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THE ANTITRUST EQUAL ENFORCEMENT ACT OF 1981 (S. 995)

INTRODUCTION

Price-fixing has been universally condemned as counter to consumer interests, incompatible with a competitive economy, and wasteful of economic resources. And yet the temptation remains for producers to fix prices and reap the fruits of higher profit, as long as all other members of the industry abide by the price-fixing agreement. Adam Smith noticed the propensity to fix prices in his own day: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices."[1]

S. 995 is a measure currently being considered in the Senate Judiciary Committee which seeks to remedy some of the inequities evident in recent price-fixing cases. Sponsored by Senator Strom Thurmond (R-S.C.), the bill is expected to be reported out of committee on September 15. The companion bill in the House of Representatives, H.R. 1242, is sponsored by Congressman Jack Brooks (D-Texas). No date has been determined for committee action on the House bill, but the Chairman of the Subcommittee on Monopolies and Commercial Law has agreed to consider the bill after the summer recess. The legislation represents some of the most important revisions in many years of the federal antitrust laws. Supporters of the legislation contend that the bill defines the liability of price-fixers in a predictable and more equitable manner while maintaining strict deterrence to price-fixing behavior. The practical effect of the bill is to limit the liability of a defendant accused of price-fixing to damages caused by his own sales, except for the case of insolvency of other companies

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1 Adam Smith, Wealth of Nations, edited by Edwin Cannon (New York: Modern Library, Inc., 1937), p. 128.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

involved in the price-fixing conspiracy.

S. 995 is designed to remedy the situation found in some recent cases where smaller, less culpable defendants have been saddled with damages they had no hand in creating. The legislation has been brought to the forefront recently because of some well-publicized liability suits running into the billions of dollars. Some people have claimed that potential damages have risen to such enormous amounts that even large firms are fearful of defending themselves in trial, even if they are innocent. The controversy appears to be over whether the remedies contained in S. 995 should be applied to pending cases as well as to future cases. The current bill omits pending cases from the changes, but some congressmen appear poised to amend the bill so that cases pending in court will have the advantage of the remedies contained in the bill.

PRESENT LAW

Rarely do price-fixing efforts succeed, since it is necessary to achieve near unanimous participation among firms in the industry. Any member of the price-fixing cartel will find it profitable to undercut the agreed upon price and thereby attract customers away from his competitors. Historically, this temptation has proved overwhelming. Price-fixing conspiracies unaided by government have been short-lived and unstable. In order to provide further deterrence to price-fixing, the government has imposed substantial penalties on businessmen and businesses found engaging in the practice. The Sherman Antitrust Act provides for a criminal penalty of imprisonment up to three years on persons found engaged in price-fixing, personal fines up to $100,000 and corporate fines of up to $1,000,000 per count. In some states, the felony conviction would cause the businessman to lose his citizenship and face disbarment from further participation in certain lines of business.

The most controversial penalty for price-fixing, however, arises from the Clayton Antitrust Act. The Clayton Act stipulates that each member of a price-fixing conspiracy is liable for three times (treble) the damages caused by all the conspirators combined, not just the damages relating to his own sales. The magnitude of the damages is determined by the extent the entire industry's sales were overstated by reason of the price-fixing. In some recent cases, damages have reached into the millions, even billions of dollars. In many cases, companies charged with price-fixing will enter into a sharing agreement among themselves in which the total damages are apportioned to each company on the basis of sales. By that procedure, no one company is liable for damages greater than its percentage of industry sales.

INEQUITABLE PENALTIES

In some cases, however, these sharing agreements cannot be worked out. The record shows that it is often difficult to attain agreement on sharing liability where the number of defendants is large, the concentration of industry is low, and the resources of firms within the industry is diverse. In price-fixing cases where sharing agreements have not been worked out, alarming inequities have arisen. Some recent cases have brought into question whether the Clayton Act as applied by the courts today assures the innocent a fair trial, provides equitable settlements to all parties, and facilitates a competitive marketplace.

Two major problems have become apparent from recent cases: (1) any one firm in the industry can be singled out and sued for the damages attributable to the entire industry; and (2) damages may be levied on firms to an extent vastly disproportionate to their culpability. The first practice arises because each firm charged with price-fixing is liable for the total damages of the industry under the principle of joint and several liability. Plaintiffs legally may sue any one defendant for the entire damages relating to the industry. When one firm is sued for the entire liability of the industry, it is not legally permitted to sue the co-conspirators for their fair share of the damages. Only one firm in a price-fixing conspiracy will bear the entire punishment for the industry, while the remaining co-conspirators go unpunished. Such an outcome is surely inequitable to defendants since some are able to escape punishment altogether while others in the conspiracy are subject to damages far beyond their culpability. The inequitable distribution of damages cannot only devastate the shareholders of the unlucky firm sued, but it also provides weak deterrence to those co-conspirators which get off unpunished.

