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JUDGMENT-SHARING AGREEMENTS

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ABSTRACT

Antitrust law condemns price-fixing cartels and seeks to encourage private suits against the conspirators by automatically trebling antitrust damages and by providing for joint and several liability. Because the Supreme Court has held that there is no right to contribution among antitrust violators, this creates the risk of a single defendant being saddled with damages significantly greater than three times the amount of the harm associated with that firm's own market share.

Firms engaged in—or accused of—price fixing often try to ameliorate this risk by entering into judgment-sharing agreements, which essentially create a right to contribution through contract. Despite their ubiquity, judgment-sharing agreements have received almost no scholarly attention. Courts and commentators uniformly praise them as a reasonable way for firms to manage risk and eliminate the perceived unfairness of joint and several liability without a right to contribution.

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This Article shows how judgment-sharing agreements can undermine antitrust deterrence and stabilize price-fixing cartels. Using both economic theory and empirical evidence, the Article explains how judgment-sharing agreements may reduce settlement values, lead to the suppression of incriminating evidence, reduce the likelihood of success of meritorious price-fixing suits, and make price fixing cost-beneficial. The Article then argues that fairness arguments in favor of judgment-sharing agreements (and contribution more generally) are misguided and easily disproved, and in any event outweighed by the potential anticompetitive effects of such agreements. Finally, the Article advocates a more informed antitrust treatment of judgment-sharing agreements that takes into account their potential use for anticompetitive purposes.

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INTRODUCTION

Longevity breeds legitimacy. The longer that a particular form of conduct endures, the more reasonable and uncontroversial it seems. One example of this phenomenon in the context of antitrust litigation involves contracts among codefendants. Defendants in price-fixing suits often enter into judgment-sharing agreements, in which the firms agree by contract to allocate financial responsibility for any private liability among them. For example, if five firms of relatively equal size are alleged to have formed a price-fixing conspiracy, the defendants might agree to each pay 20 percent of the total damages (if any) either awarded to the plaintiff following trial or agreed to in settlement with the plaintiff—even if the plaintiff declines to sue all of the cartel's members or some of the defendants are found not liable. At first glance, such judgment-sharing agreements (JSAs) seem harmless—a mechanism for defendants to spread risk. And JSAs are widespread, although their contents are generally confidential.

Courts and commentators embrace JSAs because they are common and because the contracts appear so desirable at first glance. As their name indicates, judgment-sharing agreements involve sharing, a benevolent act that we are taught to value at an early age. By their terms, JSAs spread risk among firms at risk of liability for high damages. Such agreements seem economically similar to insurance pooling or maintaining a diversified stock portfolio—uncontroversial conduct in any modern economy. Through sharing and risk spreading, judgment-sharing agreements reduce uncertainty and impose some measure of responsibility on every signatory to the agreement.

Despite their ubiquity, no scholarship addresses the potential negative aspects of judgment-sharing agreements. Unfortunately, beyond their benign rationales, JSAs may provide succor to price-fixing conspiracies. This Article explains how JSAs, by distorting the settlement process in private antitrust litigation, can help both stabilize illegal cartels and create additional incentives for cartel firms to conceal price-fixing activities. As a result, JSAs undermine key goals of antitrust law: deterring, exposing, and punishing illegal price fixing.

Part I of this Article explains the high stakes inherent in private antitrust litigation and notes the development of JSAs. Antitrust damages are automatically trebled. Both settlements and jury awards in antitrust cases often measure in the hundreds of millions of dollars and can exceed one billion dollars. Price-fixing defendants are jointly and severally liable for all damages caused by their conspiracy. But because antitrust doctrine does not include contribution rights, any single member of the conspiracy could be liable for three times the damages caused by all of the cartel participants. In an attempt to mitigate the harsh cumulative effects of these rules, antitrust defendants asked courts to recognize a right to contribution among price-fixing defendants. Those efforts having failed, many firms lobbied Congress to create a statutory right to contribution in antitrust law. With no statutory relief forthcoming, many price-fixing defendants sought to create contribution through contract by entering into judgment-sharing agreements. Courts, commentators, and members of Congress have generally assumed that JSAs are legal; none, however, has analyzed the potential anticompetitive effects of such agreements.

Part II presents the arguments in support of JSAs. JSAs benefit the signatories—defendants in price-fixing cases—by facilitating business planning and allowing firms to spread risk. More importantly, JSAs prevent antitrust plaintiffs from leveraging the threat of enormous liability against individual firms to coerce settlements out of defendants afraid of being held responsible for the bulk of the damages caused by the entire price-fixing cartel. Most often, proponents of antitrust contribution assert that the absence of contribution disproportionately hurts smaller and even innocent defendants in price-fixing litigation. JSAs offer a way to ameliorate that harm. Furthermore, proponents of JSAs argue that the agreements enhance deterrence of cartels by increasing the likelihood that *every* member of a price-fixing conspiracy will have to pay *something* to successful antitrust plaintiffs.

Part III refutes the arguments presented in Part II and explains how JSAs may help create, stabilize, and conceal price-fixing conspiracies. First, the arguments in favor of JSAs are overstated. No empirical evidence shows that the no-contribution regime inflicts unfair pressure against innocent or small defendants. Antitrust law already provides many mechanisms that allow firms to manage the risks of legitimate agreements among competitors. Second, JSAs distort the settlement process in price-fixing litigation, reducing both the probability of reaching settlements and the value of negotiated settlements. Third, JSAs can help conceal a cartel by reducing cartel members' incentive to collect and reveal evidence. Fourth, JSAs can stabilize a price-fixing cartel by solving the prisoners' dilemma associated with illegal conspiracies in which each member of the conspiracy has an incentive to defect. Perhaps not surprisingly, those firms most likely to form cartels are the ones most likely to sign JSAs. Ultimately, JSAs undermine the deterrent effect of laws against price fixing. Part IV weighs the fairness and deterrence arguments both for and against JSAs and concludes that the deterrent effects prevail.

Finally, Part V explores various antitrust approaches to JSAs. Part V explains why the confidentiality of JSAs creates problems for antitrust law and argues that JSAs should be discoverable. Because JSAs may undermine the prohibition against price fixing, antitrust scholars and judges must evaluate whether antitrust law should condemn JSAs and, if so, under what circumstances. A range of proposals is possible: make JSAs unenforceable, condemn JSAs as per se illegal, or evaluate JSAs under the rule of reason. Such analysis should consider the terms, timing, and signatories to the agreement. After evaluating these various approaches, Part V explores the role of JSAs in proving an underlying price-fixing agreement and advocates treating JSAs as a "plus factor" in antitrust analysis.

I. THE DEVELOPMENT OF JUDGMENT-SHARING AGREEMENTS

Price-fixing defendants created judgment-sharing agreements in response to an antitrust landscape that permitted significant disparities in the damages paid by defendants in the same cartel. Part I explains the antitrust damages regime and how defendants created JSAs to moderate the perceived harshness of this regime.

A. The High Stakes of Price-Fixing Litigation

For firms found liable for conspiring to fix prices, antitrust law can pack quite a punch. First, total damages in price-fixing cases are often high for two reasons: damages are measured by the cartel's overcharge, which can exceed one billion dollars,[1] and the plaintiff's actual damages are automatically trebled.[2] Also, antitrust class actions can aggregate thousands of claims into a single lawsuit and the tolling of the statute of limitations due to fraudulent concealment means that the damages often go back much further than antitrust's four-year statute of limitations might otherwise imply.[3]

Second, antitrust law provides for joint and several liability.[4] Thus, each price-fixing firm is liable for the overcharges on its co-conspirators' sales.[5] As its cartel partners earn illegal profits, each individual firm is legally responsible for triple the overcharge secured by its putative competitor. Any single price-fixing firm can be held accountable for the trebled value of the cartel's total overcharges.

Third, even when plaintiffs sue multiple cartel members, an early settlement with one firm can leave the remaining defendants on the hook for significant damages attributable to the settling defendant's sales. Although the remaining defendants receive a credit for any settlement—to prevent the plaintiff from receiving a double recovery—the settlement amount is subtracted from defendants'

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1. *See, e.g.*, *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 507 (E.D.N.Y. 2003) ($3.4 billion settlement).

2. 15 U.S.C. § 15(a) (2006).

3. *See* 15 U.S.C. § 15b; *see also, e.g.*, *In re* Vitamins Antitrust Litig., No. MISC 99-197(TFH), 2000 WL 1475705, at *2–3 (D.D.C. May 9, 2000) (explaining that the plaintiffs' case survived a motion to dismiss in which fraudulent concealment tolled the statute of limitations, extending the period for which recovery was available); *In re* Catfish Antitrust Litig., 826 F. Supp. 1019, 1029 (N.D. Miss. 1993) ("[F]raudulent concealment tolls the Clayton Act's statute of limitations.").

4. Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 144 (1968) (White, J., concurring) ("[D]amages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends."); Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc., 604 F.2d 897, 904 n.15 (5th Cir. 1979), *aff'd sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11 (N.D. Ga. 1973) ("It is well settled that an antitrust action is a tort action and that in multi-defendant antitrust actions the co-conspirator joint tortfeasors are jointly and severally liable for the entire amount of damages caused by their acts." (citations omitted)).

5. *E.g.*, Dee-K Enters., Inc. v. Heveafil Sdn. Bhd., 982 F. Supp. 1138, 1155 (E.D. Va. 1997).

damages only after the total damages are trebled.[6] On the one hand, this policy encourages settlements because otherwise "each dollar received in settlement would cause a three-dollar reduction in the judgment at trial."[7] But because a settling defendant generally pays at most the single damages associated with its own sales, the remaining defendants risk being liable for the trebled-damage component of any overcharges on the settling defendant's sales.[8]

Fourth, while contribution would significantly minimize the effects of joint and several liability, antitrust law recognizes no right to contribution.[9] Early cases consistently held that antitrust defendants had no right to contribution[10] until the Eighth Circuit forged new ground in 1979 by permitting an antitrust defendant to sue its co-conspirators for contribution.[11] The Supreme Court soon resolved the split in *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[12] holding that antitrust defendants did not possess a right to

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6. Burlington Indus. v. Milliken & Co., 690 F.2d 380, 391 (4th Cir. 1982); Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir. 1957); A.B.A. ANTITRUST SECTION, MONOGRAPH NO. 11, CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION 5 (1986); *see also* Donald J. Polden & E. Thomas Sullivan, *Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 397, 402–03 (1983) (discussing *Burlington Industries*).

7. Yosef J. Riemer, Note, *Sharing Agreements Among Defendants in Antitrust Cases*, 52 GEO. WASH. L. REV. 289, 304 (1984); *see also* Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs, Inc., 635 F.2d 118, 130 (2d Cir. 1980) ("[D]eduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs: every dollar received in settlement would cause a three dollar reduction in the judgment at trial."), *aff'd*, 456 U.S. 989 (1982).

8. *See* A.B.A. ANTITRUST SECTION, MONOGRAPH NO. 13, TREBLE-DAMAGES REMEDY 15 (1986) ("Settling defendants rarely pay treble the overcharge resulting from their sales. Therefore, settlements have the potential of leaving the last co-conspirator in a suit liable for damages enormously greater than the overcharge caused by its sales pursuant to the conspiracy."); Paula A. Hutchinson, Note, *A Case Against Contribution in Antitrust*, 58 TEX. L. REV. 961, 980 (1980) ("[T]he nonsettling defendants bear the risk that the plaintiff will settle with another defendant for less than the amount of damages directly attributable to it.").

9. United States v. Atl. Research Corp., 127 S. Ct. 2331, 2337–38 (2007) ("Contribution is defined as the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.'" (quoting BLACK'S LAW DICTIONARY 353 (8th ed. 1999))).

10. *See, e.g.*, El Camino Glass v. Sunglo Glass Co., No. C-75-2492 AJZ, 1976 WL 1382, at *3 (N.D. Cal. Apr. 28, 1976); Sabre Shipping Corp. v. Am. President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969); Olson Farms, Inc. v. Safeway Stores, Inc., No. C 75-104, 1977 WL 1484, at *1 (D. Utah Oct. 25, 1977), *aff'd*, 649 F.2d 1370 (10th Cir. 1979).

11. Prof'l Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc., 594 F.2d 1179, 1186 (8th Cir. 1979), *abrogated by* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

12. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

contribution and that only Congress could create such a right.[13] Absent any right to contribution, joint and several liability means that a prevailing antitrust plaintiff can collect all of its damage award from a single conspirator who cannot sue its co-conspirators to pay their "fair share."[14] And because neither a government nor a private plaintiff is required to sue every suspected member of an alleged price-fixing conspiracy,[15] a single price-fixing conspirator could find itself alone in court with potentially staggering exposure.[16]

Prior to and following the Supreme Court's decision in *Texas Industries*, Congress considered a flurry of proposals to allow contribution in antitrust cases.[17] Congress also debated legislation to eliminate joint and several liability for antitrust claims and to subtract settlement amounts before trebling.[18] However, none of these proposals succeeded.[19] Antitrust defendants thus took matters into their own hands.

B. Judgment-Sharing Agreements

With Congress declining to create a statutory right to contribution, many antitrust defendants have fashioned a contractual right to contribution by entering into judgment-sharing agreements.[20]

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13. *Id.* at 646 ("[R]egardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.").

14. A.B.A. ANTITRUST SECTION, *supra* note 8, at 13–14.

15. *E.g.*, Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 8 (9th Cir. 1963) ("A plaintiff need not sue all conspirators; he may choose to sue but one."); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890, 891 n.5 (1980) ("Similarly, the government need not sue all possible conspirators in a civil antitrust suit, and need not name all conspirators in a criminal antitrust indictment." (citing United States v. Gen. Motors Corp., 384 U.S. 127, 129 n.2 (1966); United States v. Gasoline Retailers Ass'n, 285 F.2d 688, 692 (7th Cir. 1961))).

16. *See* Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 VAND. L. REV. 1277, 1284 (1987) ("For many firms, the risk of a catastrophic judgment is unacceptably high . . . .").

17. *See* Polden & Sullivan, *supra* note 6, at 403–08.

One possible alternative to full contribution is an option called "carve-out," which "permits reduction before trebling of a plaintiff's monetary claim against nonsettling defendants after one defendant has executed a settlement pact with plaintiffs." Mark McCareins, *Carve-Out as an Answer to the Contribution Question in Private Antitrust Litigation*, 58 WASH. U. L.Q. 975, 1008–09 (1980) (advocating carve-out).

18. Cavanagh, *supra* note 16, at 1281.

19. *See* Burlington Indus. v. Milliken & Co., 690 F.2d 380, 394 (4th Cir. 1982) ("[J]oint and several liability . . . has been the established doctrine of antitrust law for the better part of a century . . . which Congress has not seen fit to disapprove.")

20. *See* A.B.A. ANTITRUST SECTION, *supra* note 6, at 19 ("A sharing agreement is, in

A JSA is a contract among antitrust defendants (and potential antitrust defendants) whereby the signatories agree in advance to their relative responsibility for any antitrust damages awarded at trial against any of them. In theory, these agreed-upon percentages reflect "each defendant's relative role in the alleged conspiracy."[21] Defendants often use market share as the basis for assigning damage responsibility in a JSA.[22] In some cases, the JSA provides that the antitrust defendants will submit to arbitration to determine their percentage of any damages paid, either through settlement or at trial.[23]

While once cutting edge, JSAs have become "fairly common" in antitrust litigation.[24] When a price-fixing claim is filed against them, many firms reflexively attempt to negotiate a JSA among the named defendants.[25] JSAs are particularly common when there are a small

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essence, contractual contribution."); Mark Call Dickinson, Note, *Contribution in Antitrust Treble Damage Actions*, 6 J. CORP. L. 141, 163 (1980) ("The sharing agreement can be seen to be the equivalent of self-imposed rules of contribution . . . .").

21. Dickinson, *supra* note 20, at 163.

22. MANUAL FOR COMPLEX LITIGATION § 13.23 (4th ed. 2004); Riemer, *supra* note 7, at 295; *see also, e.g.*, *In re* Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C 897, MDL 997, 1995 WL 221853, at *4 (N.D. Ill. Apr. 11, 1995) (mem.) (discussing a JSA using a modified market share approach); S. REP. NO. 96-428, at 4 (1979) ("The liability is . . . based on an assessment of the damages attributable to each defendant's specific relative benefit from the price-fixed sales weighted by the amount of the overcharge as reflected in its individual sales or purchases.").

23. Lisa Bernstein & Daniel Klerman, *An Economic Analysis of Mary Carter Settlement Agreements*, 83 GEO. L.J. 2215, 2270 n.149 (1995).

24. Jesse W. Markham, Jr., *Corporate Compliance Ethics and Malpractice Prevention*, 1526 PLI/CORP. 1387, 1401 (Jan.–Feb. 2006); Dickinson, *supra* note 20, at 163 ("[M]any defendants involved in private treble damage actions have joined forces and entered into judgment sharing agreements."); Note, *supra* note 15, at 909 ("[S]haring agreements are fairly common among larger antitrust defendants in class action suits . . . .").

25. *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 7 (1982) [hereinafter *Antitrust Damage Allocation Hearings*] (statement of A. Stephens Clay, Esq., Kilpatrick & Cody) ("At the beginning of any major antitrust litigation involving an alleged horizontal price fixing conspiracy among several defendants, defense counsel typically will meet with each other to determine if their clients are willing to enter into a so-called 'sharing agreement.'"); *id.* at 25–26 (statement of Stephen D. Susman, Esq., Susman & McGowan) (arguing that "in every major antitrust conspiracy case, one of the first things the defendants do is get together and see if they can enter into a sharing agreement" but noting that negotiations often do not result in JSAs); *Antitrust Equal Enforcement Act of 1979, S. 1468: Hearings Before the Subcomm. on Antitrust, Monopoly and Business Rights of the S. Comm. on the Judiciary*, 96th Cong. 85 (1979) [hereinafter *Antitrust Equal Enforcement Act Hearings*] (statement of Robert P. Taylor) (noting that the attempt to achieve a JSA "is one of the first things" that price-fixing defendants do); S.

number of defendants because the relevant market is concentrated.[26] Defendants often face difficulty negotiating JSAs, however, as they debate what each defendant's relative financial responsibility should be.[27] In many cases, the parties can reach no accord, and they proceed into litigation as traditional codefendants, each firm out for itself.[28] Ultimately, no one knows the precise number of JSAs because defendants generally treat them as confidential contracts.[29]

Despite their ubiquity, no scholarship addresses the many potential negative consequences—including anticompetitive effects—of JSAs. Most observers simply assume that JSAs are valid and enforceable.[30] When noting the possible use of JSAs to avoid the potential inequities of antitrust litigation during congressional

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REP. NO. 96-428, at 41 (supplemental views of Sen. Metzenbaum & Sen. Kennedy) ("Large defendants often attempt, to reach liability sharing agreements among all defendants who go to trial.").

26. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 142 (statement of Robert P. Taylor, Esq., Pillsbury, Madison & Sutro); S. REP. NO. 96-428, at 2.

27. *See Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 121 (statement of Donald T. Hibner, Attorney) ("[Judgment-sharing] 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.").

28. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 142 (statement of Robert P. Taylor, Esq., Pillsbury, Madison & Sutro) ("In a great many cases, however, because of disparities in size, culpability, market share or other such factors, defendants are not able to negotiate sharing agreements."); *id.* at 232 n.14 (letter from Hon. Charles B. Renfrew, Pillsbury, Madison & Sutro, to members of the H. Subcomm. on Monopolies and Commercial Law) ("[P]rivate sharing agreements . . . frequently cannot be negotiated . . . .").

29. Riemer, *supra* note 7, at 290 n.8 ("Because defendants often enter into sharing agreements on a confidential basis and then claim that the existence and terms of any such agreement are privileged as part of their joint defense, it is difficult to determine the extent to which sharing agreements are used." (citations omitted)); *see also* A.B.A. ANTITRUST SECTION, *supra* note 6, at 20 ("Unfortunately, there exists no helpful data measuring the frequency of use of sharing agreements."); *infra* notes 266–71 (advocating that JSAs should be discoverable).

30. *See, e.g.*, *Antitrust Damage Allocation Hearings*, *supra* note 25, at 7 (statement of A. Stephens Clay, Esq., Kilpatrick & Cody); *id.* at 135 (statement of Robert P. Taylor, Esq., Pillsbury, Madison & Sutro); *id.* at 231 (letter from Hon. Charles B. Renfrew, Pillsbury, Madison & Sutro, to members of the H. Subcomm. on Monopolies and Commercial Law); *id.* at 266 (statement of Hubert L. Will, J., United States District Court for the Northern District of Illinois); *id.* at 444 (letter from Denis P. McInerney, Esq., Cahill, Gordon & Reindel, to Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary); *id.* at 448 ("Private sharing agreements are lawful . . . ."); *id.* at 474 (letter from James F. Rill, Esq., Collier, Shannon, Rill & Scott, to Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary); *id.* at 479 (letter from Robert P. Taylor, Esq., Pillsbury, Madison & Sutro, to Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary) ("Many lawyers believe that judgment sharing agreements are lawful and enforceable . . . ."); Cavanagh, *supra* note 16, at 1326–27 (citing S. REP. NO. 97-359, at 2 (1982)).

debates in the 1980s regarding contribution among antitrust defendants, the head of the Department of Justice's (DOJ's) Antitrust Division implicitly supported such sharing agreements.[31] No witnesses during the proceedings considered the dangers of JSAs.[32] Indeed, some in Congress apparently believed that JSAs diminished the need for a statutory right to contribution among alleged price fixers.[33] More recently, although noting that courts have the authority to decline to enforce JSAs that violate public policy, the Manual for Complex Litigation describes them as "generally appropriate."[34] Even when acknowledging their power to disallow JSAs, courts consistently uphold such arrangements as legal contracts.[35] Judges have reasoned that although federal antitrust law does not recognize a right to contribution, the Court in *Texas Industries* did not prohibit defendants from acting on their own to effect contribution through contract.[36]

II. THE CASE FOR JUDGMENT-SHARING AGREEMENTS

What little is written about JSAs enthusiastically supports these contracts. Just as contribution spreads risk,[37] JSAs provide a mechanism for defendants in price-fixing cases to manage risk.[38] The

31. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 467 (letter from William F. Baxter, Assistant Att'y Gen., Antitrust Division, Department of Justice, to Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary) ("Of course, there is nothing in the Department's proposal that would negate the possibility of defendants entering into sharing agreements after the passage of the proposed legislation; in fact, the legislation may well create strong incentives among defendants to enter into such agreements to avoid the potential and divisive costs of contribution litigation.").

