to plaintiffs of bringing suit would be a good deal higher. S. 1300 would add an entirely new element of proof to price fixing cases by requiring plaintiffs to establish the market share of each individual defendant.[3] Plaintiffs would be forced to identify each individual co-conspirator, add each one to the lawsuit, and ascertain the amount of each defendant's purchases or sales of the goods or services involved.[4]

In addition to its deterrent effect, joint and several liability for antitrust defendants encourages early settlement by guilty defendants. Because a settlement by one defendant means the others are liable for the remainder of any treble damages assessed at the end of the lawsuit, there is a strong incentive to settle early. As a matter of policy, expeditious settlements in antitrust cases should be encouraged. S. 1300 has the opposite effect.[5]

There is also a serious loophole in the bill. The wording of S. 1300 would entirely exempt from liability participants in price fixing and other anticompetitive agreements that do not make purchases or sales of the relevant goods or services. Such participants could include, for example, trade associations -- groups that can provide a mechanism for exchange of price information and that easily can become active in price fixing schemes.[6] Similarly, some members of bid-rigging conspiracies never win a bid, but rather receive pay-offs in exchange for losing bids. Because these co-conspirators have neither

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3 It makes little sense to add an element of proof to cases in which plaintiffs have the benefit of a per se rule against the practice at issue. _See United States v. Trenton Potteries Co._, 273 U.S. 392 (1927).

4 Plaintiffs would also have the burden of proving that a particular co-conspirator is outside the court's jurisdiction or financially insolvent in order to take advantage of the exceptions to the new rule of liability.

5 Although some parties with greater liability may settle earlier than those with less involvement in the conspiracy, and thereby pay less damages, the deterrent effect of joint and several liability outweighs this possible imbalance.

6 _See, e.g., American Column & Lumber Co. v. United States_, 257 U.S. 377 (1921).

purchases nor sales, they would be completely protected from antitrust liability. Such conspirators should not be immune from liability for these kinds of activities.

S. 1300 is premised on the notion that joint and several liability can result in one defendant "unfairly" bearing the burden of treble damages while other, equally culpable defendants escape liability. However, the bill applies only to horizontal price conspiracies, and that is one context in which joint and several liability is most certainly not unfair. First, such conspiracies are the most blatantly anticompetitive conduct -- they are per se illegal and sometimes criminal.[7] Second, it is simply not unfair to hold each co-conspirator responsible for the full effect of the conspiracy, because a cartel cannot be effective without the participation of all co-conspirators. If one participant undercuts the agreed-upon price, others will be forced to match the lower price, and the cartel is likely to be destabilized.[8] Thus, each individual firm benefits from the participation of all of the others, and each participant is equally responsible for the success of the conspiracy. Under such circumstances, joint and several liability is not "unfair."[9]

In sum, elimination of joint and several liability for participants in horizontal price fixing conspiracies would be poor antitrust policy. Providing this special benefit to the most egregious antitrust offenders will complicate proof, permit some price fixing co-conspirators to escape liability completely, and decrease the deterrent effect of treble damage liability. The Antitrust, Trade Regulation and Consumer Protection Division urges the Committee to reject S. 1300.

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7 It is ironic that S. 1300 applies only to the most clearcut of antitrust violations -- those with an impact on price.

8 See R. Posner, Antitrust Law 52-53 (1976).

9 Similarly, joint tortfeasors are subject to joint and several liability for intentional torts. See Prosser, Handbook of the Law of Torts § 46 (4th ed. 1971).