The recent <u>Olson Farms, Inc. v. Safeway Stores, Inc.</u> offers a striking example of the inequities arising from permitting only one or a few firms to be sued for the entire liability of the industry. Olson Farms was accused of having fixed prices along with Safeway Stores and four other defendants. The damages attributable to Olson Farms' sales to the plaintiff were calculated at nearly $100,000. Olson Farms, however, was the only defendant sued by the plaintiff. As a result, it had to pay the entire industry damages of $2,405,550 -- most of which is attributable to the other defendants who were not sued by the plaintiff. Olson Farms was compelled to pay nearly ten times the treble damages attributable to its own sales to the plaintiff. Under present law, Olson Farms is prohibited from seeking contribution from other defendants jointly involved in the act.

COERCING SETTLEMENTS

Another inequity arising from the present price-fixing law is that plaintiffs can employ coercive tactics to pressure compa-

nies to agree to settlements unrelated to their culpability in price-fixing actions. The most abusive treatment is reserved to the smaller, usually less culpable defendants, while lenient punishment is meted out to the biggest firms in the industry which may be the leaders in price-fixing conspiracies. Such abuses occur with some frequency under present law because a defendant in a price-fixing case can be made to pay for damages attributable not only to his own sales to the plaintiff, but also for the sales of settling co-conspirators. Disproportionate settlements result because plaintiffs approach defendants, often the most culpable and therefore most willing to negotiate, and offer to settle for a very low price, rather than go through a long and expensive trial. The uncompensated liability, however, is not discharged, but rather is assigned to the remaining defendants. Innocent defendants often will desire to defend themselves in court rather than give in to settlement pressures. But as guilty firms settle with plaintiffs for less than their total liability, the risk of exposure to the accumulated damages caused by other conspirators exerts enormous pressure on remaining defendants to settle regardless of innocence or guilt. Plaintiffs are able to threaten the remaining firms with damages so prohibitive that they cannot afford to risk trial.

The practical result is that culpable defendants settle early for very small amounts, while later, less culpable defendants must pay three times the damages they caused, plus three times most of the damages that the settling defendants caused. These "whipsaw tactics" effectively deny innocent defendants the constitutional right of a fair trial. As the firm of Howrey and Simon, respected antitrust litigators, commented: "confronted with treble damages, joint and several liability, and class certification, many innocent companies have no choice but to pay tribute."[2]

The 1979 report of the Senate Judiciary Committee concluded that the effect of attributing uncompensated damages to a smaller business that wishes to defend its innocence is "to drive it into settlement, even if it believes that the risk of its being liable is small." The report of the committee concluded that:

> Laws which are legitimately designed to deter and punish wrongdoers should not be used to permit collusive settlements by the plaintiff with the largest and often most culpable defendants, while extracting larger, or at least proportionately larger payments from smaller, often more vulnerable defendants.[3]

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2 Unpublished statement of Howrey and Simon, "The Necessity for Contribution and Claim Reduction in Antitrust Cases," May 11, 1981, p. 3.

3 Senate Judiciary Committee, "Antitrust Equal Enforcement Act of 1979, Report of Senate Judiciary Committee on S. 1468 together with Supplemental Views." S. Rep. No. 96-428, 96th Congress, 1st Session, November 27, 1979, p. 1. (This is a report on S. 1468, the predecessor of S. 995. S. 1468 and S. 995 have identical texts.)

Griffin Bell, former attorney general under President Carter, has also testified that current antitrust penalties may cripple innocent companies:

> While sound antitrust demands ample deterrence against price fixing, which is why violation of the law is a felony, it was never intended that the penalty should be confiscation of a defendant's business. Yet, this is the very risk which effectively takes away the trial option from an innocent company in an industry dominated by price-fixers.[4]

S. 995

S. 995 achieves a greater measure of fairness and predictability in distributing price-fixing damages by mandating two major changes in price-fixing laws: (1) defendants may claim contribution from co-conspirators for their share of damages, when a plaintiff sues fewer than all the conspirators in a price-fixing case; and (2) S. 995 provides for claim reduction when some defendants choose to settle with a plaintiff while others proceed to trial.