32. *See* S. REP. NO. 96-428, at 26 (1979).

33. *Id.* at 2 ("In many cases, defendants can arrange to enter into sharing agreements—usually based on relative sales—to apportion the liability among themselves in a way that will avoid grossly disproportionate payments by any one defendant.").

34. MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 13.23.

35. A.B.A. ANTITRUST SECTION, ANTITRUST EVIDENCE HANDBOOK 61 (2d ed. 2002) ("Courts have upheld sharing agreements in antitrust cases against challenges to their validity." (citations omitted)); *see also* Bernstein & Klerman, *supra* note 23, at 2270 n.149 ("Such agreements are generally upheld despite the fact that they will affect the defendants' trial strategy and their incentives to testify in particular ways at trial.").

36. Cimarron Pipeline Constr., Inc., v. Nat'l Council on Comp. Ins., Nos. CIV-89-822-T, CIV-89-1886-T, 1992 WL 350612, at *2 (W.D. Okla. Apr. 10, 1992).

37. *See* Hutchinson, *supra* note 8, at 961.

38. A.B.A. ANTITRUST SECTION, *supra* note 6, at 19 ("Sharing agreements are attractive to defendants precisely because they manage the risk of a potentially large judgment and dampen

arguments advanced for JSAs fall into two categories: JSAs are good for the signatories, and JSAs are good for antitrust policy overall.

A. Benefits for Signatories

Commentators support JSAs as a mechanism to constrain the power of antitrust plaintiffs to unfairly exploit price-fixing defendants. Plaintiffs bringing antitrust lawsuits often need money to finance the litigation. Some plaintiffs are willing to accept relatively modest early settlements with one or more defendants in order to finance the litigation against the remaining defendants.[39] Defendants in price-fixing cases also share an incentive to settle antitrust litigation early because they can often buy repose at a more affordable price. Once an antitrust plaintiff has secured litigation financing through an early settlement, it can engage in harder bargaining in settlement negotiations with the remaining alleged co-conspirators. This means that later-settling defendants often pay more than their codefendants who settled earlier.[40] In some cases, antitrust plaintiffs actually announce that each subsequent settlement will take place at "progressively higher rates."[41] Some plaintiffs go further and bind themselves by including most-favored-nation clauses in their early settlement agreements, which assure the earlier-settling defendants that the later-settling defendants cannot receive more favorable settlement terms.[42]

Much of an antitrust plaintiff's leverage to demand higher payments from slow-moving defendants comes from the nonsettling

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the competition for early, cheap settlements.").

39. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 37–38 (statement of Denis McInerney, Esq., Cahill, Gordon & Reindel). This is particularly true with antitrust class actions in which the class counsel has a vested interest in securing guaranteed money upfront, lest they be out their costs.

40. *See, e.g.*, *In re* Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C 897, MDL 997, 1995 WL 221853, at *4 (N.D. Ill. Apr. 11, 1995) (mem.) ("The plaintiffs 'take small amounts . . . at the beginning of the settlement process' and larger amounts as time progresses." (quotation error in original) (quoting *The Antitrust Equal Enforcement Act: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 482 (1982))); Cavanagh, *supra* note 16, at 1288 n.67 (providing settlement figures in corrugated container litigation).

41. A.B.A. ANTITRUST SECTION, *supra* note 6, at 15–16 ("In fact, the plaintiffs openly announced that each settlement in the case would be at progressively higher rates, and each settlement agreement contained a 'most favored nation clause' that assured that succeeding settlements would be no more favorable." (footnote omitted)).

42. *Id.*

defendants' ever-increasing exposure. Because of the features of the antitrust damages regime discussed in Part I, as each alleged co-conspirator in a case settles, the remaining defendants are faced with a significantly greater amount of exposure. The lingering defendants remain liable for all of the damages suffered by an antitrust plaintiff, with the relatively small previous settlement subtracted only after trebling the total damages associated with the conspiracy.[43] As the number of defendants dwindles, both the absolute and relative level of damages increases for the remaining defendants. This creates a so-called whipsaw effect[44] that imposes "great pressure on a defendant to settle early so as not to be exposed to the lion's share of the joint trebled damages."[45]

Defense counsel and critics condemn this whipsaw effect as coercive and fundamentally unfair. The whipsaw effect is arguably coercive because with each settlement by one of the defendants, the remaining defendants face significantly greater exposure—they are potentially responsible for all of the damages—trebled—associated with the exiting defendants' sales (minus the settlement). "The actual risk of a nonsettling defendant's liability increases inversely to the number of nonsettling defendants because fewer defendants are left to share in the judgment."[46] Knowing this, plaintiff's counsel can demand more money from later-settling defendants.[47] Defendant firms that are more accustomed to settlement negotiations being an exercise in compromise—in which the parties' settlement figures eventually converge—resent when plaintiffs increase their settlement demands after each successive settlement.[48] Because firms worry about being the last defendant that could be responsible for the bulk of all the damages caused by the cartel, firms may be desperate to settle first or at least not be excluded from a universal settlement.[49] In

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43. Note, *supra* note 15, at 907.

44. A.B.A. ANTITRUST SECTION, *supra* note 6, at 15; Cavanagh, *supra* note 16, at 1294.

45. WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS 29 (1986).

46. McCareins, *supra* note 17, at 997.

47. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 37–38 (statement of Denis McInerney, Esq., Cahill, Gordon & Reindel).

48. *See* Cavanagh, *supra* note 16, at 1289–90.

49. *See* Note, *supra* note 15, at 906 (discussing an example of a firm that acquiesced to global settlement).

some cases, codefendants seem to "stampede"[50] to the plaintiff to avoid being the firm discussing settlement from the most vulnerable position.[51] Some judges have asserted that when the majority of defendants have already settled with the antitrust plaintiff,[52] the pressure on the remaining defendants to settle is "inherently coercive" because they cannot risk going to trial given the staggering potential damages.[53] Even a defendant that was previously willing to go to trial may have a change of heart as its potential liability increases as its codefendants settle.[54]

In addition to its coercive effect, some observers argue that the whipsaw phenomenon is also unfair because later-settling defendants pay more than their proportional share of the damages.[55] Payment

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50. Cavanagh, *supra* note 16, at 1294.

51. A.B.A. ANTITRUST SECTION, *supra* note 6, at 15 ("Thus, a competition develops among defendants to settle early in the case, when plaintiffs need money and settlements are cheap, which reduces the pool of remaining defendants and thereby further fuels the impetus to settle quickly."); C. Douglas Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 1980 B.Y.U. L. REV. 183, 188; Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 221 (1980); Riemer, *supra* note 7, at 293–94 (discussing *Corrugated Container* and pointing out that "[t]he settlement pressures were said to be so great that twenty-three defendants paid an amount of almost $300 million during a one-month settlement 'stampede'" (citing *In re* Corrugated Container Antitrust Litig., 84 F.R.D. 40, 41 (S.D. Tex. 1979), *aff'd*, 606 F.2d 319 (5th Cir. 1979))); *Panic Aided Record Box Settlements*, LEGAL TIMES (Wash., D.C.), May 7, 1979, at 1.

52. The term "majority" here means that the settling defendants were responsible for the majority of the alleged cartel's market share.

53. *E.g.*, *In re Corrugated Container Antitrust Litig*., 84 F.R.D. at 41.

54. A.B.A. ANTITRUST SECTION, *supra* note 6, at 15 ("Towards the end of this settlement process, proponents claim, the few remaining defendants face potential liabilities so large that they cannot afford to take the risk of going to trial and losing, even if justifiably convinced that they are innocent of any wrongdoing.").

55. *See, e.g.*, *Antitrust Damage Allocation Hearings*, *supra* note 25, at 134 (statement of Robert P. Taylor, Esq., Pillsbury, Madison & Sutro) ("I strongly believe that any rational legal system must distribute liability on some basis among all those who are responsible for it. It is manifestly unfair to require one company arbitrarily to shoulder the entire burden of compensating a plaintiff, while other equally responsible and perhaps more culpable companies are required to pay nothing in compensation of the plaintiff."); *id.* at 285 (statement of Hon. Barbara Jordan); A.B.A. ANTITRUST SECTION, *supra* note 6, at 13–14 ("Under the present law, it is possible for some violators to escape liability fully, by not being sued, or partially, by getting so-called 'sweetheart settlements.' Proponents of contribution legislation contend that this is also unfair."); John Cirace, *A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits*, 55 ST. JOHN'S L. REV. 42, 45 (1980) ("In general, whenever a defendant settles with the plaintiff for a sum less than three times the damages attributable to its acts, each remaining defendant faces an increased risk that it will be forced to bear more than its proportionate share of the damages."); Jacobson, *supra* note 51, at 233 ("But is it fair to compel

size risks becoming a function of settlement order instead of relative culpability[56] or market share.[57] Some observers suggest that unfairly high payments for late-settling antitrust defendants are common.[58] The unfairness is magnified by the fact that the plaintiff can decide which alleged conspirator it would like in the vulnerable last position. The plaintiff can base its selection on any rationale, whim, or spite. The plaintiff may show leniency or grant a complete pass to one or more of the price-fixing firms—for example, because the plaintiff buys directly from them and wants to maintain good relations,[59] because the plaintiff is related to them,[60] because the plaintiff is trying to simplify and speed up the litigation by suing the smallest conspirator capable of paying the total damages,[61] or for no reason at

Olson Farms to pay three times the damage caused by the entire conspiracy when it was responsible for only eleven percent? Clearly not.").

56. *See In re* Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C 897, MDL 997, 1995 WL 221853, at *4 (N.D. Ill. Apr. 11, 1995) (mem.) ("The relative culpability of the defendant is no longer pertinent. Instead, a sort of 'game theory' element emerges."); Cavanagh, *supra* note 16, at 1290 ("The lack of contribution in antitrust cases permits the utilization of whipsaw tactics that result in defendants paying settlement amounts bearing no reasonable relationship to their degree of culpability or their benefits from the conspiracy.").

57. *See* Note, *supra* note 15, at 907 ("Defendants who settle early in the whipsaw usually pay far less than their share of the trebled liability—whether computed according to market shares or on some other basis—and non-settling defendants remain liable for the difference." (footnote omitted)).

58. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 38 (statement of Denis McInerney, Esq., Cahill, Gordon & Reindel) ("Consequently, it has become commonplace for late-settling defendants to be forced to contribute to settlements in amounts wholly disproportionate to their percentage of the questioned sales . . . .").

59. *See* Prof'l Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979) ("This possibility [of escaping all liability] significantly increases where a large or powerful tortfeasor has sufficient economic influence to prevent a plaintiff from including it as a defendant."), *abrogated by* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Note, *supra* note 15, at 905–06 (citing the trial record in *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976)).

60. *See* Note, *supra* note 15, at 905 n.77 ("The plaintiff may be a blood relative of one of the potential defendants." (citing Norfolk & S. R.R. v. Beskin, 125 S.E. 678 (Va. 1924))).

61. *See* Dickinson, *supra* note 20, at 165 n.180 (noting that the plaintiff's strategy in *Olson Farms, Inc. v. Safeway Stores, Inc.*, 649 F.2d 1370 (10th Cir. 1979), may have been "to obtain a speedy recovery and avoid costly litigation with numerous defendants, [by having] the plaintiff . . . select the smallest co-conspirator that in its estimation has sufficient assets to pay the potential judgment and file suit naming only that party as a defendant"). The court, however, did not acknowledge this point. *See Olson Farms*, 649 F.2d at 1380 (Holloway, J., concurring in part and dissenting in part) ("We do not have a record or evidence in the instant case indicating the reasons why Olson Farms was sued and the defendants-appellees were ignored.").

all. Indeed, the plaintiff could decide to sue just one member of the cartel and to hold that firm liable for trebled damages on the total injuries inflicted by the entire cartel.[62] While rare, plaintiffs have sued only one alleged conspirator on occasion.[63] Some see injustice in granting so much power to an antitrust plaintiff in high-stakes litigation.[64]

Critics of the no-contribution regime suspect that antitrust plaintiffs are abusing their power to select the initial defendants and the settlement order. They hypothesize three distasteful scenarios. First, contribution proponents assert that plaintiffs make sweetheart deals with the most culpable defendant or defendants. Some commentators assert that, in determining the order of settlements, an antitrust

> plaintiff will naturally look to those defendants that it perceives to be the most in need of obtaining a release from the action. Often these will be defendants that are potentially liable for a proportionately large share of the total damages and are thus quite anxious to limit their exposure through settlement.[65]

Under this thinking, the most culpable defendant may feel uniquely vulnerable and thus seek out an early settlement.[66]

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62. *See, e.g.*, Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 8 (9th Cir. 1963) ("A plaintiff need not sue all conspirators; he may choose to sue but one.").

63. The most famous instance is perhaps *Olson Farms*, in which the plaintiff sued only the smallest egg buyer in an alleged buyers' cartel and the defendant was held liable for damages far in excess to its business relationship with the plaintiff. *See Olson Farms*, 649 F.2d at 1380 (Holloway, J., concurring in part and dissenting in part).

64. *See Prof'l Beauty Supply*, 594 F.2d at 1185–86 ("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."); Jacobson, *supra* note 51, at 238 ("It is unfair to allow plaintiffs to single out one defendant to satisfy the liability of many. It is unfair to compel a single defendant to pay treble damages for an entire industry's liability. And it is unfair to force a defendant to abandon its defense and settle simply because of the coercive impact of earlier settlements with more culpable parties.").

65. Dickinson, *supra* note 20, at 179; *see also Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 1–2 (statement of Sen. Bayh, Member, S. Comm. on the Judiciary) ("[W]e have to be aware that in a large antitrust suit . . . a small or medium-sized company could easily face legal responsibility on behalf of the entire industry . . . while larger, more culpable businesses go relatively free . . . .").

66. *See Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 36–37 (statement of Sen. Bayh, Member, S. Comm. on the Judiciary); *id.* at 67 (statement of Donald G. Kempf, Jr.).

Second, commentators assert that antitrust plaintiffs can exploit the whipsaw threat to coerce large settlements out of innocent defendants.[67] They argue that even defendants acquitted of criminal price-fixing may nonetheless feel pressured to settle follow-on private civil lawsuits.[68] Supporters of contribution rights assert that defendants who maintain their innocence "have, as a practical matter, been forced to settle without regard to liability or damage caused."[69]

Third, the absence of contribution might be particularly unfair to small players with lower market shares because, according to some commentators, antitrust plaintiffs do not offer them the same favorable terms offered to cartel ringleaders.[70] The most extreme example of this phenomenon occurs when the plaintiff brings suit against only one small defendant in lieu of suing any of the larger potential defendants.[71] Because the whipsaw creates the potential for crippling liability should the plaintiff prevail, even a minor player in the cartel may consent to a significant settlement to avoid the risk of being held liable for three times the amount of all of the injury caused by the cartel.[72] Characterizing such settlement pressure on small

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67. *See, e.g.*, Note, *supra* note 15, at 907–10.

68. *See, e.g.*, Cavanagh, *supra* note 16, at 1290. This does not seem particularly surprising given that the plaintiff's burden of proof in private litigation is lower than the government's in a criminal prosecution. Also, new evidence may have come to light between the criminal and civil proceedings. For example, Cargill, a provider of food and agricultural products, escaped criminal liability for its participation in the citric acid price-fixing conspiracy because definite evidence came to light too late. *Compare In re* Citric Acid Litig., 191 F.3d 1090, 1106 (9th Cir. 1999) (noting that the government declined to prosecute Cargill and affirming summary judgment for Cargill in a follow-on civil suit), *with* David Barboza, *Archer Daniels Executive Said To Tell of Price-Fixing Talks with Cargill Counterpart*, N.Y. TIMES, June 17, 1999, at C6 (showing that Cargill participated in a price-fixing conspiracy).

69. A.B.A. ANTITRUST SECTION, *supra* note 6, app. A at 53 (Report of the Section on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions); *see also Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 66–67 (statement of Donald G. Kempf, Jr.) ("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.").

70. *See* Cavanagh, *supra* note 16, at 1290.

71. *See* Note, *supra* note 15, at 908 ("By the latter stages of the whipsaw, a company directly responsible for only a small fraction of a plaintiff's damages may alone face liability for damages caused by an entire industry."); *see also, e.g.*, *id.* at 904 ("Although Olson Farms was the smallest of the price-fixers by sales, the plaintiffs sued that company alone for treble damages. The judgment Olson Farms eventually paid amounted to twenty-four times the damages immediately caused by the company's egg purchases.").

72. *See id.* at 906.

players as fundamentally unfair, some commentators advocate contribution among price-fixing defendants, whether by statute or by contract.[73]

A JSA ameliorates the whipsaw threat. Because JSAs theoretically make each defendant responsible only for the overcharges on its own sales, early settlements made by some defendants do not create additional pressure on the remaining defendants to settle on onerous terms. Courts have approved judgment-sharing agreements as a mechanism to "minimize the likelihood of these coercive settlements by equitably apportioning any judgment that might be entered against the defendants."[74] The Manual for Complex Litigation endorses JSAs because they "serve the legitimate purposes of controlling parties' exposure and preventing plaintiffs from forcing an unfair settlement by threats to show favoritism in the collection of any judgment that may be recovered."[75] With a JSA in place, antitrust plaintiffs will not generally be able to successfully employ the whipsaw strategy to pressure price-fixing defendants to settle.[76] Even those opposed to amending the Sherman Act to allow contribution in antitrust cases point to JSAs as a mechanism to solve the whipsaw problem without creating a broad statutory right to contribution.[77]

B. Benefits for Antitrust Enforcement: Deterrence and Overdeterrence

In addition to fairness arguments, JSA supporters argue that these contracts could also serve the goals of antitrust policy by enhancing deterrence and diminishing the risk of overdeterrence. Most of the antitrust contribution debate in the post–*Texas Industries* era focused on whether a right to contribution would enhance or

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73. *See, e.g.*, A.B.A. ANTITRUST SECTION, *supra* note 6, at 20–23.

74. *In re* Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C 897, MDL 997, 1995 WL 221853, at *4 (N.D. Ill. Apr. 11, 1995) (mem.).

75. MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 13.23.

76. *Cf.* Note, *supra* note 15, at 910 (discussing how a contribution rule would reduce whipsawing).

77. A.B.A. ANTITRUST SECTION, *supra* note 6, app. A at 68 (Minority Report on Contribution) ("If plaintiffs truly are using their leverage arising from defendants' joint and several liability in an abusive manner, defendants already have at their disposal the weapon needed to redress the imbalance. Sharing agreements, enthusiastically endorsed in the Majority Report, can provide desired protection and without creating disabling uncertainty.").

inhibit deterrence of illegal price fixing. The procontribution camp argued that contribution would better deter firms from joining price-fixing conspiracies. Because JSAs are essentially contribution by contract, their rationales apply in large part to JSAs as well.

Proponents of contribution in antitrust have advanced two related deterrence arguments in support of creating a right to contribution among price-fixing defendants. First, they argue that a right to contribution increases the probability that each cartel participant will pay antitrust damages.[78] The absence of contribution is said to reduce deterrence because some conspirators can escape liability.[79] For example, in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,[80] the only antitrust case to actually recognize a right to contribution, the Eighth Circuit asserted,

> [O]n balance a rule allowing contribution is actually a greater deterrent. The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors 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.
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> . . . To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.[81]

This position assumes that the greater certainty of *some* punishment necessarily increases deterrence. Applying this procontribution argument to JSAs, some commentators have argued that JSAs should not reduce deterrence of price fixing because each alleged conspirator faces a greater probability of having to pay *something*.[82] So long as any defendant is found liable, no signatory to

78. Dickinson, *supra* note 20, at 187–90.

79. *See Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 69 (statement of Donald G. Kempf, Jr.) ("[Contribution] improves the deterrent force of our price-fixing laws. Violators will not go unpunished, as they can now.").

80. Prof'l Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), *abrogated by* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

81. *Id.* at 1185.

82. *See, e.g.*, Riemer, *supra* note 7, at 312 ("Risk-neutral potential violators are unlikely to be less deterred under a sharing agreement because the resulting reduced amount of potential liability is offset by the increased probability of having to make at least some payments.").

the JSAs can escape payment. The increased probability of payment increases deterrence, according to this theory.[83]

Second, some contribution proponents assert that antitrust deterrence does not depend on joint and several liability without contribution. Rather, they argue that the mandatory trebling of antitrust damages sufficiently deters price-fixing conspiracies.[84] Further, criminal sanctions—including nine-figure fines and imprisonment—dissuade firms from price fixing. Indeed, some commentators assert that in light of criminal penalties, "it is very unlikely that the management of any company is making such [cost-benefit] analysis" as to whether to join a price-fixing cartel.[85] In sum, because the combined threats of criminal liability and treble-damage private suits deter cartelization, allowing contribution should not reduce deterrence.[86] By extension, allowing price-fixing defendants to allocate responsibility through private JSAs should not detract from the primary deterrents of antitrust conspiracies.

Beyond arguing that contribution would not undermine antitrust's deterrence goal, some proponents argue that the absence of contribution, combined with joint and several liability, creates a risk of overdeterrence[87] because the prospect of high damages might convince a company not to undertake arrangements that would be

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83. *See* S. REP. NO. 96-428, at 9 (1979) ("[I]n a regulatory scheme, where one of the goals is to deter destructive or illegal behavior, the best way to do so is to require that all of those responsible for the wrong pay their part of the liability. This ensures that no one gets out of the suit without paying for the wrong committed.").

84. *See, e.g.*, *Antitrust Damage Allocation Hearings*, *supra* note 25, at 233 (letter from Hon. Charles B. Renfrew, Esq., Pillsbury, Madison & Sutro, to members of the H. Subcomm. on Monopolies and Commercial Law).

85. *Id.* at 47 (statement of Thomas R. Long).

86. *See id.* at 118 (statement of Donald T. Hibner, Jr.) ("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."); A.B.A. ANTITRUST SECTION, *supra* note 6, at 24–25 ("Proponents also claim that the threat of criminal liability and to a lesser extent treble damages, not joint and several liability, are the true deterrents to price fixing and other anticompetitive activity. As one attorney testified, '[a]ny corporate executive foolish enough to engage in such activities in the face of those risks would hardly be deterred by the lack of a contribution statute.'" (alteration in original) (quoting *Antitrust Damage Allocation Hearings*, *supra* note 25, at 39 (statement of Denis McInerney, Esq., Cahill, Gordon & Reindel))).

87. *See* A.B.A. ANTITRUST SECTION, *supra* note 6, at 25 ("[P]roponents claim that joint and several liability can overdeter conduct which is subject to antitrust scrutiny but may be procompetitive or competitively neutral."); A.B.A. ANTITRUST SECTION, *supra* note 8, at 30–35, 40–44.

legal and procompetitive.[88] Federal courts have long recognized the risk that antitrust laws might overdeter legitimate business behavior.[89] Even though the Supreme Court declined to recognize a right to contribution among antitrust defendants, it nonetheless acknowledged that "any discussion of this problem must consider the problem of 'overdeterrence,' i.e., the possibility that severe antitrust penalties will chill wholly legitimate business agreements."[90] According to this view, fear of antitrust liability could deter firms from pursuing efficient collaborations, such as distributional joint ventures. Because a JSA could prevent overdeterrence by minimizing the maximum amount of damages if such a collaboration were found to be an antitrust violation, JSAs might facilitate a more efficient antitrust regime.

Finally, some assert that the no-contribution rule increases the likelihood that price-fixing litigation will force a defendant to declare bankruptcy and exit the market, which would reduce competition in the market. In the absence of JSAs, joint and several liability creates a risk of bankruptcy when there is one holdout defendant or, perhaps, when the plaintiff sues only one defendant. Some courts have noted the bankruptcy risk, especially given the automatic trebling of antitrust damages.[91] To the extent that JSAs prevent any one firm in a concentrated industry from getting hit with an antitrust damage award that would force the firm from the market, JSAs can increase competition, so the reasoning goes.

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88. *See* Note, *supra* note 15, at 911 ("Excessive penalties can cause businesses to shun competitive practices lying close to the borderline of impermissible conduct . . . for example . . . refus[ing] to release price information for fear that it may be interpreted as price-fixing.").

89. *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422, 441 (1978) ("[There exists] the distinct possibility of overdeterrence; 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."); *see also* S. REP. NO. 96-428, at 18 (1979).

90. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 636–37 (1981) (citing *U.S. Gypsum Co.*, 438 U.S. at 441–42).

91. *See, e.g.*, Arth Main St. Drugs v. Beer Distribs. of Ind., Inc., No. F 77-73, 1978 WL 1357, at *3 (N.D. Ind. June 8, 1978) (mem.) (asserting that the treble damages could bankrupt antitrust defendants); *see also* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 793 (1987) ("Where actual damages are high, mandatory trebling may impair a firm's ability to compete after judgment.").

III. THE CASE AGAINST JUDGMENT-SHARING AGREEMENTS

Although JSAs may seem like a reasonable way for defendants to manage litigation costs, they also present many anticompetitive dangers. First, JSAs may interfere with the settlement process in a manner that reduces deterrence of price fixing. Second, JSAs may help price-fixing firms conceal an illegal conspiracy. Third, JSAs may represent a cartel-stabilizing device by solving one of the collective action problems associated with illegal price-fixing. As a result, JSAs may have the net effect of undermining cartel deterrence and facilitating price-fixing conspiracies.

A. Judgment-Sharing Agreements Distort the Settlement Process

In general, antitrust law favors settlement. The Supreme Court has opined that policies that promote settlement are "most consistent with the aims and purposes of the treble damage remedy under the antitrust laws."[92] Not only do settlements conserve judicial resources by avoiding expensive trials,[93] but if "settlements are discouraged, it may be more difficult for plaintiffs to bring meritorious claims, obtain redress for consumers, and deter unlawful behavior."[94] Not all settlements, though, help achieve antitrust's twin goals of compensation and deterrence; the terms matter. As Professors Easterbrook, Landes, and Posner have recognized, "settlement terms, no less than damages awarded in litigated cases, determine the deterrent effect of antitrust rules."[95] If particular rules systematically reduce settlement amounts below their optimal level, deterrence suffers.

Although some have suggested that JSAs should not affect settlement amounts,[96] that conclusion is logically suspect for several reasons. First, absent a JSA, the race to settle early should increase

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92. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 346 (1971).

93. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 19 (statement of Stephen D. Susman, Esq., Susman & McGowan).

94. A.B.A. ANTITRUST SECTION, *supra* note 6, at 39.

95. Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 354 (1980).

96. *E.g.*, Riemer, *supra* note 7, at 315 ("[T]he fact that sharing agreements affect the terms of settlements is irrelevant to the goal of compensation. These agreements may affect the ultimate apportionment of a judgment among defendants, but they do not, in any way, cause a reduction in the amount of the judgment that a plaintiff can recover." (footnotes omitted)).

settlement values as defendants compete against each other to exit the litigation.[97] A shrewd antitrust plaintiff can play two or more defendants against each other, essentially having the defendants bid for the prize of settling first and avoiding both trial and the end of the whipsaw.[98] In the absence of contribution, joint and several liability means that the expected cost of losing at trial is greater. This should increase the reservation price that a defendant is willing to pay to avoid the risk of trial. The no-contribution rule encourages settlement because defendants are willing to pay dearly to avoid the risk of a greater payout should they lose at trial. In contrast, a JSA may prevent co-conspirators from bidding against each other in negotiations with the plaintiff.[99] Indeed, the reason that most defendants enter into JSAs is to avert any "rush to settlement."[100] By eliminating the risk of the whipsaw, JSAs reduce firms' incentives to settle private antitrust litigation.[101] Indeed, this is the entire theory behind the unfairness arguments in favor of creating contribution rights for defendants in price-fixing cases. As a result, JSAs likely depress settlement amounts.

Second, the primary justification for JSAs is to prevent the so-called whipsaw effect. The whipsaw allegedly coerces defendants into paying larger settlements than they otherwise would. To the extent that JSAs successfully prevent this whipsaw, they reduce the plaintiff's leverage and should consequently reduce the aggregate settlements received by antitrust plaintiffs.[102] Indeed, some courts

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97. *See* Easterbrook et al., *supra* note 95, at 365 ("A rule of no contribution creates competition among defendants to settle rather than litigate. Each defendant dreads being the last to settle, because every time one defendant settles the expected liability of the remainder increases. The plaintiff can use this fear to obtain a larger aggregate settlement under a no-contribution rule than he could expect to obtain if all of the defendants litigated.").

98. *See* A.B.A. ANTITRUST SECTION, *supra* note 6, at 40 ("Economic analysis suggests that the rule of no contribution produces higher aggregate settlements by fostering competition among defendants to settle early.").

99. *See* DAVID BOIES, COURTING JUSTICE 320–54 (2004) (discussing the auction houses price-fixing class action lawsuit).

100. Cavanagh, *supra* note 16, at 1327 n.271 ("[I]n the *In re Antibiotics Antitrust Cases*, the five defendants entered into a sharing agreement and thereby avoided any 'rush to settlement.'").

101. *See Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 94–96 (testimony of Harold Kohn, Attorney).

102. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 237 (testimony of William W. Schwarzer, J., Northern District of California) ("I think that it is probably true that the cases would be settled at lower amounts than now because of the decline in the plaintiff's leverage.").

have praised JSAs precisely for "discouraging coerced settlements."[103] Yet if each defendant is paying a smaller individual settlement, then the aggregate settlement amount must also be lower. Consistency precludes JSA proponents from praising the settling-reducing effects of JSAs while simultaneously purporting that JSAs should not affect settlement amounts.

Third, a JSA can reduce the value of early settlements because JSAs sometimes require any settling defendant to negotiate a term in its settlement agreement whereby the plaintiff agrees "not to seek damages from nonsettling defendants attributable to the settling defendants' sales."[104] The settling defendant must ensure that the final settlement with the plaintiff includes such a carve-out provision because if it does not, then the other signatories have a contractual right to sue the settling defendant for contribution as described in the JSA.[105] By forcing the settling defendant to include this carve-out provision, the JSA ensures that the other settling defendants will not be liable for the settling defendant's overcharges. The plaintiff must disclaim any further interest in the settling defendant's overcharges, whereas under ordinary joint and several liability, the plaintiff would still be able to collect from the nonsettling defendants the difference between the settling defendant's overcharges (trebled) and the settlement amount. Thus, JSA carve-out provisions decrease the value of the overall litigation to an antitrust plaintiff by preventing the plaintiff from factoring the settling defendant's overcharges into damage awards against the co-conspirators. In essence, these JSA provisions eliminate joint and several liability.[106]

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103. *In re* Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C 897, MDL 997, 1995 WL 221853, at *4 (N.D. Ill. Apr. 11, 1995) (mem.).

104. A.B.A. ANTITRUST SECTION, *supra* note 6, at 19; *see also Antitrust Damage Allocation Hearings*, *supra* note 25, at 142 (statement of Robert P. Taylor, Esq., Pillsbury, Madison & Sutro) ("Although diverse, such agreements typically apportion liability under some agreed-upon formula, often market share, and provide that if any signatory defendant settles it must require the plaintiff to reduce any judgment obtained against the other signatories by the settling defendant's percentage share under the agreement or alternatively to remain contractually responsible to the other signatories for any difference.").

105. Riemer, *supra* note 7, at 306 ("[B]ecause a settling defendant is relieved of liability to the non-settling defendants only if the settlement agreement contains a claim reduction or carve-out provision, defendants will have little incentive to settle unless plaintiffs agree to such a provision." (footnote omitted)).

106. *See* S. REP. NO. 96-428, at 36 (1979) (supplemental views of Sen. Metzenbaum & Sen. Kennedy).

In addition to diminishing the value of settlements, JSAs reduce the probability of settlement for two reasons. First, JSAs reduce the defendants' incentive to settle by significantly limiting each defendant's potential exposure. As Judge Hubert Will noted in his Congressional testimony, contribution in antitrust cases would "substantially deter settlements because it would reduce the defendant's risks, and anything that reduces his risks reduces the incentive to settle."[107] Second, JSAs can complicate the settlement process because the settling defendant has to negotiate to protect the nonsettling defendants. As noted, JSAs sometimes "contain provisions requiring a settling defendant to extract an agreement from the plaintiff to reduce its claims against the nonsettling defendants by the amount of damages for which the settling defendant would have been responsible absent any settlement."[108] Antitrust practitioners have long recognized that a defendant

> seriously interested in settling has a better chance for success by going it alone. Besides being able to plead its own cause most effectively, it can avoid the quagmire of the conflicting interests of its fellow bargainer-competitors, and gain a possible competitive advantage by either early settlement or by settlement on its own terms.[109]

Even a price-fixing defendant that strongly prefers settlement may be unable to offer a deal that satisfies both the terms of the JSA and the needs of the plaintiff.[110] Although settlements still happen with

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107. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 270 (testimony of Hubert L. Will, J., Northern District of Illinois).

108. Mark D. Plevin, *Avoiding Problems in Joint Defense Groups*, 23 LITIGATION 41, 44 (1996); *see also Antitrust Damage Allocation Hearings*, *supra* note 25, at 7 (statement of A. Stephens Clay, Esq., Kilpatrick & Cody) ("Such an agreement provides, among other things, that no defendant will settle unless the plaintiffs surrender their claim for damages attributable to that defendant's sales."); *Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 121 (statement of Donald T. Hiber) ("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.").

109. H. Robert Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases*, 32 ANTITRUST L.J. 98, 99–100 (1966).

110. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 93 (statement of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf, P.C.) (stating that contribution rights among antitrust defendants would "in many instances" make settlement "impossible").

JSAs,[111] anecdotal evidence suggests that signatories to a sharing agreement may be less likely to settle than nonsignatories.[112]

Despite such reasoning and evidence, courts have rejected arguments that JSAs improperly reduce the incentive for settlement. For example, the district judge in one case, *Cimarron Pipeline Construction v. National Council on Compensation Insurance*,[113] agreed with the defendants' position "that the sharing agreement does not disrupt the settlement process and in fact makes the settlement negotiations more equitable by alleviating the need for a party to settle merely to avoid the sometimes disastrous costs of extensive litigation."[114] The court's reasoning proves the opposite point: by minimizing the threat of litigation, JSAs reduce the defendants' incentive to settle with the plaintiff. That reduction of pressure may be good or bad depending on one's perspective, but it exists. The court stood on firmer ground when it noted that the plaintiffs in the case had "in fact reached settlement agreements with over 60 percent of the signatories to the sharing agreement."[115] But the argument is not that JSAs make settlement impossible; rather, JSAs make settlements harder to reach and may reduce settlement values for the plaintiff.[116]

Finally, by reducing the likelihood of early settlements, JSAs may interfere with the funding and evidence-gathering processes of legitimate antitrust cases. First, JSAs may hinder victims of price-fixing conspiracies from successfully litigating their claims by interfering with the financing of antitrust lawsuits. Small plaintiffs

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111. *See* S. REP. NO. 96-428, at 25.

112. *See, e.g.*, Cimarron Pipeline Constr. v. Nat'l Council on Comp. Ins., Nos. CIV-89-822-T, CIV-89-1886-T, 1992 WL 350612, at *2 (W.D. Okla. Apr. 10, 1992).

Indeed, one of the purported justifications for JSAs is that they forestall settlements. For example, one source argues that "a judgment-sharing agreement may be appropriate where there is a meritorious defense and the defendants want to make sure that none of the other defendants settle." Edward D. Cavanagh, *Antitust*, 5 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 61, § 61.7 (Robert L. Haig ed., 2d ed. 2008). While Professor Cavanaugh supports JSAs when the defendants have a meritorious defense, the settlement-precluding effect of a JSA exists regardless of whether the defendants have a meritorious defense.

113. Cimarron Pipeline Constr. v. Nat'l Council on Comp. Ins., Nos. CIV-89-822-T, CIV-89-886-T, 1992 WL 350612 (W.D. Okla. Apr. 10, 1992).

114. *Id.* at *3.

115. *Id.*

116. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 94–95 (statement of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf).

that pursue antitrust claims are less successful than larger plaintiffs.[117] One reason may be that antitrust litigation is expensive and only plaintiffs with sufficiently deep pockets can persevere. Absent financing, many plaintiffs cannot survive the war of attrition that is antitrust litigation.[118] Plaintiffs often rely on partial, incremental settlements to fund the litigation against the remaining defendants.[119] By impeding this funding mechanism, JSAs might deter or derail legitimate suits.[120]

Second, early settling defendants often provide critical evidence to support the plaintiff's claims. Although some may argue that many private price-fixing lawsuits rely on successful previous government actions that provide all of the necessary evidence to prove liability, the evidence secured through discovery is important even in follow-on cases. First, in many cases, the private price-fixing lawsuit precedes any government prosecution.[121] Second, even when a private lawsuit follows a successful government case, plaintiffs' attorneys often need more evidence than prosecutors have collected.[122] For example,

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117. Jeffrey M. Perloff, Daniel L. Rubinfeld & Paul Ruud, *Antitrust Settlements and Trial Outcomes*, 78 REV. ECON. & STAT. 401, 407 (1996).

118. Joseph L. Alioto, *The Economics of a Treble Damage Case*, 32 ANTITRUST L.J. 87, 92 (1966) ("[A] war of attrition [is] carried on as an accepted method of defence by the large defendants and their attorneys; any suggestion that the plaintiff may not be adequately financed will result in stretching out the pretrial process by various devices.").

119. MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 13.21 ("Such partial settlements may provide funds needed to pursue the litigation . . . ."); *see also Antitrust Damage Allocation Hearings*, *supra* note 25, at 8 (statement of A. Stephens Clay, Esq., Kilpatrick & Cody) ("Partial settlements, or settlements with fewer than all the defendants, have served as a crucial preliminary step in achieving comprehensive settlements of complex antitrust litigation.").

120. S. REP. NO. 96-428, at 40 (1979) (supplemental views of Sen. Metzenbaum & Sen. Kennedy) ("Allowing contribution would discourage . . . settlements and make it much more difficult for the plaintiff to ultimately prevail. *The more difficulty the plaintiff faces, the less likely such suits will be brought, the less likely plaintiffs will succeed, and the less likely would-be violators will be deterred.*" (alteration in the original) (quoting Alabama v. Bluebird Body Co., No. 75-23-N, slip op. at 5 (M.D. Ala. May 18, 1979))).

121. *See, e.g.*, JOHN M. CONNOR, GLOBAL PRICE FIXING 314 (2001) ("Boies & Schiller filed a civil price-fixing suit in U.S. District Court in Dallas, Texas on behalf of several direct purchasers of bulk vitamins in March 1998. It would be more than one year before the government indicted Hoffmann-La Roche, BASF, and others for the same crimes.").

122. *See In re* Folding Carton Antitrust Litig., 84 F.R.D. 245, 266 (N.D. Ill. 1979) ("Nonetheless, it can also be said that prior criminal proceedings are generally narrower in scope than any civil action and helpful, from a discovery viewpoint, only in the beginning. Where all or most of the defendants plead Nolo soon after indictments have been handed down, government evidence gathering comes to a halt and the civil plaintiffs must do considerable discovery work on their own.").

private price-fixing cases are often broader than government cases in that private cases often allege that the price-fixing covered more products over a longer time frame.[123] In short, in many cases, "[t]he only way the plaintiff can get evidence is to find someone involved in the conspiracy who has nothing to lose, and in effect give them some kind of informal immunity" in a settlement agreement.[124] Unfortunately, JSAs may undermine the evidence-gathering process, as the following Section explains.

In sum, JSAs can reduce the amount that price-fixing defendants pay in the aggregate. This can reduce the attractiveness of bringing legitimate antitrust suits and could undermine deterrence of price-fixing conspiracies, as Part IV discusses.

B. Judgment-Sharing Agreements Can Help Conceal a Cartel

The first rule of cartel membership is "don't get caught." All cartel members share a common interest in concealing their activities. A price-fixing conspiracy exposed during private litigation can lead to criminal prosecutions, possibly resulting in massive criminal fines against cartel firms and prison time for the individuals involved.[125] Consequently, cartels go to great lengths to hide their crimes. Price fixers employ code names, use public phones, falsify travel itineraries when they meet with competitors,[126] and create shell trade associations with fake agendas.[127] In the aftermath of the electrical equipment cartels, participants explained

123. *See, e.g.*, *id.* at 252; *see also* ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 18:57 (4th ed. 2002) ("Plaintiffs' counsel will usually seek, initially at least, to recover damages based on the entire alleged conspiracy period, when it is longer than four years . . . .").

124. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 28 (statement of Stephen D. Susman, Esq., Susman & McGowan).

125. *See* 15 U.S.C. § 1 (2006) ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").

126. Gilbert Geis, *White Collar Criminal: The Heavy Electrical Equipment Antitrust Case in 1961*, *in* WHITE-COLLAR CRIMINAL 103, 107 (Gilbert Geis ed., 1968); *see also, e.g.*, JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND 221 (2000) (discussing the lysine cartel and measures taken to conceal the cartel).

127. John Gibeaut, *Antitrust American Style*, A.B.A. J., Apr. 2004, at 55, 58 ("Cartels are especially hard to detect because members can reach secret agreements under the cover of social connections, trade associations, mutual business contacts and other legitimate

> the techniques of concealment: ". . . to minimize telephone calls, to use plain envelopes if mailing material to each other, not to be seen together on traveling, and so forth. . . . not to leave wastepaper, of which there was a lot, strewn around a room when leaving."[128]

And when price-fixing firms fear that the conspiracy may be exposed, they often attempt to destroy all incriminating documents.[129]

Although cartel rules commonly prohibit participants from taking notes or documenting the price-fixing activity, cartels often include an individual or two who disobeys the ban on record-keeping.[130] While individuals may keep notes for many reasons—such as fastidiousness, or to hold cartel partners accountable should a dispute among co-conspirators arise about the substance of earlier agreements—the notes are often cashed in as makeshift insurance policies when the cartel unravels.[131] Participants in price-fixing cartels routinely create incriminating documents but conceal them until it is in their best interest to reveal them. For example, in the auction-house price-fixing cartel between Sotheby's and Christie's, the heads of Sotheby's (Dede Brooks) and Christie's (Christopher Davidge) fixed nonnegotiable sellers' commissions and agreed to not memorialize their illegal agreement in writing.[132] Brooks honored their agreement and believed that her partner in crime was abiding by their agreement as well. She was wrong. Although Davidge did respect his promise to fix commissions, unbeknownst to anyone else

circumstances.").

128. Geis, *supra* note 126, at 107 (second alteration in original) (quoting *Administered Prices: Hearings Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 87th Cong. pt. 27 (1961)).

129. *See, e.g.*, LIEBER, *supra* note 126, at 155–56.

130. *See* Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1641–48 (2008).

131. Cécile Aubert, Patrick Rey & William E. Kovacic, *The Impact of Leniency and Whistle-Blowing Programs on Cartels*, 24 INT'L J. INDUS. ORG. 1241, 1260 (2006) (explaining that cartel members take notes because cartel "agreements may be very complex, due to the variety of products and prices involved, and to the number of possible contingencies; limited memory may then call for keeping notes about the agreement"); *see also, e.g.*, CHRISTOPHER MASON, THE ART OF THE STEAL 142 (2003) (describing a price fixer who "thought it wise to keep a record of [price-fixing] discussions in case of any unforeseen repercussions"); Douglas Frantz, *Private Files Fuel an Art Auction Inquiry*, N.Y. TIMES, Oct. 8, 2000, at A1 (describing notes that were taken in the Christie's case that were handed over to the Department of Justice).

132. MASON, *supra* note 131, at 140–41 (providing the entire series of events in the Christie's case in detail).

he created copious notes after each illegal meeting.[133] He documented his one-on-one conversations with his boss, Anthony Tennant (the CEO of Christie's), his negotiations and agreements with Brooks, and what Brooks had told him about her discussions with Alfred Taubman (the CEO of Sotheby's), whose meetings with Tennant had set the cartel in motion.[134] These notes were ultimately critical to antitrust authorities securing guilty pleas by Sotheby's and Christie's and a criminal conviction of Taubman, who was sentenced to a year and a day in federal prison, and fined $7.5 million.[135] In short, evidence of illegal price-fixing often exists; the difficulty is uncovering it.