Contribution

The first measure providing for the right of contribution is vital when only a few businesses are sued for the entire liability of an industry. Under present law, a conspirator is responsible to pay all damages, even though he was directly responsible for only a small fraction of the damages. In some cases, plaintiffs choose not to sue a price-fixing defendant with whom it has important business relations, usually a supplier or buyer. Instead, the plaintiff will sue another conspirator who must pay not only three times the damages attributable to its own participation, but three times the damages of other conspirators who were not sued. Such an outcome is not only an intolerable breach of equity, but it reduces deterrence to firms which through their size, influence, or connections can avoid being charged with price-fixing.

S. 995 permits defendants to sue conspirators not sued by the plaintiff for their fair share of damages. The availability of contribution assures that all defendants in a price-fixing scheme will bear their fair share of liability.

Claim Reduction

The second provision allowing claim reduction is vital to firms, especially small ones, which seek to prove their innocence

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[4] Testimony of Griffin B. Bell Before the Committee of the Judiciary, United States Senate, April 22, 1981, p. 2.

in court at the same time that other firms charged in the price-fixing case are settling out of court. S. 995 provides that the liability of settling defendants is "carved-out" from the liability accruing to remaining defendants. The carve-out formula is based on the market share of each price-fixing defendant. The result is that the liability attributable to defendants who settle their cases out of court is discharged in its entirety from the liability of the remaining defendants. Currently, if a defendant settles for less than his total liability -- a common occurance -- the unpaid liability is shifted to the remaining defendants. Defendants who choose to litigate while other defendants choose to settle with the plaintiff face the risk that they will be liable for the entire unpaid damages of the industry.

S. 995 remedies this situation by stipulating in effect that defendants who choose to proceed to trial are liable only for damages relating to their own sales, and not those of other defendants. This prevents plaintiffs from settling early for very small amounts with the largest and the most guilty price-fixers, while coercing larger payments from smaller or more vulnerable defendants.

If S. 995 were passed, plaintiffs looking to enrich themselves could no longer prey on small firms in an industry characterized by price-fixing; wrongly-accused defendants could more easily prove their innocence in a trial. Currently, a defendant may choose to settle rather than proceed to trial, even if he feels he has a good case, because of the risk of being saddled with the enormous liability for everyone else's damages. If a defendant is liable only to the degree of his own sales, rather than the sales of the entire industry, he will more readily defend his own innocence.

CORRUGATED CONTAINER CASE

The Corrugated Container litigation provides a striking example of how guilty defendants are given bargain settlements in order to accumulate vast damage claims that "whipsaw" smaller and less culpable defendants into punitive settlements. The case was precipitated by a criminal action against fourteen companies and twenty-six employees. Mead Corporation and one other company went to trial and were acquitted by a jury of all wrongdoing. All other defendants, including the industry leader, International Paper, pleaded nolo contendere (no contest).

In subsequent civil suits, indictments were delivered against thirteen corrugated container companies and twenty-five officers for price-fixing activity. Because of the large number of defendants and disparity in size of firms, no sharing agreement among defendants was formulated. The strategy of the plaintiff, according to the report of the Senate Judiciary Committee, was "to break the defendants' ranks by offering discounted settlements to a few initially in order to pressure subsequent settlements at a higher

price."[5] The tactic proved successful, if inequitable to defendants. International Paper, the second firm to settle and the largest firm in the industry, with 8.3 percent of the market share, paid $1 million for each percentage point of market share for a total of $8.3 million. In contrast, Continental Group, which was acquitted in the criminal case and had only a 4.2 percent market share, paid $6.5 million per market share for a total of $27 million. Amazingly, Continental Group which has a smaller presence in the industry than International Paper ended up paying almost $19 million more in damages than International Paper -- the industry leader.

If this disparity in settlements appears unjust, consider the situation of Mead Corporation, another firm in the corrugated container industry. As matters now stand, plaintiffs claim that Mead will be found liable for $300 million per market share point for total damages of $750 million -- based on the company's relatively insignificant 2.5 percent share of the corrugated container market. Mead's enormous claimed liability is attributable to the fact that other firms in the industry have settled with the plaintiff at a fraction of their liability and the uncompensated damages are shifted to the remaining firms in the industry. Because Mead has chosen to litigate its case in trial, it faces damage claims related not only to its own sales but to the sales of the defendants who settled.

Professor Robert Bork of Yale concluded that the result in the _Corrugated_ case is intolerable. "It bears no relation to Congress' intended punishment of triple damages. It imposes wildly disproportionate punishments upon the companies -- in a ratio of 300 to 1 -- and assigns the lightest payment to the most culpable and the heaviest to the least."[6]

"Whipsaw" Tactics

There are abundant cases of plaintiffs in price-fixing cases wielding the threat of vast damages to "whipsaw" settlements from innocent companies, many of whom are the smallest in the industry. Perhaps two of the most devastating and patently unfair are the cases of Green Bay Packaging and Menasha Corporation. Both companies and their officers were investigated by federal grand juries but were never indicted. In subsequent civil suits, both Menasha Corporation and Green Bay Packaging were found, in fact, not to be members of any price-fixing conspiracy. Their innocence, however, did not protect them from paying huge damages. The Judiciary Committee in its final report found the experience of the two tiny companies to be especially disturbing. Their experience, the committee said, raises "the larger policy question of how to protect the small and middle-sized businesses that claim

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5 Senate Judiciary Committee (1979), p. 14.

6 Robert Bork, Statement of Milliken & Co., Inc. and Georgia Pacific Corporation, unpublished typescript document, July 13, 1981, p. 5.

their innocence in price-fixing suits...while at the same time engaging in strong antitrust enforcement."[7]

Mr. George Kress and his company, Green Bay Packaging, were at first determined to prove their innocence. But as 80 percent of the industry settled, the small company saw its liability go to a staggering $2 to $5 billion. A liability of this size would have wiped out the entire equity of his company. Each time a firm settled a suit with the plaintiff at below its total liability, the uncompensated damages were shifted to the remaining defendants. Plaintiffs accordingly raised their own settlement prices as damage exposure ballooned.

Green Bay Packaging, as Mr. Kress testified, depended heavily on debt financing. It became impossible, however, for the company's officers to secure new financing with a suit of such enormous magnitude hanging over the company. The loss of borrowing eventually pressured the company into capitulating to the plaintiffs. The company was forced to settle at a punitive figure even though it was later found to be innocent of any wrongdoing. Mr. Kress commented: "We had no choice but to settle for $3,750,000 per percentage point of the market, a total of $5,750,000, a rate seven times higher than the first settlements."[8]

The Menasha Company case provides yet another example of how innocent firms are "whipsawed" into inequitable settlements. Richard L. Johnson, Chairman and Chief Executive Officer of Menasha, as well as the directors of the company, decided to fight the price-fixing charges since they were convinced of the firm's innocence. But, as with Green Bay Packaging, other defendants in the case settled and the potential liability of Menasha Corporation increased to over $1 billion, a figure far in excess of the total net worth of the company. Meanwhile, the plaintiff threatened to escalate the price of settlement in order to pressure the company to settle immediately. The "whipsaw" tactic worked successfully. Mr. Johnson testified, "We could not afford the huge cost of litigating an action of this nature nor could we bear the risk of not having each party pay their rightful share of an alleged conspiracy, whether actual or imagined. With no consideration of the merits, Menasha Corporation was given the opportunity by the plaintiff to settle on a 'take it or leave it basis.' We chose to settle and paid $2,750,000 per point and having a solid 1.68 percent of the market, we paid a total of $4,600,000. Further, we have to date incurred legal expenses of $651,000 and spent untold hours of executive staff time....We made our payment to save us from possible bankruptcy."[9]

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[7] Senate Judiciary Committee (1979), p. 17.

[8] George Kress, "Hearings Before the Committee on the Judiciary, United States Senate," April 22, 1981, pp. 48-49.

[9] Richard L. Johnson, C.E.O. Menasha Corp., "Hearings Before the Committee on the Judiciary, United States Senate," April 22, 1981, p. 53.

As it later turned out, Menasha was found in a civil case not to be a member of the price-fixing conspiracy. As Johnson concluded in Judiciary Committee testimony, he paid an enormous insurance premium to assure his company of solvency.