Prior to any settlements, codefendants in many types of litigation share an incentive to conceal evidence of price fixing. In general, the plaintiff's failure to discover all relevant evidence from the defendants before settling remains a significant problem in civil litigation.[136] The incentive to conceal bad evidence is compounded in price-fixing cases because a diligent private plaintiff can expose a criminal conspiracy that the government will later prosecute. Thus, it is hardly surprising that antitrust defendants fail to produce nonprivileged documents that are responsive to plaintiffs' discovery requests when the documents demonstrate the existence of a price-fixing conspiracy.[137] As a result, price fixers may escape liability simply for the plaintiff's want of evidence.

Settlements, however, can lead to the exposure of incriminating evidence. Traditional settlements in price-fixing cases—without JSAs—often require the settling defendants to assist plaintiffs with discovery.[138] In discussing settlements, plaintiffs' attorneys in price-fixing cases often seek evidence as much as money.[139] Price fixers who desire to minimize their monetary exposure are sometimes willing to

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133. *See id.* at 142.

134. *Id.* at 2–3.

135. *Id.* at 360.

136. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 811–13.

137. *See* Alioto, *supra* note 118, at 92–93.

138. *See, e.g.*, *In re* Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 575 (E.D. Pa. 2003).

139. *See, e.g.*, BOIES, *supra* note 99, at 340 ("After our meeting with the Christie's lawyers, Richard, Phil, and I sat down to try to structure a settlement offer that would induce Christie's to pay the class a substantial amount of money and, equally important, provide us with the evidence we were missing to establish a buyers' commission conspiracy.").

supply incriminating documents and even necessary testimony at trial against their former cartel partners.[140] The joint and several liability allows plaintiffs to negotiate liability releases in exchange for evidence. The first settler is often willing to supply inside evidence in order to reduce its liability. The plaintiff is willing to accept this reduced amount of money because the joint and several liability means that the plaintiff can recover any foregone money from the remaining defendants, against whom the plaintiff can make a better case after receiving evidence from the first settler. Indeed, because the nonsettling defendants remain liable for all of the damages, a prudent price-fixing plaintiff may grant a settlement for little or no money in exchange for incriminating evidence against its co-conspirators.[141] Furthermore, when early settlements have a money component, they can fund the plaintiff's continued evidence gathering.[142]

Although the whipsaw theory argues that "the plaintiff is able to use the leverage provided by the increase in liability as a means to coerce settlements from the remaining defendants,"[143] this explanation fails to consider that the increased pressure may be attributable, in part, to the increased strength of the plaintiff's case on the merits by the time that later settlements occur. Evidence secured from early-settling defendants may increase the settlement payments of later-settling defendants because the plaintiff's case grows stronger as the plaintiff accumulates more evidence.[144] The increased pressure to pay more money that later-settling defendants face is perfectly legitimate to the extent that it derives from the plaintiff's stronger case.

Judgment-sharing agreements can undermine this evidence-producing dynamic. In the presence of a JSA, a defendant who has admissible proof of illegal activity—which it could use as leverage to

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140. *Id.* at 340–41; Halper, *supra* note 109, at 113 n.25 ("[A settling antitrust] defendant might agree to make specific information available, or allow plaintiff to interview its employees.").

141. BOIES, *supra* note 99, at 242 n.*.

142. MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 13.21.

143. Dickinson, *supra* note 20, at 180–81.

144. This notion is consistent with the observation that "post discovery settlements are more likely to reflect the true value of the claim and be fair." Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 588 (3d Cir. 1999) (alteration omitted) (quoting Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1314 (3d Cir. 1993)).

get itself a sweetheart deal in an early settlement—may have insufficient incentive to share the information. Although any settlement might reduce that individual defendant's direct liability, the evidence would lead to a greater probability of liability and higher damages for the remaining defendants and that first-settling party would bear a percentage of those damages pursuant to the terms of the JSA.[145] Discussing JSAs in the context of multidefendant tort litigation, Professors Lisa Bernstein and Daniel Klerman explain that JSAs

> will affect the defendants' trial strategy and their incentives to testify in particular ways at trial. For example, in the absence of such an agreement each defendant has an incentive to introduce evidence tending to place responsibility for the plaintiff's harm on other defendants. In contrast, when a judgment-sharing agreement exists, the defendants will try to show that none of them were at fault. Finger pointing will be avoided, and it will be left to the plaintiff to introduce all of the evidence against each defendant. Each defendant will then have an incentive to testify in a way that minimizes the defendants' total expected liability. Because the plaintiff will often have less information than each defendant about the cause of his harm, these agreements may decrease the likelihood that he will prevail.[146]

Thus, critical evidence could be suppressed in cases in which the defendants have entered into a JSA, as the only individuals who are aware of the evidence have less incentive to share it with private plaintiffs.

In sum, JSAs reduce incentives for co-conspirators to turn on each other. Normally, once a price-fixing cartel has been exposed, the best way to reduce one's individual liability is to present evidence that shifts the blame to other members of the cartel. This is often done in the context of a settlement whereby the settling firm agrees to provide evidence against its former co-conspirators in exchange for a relatively low settlement amount. With a JSA in place, there is

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145. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 51 (statement of John F. Seiberling, Member, H. Comm. on the Judiciary) ("[F]rom the practical standpoint of a plaintiff's lawyer, it is going to be extremely difficult for him to proceed to collect evidence if everyone is liable for his pro rata share."); MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 13.23 ("[Sharing agreements] also create a disincentive for defendants to make available evidence indicating liability on the part of codefendants.").

146. Bernstein & Klerman, *supra* note 23, at 2270 n.149.

significantly less incentive to engage in such finger pointing—after all, increasing the damages paid by one's former cartel partners may increase the amount of money that the finger-pointer will eventually have to pay out pursuant to the JSA. In the absence of a JSA, each individual defendant has an overriding incentive to reduce its own exposure, regardless of the penalties paid by its co-conspirators. Indeed, because the other defendants are its competitors, it may benefit from a disproportionately low damage assessment because its competitors may have to charge a greater amount of money for their products in the future in order to recoup their higher damages. The JSA, however, shifts incentives, reduces the benefits of individual settlement, and thus reduces the pressure to expose cartel activity.

C. Judgment-Sharing Agreements as a Solution to the Prisoner's Dilemma

Game theory illustrates how JSAs may stabilize price-fixing conspiracies and foster the concealment of cartel activity. Price-fixing conspiracies present many instances of prisoner's dilemmas.

1. *The Prisoner's Dilemma.* The prisoner's dilemma is a game theory model based on two criminals who have committed a major crime and a minor crime. The police have sufficient evidence to convict both for the minor crime, but not enough to sustain convictions of either for the major crime. The police interrogate both suspects independently about their roles in the major crime but neither has confessed. The confession of either would be enough to convict the other of the major crime. Because the police want to convict at least one—and ideally both—of the prisoners for the major crime, they offer each the same deal: "If you confess and provide evidence against your partner, then you'll get no jail time for either the minor or major crime and he'll get a three-year sentence; if he confesses and you don't, you'll get the three-year sentence and he'll walk. But, if both of you confess, we won't need your testimony and both of you will get a two-year sentence. Finally, if neither of you confesses, then you'll each get one year in prison on the minor crime. Your partner is being offered the same deal."

The offered deal is commonly depicted by the following matrix, which shows the payoff in jail time to each prisoner under each scenario:

Basic Prisoner's Dilemma Matrix

B A	Don't Confess	Confess
Don't Confess	1 1	0 3
Confess	3 0	2 2

Under this scheme, prisoners pursuing their own short-term self interest should confess. From Prisoner A's perspective, if Prisoner B confesses, then Prisoner A can either confess and receive two years in prison or not confess and receive three years in prison. Framed in this manner, Prisoner A should confess in order to receive less time in prison. Conversely, if Prisoner B does not confess, then Prisoner A can either remain quiet and thus receive one year in prison on the minor crime or can confess and avoid imprisonment altogether. In this situation, Prisoner A should confess because no prison time is preferred over one year in prison. Thus, if Prisoner B confesses, Prisoner A is better off confessing, and if Prisoner B does not confess, Prisoner A is still better off confessing. This makes confession a dominant strategy because Prisoner A is better off confessing regardless of what Prisoner B does.[147]

Prosecutors, however, have offered Prisoner B the same deal and, similarly, confession is Prisoner B's dominant strategy as well. If each prisoner pursues this dominant strategy and confesses, then both prisoners will receive two years in prison for the major crime. If the prisoners were to cooperate and neither were to confess, then each would receive only a one-year prison sentence for the minor crime. This means that the mutual pursuit of the dominant strategy results in

147. A dominant strategy exists if a player is better off picking a particular option regardless of which course the player's partner selects. Conversely, if a player could be better off changing the decision after learning the player's partner's choice, then no choice dominates the other under all circumstances and there is no dominant strategy and no true prisoner's dilemma.

a Pareto-inferior outcome because both prisoners could improve their position if the two could shift from the Confess-Confess outcome (two years in prison for each) to the Don't Confess-Don't Confess outcome (one year in prison for each).

2. *Cartels and the Prisoner's Dilemma*. Cartel relationships are rife with prisoner's dilemmas. The first, and most discussed, prisoner's dilemma in any cartel arrangement involves the incentive of price-fixing firms to cheat on their agreement by charging less than the fixed price. Although the firms are better off as a group with a stable cartel in which every firm charges the cartel-set price, each individual firm maximizes its own short-term profits by reducing its price and selling more than its cartel allotment.[148] Such cheating can destabilize a cartel, resulting in price wars in which all firms are worse off than if every firm had abided by the cartel price. Cartel members also face prisoner's dilemmas when deciding whether to cooperate with either a criminal antitrust prosecution or a civil price-fixing claim.

a. The Prisoner's Dilemma and Prosecuting Cartels. The prisoner's dilemma created by a criminal antitrust prosecution closely mirrors the classic prisoner's dilemma because it presents co-conspirators the opportunity to gain leniency by confessing. The key element in this dilemma is that antitrust authorities grant amnesty from criminal prosecution to the first member of a cartel to confess. The cartel members are better off as a group if they are silent (that is, if nobody confesses in exchange for amnesty) because the conspiracy remains hidden and they continue to make cartel profits. However, the only way that an individual firm can be guaranteed that it will not be criminally prosecuted is to be the first firm to confess. This can create the dynamic of a prisoner's dilemma.[149]

In 1993, the DOJ's Antitrust Division reformed its Corporate Leniency Policy by making the process for awarding amnesty more structured and less discretionary. Under the government's revamped Amnesty Program, the first confessor gets the best deal: no criminal liability and, in subsequent private lawsuits, liability limited to single

148. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 558 (2004).

149. Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 465–66 (2006)

damages for its own sales made at the cartel price.[150] The second confessor gets the second best deal: a significant reduction in criminal fines (though no limitation on damages in follow-on private litigation). Each successive confessing firm receives a smaller discount off of its maximum criminal fine[151] until every cartel member has confessed (or faces a criminal trial with an almost certain outcome, as the confessing cartel members must provide evidence against their former partners).

The program has been wildly successful. The Amnesty Program has been the "most effective generator of cartel cases and is believed to be the most successful program in U.S. history for detecting large commercial crimes."[152] Before the new program, the government received one application per year from firms willing to expose a cartel in exchange for leniency; after the change in policy, applications increased to three per month.[153] The Amnesty Program has led to the exposure of international cartels in marine transportation services, graphite electrodes, bromines, and vitamins,[154] resulting in over one billion dollars in fines.[155] In short, the government has successfully applied the insights of the prisoner's dilemma in its Amnesty Program.

Judgment-sharing agreements undermine the Amnesty Program. One reason for a price-fixing firm to confess first is to get single damages and avoid the whipsaw in civil litigation because the first confessor is not liable for treble damages or any damages associated with its co-conspirators' sales regardless of whether that firm settles any subsequent private suit based on cartel activity first, last, or not at all. If a JSA eliminates the whipsaw, as claimed by its proponents, this significantly reduces the incentive to confess first in order to secure amnesty and resulting single damages. The Amnesty Program

150. 15 U.S.C. § 1 note (2006) (Antitrust Enforcement Enhancements and Cooperation Incentives). In essence, the Amnesty Program eliminates both treble damages and joint and several liability for the first firm to confess.

151. Late-confessing firms also generally must sacrifice at least one executive, who must serve prison time. *See* Leslie, *supra* note 130, at 1660–61.

152. Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798, 799 (2001).

153. Kathryn K. Dyer & Garrett M. Liskey, *Antitrust Violations*, 45 AM. CRIM. L. REV. 195, 224 (2008).

154. CONNOR, *supra* note 121, at 509.

155. Spratling, *supra* note 152, at 800.

succeeds by rewarding the first-confessing firm in a manner that creates distrust among cartel partners, as each must worry that one of its co-conspirators may take the bait and confess first.[156] Because the costs of not confessing first are high, this creates distrust among the cartel members. By decreasing (often significantly) the marginal gains from confessing first, JSAs can moderate the distrust-creating effects of the Amnesty Program. As a result, JSAs can weaken the government's most effective weapon for exposing, punishing, and deterring price-fixing conspiracies.

b. The Prisoner's Dilemma and Negotiating Private Settlements. In addition to the cheating and confessing prisoner's dilemmas, the process of negotiating settlements in private antitrust litigation against price fixers also represents a form of prisoner's dilemma. Settlement negotiations provide yet another instance in which each firm must decide whether to maximize its individual short-term utility or to stay loyal to the cartel. Early in the cartel's life, firms may be tempted to cheat or confess, but that temptation will be tempered by the fact that a firm's defection could cause the demise of a profitable cartel. Once litigation has been filed, however, the cartel probably cannot continue business as usual and the lure of future cartel profits no longer figures as significantly into a firm's decisionmaking calculus on whether to share evidence of the cartel's activities.

Nevertheless, the conspirators are generally better off as a group if they present a united no-settlement front against the antitrust plaintiff because none would fund the litigation or provide evidence that can be used against the remaining defendants. Each individual defendant, however, might perceive an advantage to striking a deal and settling first, based on the assumption that the first-settling defendant may receive the best deal. A so-called sweetheart settlement—in which the first settling defendant trades evidence for a lower settlement—is analogous to the prisoner's dilemma model in which the prosecutors reward confession by offering less prison time.

Firms may be worried that if they do not settle first, then one of their former partners will strike a deal with the plaintiff. As discussed above, settlement costs for holdout firms generally rise as their

156. A.B.A. ANTITRUST SECTION, ANTITRUST COMPLIANCE: PERSPECTIVES AND RESOURCES FOR CORPORATE COUNSELORS 49 (2005) ("This 'winner-takes-all' dynamic generates tension and mistrust among cartel members.").

codefendants settle because the earlier settlers have provided both a litigation war chest and (often) damning evidence. The plaintiff—now armed with funds and evidence—poses a more credible threat to the remaining defendants of going to trial and winning. In sum, each defendant maximizes its utility by settling first, but the defendants as a group do better if they negotiate as a group or decline to settle altogether.[157] This is a prisoner's dilemma because the group as a whole maximizes utility through mutual nonconfession, while each individual profits most by confessing.

The most direct solution to the prisoner's dilemma is an enforceable contract in which the prisoners contractually bind themselves not to confess or provide evidence against each other. Any such contract between criminal defendants—such as the suspects in the classic prisoner's dilemma—would be unenforceable as a matter of public policy. Judgment-sharing agreements, however, can solve the prisoner's dilemma by in essence committing the alleged co-conspirators to a strategy of mutual nonconfession. The JSA helps prevent the settlement race by allowing defendants to present a united front against the plaintiff's attempts to play co-conspirators against each other. With a JSA in place, each firm has less to gain by breaking ranks and settling. Although settling early would allow the firm to avoid litigation costs, depending on the terms of the JSA, any evidence that it provided as part of its settlement could increase the amount of damages at trial, of which it would be responsible for a percentage pursuant to the JSA.

In short, a JSA may be a mechanism for cartel discipline at the settlement stage. Stable cartels require a minimal measure of discipline whereby the cartel members do not pursue their own individual interests—for example, by cutting price or exposing the cartel to the government in exchange for leniency—at the expense of their cartel partners. With each firm constraining its ability to trade evidence for a sweetheart deal, the JSA makes all members of the cartel better off. While a federal court would never countenance a private contract among defendants to conceal evidence or to not settle, the effect of such a forbidden contract may be achieved if courts fail to appreciate the anticompetitive potential of JSAs.

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157. *See* Cirace, *supra* note 55, at 54–55.

IV. BALANCING THE UNFAIRNESS AND DETERRENCE CONSIDERATIONS

Parts II and III present very different characterizations of judgment-sharing agreements. The arguments in Part II see JSAs as legitimate risk-spreading mechanisms that mitigate the unfairness of the no-contribution regime in antitrust and may also increase deterrence. Part III suggests that JSAs may help stabilize and conceal cartels, which would necessarily reduce deterrence of price-fixing activity, and may decrease the chance of successful litigation of meritorious price-fixing claims, which could also reduce deterrence as well as leave the cartel's victims uncompensated. This Part weighs the proffered fairness arguments and competing theories on deterrence and concludes that JSAs probably have a net negative effect on cartel deterrence.

A. Challenging the Unfairness Critique of the No-Contribution Regime

Commentators defend JSAs as necessary to moderate the unfairness of plaintiffs' coercive whipsaw tactics. Although facially persuasive, upon closer inspection the unfairness justification weakens considerably. This Section suggests that the unfairness argument is largely speculative and overstated.

The premise of the unfairness argument—that many antitrust plaintiffs employ coercive whipsaw tactics—appears more theoretical than real. In particular, "there is little hard evidence that unfair whipsaw settlements are pervasive in the antitrust arena,"[158] that antitrust plaintiffs target defendants for anticompetitive purposes,[159] or that there has been any "case in which a small, relatively less culpable defendant has actually paid an outlandish judgment resulting in bankruptcy."[160] Although there are a couple of well-trod anecdotes

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158. Cavanagh, *supra* note 16, at 1302.

159. A.B.A. ANTITRUST SECTION, *supra* note 6, at 14 ("Although it has been suggested that a plaintiff may target a particular defendant to satisfy the judgment for anticompetitive purposes, there is no evidence to suggest that judgments have been disproportionately or unfairly executed on a widespread basis.").

160. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 13 (testimony of Stephen D. Susman, Esq., Susman & McGowan) ("There is no empirical evidence that any antitrust settlement or judgment has ever bankrupted a defendant."); *id.* at 473 (statement of James F. Rill, Esq., Collier, Shannon, Rill & Scott) ("I am not aware of any instance in which a company

of whipsawing creating a seemingly unfair result, there is no evidence of a systemic problem.[161] Each anecdote "is subject to case-by-case rebuttals which rob it of much of its force."[162]

Although there are some well-known examples of antitrust plaintiffs suing only one alleged conspirator from a cartel,[163] these cases are well-known because they are exceptional. For attorneys who bring private antitrust suits, "it is a generally recognized practice among plaintiffs to name as defendants as many of the co-conspirators as may reasonably be expected to be liable, so as to ensure full recovery."[164] More importantly, even if some conspirators are not named as defendants by a particular plaintiff, "in any given case there may be any number of other potential plaintiffs who were damaged by the particular restraint of trade or monopoly in which the prospective third-party defendant has been a participant."[165] So if one

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has been forced into bankruptcy because of the execution of an adverse judgment rendered in an antitrust lawsuit."); *id.* at 477 (statement of Robert P. Taylor) ("I am not aware of any situation in which a defendant has been forced into bankruptcy by having to satisfy an antitrust judgment."); A.B.A. ANTITRUST SECTION, *supra* note 6, at 14 ("The Subcommittee has also been given few, if any, examples in which small defendants were forced to shoulder grossly disproportionate liability for nationwide conspiracies." (quoting STAFF OF THE H. COMM. ON THE JUDICIARY, 98TH CONG., PROPOSED LEGISLATION TO ALLOCATE DAMAGES AMONG DEFENDANTS IN PRIVATE ANTITRUST LITIGATION (Comm. Print 1983), *reprinted in* 44 Antitrust & Trade Reg. Rep. (BNA) 280 (Feb. 10, 1983))).

161. A.B.A. ANTITRUST SECTION, *supra* note 6, at 17 ("Unfortunately, there is no systematic data which allows one to quantify the frequency or amounts of so-called coerced settlements."); Cavanagh, *supra* note 16, at 1301 ("A careful review of the legislative debates concerning damage allocation reform suggests that the unfairness arguments have been generated by a few well-publicized cases. The problem is hence not as pervasive as it might appear at first glance.").

162. A.B.A. ANTITRUST SECTION, *supra* note 6, at 18.

163. *See, e.g.*, Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370, 1372–73 (10th Cir. 1979) (examining Olson Farms's claim for contribution against Safeway Stores after Olson Farms had been previously found liable as the sole defendant in an antitrust suit).

164. Dickinson, *supra* note 20, at 172 (citing Peter G. Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111, 111 (1962)); *see also Antitrust Damage Allocation Hearings*, *supra* note 25, at 236 (testimony of William W. Schwarzer, J., Northern District of California) ("[I]n most antitrust cases, the plaintiffs tend to join all of those prospective or alleged wrongdoers who are solvent and are likely to be in a financial position to make a contribution, so it is not going to be a very common case in which a defendant will need to bring in additional parties, people that are obviously left out."); Jacobson, *supra* note 51, at 235 ("In the typical complex price-fixing class action, plaintiffs almost invariably join all conceivable parties . . . .").

165. Prof'l Beauty Supply, Inc. v. Nat'l Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting in part), *abrogated by* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

particular plaintiff decides to exclude its business partners as defendants, other potential plaintiffs could sue those price fixers who were not named in the previous lawsuit.

Furthermore, the unfairness arguments espoused by proponents of contribution are premised on the relative culpability of the price-fixing firms. Although some scholars talk about the possibility of "the most culpable defendants" paying less than "the least culpable defendants,"[166] the degrees-of-culpability concept fails to describe most cartels. All members of the price-fixing cartel do the same thing; some just have a greater market share and thus profit more from the conspiracy.[167] Simply because one firm in the cartel had a greater market share than another conspirator does not automatically mean the former is more culpable for the crime based merely on its greater volume of sales at the same artificially high price as its competitors.

Even if one were to accept the premise that one firm is more culpable than the others, it would be difficult to identify this firm with any precision or consistency. That one firm has a greater market share than the others does not necessarily mean that it is more culpable or necessarily caused more damage than the other members of the cartel. While courts may use market share to allocate financial responsibility in tort cases, price-fixing conspiracies are distinguishable because the firms with a smaller market share have enabled the firm with a larger market share to inflict injury. After all, if the smaller members of the cartel had not participated in the conspiracy, then the firm with a large market share would not have been able to successfully charge the cartel price.

In essence, every member of a price-fixing conspiracy is responsible for all of the damages. In many criminal conspiracies, a reluctant participant can generally be replaced by someone else with similar skills—for example, the safe cracker in a bank-robbing conspiracy. In contrast, the market determines which firms are necessary participants for a price-fixing conspiracy to succeed and

> [i]f any competitor insists on price competition, either the conspiracy will fail or the uncooperative competitor will dramatically increase

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166. Cavanagh, *supra* note 16, at 1290; *see also id.* at 1302 (discussing the "degree of culpability" among price-fixing conspirators).

167. If there is any firm that is "more culpable," it is the ringleader. But the ringleader is not necessarily the firm with the greatest market share. Also, it can be difficult to determine who the ringleader is. Leslie, *supra* note 149, at 480.

> its market share, to the benefit of the public paying lower prices and to the substantial detriment of the co-conspirators. The conspiracy is not likely to survive long under such circumstances.[168]

Depending on the market structure and concentration, each conspirator can be a but-for cause of all cartel injuries.[169]

Fairness arguments made in support of JSAs are also unpersuasive given their source. Although fairness arguments are most credible when made by innocents, those claiming the need for JSAs (or contribution) are generally wrongdoers in their own right.[170] When members of a price-fixing conspiracy attempt to share risk through a JSA, it is important to remember that the signatories are not merely intentional tortfeasors, they are often criminals.[171] For example, the party seeking contribution has often already pled guilty or nolo contendere to criminal price-fixing charges.[172] The unfairness

168. A.B.A. ANTITRUST SECTION, *supra* note 6, app. A at 69 (Minority Report on Contribution); *see also Antitrust Damage Allocation Hearings*, *supra* note 25, at 7 (statement of A. Stephens Clay, Esq., Kilpatrick & Cody) (discussing the need for cooperation from each member of a price-fixing conspiracy); A.B.A. ANTITRUST SECTION, *supra* note 6, at 21 ("For a cartel to be stable and effective, it must control enough of the production capacity of an industry so that when its members raise prices and correspondingly reduce output, outsiders cannot take up the slack."); Cavanagh, *supra* note 16, at 1296 ("[T]he success of a conspiracy depends on the participation of all members. In this 'one for all and all for one' atmosphere, it is difficult to assess individual liability based on degree of participation or benefits derived. In effect, responsibility is indivisible, and the concept of contribution is somewhat artificial."); Hutchinson, *supra* note 8, at 982 ("A policy holding all participants responsible for the effects of a concerted scheme is particularly appropriate in the antitrust area since, by economic necessity, the success of an anticompetitive scheme often depends on the participation of each. In a real sense, each defendant has caused the entire amount of damages." (footnote omitted)).

As Justice White noted in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), "neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the reach of § 1 of the Sherman Act," *id.* at 144 (White, J., concurring).

169. S. REP NO. 96-428, at 29 (1979) (supplemental views of Sen. Metzenbaum & Sen. Kennedy); Corbett, *supra* note 164, at 116 (citing City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23, 25–26 (6th Cir. 1903)).

170. Easterbrook et al., *supra* note 95, at 339 ("The first thing to be noted about the fairness issue is that the party claiming to have been unfairly treated is himself an intentional wrongdoer."); *see also* Floyd, *supra* note 51, at 213 ("[C]ontribution is inappropriate in the case of intentional wrongdoers . . . .").

171. This Article does not address unintentional violations, which are theoretically possible and have unique arguments in support of contribution. *See* Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc., 604 F.2d 897, 906–08 (5th Cir. 1979) (Morgan, J., concurring in part and dissenting in part) (arguing in favor of awarding contribution to unintentional antitrust violaters), *aff'd sub nom.* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

172. *See, e.g.*, *Tex. Indus.*, 451 U.S. at 633 n.4; USX Corp. v. Penn Cent. Corp., 738 N.E.2d

examples paraded out by procontribution commentators generally involve actual cartels, not false positives.[173] These parties were in total control of their risk of being subjected to an "unfair whipsaw." The easiest way to minimize the risk of being saddled with joint and several liability for treble the harm inflicted by a cartel is to not participate in a cartel in the first place.[174] Thus, it is difficult to feel sorry for Olson Farms—the lone defendant in a price-fixing case infamous for that reason—because "[a]lthough Olson Farms allegedly purchased only eleven percent of the eggs sold by the plaintiffs, without its cooperation the conspiracy might have broken up with no injury to the plaintiffs. In that sense, Olson Farms was responsible for the plaintiffs' entire loss."[175] While fairness arguments would be persuasive if advanced by innocent defendants,[176] the anecdotal evidence suggests that innocent firms do not enter into JSAs.[177] With a JSA, an innocent firm would be obligated to pay a percentage of the cartel overcharge, even if it did not participate in the cartel. True innocents can best protect themselves in court.[178] In contrast, for truly culpable defendants—who lobby for statutory contribution and

13, 19 (Ohio Ct. App. 2000) ("The evidence presented to the trial court showed that B & LE pleaded no contest to a criminal indictment for violating the Sherman Act by engaging in the iron ore conspiracy . . . .").

173. For example, after being the only party sued in an antitrust conspiracy, Olson Farms turned around and sued its co-conspirators, "alleging that they were participants in the unlawful conspiracy and thus liable to Olson Farms for contribution in respect to the judgment arising out of the original action." Dickinson, *supra* note 20, at 151. If Olson Farms wanted to avoid the joint and several liability conundrum, it could have easily obeyed the law.

174. *See* Easterbrook et al., *supra* note 95, at 364 ("[T]he prospective antitrust violator can avoid the harshness of the no-contribution rule simply by complying with the antitrust laws.").

175. Note, *supra* note 15, at 903–04 n.73.

176. *Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 6 (testimony of John Shenefield, Assistant Att'y Gen., Antitrust Division, Department of Justice) ("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."); S. REP NO. 96-428, at 19 (1979) ("[I]t is necessary to balance the desire to terminate antitrust cases in as rapid a manner as possible with the rights of the defendants to utilize the courts to assert their innocence.").

177. *See Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 72 (statement of Robert P. Taylor, Attorney) ("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.").

178. *See id.* at 51 (testimony of Lowell E. Sachnoff, Attorney); *see also, e.g.*, *id.* at 68 (statement of Donald G. Kempf Jr.) (discussing the need for defendants to be able to litigate their individual antitrust cases on the merits).

negotiate JSAs whenever possible—cries of unfairness ring hollow given the well-understood penalties for price fixing.[179]

Furthermore, any asymmetry in settlement amounts among price-fixing defendants raises fewer fairness concerns when one considers defendants' positions ex ante. Those critics who lament the higher payouts by later-settling defendants focus exclusively on the outcomes ex post.[180] This ignores the fact that all defendants generally have the same opportunity to approach plaintiffs with evidence and make a deal. Remaining silent in the hope that no member of the cartel will break ranks and having accepted the risk that its co-conspirators will settle first, the holdout defendant is not in a position to cry foul when its gamble does not pay off. At the time that a price-fixing suit is filed, there is ex ante equity among the suspected conspirators. Any defendant who does not want to be left holding the bag should provide evidence against its co-conspirators and settle. It cannot make credible fairness arguments based solely on ex post inequity.[181] As Professor Lawrence Sullivan explained to Congress during the 1980s debate over antitrust contribution:

> Any defendant that suffers a big verdict are [*sic*] not a hopeless victim. First, it made a decision to participate in an unlawful conspiracy, and did so in order to make monopoly profits at the expense of consumers. Next, it made a strategic decision not to settle on terms on which others did settle. There is no obvious reason why such a firm should be regarded as victims [*sic*] of unfairness.[182]

Even after the cartel is operating, each participating firm possesses the power to prevent itself from being "unfairly" saddled with the bulk of the liability—it can confess its participation in the

179. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 91 (statement of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf, P.C.) ("[T]he ancient maxim is: 'Equity is not concerned about contributions among persons who are engaged in an illegal activity.'").

180. *See, e.g.*, Jacobson, *supra* note 51, at 221 (discussing *In Re* Corrugated Container *Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex.), *aff'd*, 606 F.2d 319 (5th Cir. 1979)); Laura J. Lodawer, Note, *Contribution in Antitrust Actions: Is Fairness Reason Enough?*, 14 LOY. U. CHI. L.J. 575, 586 (1983) (same).

181. *But see* Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1543–44 (1980) ("[E]x ante equity cannot eliminate ex post inequity, for the ex post unfairness of a no-contribution rule remains regardless of the state of affairs ex ante.").

182. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 509 (letter from Lawrence A. Sullivan, Earl Warren Professor of Public Law, University of Chicago, The Law School, to Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary).

cartel to the DOJ's Antitrust Division in exchange for amnesty, which would immunize the firm from all criminal liability and limit any damages in private litigation to single damages.[183] Any defendant that finds itself at the end of the whipsaw has only itself to blame for not confessing to federal antitrust authorities in a timely manner. In short, the fact that a firm pays a higher settlement because it chose to join a price-fixing conspiracy and then failed to seek amnesty (or reach a settlement with plaintiffs) in a timely manner represents bad decisionmaking by the firm, not unfairness foisted upon it by an unjust system.

While many condemn the absence of contribution as facilitating antitrust plaintiffs' efforts to squeeze disproportionately large settlements out of *innocent* defendants,[184] this concern appears more fanciful than factual. First, rational antitrust plaintiffs would not pursue a strategy of granting sweetheart deals to culpable defendants in the hopes of coercing a large settlement out of an innocent party. An innocent defendant is more likely to win at trial, in which case the antitrust plaintiff receives nothing except the early cheap settlements. As the American Bar Association Minority Report on Contribution noted, "No plaintiff wants to try his case against the most innocent or poorest defendant. . . . Plaintiffs prefer to try their cases against the very bad, very rich defendants."[185] Second, defendants who believe that they can prove their innocence are more likely to resist paying a high settlement than defendants who know their liability will be established at trial. Thus, innocents are less susceptible to pressure than the guilty.[186] Rational plaintiffs would rather take advantage of

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183. *See* Status Report, U.S. Dep't of Justice Antitrust Div., Status Report: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program 7–10 (2004), *available at* http://www.usdoj.gov/atr/public/guidelines/202531.pdf (discussing the basics of the Antitrust Division's amnesty program).

184. *See* A.B.A. ANTITRUST SECTION, *supra* note 6, app. A at 66 (Minority Report on Contribution); Floyd, *supra* note 51, at 206 ("The more serious concern is that the settlement strategy employed by plaintiffs' counsel has operated in practice to permit larger and more culpable defendants to settle early, leaving smaller and innocent ones facing liability for an entire industry in a nationwide class action suit as a result."); *supra* notes 67–69 and accompanying text; *see also* A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447, 449 (1981) ("[T]he no contribution rule achieves deterrence by imposing greater risks on innocent parties.").

185. A.B.A. ANTITRUST SECTION, *supra* note 6, app. A at 66 (Minority Report on Contribution).

186. *See* Polinsky & Shavell, *supra* note 184, at 461 ("Defendants who are confident that

the most vulnerable target when seeking the big payoff from the last settlements.[187] Finally, no empirical evidence suggests antitrust plaintiffs normally enter into sweetheart deals in order to pursue innocent targets.[188]

Although many commentators bemoan the risk of antitrust plaintiffs using whipsaw tactics to harass smaller defendants in price-fixing conspiracy cases,[189] the story traditionally spun is facially implausible. It would be irrational for an antitrust plaintiff to give deep-pocket defendants the break because smaller defendants are more likely to avoid payment by declaring bankruptcy.[190] While evidence indicates that plaintiffs do in fact consider defendants' financial situation when negotiating and accepting settlement offers,[191]

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they have committed no violations . . . will tend to be relatively optimistic . . . .").

187. Floyd, *supra* note 51, at 192.

188. *See* S. REP NO. 96-428, at 37 (1979) (supplemental views of Sen. Metzenbaum & Sen. Kennedy) ("We have been presented with absolutely no evidence that the larger, more 'culpable' defendants routinely settle price-fixing suits early in the litigation."); A.B.A. ANTITRUST SECTION, *supra* note 6, app. A at 66 (Minority Report on Contribution) ("Whether such a dilemma has been so frequent and serious a phenomenon as to require legislative solution has not been proved. Certainly such a settlement approach does not comport with traditional litigation strategy."); *see also Antitrust Damage Allocation Hearings*, *supra* note 25, at 8 (statement of A. Stephens Clay, Esq., Kilpatrick & Cody) ("Speaking from experience, I can tell you that plaintiffs do not prefer to try their cases against the most innocent or the poorest defendants."); Floyd, *supra* note 51, at 206 ("It seems unlikely that plaintiffs' counsel would deliberately pursue a strategy of settling with larger, more culpable, and more financially responsible defendants at bargain rates in order that they might preserve their claims against innocent defendants who would be unable to discharge a jury verdict against them in any event.").

189. *See supra* notes 70–72 and accompanying text.

190. S. REP. NO. 96-428, at 38 (supplemental views of Sen. Metzenbaum & Sen. Kennedy) ("Plaintiffs have no interest in forcing a small company to bear the burden of lengthy and extraordinarily expensive litigation and the risk of bankruptcy."); *id.* at 37 ("Professor Rose points out that 'it is not known whether plaintiffs settle early with the larger defendants with any frequency. Moreover, it seems unlikely that plaintiffs would select large, more culpable defendants for easy treatment and consciously shift the burden of the judgment to smaller firms.'" (quoting Jonathan Rose, Professor, Sandra Day O'Connor Coll. of Law, Ariz. State Univ., Address at the ABA Antitrust Section Meeting (Aug. 13, 1979))); Easterbrook et al., *supra* note 95, at 343 ("At all events, there is no apparent reason why antitrust plaintiffs could generally seek to obtain disproportionately large recoveries from the smaller or less responsible defendants. If a plaintiff settles for a small amount with the larger defendants and proceeds to trial against the smaller defendants, he increases his risk that any judgment will be unsatisfied.").

191. Riemer, *supra* note 7, at 307 ("There is much evidence that plaintiffs do consider the financial condition of particular defendants in evaluating possible settlement terms."); *see also, e.g.*, *In re* Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 632 (E.D. Pa. 2004) (mentioning the plaintiff's assertion that the defendant's financial situation was a factor that affected the

this calculus favors smaller firms. Plaintiffs are generally willing to accept less money from smaller defendants.[192] This makes sense because large firms are more capable of paying a large settlement or a significant jury award.[193] Also, a savvy antitrust plaintiff will avoid taking only smaller firms to trial because they are better able to play on the jury's sympathy.[194] Finally, again, there is no evidence of plaintiffs using whipsaw tactics to force smaller firms to acquiesce to disproportionate settlement demands.[195]

For the same reasons that rational plaintiffs will not grant sweetheart deals to large players with deep pockets in order to create leverage against smaller or less culpable defendants, plaintiffs are unlikely to pursue a strategy that risks bankrupting their quarry. No rational plaintiff has an incentive to drive any defendant into bankruptcy or to otherwise render it judgment-proof; nor would it want the last settling firm to have even a credible threat of declaring bankruptcy. The threat of bankruptcy emboldens the targeted

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settlement amount).

192. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 93 (statement of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf, P.C.) ("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."); Riemer, *supra* note 7, at 294 n.33 ("Indeed, there is much evidence supporting the conclusion that plaintiffs consider a defendant's ability to pay in negotiating settlements and are likely to be satisfied with proportionately smaller recoveries from smaller defendants.").

193. *See* Hutchinson, *supra* note 8, at 984 ("Since a strong market power is often crucial to the plaintiff's case, it seems unlikely that a plaintiff would, without some qualms, allow a powerful defendant to buy its peace cheaply."); Polinsky & Shavell, *supra* note 184, at 455–56 ("[A] firm with large assets might expect to pay a disproportionately large share of joint damages since it might predict that the plaintiff will choose to collect a disproportionate share of joint damages from it.").

194. Easterbrook et al., *supra* note 95, at 343.

195. *See* S. REP NO. 96-428, at 37 (supplemental views of Sen. Metzenbaum & Sen. Kennedy) ("Neither have we seen any evidence demonstrating that small defendants are ultimately forced to settle against their will for unreasonable amounts because of earlier settlements by larger defendants."); A.B.A. ANTITRUST SECTION, *supra* note 6, at 14 ("The Subcommittee has also been given few, if any, examples in which small defendants were forced to shoulder grossly disproportionate liability for nationwide conspiracies." (quoting STAFF OF THE H. COMM. ON THE JUDICIARY, 98TH CONG., *supra* note 160)); Easterbrook et al., *supra* note 95, at 364 ("Nor is there persuasive evidence that some identifiable class of antitrust violators, such as small firms, are systematically at a disadvantage under the no-contribution rule compared to a contribution rule."); *see also Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 60 (testimony of Lowell E. Sachnoff, Attorney) (discussing the willingness of plaintiffs' attorneys to settle for smaller amounts with smaller defendants).

defendant and gives it leverage to pay less to an antitrust plaintiff.[196] Indeed, the risk of bankruptcy means that the plaintiff and defendant share a strong incentive to settle the litigation on mutually acceptable—and reasonable—terms. In antitrust class action litigation—in which proposed settlements must be approved by the court[197]—the risk that posttrial damages may bankrupt the defendant is a factor that courts consider in determining whether a settlement offer to the class is reasonable.[198] Not surprisingly, there is no empirical evidence of antitrust plaintiffs pursuing whipsaw settlement strategies that could bankrupt the remaining defendants.[199] In short, JSAs are not necessary to prevent antitrust litigation from driving firms into bankruptcy.

In sum, the fairness arguments in support of contribution—whether by statute, judicial fiat, or contract—are facially attractive, but wither under close scrutiny. The factual predicates of the fairness arguments—that small or innocent defendants are forced to pay disproportionately high settlements under threat of bankruptcy—are false. Furthermore, procontribution commentary generally fails to recognize that price-fixing defendants have constructed their dilemma through their own misdeeds. Finally, whatever their strength, the fairness arguments must be considered in light of other

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196. *See, e.g.*, Riemer, *supra* note 7, at 307 n.133 (discussing a memorandum filed by the plaintiffs in *In re Chicken Antitrust Litigation*, 560 F. Supp. 943 (N.D. Ga. 1979), in which "plaintiffs expressed willingness to settle with defendant H&H Poultry for less than the [amount] being demanded of other defendants because H&H was 'hovering on the brink of bankruptcy'" (quoting the memorandum)); *see also Antitrust Damage Allocation Hearings*, *supra* note 25, at 95 (statement of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf, P.C.) ("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."); S. REP NO. 96-428, at 37 (supplemental views of Sen. Metzenbaum & Sen. Kennedy) ("We have been presented with absolutely no evidence that the larger, more 'culpable' defendants routinely settle price-fixing suits early in the litigation. Neither have we seen any evidence demonstrating that small defendants are ultimately forced to settle against their will for unreasonable amounts because of earlier settlements by larger defendants.").

197. FED. R. CIV. P. 23(e).

198. *See, e.g.*, *In re* Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 746 (S.D.N.Y. 1985).

199. *See* A.B.A. ANTITRUST SECTION, *supra* note 6, at 14 ("After hearing extensive testimony on the issue, a House Subcommittee Staff Report concluded: 'The Subcommittee is aware of no case in which a small, relatively less culpable defendant has actually paid an outlandish judgment resulting in bankruptcy.'" (quoting STAFF OF THE H. COMM. ON THE JUDICIARY, 98TH CONG., *supra* note 160)).

considerations, such as deterrence of price-fixing conspiracies, as the next Section explores.

B. Judgment-Sharing Agreements Undermine Deterrence of Price Fixing

Any examination of JSAs must weigh the fairness arguments against the likely effects of these agreements on deterrence. The Supreme Court has often recognized that a "principal purpose of the anti-trust private cause of action is, of course, to deter anticompetitive practices."[200] No change in antitrust policy should take place without considering deterrence of antitrust violations, particularly price fixing.

Deterrence is a function of three factors: the size of penalties, probability of liability, and risk aversion. First, raising the penalties associated with a violation of the law generally increases deterrence. Second, increasing the likelihood that offenders will be caught and held liable raises the expected costs of wrongdoing and thus increases the probability that firms will conclude that the offense is not cost-beneficial. Third, a firm's level of risk aversion will affect what combination of penalties and probability of liability the firm is willing to accept. If a firm is risk averse, it "looks not only at the expected value of the risk, but also its absolute magnitude, and it avoids strategies that subject it to the potential of a greater absolute loss even if it is less likely to suffer that loss."[201]

If the availability of JSAs affects any of these factors, these agreements could shape the level of antitrust deterrence. Judgment-sharing agreements may affect all three variables. First, it may seem that JSAs should not change the penalty part of the deterrence calculation. In theory, JSAs should not influence the amount of damages in the event of liability because in a private case alleging horizontal price-fixing, the damages are treble the aggregate illegal overcharges charged by all of the cartel members, which should be a set number regardless of how the conspirators attempt to allocate liability through a JSA. While the above reasoning is true, it neglects the fact that the vast majority of price-fixing cases settle[202] and the

200. Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 572 (1982) (citation omitted); *accord* Pfizer v. India, 434 U.S. 308, 314 (1978); Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).

201. A.B.A. ANTITRUST SECTION, *supra* note 6, at 27–28.

202. *See* Cavanagh, *supra* note 91, at 813 ("The Georgetown data indicate that 88.2% of the

ultimate penalty is not a function of treble the overcharge, but rather what the parties negotiate. Because JSAs lead to smaller aggregate settlements,[203] they effectively reduce the penalty for price-fixing.

Second, even if JSAs do not affect the conspiracy's total damages upon a finding of liability, such agreements do diminish the probability that price fixers will be held liable for their antitrust violations. Previous analyses of the antitrust contribution issue have focused exclusively on the probability of *individual* liability assuming that the cartel as a whole is caught and successfully held liable.[204] This overlooks a more fundamental inquiry: how does the presence of a JSA affect the probability of the cartel as a whole evading liability? Economic analyses of the effect of contribution rules on deterrence have assumed that the probability of cartel detection (and subsequent liability) remains constant.[205] But this is not the case. JSAs reduce the probability of liability for two reasons. First, JSAs reduce the probability that one of the alleged co-conspirators will settle early, fund the litigation, and increase the pressure on the remaining defendants to settle.[206] Second, JSAs reduce the likelihood that inculpatory evidence will be collected.[207] While contribution rights increase the probability of individual accountability *if* the cartel is exposed, JSAs increase the probability of the cartel escaping liability altogether. Consequently, JSAs can reduce deterrence of price-fixing activity.

Third, JSAs may encourage price fixing among firms that are risk averse. Whether or not allowing contribution enhances or reduces

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antitrust cases surveyed settled.").

203. *See supra* notes 96–106 and accompanying text.

204. *See, e.g.*, Hutchinson, *supra* note 8, at 971–72 (discussing the availability of contribution as a factor in a business's cost-benefit analysis before entering a price-fixing conspiracy).

205. *See, e.g.*, Easterbrook et al., *supra* note 95, at 353 ("Yet even if these conditions do not obtain, the choice between contribution and no contribution is not affected, at least as a first approximation, because that choice does not affect the total damages assessed for unlawful joint action but only the distribution of the damages (ex post, and sometimes ex ante) among those who participate in the joint action."); Polinsky & Shavell, *supra* note 184, at 450–52 (calculating the business incentives both with and without contribution rules but keeping the probability of detection constant).

Congress, too, assumed no effect on the amount of money the plaintiff could recover. *See* S. REP NO. 96-428, at 2 (1979) ("S. 1468 would not, however, change the principle of joint and several liability and thus would not impair the plaintiff's rights vis-à-vis any defendant."). That is incorrect. *See supra* notes 96–106 and accompanying text.

206. *See supra* notes 39–54 and accompanying text.

207. *See supra* notes 125–46 and accompanying text.

deterrence will largely be a function of price-fixing firms' willingness to accept risk. If firms are risk neutral—and the total penalties and the probability of liability are held constant—contribution rules should theoretically not affect deterrence. Professors Polinsky and Shavell explain, "[U]nder no contribution, each defendant faces some probability of having to pay the entire judgment. Under contribution, all defendants share the entire judgment, so that each faces a higher probability of having to pay an amount proportionally less than the entire judgment."[208] A risk-neutral firm is indifferent between facing a 10 percent probability of paying $80,000,000 and an 80 percent probability of paying $10,000,000.[209] Each has an expected cost of $8,000,000. The risk-neutral firm is concerned only with the expected value of alternatives, not the absolute magnitude of any particular outcome.[210] If the disastrous outcome has a sufficiently low probability, the risk-neutral firm will pursue a potentially perilous course so long as that option has a preferable expected value compared to the available alternatives.

If firms are risk averse, then allowing contribution in antitrust cases would diminish deterrence. The risk-averse firm focuses not solely on the relative expected values of various options, but also on the absolute magnitude associated with each alternative.[211] Thus, a risk-averse firm may decide to pay a $6,000,000 fine instead of accepting a 5 percent probability of paying a $100,000,000 fine. The latter has a lower expected cost—$5,000,000 versus $6,000,000—but the absolute amount of money at risk in the second scenario is staggering. The more risk averse a firm is, the more likely that it will be deterred by a no-contribution regime.[212] For risk-averse firms, "economists agree that the deterrent effect of [the] no contribution rule exceeds the deterrent effect of contribution or claim reduction since it exposes the potential wrongdoer to a risk of greater absolute magnitude."[213] For firms whose desire to remain an ongoing business

208. Polinsky & Shavell, *supra* note 184, at 450–51.

209. I have made the probability under the contribution regime 80 percent instead of 100 percent to reflect the uncertainty that any member of the cartel will be held liable.

210. Polinsky & Shavell, *supra* note 184, at 450 ("Risk neutral firms consider only the 'expected value' of a risky situation—that is, the magnitude of the risk discounted by its probability.").

211. *Id.* at 452.

212. *See* BREIT & ELZINGA, *supra* note 45, at 34.

213. A.B.A. ANTITRUST SECTION, *supra* note 6, at 28; *see also* Cavanagh, *supra* note 16, at

is paramount, the threat of debilitating damages is a greater deterrent than a higher probability of lower damages.[214] In rejecting a right to contribution among antitrust defendants, the Fifth Circuit reasoned, "that very possibility of imposition of sole liability has an enhanced deterrent effect. The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share."[215]

While there is no general consensus among economists,[216] much theoretical[217] and empirical evidence[218] suggests that firms are, in fact, largely risk averse. Firms often behave in a risk-averse manner, such as by purchasing property and liability insurance.[219] The risk aversion of antitrust defendants is also sometimes indicated by their strong

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1307 ("[I]f a firm is risk averse a contribution rule may provide less deterrence.").

Yet even before the development of modern economics and congressional enactment of the Sherman Act in 1890, courts had long recognized that a low likelihood of being held liable for all of the damages may be a better deterrent than allocating financial responsibility among all the wrongdoers. *See* Rhea v. White, 40 Tenn. (3 Head) 90, 91 (1859) ("[T]here can be no contribution between wrongdoers. The reason of this is, that they may be intimidated from committing the wrong, by the danger of each being made responsible for all the consequences.").

214. *See* Hutchinson, *supra* note 8, at 976 ("The desire that the business survive probably provides a restraint powerful enough to outweigh even an owner's strong profit motive. Smaller businesses, even more than their larger counterparts, can ill afford the cost of antitrust violations, particularly under a no-contribution rule.").

215. Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc., 604 F.2d 897, 901 (5th Cir. 1979), *aff'd sub nom*. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

216. Cavanagh, *supra* note 16, at 1309 ("Whether firms are, in fact, risk averse has generated much scholarly debate but has produced no consensus."); Easterbrook et al., *supra* note 95, at 352 n.50 ("We conclude that the extent and intensity of risk aversion among firms is an unsettled empirical question.").

217. *See, e.g.*, Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55, 56–57 (1979) (presenting theoretical model of firms' risk aversion).

218. *E.g.*, KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 128–29 (1976); Hutchinson, *supra* note 8, at 974 n.81 ("Empirical data supports the existence of risk aversion among a significant population of the business community."); *see also Antitrust Damage Allocation Hearings*, *supra* note 25, at 450 (letter from Lowell Sachnoff, Esq., Sachnoff Weaver & Rubenstein, Ltd, to Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary) ("Top level corporate managers are intensely risk averse . . . ."); Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1267 (1995) (arguing that, in the context of class action settlements, "[m]ost people are risk averse, preferring a certain resolution to an uncertain opportunity").

219. Polinsky & Shavell, *supra* note 184, at 452 n.18.

preference for settlement over litigation.[220] Importantly, firms operate through managers, who are often conservative by nature and prone to pursue less risky paths, lest a large mistake cost them their careers.[221]

Price-fixing firms, in particular, have demonstrated aversion to risk by entering into JSAs.[222] Signatories to JSAs are risk averse by definition—they would rather pay a proportion of total damages than risk paying a greater percentage of the plaintiff's total damages, even though the latter risk is low and includes the possibility of paying no damages at all.[223] Also, firms in judgment-sharing arrangements want to avoid risk so much that they are willing to pay transaction costs to negotiate JSAs in order to avoid the high-cost, lower-risk event of being held liable for the bulk of the harm caused by the cartel. Price fixers incur these transaction costs in order to spread risk. All of this suggests that JSAs actually reduce cartel deterrence. For risk-averse firms, the prospects of significant damages awards can deter price-fixing activity. But JSAs effectively cap a price-fixing firm's exposure in antitrust litigation, which undermines deterrence.[224]

In addition to reducing the maximum penalty, JSAs may also diminish deterrence by providing greater certainty to firms engaged in illegal price-fixing. Uncertainty can increase deterrence of conspiracies.[225] Firms often share a general distaste for uncertainty.

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220. *See* Cirace, *supra* note 55, at 49 n.20.

221. *See* Cavanagh, *supra* note 16, at 1309 ("A respectable body of literature urges that corporate managers are risk averse."); Dickinson, *supra* note 20, at 188 ("[P]revailing economic theory . . . labels modern managers as generally risk averse.").

222. *See* CHARLES A. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES 314–15 (1973). While some commentators have suggested that firms breaking the law may actually have a preference for risk, A.B.A. ANTITRUST SECTION, *supra* note 6, at 29 ("[W]hen considering the behavior of firms which are prone to violate the law, an assumption of risk preference might even be appropriate . . . ."), firms in illegal cartels are not necessarily risk seekers because price-fixing may have a positive expected value even under bad conditions, such as when the cartel is exposed and its members are held liable, *see, e.g.*, Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329, 341 n.48 (2004) ("[R]esearch demonstrates that the international vitamin cartel generated the largest total of antitrust fines and penalties in history, which are calculated to be between $4.4 and $5.6 billion. But the cartel's monopoly profits in all areas of the world were $9 to $13 billion." (quoting Brief for Professors Darren Bush et al. as Amici Curiae Supporting Respondents at 4, Empagran, S.A. v. F. Hoffman-LaRoche, Ltd., 542 U.S. 155 (2004) (No. 03-724), 2004 WL 533933)).

223. This statement assumes a constant probability of detection. To the extent that JSAs reduce the probability of detection, signatories to JSAs could arguably be risk neutral.

224. *See Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 62 (statement of Lowell E. Sachnoff).

225. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 13 (testimony of Stephen D.

Indeed, one of the primary reasons that some firms enter price-fixing conspiracies is to reduce uncertainty. For example, in the infamous electrical equipment cartels of the 1950s and 1960s, "the attractiveness of a secure market arrangement represented a major ingredient drawing corporate officers to the price-fixing violations. The elimination of competition meant the avoidance of uncertainty, the formalization and predictability of outcome, the minimization of risks."[226] By significantly limiting the maximum damages that any one cartel member could be forced to pay, JSAs can result in risk-averse firms concluding that price-fixing is either cost-beneficial or at least an acceptable gamble.[227]

If uncertainty is the Achilles' heel of price-fixing firms, antitrust policy should retain that vulnerability. But JSAs provide a measure of certainty by eliminating the risk that a firm will be held liable for all of the damages associated with the cartel. By entering into JSAs, firms set the percentage of damages that they are comfortable accepting instead of competing against each other to make a better deal with the plaintiff. This weakens deterrence.[228] With a JSA in place, firms can more accurately perform a cost-benefit analysis on the wisdom of joining a price-fixing conspiracy.[229] In the absence of a contribution mechanism, firms considering joining a cartel may be unable to conduct cost-benefit analysis with sufficient confidence.[230]

Susman, Esq., Susman & McGowan); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1342–43 (2003).

226. Geis, *supra* note 126, at 150.

227. *Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 50 (statement of Lowell E. Sachnoff) ("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.").

228. Cavanagh, *supra* note 16, at 1314 ("Deterrence may be weakened if price-fixers are permitted to allocate damages among themselves rather than face liability for all damages inflicted by a conspiracy.").

229. *Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 27–28 (statement by John Shenefield, United States Assistant Att'y Gen., Antitrust Division, Department of Justice) ("By amending this system so that each conspirator is liable only for that portion of total damages 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."); Cavanagh, *supra* note 16, at 1297 ("In addition, because a contribution rule makes individual liability more certain, it is easier, at least in theory, to develop a cost-benefit analysis regarding a company's illegal acts.").

230. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 12 (statement of Stephen D.

However, the JSA provides greater precision and predictability in the decision to join a cartel[231] and, with the maximum punishment capped by the JSA, a firm may be more likely to conclude that price-fixing is worth the risk.[232]

Some commentators assert that price-fixing firms do not perform cost-benefit analyses[233] and, even if they did, criminal sanctions and treble damages would be sufficient to deter antitrust violations.[234] These arguments are unpersuasive. First, like all business decisions, executives weigh the costs and benefits of cartel participation—price fixing is never a crime of passion. Second, these sanctions are currently inadequate, as proven by the fact that major firms continue to fix prices and enter JSAs to spread the penalties. Third, these arguments assume that defendants actually pay treble damages, but even defendants found liable often pay less than single damages[235] and most antitrust claims settle for pennies on the dollar.[236] Thus, if

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Susman, Esq., Susman & McGowan) ("In addition, the no-contribution rule helps prevent the type of cost-benefit analysis of potential price fixing that would so easily occur if each defendant knew in advance that it will have to pay a predictable share of the conspiracy damages.").

231. *Id.* at 82 (testimony of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf, P.C.) ("[JSAs] can give precise dollar amounts; they can give precise product amounts; they can give precise percentages of sharing, which they did."); S. REP. NO. 96-428, at 33 (1979) (supplemental views of Sen. Metzenbaum & Sen. Kennedy) (discussing the predictability afforded by JSAs).

232. *See* A.B.A. ANTITRUST SECTION, *supra* note 6, at 24 ("Opponents claim that if potential wrongdoers knew in advance the amount of their potential liability, which would ordinarily be much less than the potential liability of the conspiracy as a whole, the balance against the expected return of the crime would more often tip in favor of violating the law.").

Because contribution provides firms a way to reduce uncertainty, one early court rejected contribution in antitrust cases, "believ[ing] that the deterrent effect of the antitrust laws may be increased by not permitting defendants to redistribute the cost of an antitrust violation." El Camino Glass v. Sunglo Glass Co., No. C-75-2492 AJZ, 1976 WL 1382, at *3 (N.D. Cal. Apr. 28, 1976).

Although some contribution proponents have asserted that price-fixers do not engage in cost-benefit analysis, *see, e.g.*, *Antitrust Damage Allocation Hearings*, *supra* note 25, at 233 (letter from Hon. Charles B. Renfrew, Pillsbury, Madison & Sutro, to members of the H. Subcomm. on Monopolies and Commercial Law), the weight of theoretical and empirical evidence suggests that price fixers do, *see id.* at 449 (letter from Lowell Sachnoff, Esq., Sachnoff Weaver & Rubenstein, Ltd, to Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary).

233. *See, e.g.*, *id.* at 233 (letter from Hon. Charles B. Renfrew, Pillsbury, Madison & Sutro, to members of the H. Subcomm. on Monopolies and Commercial Law).

234. *See, e.g.*, *id.* at 145 (statement of Robert P. Taylor, Esq., Pillsbury, Madison & Sutro); *id.* at 233 (letter from Hon. Charles B. Renfrew, Pillsbury, Madison & Sutro, to members of the H. Subcomm. on Monopolies and Commercial Law).

235. Lande, *supra* note 222, at 341 n.48.

236. *See* Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 51 ARIZ. L. REV. 1009, 1035–36 (2008).

defendants are only responsible for damages associated with their own sales and they pay less than single damages for their overcharges, price-fixing firms can profit from their misdeeds even if caught. In short, by eliminating joint and several liability, JSAs minimize the effect of treble damages.

But perhaps the most persuasive evidence that JSAs reduce deterrence is the fact that price-fixing firms—not simply firms accused of price-fixing, but firms actually convicted in criminal proceedings—have embraced such agreements so enthusiastically.[237] Convicted price-fixing firms championed the contribution legislation debated (though ultimately rejected) in the 1980s.[238] The previous national debates about contribution in antitrust litigation often failed to consider how price-fixing firms themselves viewed the ability to allocate antitrust liability based on market share, though some commentators observed that "the very distaste that antitrust violators show for the traditional no-contribution rule in itself demonstrates the deterrent value of that rule."[239] The proliferation of JSAs provides more concrete evidence that price-fixing firms prefer to manage the risks of their illegal conduct by preapportioning damages. This does not bode well for cartel deterrence: price-fixing firms would not enter into JSAs if such agreements reduced the expected profitability of cartel activity. Thus, when price-fixing firms and their counsel champion JSAs as increasing deterrence and facilitating settlements,[240] one must consider the source and be suspicious that alleged, potential, and actual price-fixing firms tout the deterrent effect of contribution, but antitrust victims do not. Indeed, innocent firms shun JSAs.[241]

237. *See, e.g.*, BANE, *supra* note 222, at 234, 314–15.

238. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 81 (testimony of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf, P.C.) (stating that the movement to create a statutory right to contribution in price-fixing cases "originated a few years ago with a very small group of companies in the forest products industry who were engaged in probably the most extensive series of price-fixing conspiracies this country has seen since the electrical conspiracies of 20 years ago in the early 1960's").

239. *Id.* at 17 (statement of Stephen D. Susman, Esq., Susman & McGowan).

240. *See id.*; *id.* at 145 (statement of Robert P. Taylor, Esq., Pillsbury, Madison & Sutro).

241. *Id.* at 7 (statement of A. Stephens Clay, Esq., Kilpatrick & Cody) ("Defendants who prefer settlement to long-term litigation generally avoid sharing agreements. They view litigation as an intolerable expense and risk. They believe themselves innocent, but they are willing to pay a price to get out of the case.").

Unfortunately, to date, courts have not appreciated the detrimental effects that JSAs may have on deterring antitrust violations. Without much analysis, some courts have rejected the argument that JSAs undermine deterrence and have, consequently, declined to invalidate JSAs.[242] For example, the Oklahoma district court in *Cimarron* asserted that because JSAs do not violate antitrust laws "the argument that such agreements should be prohibited due to the policy of deterrence in those laws should logically fail as well."[243] In essence, the court assumed the legal conclusion—that JSAs are not themselves illegal—and then rejected any argument at odds with this predetermined conclusion. A better understanding of the potential anticompetitive effects of JSAs may induce greater judicial scrutiny of such contracts.

C. Low Risk of Overdeterrence

Although some worry that the staggering individual damages made possible by the lack of contribution in treble-damage antitrust actions could deter beneficial conduct,[244] those arguments hold little water in the context of price-fixing cases. Overdeterrence concerns should inform discussions when the scope of antitrust law is imprecise.[245] But they do not really apply when the illegal conduct is well defined and clearly without redeeming value, such as price-fixing conspiracies.[246] As former Assistant Attorney General William Baxter

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242. *See, e.g.*, Fireman's Fund Ins. Co. v. W. Nat'l Mut. Group, 851 F. Supp. 1361, 1365–66 (D. Minn. 1994); Cimarron Pipeline Constr. v. Nat'l Council on Comp. Ins., Nos. CIV-89-822-T, CIV-89-1886-T, 1992 WL 350612, at *2 (W.D. Okla. Apr. 10, 1992) ("The deterrent effect of the severe penalties imposed upon a party convicted of committing antitrust violations cannot be deemed to be outweighed by the benefits of a sharing agreement as the Plaintiffs contend.").

243. *Cimarron Pipeline Constr.*, 1992 WL 350612, at *2.

244. *See, e.g.*, *Antitrust Damage Allocation Hearings*, *supra* note 25, at 145 (statement of Robert P. Taylor, Esq., Pillsbury, Madison & Sutro) ("[O]ne must consider the danger that exposure to massive liability may deter desirable, pro-competitive business behavior."); Note, *supra* note 181, at 1545 ("Indeed, prohibition of contribution could overdeter corporations from performing acts bordering upon antitrust violations but beneficial to society."); *supra* notes 87–90 and accompanying text.

245. *See* Polinsky & Shavell, *supra* note 184, at 462–63.

246. *Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 17 (testimony of John Shenefield, Assistant Att'y Gen., Antitrust Division, Department of Justice) ("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."); A.B.A. ANTITRUST SECTION, *supra* note 6, at 25 ("[I]t is highly questionable whether unambiguously criminal conduct such as

noted "[b]ecause true cartel behavior can never yield any benefit, by definition it cannot be overdeterred."[247]

Importantly, firms concerned about forgoing efficient agreements out of fear of antitrust liability—magnified by the risk of joint and several liability without contribution—can protect their legitimate activities in a variety of ways. For example, they can create a legitimate joint venture, which could eliminate antitrust liability altogether.[248] Alternatively, antitrust law already contains mechanisms to prevent deterrence of beneficial collaborations. For example, the National Cooperative Research and Production Act and the Standards Development Organization Advancement Act of 2004 provide for single damages for members of properly registered joint ventures and Standard Setting Organizations that are found liable for violating the Sherman Act.[249] Notably, none of these judicial or legislative initiatives existed during the last congressional contribution debate in the 1980s. These avenues would significantly reduce any antitrust exposure while simultaneously providing some

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hard core price fixing can ever be overdeterred."); BREIT & ELZINGA, *supra* note 45, at 35 ("If horizontal price fixing could be correctly defined, the problem of overdeterrence could not occur since horizontal price fixing has little if any social benefit."); Cavanagh, *supra* note 16, at 1297 ("The argument that the present system overdeters is more theoretical than real. . . . [T]he primary target of the no-contribution rule is horizontal price-fixing, which has no socially useful benefits and hence cannot be overdeterred.").

The risks of overdeterring beneficial behavior seem greatest in Section Two cases and in Section One cases involving vertical restraints. In the context of Section Two of the Sherman Act—which condemns unilateral conduct characterized as monopolization or attempted monopolization—an efficient competitor could theoretically be deterred from competing aggressively but legitimately. While this risk is real, it is unaffected by the presence or absence of JSAs because there are rarely multiple defendants in Section Two cases. Because JSAs are not seen in Section Two litigation, condemning them is unlikely to chill the zeal of an aggressive competitor. In contrast, Section One cases involving restraints generally involve multiple defendants. Vertical restraints are more likely to increase efficiency than horizontal restraints and thus antitrust should be more concerned about deterring efficient vertical agreements. But JSAs appear not in vertical restraint cases, but rather in horizontal price-fixing cases. *See, e.g.*, *In re* Cement & Concrete Antitrust Litig., 817 F.2d 1435, 1439 (9th Cir. 1987).

247. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 466 (letter from William F. Baxter, Assistant Att'y Gen., Antitrust Division, Department of Justice, to Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary); *see also id.* at 9 (testimony of Stephen D. Susman, Esq., Susman & McGowan) ("Everyone admits, however, that there is nothing socially useful about price fixing, and therefore you could not only triple damages, quadruple, tenfold, twentyfold damages, and there would be no danger whatsoever of deterring socially useful conduct.").

248. Texaco Inc. v. Dagher, 547 U.S. 1, 8 (2006).

249. 15 U.S.C. §§ 4301–05 (2006).

assurance that the firms' activities were not unreasonably anticompetitive. Most notably, these protective measures require the firms to make their relationship public, as opposed to JSAs, which are often confidential and do not alert antitrust authorities or affected private parties about any suspect cooperation among competitors.[250]

D. Balancing Deterrence and Unfairness

To the extent that the whipsaw creates some unfairness while nevertheless enhancing deterrence of price-fixing, the need for deterrence outweighs the desire to facilitate fairness among conspirators. Automatic trebling of damages might not be particularly fair but when Congress originally made the trade-off between deterrence and fairness, the former prevailed. Congress opted for treble damages because—while harsh—it would increase deterrence.[251] Congress focused on the need to protect consumers from price fixers, not the need to protect price fixers from their co-conspirators.[252] In rejecting a right to contribution in antitrust litigation, the Supreme Court noted that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."[253] In short, deterrence of price-fixing is more important than fairness among price fixers.

Fairness is not irrelevant, but at the margin when trading off between fairness and deterrence, deterrence trumps. Some judges have upheld JSAs because they "can 'ameliorat[e] [the] harsh result' that joint and several liability can pose."[254] But courts are not

250. *See infra* notes 256–58 and accompanying text.

251. Hutchinson, *supra* note 8, at 978 ("Had Congress been concerned with ensuring that defendants not pay more than the damages they actually caused, it would have limited the liability to that amount. Instead, it enacted a provision whose most salient features are deterrent: the provision magnifies the defendant's penalty and, by overcompensating plaintiffs, induces them to bring suit.").

252. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) ("Moreover, it is equally clear that the Sherman Act and the provision for treble-damages actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade.").

253. *Id.*

254. Phillip A. Proger & Deborah Platt Herman, *The Price of Price Fixing Through International Cartels*, 1999 BUS. L. INT'L 24, 48 (quoting *In re* Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C 897, MDL 997, 1995 WL 221853, at *4 (N.D. Ill. Apr. 11, 1995) (mem.)).

supposed to ameliorate the harsh results of congressional policies to deter violations and compensate victims.

V. How Antitrust Law Should Address Judgment-Sharing Agreements

Despite the potential for price-fixing firms to employ a JSA as a cartel-stabilizing device, antitrust law does not recognize the anticompetitive consequences of such agreements. Those few courts to consider JSAs have upheld them as legitimate risk-spreading mechanisms.[255] Unfortunately, much of the legitimacy of JSAs stems from the fact that too little is known about them. Price-fixing defendants negotiate them in private and their terms are generally kept confidential. This Part advocates greater transparency and discoverability of JSAs so that judges and scholars can study and better understand their effects. Based on future empirical work, courts should revisit their approval of JSAs. If courts were to denounce JSAs because they stabilize cartels, judicial condemnation can either be weak (by rendering JSAs unenforceable) or strong (by treating JSAs as illegal restraints of trade under Section One of the Sherman Act). This Part considers both options and concludes that either approach would currently be premature given our incomplete knowledge of the net effects of actual JSAs. Instead of arguing that JSAs represent an antitrust violation in and of themselves, this Article advocates a role for JSAs in proving the existence of an underlying illegal price-fixing conspiracy.

A. A Call for Greater Transparency

The primary problem with advocating any significant change in the law regarding JSAs is the lack of any meaningful empirical data on their terms and effects. Before courts condemn a species of contract that has existed for decades, they need a better understanding of when these agreements are negotiated, what their terms are, who enters into such agreements, and whether JSAs tend to act as cartel-stabilizing devices. A better understanding of these issues will help judges, scholars, and attorneys assess the anticompetitive potential in any given JSA. The actual terms of JSAs

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255. Riemer, *supra* note 7, at 316 ("Current antitrust doctrine establishes that sharing agreements do not violate the Sherman Act.").

will determine their anticompetitive potential,[256] but no systematic research has been done on the subject.

Two important aspects of JSAs that need exploration are when they are entered into and who enters into them. First, the timing of when JSAs are negotiated and signed is significant and warrants study. Co-conspirators could enter into JSAs either before or after the threat or onset of litigation. Some commentators assume that firms enter JSAs only after an antitrust violation is detected.[257] But most JSAs exist in secrecy and little is known about their terms or timing. At least some JSAs have been in place years before litigation began.[258] And the timing of the agreement may be important in evaluating its anticompetitive impact. Price-fixing firms may enter into a JSA before the onset of antitrust litigation because it provides assurance to risk-averse firms considering whether to join a cartel. Because the pressure to settle will exist once a price-fixing suit is filed, some executives may only feel comfortable participating in the conspiracy if the JSA is in place at the outset.[259] After an antitrust lawsuit is filed, price-fixing defendants are often unable to reach a judgment-sharing accord given their divergent individual incentives at that point.[260] Judgment-sharing agreements can be difficult and time-

256. *See infra* notes 300–02 and accompanying text.

257. *See, e.g.*, Mary B. Cranston & John S. Kingdon, *Judgment Sharing Agreements*, *1985 Research Project of the Civil Practice and Procedure Committee*, ABA SEC. ANTITRUST L. 8 (1985) (on file with the *Duke Law Journal*) ("A sharing agreement does not necessarily lessen any deterrent value to the treble damages remedy since it is negotiated and executed after any alleged wrongdoing and the filing of a lawsuit."); Riemer, *supra* note 7, at 314 ("Common-law principles of contracts also suggest that, because sharing agreements are entered into only after the occurrence of a violation, such agreements cannot contravene the policy of deterrence." (footnote omitted)).

The assumption is reasonable given that most publicly known JSAs were apparently negotiated after litigation was filed. *See, e.g.*, *Antitrust Equal Enforcement Act Hearings*, *supra* note 25, at 71 (statement of Robert P. Taylor) (discussing the *Western Asphalt* litigation).

258. Discovery in some products liability litigation has revealed judgment-sharing agreements that have been in place for over two decades before being disclosed during litigation. *See, e.g.*, Plaintiffs' Response to Defendants' Memorandum of Law in Opposition to Production of Joint Defense Agreement at 1, *In re* Welding Fume Rod Prod. Liab. Litig., No. 1:03-CV-17000, 2005 WL 5408315 (N.D. Ohio Dec. 5, 2005), 2005 WL 3671330.

259. *See* Reimer, *supra* note 7, at 313 ("A risk-averse firm, weighing the value and risks of violating the antitrust laws, likely has no assurance that the other potential co-conspirators will agree to enter into a sharing agreement if, after the violation, they are sued by the injured parties.").

260. *See, e.g.*, *id.* at 313 n.175.

consuming to negotiate.[261] A firm worried that one of its cartel partners may defect and provide evidence to an antitrust plaintiff would rather negotiate and sign this agreement in advance before a lawsuit is filed and the cartel partners have greater incentive to defect.

Second, judges and scholars need to understand *who* enters into JSAs. Firms that have not engaged in illegal price fixing should be able to enter into private agreements to spread litigation risk. But this raises the issue of which firms actually take advantage of JSAs. Most judgment-sharing agreements are confidential,[262] which makes generalizing about the signatories to these agreements difficult. Of those judgment-sharing agreements that have been exposed, however, many involve firms that have, in fact, engaged in illegal price fixing.[263] If these cases are typical, this reality holds great significance for antitrust jurisprudence. For example, if JSAs are used primarily—or perhaps even exclusively—by firms that actually belonged to price-fixing cartels, that can help build a case for condemning such agreements and expanding the range of reasonable inferences that may be drawn from their existence.

How can scholars and policymakers learn more about these and other aspects of JSAs? Two primary avenues exist to make JSAs more transparent. First, federal antitrust authorities could take the lead. For example, the Federal Trade Commission (FTC) could require firms to register their judgment-sharing agreements. If the plaintiff could prove that the defendants had entered into a judgment-sharing agreement but had not properly registered it with the federal government, this could create a rebuttable presumption that the judgment-sharing agreement operated as a cartel-stabilizing device. Section 6 of the Federal Trade Commission Act grants the FTC the authority to use its subpoena powers to pursue investigations.[264] Using its powers, the FTC could subpoena and review JSAs, publishing the results of its study.[265] FTC review of otherwise confidential

261. *Civil Remedies Issues: Hearings Before the Antitrust Modernization Commission* 14–15 (2005) (statement of Harry M. Reasoner, Esq., Vinson & Elkins L.L.P.), http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Reasoner.pdf.

262. *See supra* note 29 and accompanying text.

263. *See, e.g.*, BANE, *supra* note 222, at 234.

264. 15 U.S.C. § 46(b) (2006).

265. *Id.* § 46(f).

settlements is not unprecedented: due to the risk of anticompetitive collusion, settlements between patent applicants in an interference proceeding must be registered with the FTC, or else the resulting patent will be rendered unenforceable.

Second, JSAs should be discoverable in private antitrust litigation against alleged price fixers. Although courts sometimes order production of JSAs,[266] plaintiffs are generally unaware of the presence of JSAs and, even when they know a JSA exists, plaintiffs are often kept ignorant of the JSA's terms.[267] Courts often hold that JSAs are not discoverable.[268] Judges have reasoned that "[j]udgment sharing agreements are, in effect, a form of settlement, and drafts of settlements and settlement negotiations among counsel are generally not discoverable."[269]

JSAs should be discoverable for several reasons. First, the existence and terms of JSAs are relevant to the issue of witness bias.[270] It is common for defendants to settle and testify against their former cartel partners, and for codefendants at trial to blame each other. If the defendants in a price-fixing trial are not blaming each other, the jury may wonder why. If kept unaware of a JSA, the jurors may infer that there was no cartel. The jury—or judge in a bench trial—should know about the terms of any JSA because those terms can alter the defendants' incentives regarding testimony and trial strategy. Second, JSAs should be discoverable because they may provide significant evidence about which firms were participants in—or may have relevant information about—the alleged price-fixing conspiracy. The content and circumstances behind the JSA may expose

266. *See, e.g.*, Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., Nos. 98 Civ. 861 RWS, 99 Civ. 3607 RWS, 2003 WL 1345136, at *5 (S.D.N.Y. Mar. 19, 2003); Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., No. 98 Civ. 861 RWS, 2003 WL 135653, at *2 (S.D.N.Y. Jan. 16, 2003) (mem.); *In re* Terazosin Hydrochloride Antitrust Litig., No. 991317 MDL, 2002 WL 31761289, at *1 (S.D. Fla. Mar. 1, 2002).

267. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 150 (testimony of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf, P.C.) ("In many cases, the plaintiffs don't even know the terms of [the JSA]."); Cranston & Kingdon, *supra* note 257, at 2 ("The challenges that have thus far been made by plaintiffs' counsel have been either attempts to discover the contents of the agreement, or to void the agreement altogether as contrary to public policy. So far, neither challenge has proved successful in court.").

268. A.B.A. ANTITRUST SECTION, *supra* note 35, at 61 (noting that "courts have refused to order production of [judgment-sharing] agreements in discovery" (citations omitted)).

269. *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 221853, at *4.

270. *See, e.g.*, *Geneva Pharm. Tech. Corp.*, 2003 WL 135653, at *2.

knowledgeable individuals who should be deposed. Third, knowing the terms of the JSA could help the plaintiff reach partial settlements.[271]

Signatories to JSAs generally argue that the details of their agreements are privileged.[272] However, it is unlikely that a pre-existing JSA is properly covered by any privilege. First, attorney-client privilege should not apply because the agreements are not communications between attorneys and clients in search of legal advice.[273] Furthermore, the privilege does not protect communications made in furtherance of a future crime or fraud.[274] To the extent that a JSA is part and parcel of a price-fixing conspiracy, the document falls outside the protection of the attorney-client privilege. Second, JSAs are not protected under work-product doctrine, which is narrowly interpreted to apply to an attorney's impressions, observations and opinions.[275] Also, the crime-fraud exception applies here as well.[276] Most importantly, JSAs are agreements among alleged conspirators. At a minimum, courts should know the contents of JSAs. If JSAs are privileged, then cartels could embed price-fixing agreements within JSAs and conceal their illegal contracts from view.[277] Indeed, if privilege extended to agreements between competitors, price-fixing agreements themselves could arguably be privileged, an absurd result that no court should countenance.

Understanding how cartels operate and how JSAs can serve to simultaneously stabilize and conceal price-fixing activity should

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271. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 13.23 ("Sharing agreements should be discoverable. Once the agreement is made known, it may be possible to structure partial settlements to take its terms into account.").

272. *See, e.g.*, *Geneva Pharm. Tech. Corp*., 2003 WL 135653, at *2.

273. *See* United States v. Skeddle, 989 F. Supp. 890, 900 (N.D. Ohio 1997) (noting that the attorney-client privilege only protects communications necessary for providing legal advice).

274. United States v. Zolin, 491 U.S. 554, 562–63 (1989).

275. FED. R. CIV. P. 26(b)(3)(B) ("If the court orders discovery . . . it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.").

276. *See Zolin*, 491 U.S. at 562–63.

277. *Cf.* MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 13.23 ("In presenting settlement agreements for judicial approval, however, the parties are obliged to make full disclosure of all terms and understandings, including any side agreements. The settling parties may request that certain terms not be disclosed to other parties, but must justify this to the court.").

inform how courts approach legal challenges to both the substance and secrecy of such agreements among alleged co-conspirators.

B. Judgment-Sharing Agreements as Unenforceable Contracts

The simplest response to concerns about JSAs would be to render such agreements unenforceable. While businesses can enter private contracts and have the terms enforced in court, the right to contract is not absolute. Both state law and federal antitrust law limit the ability of firms to enter into several types of contracts. Although no state or federal statute prohibits judgment-sharing agreements, the common law of contracts can still render them unenforceable. A contract is unenforceable on public policy grounds if "legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy."[278] Most importantly, the law does not generally allow participants in illegal conspiracies to fashion their own remedy among themselves.

The argument for unenforceability is straightforward. Agreements that create inappropriate incentives—for example, incentives to suppress of relevant evidence of illegal conduct—should be void as against public policy. Federal courts would never enforce a price-fixing agreement should a cartel member bring a breach of contract suit against another firm that cheated on the cartel. Because JSAs can create incentives for price-fixing firms to continue to conceal their misdeeds and can stabilize an illegal conspiracy, courts should also refuse to become de facto cartel-enforcement mechanisms.[279] Furthermore, if the JSA is entered into before the actual price-fixing occurs, the contract may be void as an attempt to indemnify participants for illegal activity before it occurs.[280] To the extent that a JSA operates as a form of insurance against antitrust liability, courts could void the agreement as against public policy.[281]

278. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

279. *Antitrust Damage Allocation Hearings*, *supra* note 25, at 10 (testimony of Stephen D. Susman, Esq., Susman & McGowan) (arguing that judicial enforcement of a JSA "would be against public policy, because it would encourage and facilitate a crime").

280. *Cf.* Riemer, *supra* note 7, at 314 ("Although courts uniformly hold that contracts indemnifying a party for a subsequent illegal act are void, courts have long upheld contracts to indemnify a party for an illegal act that has already been committed." (footnotes omitted)).

281. *See* St. Paul Ins. Cos. v. Talladega Nursing Home, Inc., 606 F.2d 631, 633–34 (5th Cir. 1979). *But see* Cranston & Kingdon, *supra* note 257, at 9–10 ("First, a sharing agreement does not provide for complete indemnification or exemption from responsibility. All parties do bear

Although JSAs could be held unenforceable under either federal antitrust law or state common law principles, blanket unenforceability would be both overinclusive and underinclusive. On the one hand, this approach could be overinclusive because it would condemn legitimate risk-spreading accords by innocent defendants who have done nothing wrong. On the other hand, mere unenforceability may not go far enough in cases in which the signatories did in fact fix prices. Agreements need not be legally enforceable in order to stabilize a cartel. If such contracts were simply unenforceable, the parties could still legally negotiate and memorialize their agreement. Even if not enforceable in court, JSAs could form the basis of a cartel-stabilizing gentlemen's agreement. Most aspects of agreements among price-fixing firms are not enforceable in court. For example, in order to conceal their conspiracy, price-fixing firms agree to forbid cartel participants from taking notes. Although no court would recognize legal liability stemming from breach of one of these agreements, the mere presence of these kinds of agreements has served to stabilize many a cartel in the past.[282] If judgment-sharing agreements were merely unenforceable, cartel members could develop alternative enforcement mechanisms. This is essentially how cartel members deal with the unenforceability of price-fixing agreements themselves. The mere fact that competitors were able to come to an unenforceable agreement on damage allocation could cause co-conspirators to decline to trade a low settlement in exchange for providing evidence against the former cartel partners, even if it does not appear in any firm's individual self-interest to abide by the agreement. Historically, cartel members often honor agreements that are against their short-term interests in order to preserve harmonious relations with their cartel partners.[283]

Because mere unenforceability may be insufficient to rid JSAs of their cartel-stabilizing effects (while at the same time invalidating legitimate attempts to spread litigation risk), perhaps antitrust law should condemn those JSAs among firms that have either the purpose or effect of stabilizing a cartel. This more targeted approach might

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a relative share of responsibility for the alleged wrongdoing and are not insured against all liability." (footnotes omitted)).

282. The agreements are not perfect, as some individuals may violate the agreement, but they have a stabilizing influence.

283. Leslie, *supra* note 148, at 568.

avoid the problems of under- and overinclusiveness that would result from simply holding all JSAs to be unenforceable.

C. Judgment-Sharing Agreements as Unreasonable Restraints of Trade

Section One of the Sherman Act condemns agreements that unreasonably restrain trade.[284] Courts commonly hold that "the elements of a section 1 violation are threefold: 1) joint or concerted action between more than one party that 2) unreasonably restrains trade in 3) interstate or foreign commerce."[285] In determining which agreements unreasonably restrain trade, courts generally condemn agreements that stabilize price-fixing conspiracies. For example, because members of a cartel may cheat by offering discounts on transportation or extending credit to consumers, many cartels require the use of base-point pricing[286] and prohibit cartel members from extending credit. Recognizing that these side agreements may strengthen an underlying cartel, antitrust law proscribes such accords.[287] If JSAs have similar cartel-stabilizing effects, courts could also hold them violative of antitrust laws.

Antitrust law primarily uses two modes of analysis to determine whether a challenged restraint of trade is unreasonable: the *per se* rule and rule-of-reason analysis. Under the *per se* rule, certain categories of agreements are deemed unreasonable as a matter of law. Those trade restraints that do not fall within a per se category are evaluated under the rule of reason, in which the factfinder determines whether the particular challenged agreement has a net anticompetitive effect.

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284. 15 U.S.C. § 1 (2006).

285. R.D. Imports Ryno Indus. v. Mazda Distribs., 807 F.2d 1222, 1224 (5th Cir. 1987).

286. FTC v. Cement Inst., 333 U.S. 683, 714 (1948); *see also* Leslie, *supra* note 148, at 577–78 (explaining the cartel-stabilizing effects of base-point pricing). Base-point pricing is a practice in which transportation costs (which are ultimately factored into the price the consumer pays) are calculated as though all items are shipped from a single location). Aaron S. Edlin, *Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?*, 111 HARV. L. REV. 528, 554 n.7 (1997). This prevents firms from cheating on a price-fixing agreement by cutting transportation costs.

287. *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980) (holding that agreements to eliminate short-term trade credit are anti-competitive); *Cement Inst.*, 333 U.S. at 721 (upholding the Federal Trade Commission's conclusion that the base-point pricing system is an unfair trade practice).

1. Per Se *Rule*. JSAs are unlikely candidates for per se illegality. The Supreme Court has frequently "expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'"[288] Thus, courts reserve per se condemnation for agreements "that would always or almost always tend to restrict competition and decrease output."[289] In applying this standard, federal judges rely on collective judicial exposure and understanding, declining to classify a particular category of agreement as per se illegal until courts have garnered "considerable experience" and can confidently rely on empirical data.[290] Although Part III argues that JSAs may help price-fixing conspirators stabilize and conceal their cartel, no body of empirical literature or judicial opinions contends that JSAs necessarily or inherently decrease output or restrict competition in a way that inflicts antitrust injury. The absence of relevant judicial experience counsels against *per se* treatment.[291] Furthermore, courts decline to condemn trade restraints as categorically unreasonable unless the practice lacks "any redeeming virtue."[292] To the extent that JSAs operate as risk-spreading devices that even defendants that have not violated antitrust laws would value, JSAs serve a function unrelated to the suppression of competition, and thus should fall outside of antitrust's per se rule. Finally, given the current widespread support of judgment-sharing

288. Texaco Inc. v. Dagher, 126 S. Ct. 1276, 1279 (2006) (alteration in original) (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

289. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–90 (1985) (quoting Broad. Music, Inc. v. Colum. Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979)).

290. United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972) (citation omitted); *see also Broad. Music, Inc.*, 441 U.S. at 9 (quoting *Topco Assocs., Inc.*, 405 U.S. at 607–08); Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (quoting *Maricopa County*, 457 U.S. at 344); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990) (same); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 433 (1990) (same).

291. *See, e.g.*, *Broad. Music, Inc.*, 441 U.S. at 10 ("[E]xperience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade."); Appalachian Coals v. United States, 288 U.S. 344, 377 (1933) ("Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership."); *cf.* NCAA v. Bd. of Regents, 468 U.S. 85, 100 (1984) ("[W]e have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement . . . .").

292. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

agreements, it would simply be too jarring to declare such contracts *per se* illegal. It would undermine the legitimacy of antitrust law in a manner similar to that of the effect of the Supreme Court's declaration in *United States v. Arnold, Schwinn & Co.*[293] that nonprice vertical restraints are *per se* illegal,[294] despite the absence of empirical evidence of consistent anticompetitive effects.[295]

2. *Rule of Reason*. Because JSAs can serve valid business purposes unrelated to the suppression of competition—risk spreading and mellowing the harshness of joint and several liability without contribution—antitrust law should not condemn them as illegal per se. But neither should it give them a free pass in all instances. Because JSAs among alleged cartelists carry the inherent risk of stabilizing or concealing a cartel, they should not be per se legal. With neither form of *per se* treatment appropriate, suspect JSAs are perfect candidates for rule-of-reason analysis.

Under a rule-of-reason analysis, courts would determine whether a particular JSA is, on balance, anticompetitive. The traditional rule-of-reason factors for evaluating any challenged agreement include its purpose, history, and competitive effects.[296] But these factors may prove insufficient when analyzing JSAs because these contracts take place in the shadow of litigation over allegations of the most serious antitrust violation. If the defendants are found liable on the price-fixing charges, liability for the additional agreement to sign a JSA would seem to add little to the defendants' legal woes or the plaintiffs' coffers.

Nevertheless, if during litigation the JSA itself can be invalidated under rule-of-reason analysis, that could prompt cartel members to provide evidence of price fixing in exchange for a lower settlement. But, of course, not all JSAs are necessarily entered into by defendants who have actually conspired to fix prices. This raises the fundamental question: Is there a way to distinguish between acceptable JSAs and anticompetitive ones? The rule-of-reason factors for evaluating JSA should include, at a minimum, the issues for further study discussed in

293. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

294. *Id.* at 377–78.

295. *See* Donald E. Knebel, *Antitrust Counseling: The Five Factors of Antitrust Liability*, 9 J. CORP. L. 359, 362 (1984) (noting the lack of evidence in *Arnold, Schwinn & Co.*).

296. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

Section A. These include: when the JSA was entered into (before or after the onset of litigation); whether the JSA's terms prevent competition among co-conspirators to compete for the best deal with the plaintiff; and whether the JSA makes individual settlements practically or contractually unlikely or impossible. Additional considerations might include whether there is any evidence of intent to conceal underlying illegal activity and whether the JSA was secret or publicly acknowledged.

a. Timing of the Judgment-Sharing Agreement. The timing of the JSA is a relevant factor. If the alleged price fixers entered into a JSA before any litigation process began or was imminent, this may suggest that the JSA was part of a cartel agreement. Risk-averse members of price-fixing cartels may prefer to have a JSA in place at the outset. This would essentially place a cap on exposure to antitrust damages, which would allow the firm to conclude that price-fixing was on balance likely to be cost beneficial. JSAs entered into before the filing of antitrust litigation may also be more likely to deter a price-fixing firm from seeking amnesty with the DOJ Antitrust Division.[297] Furthermore, entering a JSA before the commencement of litigation magnifies the agreement's evidence-concealing effects because there is no window between the filing of the price-fixing suit and the signing of the JSA during which one conspirator could sell out the cartel by trading evidence for a low settlement. By diminishing the probability of settlement while creating incentives to conceal evidence, prelitigation JSAs are particularly dangerous to competition.

In contrast, if the JSA was entered into after a price-fixing case had been filed or initiated, then it may be less damning. A firm with valuable evidence against other cartel members would be less likely to sign a JSA after the plaintiff files a price-fixing suit because at that moment it can eliminate its exposure at little or no cost by exchanging its evidence for repose. In contrast, signing the JSA at that point almost ensures that it will have to pay the plaintiff a greater sum of

297. *See supra* notes 149–56 and accompanying text.

In theory, a firm cannot get amnesty if the government has already initiated an investigation into suspected price-fixing. However, if the government has not developed sufficient evidence to prosecute and the first confessing firm provides such evidence, then that firm can get amnesty or a particularly attractive deal. *See* Leslie, *supra* note 130, at 1659–60 (discussing Christie's deal in the auction house price-fixing case).

money.[298] This does not suggest a rule of per se legality for postlitigation JSAs because a JSA can be anticompetitive even if it is entered into after the filing of a price-fixing lawsuit.[299] But this timing is less inherently suspicious and therefore in the rule-of-reason analysis would weigh less strongly toward condemning the JSA.

b. Terms of the Judgment-Sharing Agreement. The individual terms of a judgment-sharing agreement may also render the agreement an unreasonable restraint of trade. Two areas of concern stand out. First, JSA terms may unreasonably hinder signatories from individually settling with the plaintiffs. For example, some JSAs preclude a co-conspirator from entering into any settlement that does not require the plaintiff to agree to particular terms (for example, foregoing joint and several liability). In more extreme cases, JSAs have "forbade any individual settlement by a signatory and stated that any settlement offer on behalf of all the participants to the sharing agreement must be determined by a majority vote of those participants."[300] The refusal to settle individually smacks of price-fixing or a group boycott.[301] The defendants should be competing against each other for the best deal from the buyer, in this case the antitrust plaintiff.

Second, JSA terms could discourage signatories from providing evidence of price fixing. Cartel members sometimes operate as a unit, apparently agreeing to jointly assert Fifth Amendment rights and block plaintiffs' access to necessary evidence.[302] Any term that punished cartel exposure or cooperation with plaintiffs' counsel or antitrust authorities would clearly demonstrate the anticompetitive nature of the judgment-sharing agreement. For example, if the agreement provided a greater share of damages for the first signatory

298. The firm would not have to pay the plaintiff anything if the suit is dismissed or the defendants prevail at summary judgment, the probability of which increases if the members of the cartel successfully conceal the incriminating evidence of price fixing.

299. A per se legal rule is also inappropriate because the parties may have already negotiated the JSA but have waited to sign and date it until litigation is imminent, at which point all parties execute the previously concealed JSA.

300. Cimarron Pipeline Constr. v. Nat'l Council on Comp. Ins., Nos. CIV-89-822-T, CIV-89-1886-T, 1992 WL 350612, at *3 (W.D. Okla. Apr. 10, 1992) (discussing *In re* San Juan Dupont Plaza Hotel Fire Litig., 129 F.R.D. 424 (D.P.R. 1989)).

301. *See* Jones Knitting Corp. v. Morgan, 361 F.2d 451, 459 (3d Cir. 1966).

302. *See Antitrust Damage Allocation Hearings*, *supra* note 25, at 28 (testimony of Stephen D. Susman, Esq., Susman & McGowan).

to settle or for any signatory that supplied incriminating evidence against the other signatories, such terms would suggest that the agreement was intended as a cartel-stabilizing and cartel-concealing device and not as a legitimate effort to spread risk among innocent defendants.

In sum, if particular terms significantly reduce the incentive for price-fixing defendants to settle or to provide evidence to plaintiffs, that should count against the signatories in a rule-of-reason analysis. Given the lack of study, however, it may be too soon to condemn JSAs because we have an insufficient understanding of their anticompetitive effects. But this is not a reason to give a complete pass to JSAs; it is the reason that further study is warranted.

c. Secrecy. The creation of a JSA prior to the onset of price-fixing litigation might suggest the JSA is used to stabilize a cartel. If so, this creates a significant incentive for the signatories of such prelitigation JSAs to keep them secret. If the reforms suggested in Section A were adopted and signatories still concealed their JSA, that could indicate an anticompetitive purpose of stabilizing a secret price-fixing conspiracy. Firms do not generally announce the existence and substance of their private contracts, nor should they be expected to. However, because JSAs have the potential for stabilizing price-fixing conspiracies, they should not be treated as ordinary business contracts that are inherently confidential. Failing to disclose a JSA when required to do so by the FTC or in discovery should be considered as part of the rule-of-reason analysis.

D. Judgment-Sharing Agreements as a Plus Factor

Even if it would be premature to conclude that JSAs may constitute an unreasonable restraint of trade, JSAs could play a role in price-fixing cases with respect to the first element of a Section One claim—the presence of an agreement among firms. Because price fixing is per se illegal, in most price-fixing litigation the imperative question is whether or not the defendants actually agreed to fix prices. In a minority of cases, clear evidence of a conspiracy exists in the form of written notes memorializing agreements among competitors or of audio or video recordings of price-fixing discussions. But antitrust plaintiffs rarely have such a smoking gun.

Price-fixing plaintiffs generally must prove the existence of an agreement through circumstantial evidence.[303]

Courts refer to the legal test for showing a price-fixing agreement through circumstantial evidence as "conscious parallelism with plus factors."[304] Conscious parallelism is the process "not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests."[305] Parallel conduct alone is insufficient to establish an agreement.[306] In addition, the plaintiff must demonstrate the presence of so-called plus factors that suggest the conscious parallelism was the product of an agreement, not independent action.[307] Common plus factors include whether the parallel conduct represents a radical change in policy,[308] as well as "actions contrary to a defendant's economic self-interest, product uniformity, exchange of price information and opportunity to meet, and a common motive to conspire or a large number of communications."[309]

To date, courts and commentators have shunned the idea that JSAs could constitute a plus factor. Courts do not permit plaintiffs to refer to the JSA as circumstantial evidence of an underlying price-

303. *See* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978) ("Most price fixing conspiracies are established through circumstantial evidence.").

304. *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) ("[A] horizontal price-fixing agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors."); Southway Theatres, Inc. v. Ga. Theatre, Co., 672 F.2d 485, 501 (5th Cir. 1982) ("The rule of 'conscious parallelism and plus factors' has governed proof of much conspiratorial conduct up through the present." (citation omitted)).

305. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993).

306. Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 (11th Cir. 1991).

307. *See* Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., Inc., 203 F.3d 1028, 1033 (8th Cir. 2000) ("An agreement is properly inferred from conscious parallelism only when certain 'plus factors' exist." (citations omitted)); *In re* Baby Food Antitrust Litig., 166 F.3d 112, 121 (3d Cir. 1999) ("In the absence of direct evidence, the plaintiffs may nevertheless support their claim with circumstantial evidence of conscious parallelism."); Wallace v. Bank of Bartlett, 55 F.3d 1166, 1168 (6th Cir. 1995) ("[P]arallel pricing, without more, does not itself establish a violation . . . . Courts require additional evidence which they have described as 'plus factors.'").

308. *See* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 222 (1939) ("Compliance with the [film distributors'] proposals involved a radical departure from the previous business practices of the industry and a drastic increase in admission prices of most of the subsequent-run theatres.").

309. *Wallace*, 55 F.3d at 1168 (citations omitted).

fixing conspiracy.[310] Jurors generally are prevented from even knowing that the defendants entered into a JSA.[311] The Manual for Complex Litigation takes the position that if the jury is told about the JSA—for example, because it is relevant to witness bias—the court should issue "a limiting instruction that the agreement is not to be considered proof or disproof of liability or damages."[312] But neither judges nor the authors of the Manual actually analyze the relationship between JSAs and price-fixing conspiracies.

There are sound arguments for why the presence of a JSA between price-fixing defendants could be treated as a relevant plus factor. Part III explained how JSAs can stabilize a cartel. The mere fact that competitors are cooperating by entering into an agreement that increases utility for the group but eliminates the ability of each individual firm to escape liability at reduced cost suggests the presence of a group dynamic conducive to cartelization. And if further study shows that actual price-fixing firms enter into JSAs more often than innocent firms, then the existence of a JSA may have even greater probative value.

Again, timing is important. If a JSA were entered into before antitrust litigation was filed or threatened, this could be indicative of underlying illegal agreements. Absent litigation or a preexisting price-fixing conspiracy, the members of an industry would seem to have little cause to meet and negotiate an agreement to allocate damages in a future price-fixing case. A truly innocent firm would have to worry that the other members of the industry were engaging in illegal behavior and setting up the innocent firm to pay a share of any eventual damages. In contrast, it would be perfectly logical for the members of an ongoing price-fixing conspiracy to agree—before the filing of a price-fixing lawsuit—to allocate any future antitrust

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310. The congressional debate about contribution yielded this exchange:

> Mr. SEIBERLING. Doesn't the very existence of a sharing agreement tend to reinforce charges of conspiracy or cartel?
>
> Mr. KOHN. No, the evidence is not permitted. No lawyer would waste time trying to put it in. No judge would permit it.

Antitrust Damage Allocation Hearings, *supra* note 25, at 150 (testimony of Harold E. Kohn, Esq., Kohn, Savett, Marion & Graf, P.C.).

311. *Id.* at 151 ("I assure you, I have been practicing for 40 years. I have been trying antitrust cases for 25 years. I have never yet seen the situation where there was the slightest suggestion with respect to a sharing agreement that ever got before the jury . . . .").

312. MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 13.23 (footnote omitted).

damages because this facilitates the cartel's risk management. It remains possible that once price-fixing litigation is actually filed, risk-averse defendants may seek to reduce their maximum exposure by entering into a JSA with their codefendants. More empirical work needs to be done to answer this question satisfactorily. How often do truly innocent firms enter into JSAs? If very rarely, then the presence of the JSA is, in fact, probative. Given the importance of timing issues, depending on what further research shows, perhaps the presence of a JSA should only be a plus factor when it is entered into before the onset of price-fixing litigation.

If the presence of a JSA were treated as a plus factor for inferring a conspiracy among the signatories, this would raise the issue of whether juries might assign too much weight to the fact that price-fixing defendants have entered into a JSA. Juries could theoretically construe the existence of the JSA as prima facie proof of a price-fixing conspiracy. But defendants will have the opportunity to explain why they entered the JSA despite their innocence, and courts could address the issue of overweighting with a limiting instruction.

To the extent that JSAs operate as a form of risk-spreading insurance, the evidentiary rule in tort cases that precludes juries from learning that a defendant has insurance may be analogous and might suggest that a jury should not learn of a JSA's existence.[313] The situations, however, are not equivalent. Courts exclude evidence of insurance because it is both irrelevant and potentially prejudicial because juries may infer negligence from the fact that the defendant possesses insurance.[314] Insurance coverage is irrelevant because "it simply has no bearing on the fault of a defendant."[315] As the Advisory Committee Notes to the Federal Rules of Evidence declare, "the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse."[316]

Although the rule generally barring admission of insurance evidence is sound, JSAs are distinguishable. Unlike evidence of insurance coverage, the presence of a JSA may, in fact, be probative

313. *See* FED. R. EVID. 411 ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.").

314. *See* Ikerd v. Lapworth, 435 F.2d 197, 208 (7th Cir. 1970).

315. Williams v. Bennett, 689 F.2d 1370, 1391 (11th Cir. 1982).

316. FED. R. EVID. 411 advisory committee's note.

of liability, depending on the JSA's terms, timing, and context. Courts describe the evidentiary rules regarding insurance as generally excluding the "existence of a collateral source of revenue to pay a judgment."[317] But JSAs are not a mere alternative payment source; rather, JSAs represent a mutual financial commitment among alleged price fixers to pay each other in the event of liability for illegal conspiracies. The defendant has obligated itself to pay a portion of its alleged co-conspirators' damages. This is markedly different than traditional insurance policies in which the insured pays a third party for coverage but does not indemnify its competitors in any way. As explained in Part III, defendants may enter JSAs to conceal and stabilize an underlying price-fixing conspiracy. Thus, unlike conventional liability insurance, the presence of the JSA may be probative of the underlying liability, not merely of the ability to pay or relative distribution of damage award.[318]

Treating a JSA as merely one plus factor would not necessarily condemn the signatories as antitrust violators. Courts generally require a multitude of plus factors before allowing juries to infer a price-fixing agreement.[319] If a defendant's signature on a JSA were considered a plus factor, this would lighten the antitrust plaintiff's load but not carry it completely. Importantly, antitrust law has plentiful safeguards to protect innocent defendants. The Supreme Court has increased the height and number of hurdles that plaintiffs'

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317. *Williams*, 689 F.2d at 1391.

318. Courts also fear that evidence of insurance coverage "would result in extravagant verdicts" because juries believe that the defendant will not have to pay out of its own pocket. Kiernan v. Van Schaik, 347 F.2d 775, 781 (3d Cir. 1965). This is a particular concern in tort litigation in which the jury can award punitive damages. The risk of a runaway jury awarding excessive damages is less in antitrust cases because an antitrust jury only calculates compensatory damages, which the judge trebles. An antitrust jury is generally not asked to "send a message" to defendants.

Further, JSAs are distinguishable from insurance coverage on this front, as well. Courts may worry that juries will award a sympathetic plaintiff more money if the jurors believe the defendant will not be personally responsible because an insurance company will pay. But a JSA does not allow a liable price-fixing defendant to completely shift financial responsibility to an absent, deep-pocketed third party. The defendant remains responsible for the JSA-stipulated percentage of total antitrust damages paid by all of the signatories to the JSA, including settlement payments and jury awards. In short, informing the jury about the JSA should not lead to an inappropriate increase in damages awarded by juries in price-fixing cases.

319. *See In re* Citric Acid Litig., 191 F.3d 1090, 1102 (9th Cir. 1999) ("Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other 'plus' factors, an inference of conspiracy can be reasonable.").

counsel must clear in order to survive dismissal and summary judgment.[320] Indeed, it is arguably too difficult for antitrust plaintiffs to pursue and succeed on legitimate claims;[321] the likelihood of frivolous or nonmeritorious claims prevailing is not great. The presence of a JSA alone would probably be insufficient for a plaintiff to survive a motion to dismiss, let alone a motion for summary judgment, when the plaintiff is proving the agreement using conscious parallelism with plus factors.

In short, the presence of a judgment-sharing agreement among the members of an industry prior to the onset of litigation may be circumstantial evidence of an underlying price-fixing conspiracy.

E. Noerr-Pennington Issues

Signatories to a JSA may argue that their agreement is immune from antitrust liability under the Noerr-Pennington doctrine, which protects the ability of firms to jointly pursue litigation.[322] Courts have expanded Noerr-Pennington immunity to cover tasks ancillary to litigation.[323] But that does not mean that any contracts that competitors make with an eye toward eventual litigation are necessarily protected by Noerr-Pennington immunity. Noerr-Pennington immunity protects petitioning activity directed toward government actors. JSAs do not fit within this mold; they are generally secret agreements among competitors that the parties intend to conceal from the government. Furthermore, settlement

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320. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965–66 (2007) (holding that a valid claim under Section One of the Sherman Act based on allegations of parallel conduct requires "enough factual matter" that "raises a suggestion of a preceding agreement, not merely parallel conduct"); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–88 (1986) (holding that, to survive a motion for summary judgment, a plaintiff must show evidence that likely excludes "competing inferences of independent action or collusive action").

321. *See* Christopher R. Leslie, *Rational Irrationality* 41–42 (unpublished manuscript, on file with the *Duke Law Journal*) (arguing that, "if the plaintiff's theory of the case conflicts with the judge's own view of how businesses operate, the latter will prevail even if the plaintiff provides strong evidence to support its allegations").

322. Cal. Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

323. *See, e.g.*, Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 100 (2d Cir. 2000); McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992); Colum. Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 944 F.2d 1525, 1528–29 (9th Cir. 1991); Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir. 1983) ("[I]t would be absurd to hold that [petitioning immunity] does not protect those acts reasonably and normally attendant upon effective litigation.").

agreements are not necessarily protected by Noerr-Pennington in that settlement agreements can themselves violate the Sherman Act.[324] Of course, JSAs are not settlement agreements themselves; rather they are contracts among alleged price fixers that make settlement more difficult. These agreements should be given no more protection than settlement agreements themselves. In any case, treating JSAs agreed to before the filing of antitrust litigation as a plus factor does not implicate Noerr-Pennington doctrine.

CONCLUSION

Judgment-sharing agreements provide a way for codefendants in price-fixing cases to manage risk. Businesses should generally be able to organize their affairs in a manner that reduces their exposure to legal liability, but that principle has limits. In particular, while legitimate businesses should be able to minimize uncertainty when possible, antitrust law should not allow cartels to effectively manage risk so as to prolong their unlawful existence. JSAs may help cartelists conceal their illegal agreements and may lead firms to conclude that price-fixing is cost-beneficial. Judges and scholars should take these considerations into account when discussing whether price-fixing defendants should have an unfettered ability to enter into enforceable judgment-sharing agreements.

Given the ubiquity of JSAs and their potential to facilitate illegal conspiracies, more study is necessary. Unfortunately, meaningful empirical research is impossible so long as JSAs largely remain shielded from public view. If judges order more disclosure of JSAs that come before them, scholars will be better able to understand how the timing, frequency, and terms of JSAs may affect the potential anticompetitive risks associated with those agreements. Also, greater transparency will permit researchers to determine whether signatories to JSAs are, in fact, more likely to be firms that have actually fixed prices or firms that have been falsely accused. If research confirms

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324. *See, e.g.*, Standard Oil Co. v. United States, 283 U.S. 163, 169 (1930) (stating, in holding that a settlement agreement did not violate antitrust laws, that "[a]ny agreement between competitors may be illegal if part of a large plan to control interstate markets"); *In re* Tamoxifen Citrate Antitrust Litig., 277 F. Supp. 2d 121, 130 (E.D.N.Y. 2003) ("Plaintiffs can establish a Sherman Act violation by alleging facts from which it can be inferred that [defendants] entered into the Settlement Agreement in bad faith and used the agreement to restrain or monopolize trade.").

that JSA signatories are primarily price-fixing—not innocent—firms, that would be strong evidence that such agreements are anticompetitive.

While additional research will be helpful, antitrust courts need not await the results of further investigation before scrutinizing JSAs more closely. Given that JSAs may conceal and stabilize price-fixing conspiracies—and given the propensity of actual price-fixing firms to enter JSAs—antitrust law should not treat these agreements as *per se* legal. This Article does not argue that JSAs inevitably have anticompetitive effects, so neither is *per se* illegality appropriate. Rather, courts should analyze JSAs under the rule of reason. In particular, antitrust law should condemn those JSAs that penalize a signatory for settling early or providing evidence to an antitrust plaintiff. In addition to an antitrust analysis of the reasonableness of a particular sharing agreement, this Article argues that the presence of JSAs may also serve as a plus factor for proving an underlying price-fixing agreement, which would be *per se* illegal. Consequently, JSAs may be relevant to both the agreement and the unreasonable restraint elements of a Section One claim. At a minimum, more research is warranted to determine how JSAs are negotiated and implemented, to analyze the consequences of past JSAs, and to predict the effects of current and future JSAs.