OBJECTIONS TO S. 995

Legal Complexity

A number of objections have been raised against allowing contribution and claim reduction in price-fixing cases. One objection raised during Judiciary Committee hearings is that providing contribution among defendants would increase the complexity of antitrust litigation. Many legal experts, however, including former Attorney General Bell and Professor Bork have concluded that the legislation would not appreciably lengthen trials nor complicate antitrust proceedings. In his testimony at the Judiciary Committee hearings, Bell concluded that the objection was groundless:

> I do not believe that contribution would materially add to the existing complexity of price-fixing litigation. In any event, the trial judge can order separate trials of contribution actions and can award damages to the plaintiff before hearing the contribution claim among the defendants.[10]

Trial judges have the power under existing rules to organize contribution actions to serve the purpose of efficiency; a judge has the discretion to sever, join, or consolidate issues based on equity. In no respect would compensation to plaintiffs be delayed or reduced by the right of contribution. Under the principle of joint and several liability, a plaintiff may sue any defendant for total liability. S. 995 simply assures that a defendant could seek compensation from other defendants for their fair share of the damages. If a defendant began such an action, he would have to prove that other parties were, in fact, guilty, but that would not require any effort by the plaintiff nor affect the integrity of settlements. Plaintiff's settlement would not be complicated or changed by the right of contribution. Only the distribution of liability among defendants would be affected.

The provision of claim reduction would also not complicate antitrust cases. The calculation of the amount by which a defendant's liability would be reduced when other defendents settle is clearly set forth in the proposed statute. The legislation would, in most cases, simply mandate what is already universally used to apportion liability: the market share of each defendant.

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[10] Bell, p. 3.

Deterrence

A second objection often made to permitting contribution is that it would reduce the level of deterrence to price-fixing. Senators Ted Kennedy (D-Mass.) and Howard Metzenbaum (D-Ohio), for instance, argue that the possibility that the liability of the entire industry may fall on any one of the participants in a conspiracy has an enhanced deterrent effect on price-fixing. The senators quoted favorably the Abraham decision in the Fifth Circuit Court: "The chance that a participant may be faced with a full judgment is more likely to discourage anti-competitive conduct than would ensuring that each participant pay a fair share."[11]

There are many reasons, however, why allowing contribution and claim reduction would not undermine the intended deterrence of antitrust laws. First, conspirators are liable for treble the damages caused by reason of their conduct -- not an insignificant punishment. Under the Sherman Act, defendants convicted of price-fixing may be subject to prison sentences of up to three years and individual fines of $100,000; there are also corporate fines of $1 million per count. As Griffin Bell testified, "The treble damages based on a defendant's own market share afford a sufficient deterrent to price-fixing. More importantly, the best deterrent to price-fixing is vigorous criminal prosecutions by the Antitrust Division of the Justice Department."[12]

In fact, deterrence to price-fixing might be enhanced if contribution and claim reduction were permitted. In some recent cases, guilty parties have not been sued at all, since only one defendant may be sued for the entire damages of the industry. The deterrent effect of price-fixing laws is damaged if any firm can expect with some probability to escape punishment for its acts. Under S. 995, a defendant sued for all damages of the industry could seek contribution from other guilty parties for their fair share of the damages. If contribution were allowed, no conspirator could escape punishment for his price-fixing actions.

Deterrence also appears to favor permitting claim reduction. A review of recent cases indicates that many times the most culpable firms are handed the sweetheart settlements while small, less culpable firms are coerced into paying enormous sums far beyond damages caused by their actions. The provision of claim reduction should discourage plaintiffs from letting some favored firms off at a fraction of their actual liability. Under the claim reduction formula provided in S. 995, sweetheart settlements reduce total liability of defendants to plaintiffs not by the settlement amount negotiated, but by the total damages attribut-

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[11] Senate Judiciary Commitee (1979), p. 28.

[12] Bell, pp. 3-4.

able to the settling defendant. Plaintiffs should be deterred from giving such settlements since under the claim reduction formula, the unpaid balance cannot be retrieved from remaining firms.

Out of court settlements will still occur; they will simply be more in line with the relative guilt of accused defendants. But by diminishing expectations of attaining bargain settlements, S. 995 will provide a powerful deterrent to firms considering price-fixing.

Small Business

Senators Kennedy and Metzenbaum also argue that mandating contribution and claim reduction would actually hurt small businesses. Their rationale is that plaintiffs "have no interest in forcing a small company to bear the burden of lengthy and extraordinarily expensive litigation and the risk of bankruptcy."[13] They assert that plaintiffs are willing to work out early affordable settlements with small businesses to prevent their insolvency. S. 995, they argue, would not encourage early settlements with small firms because under the carve-out formula, a settlement would reduce total liability by an amount greater than the amount paid in settlement to the plaintiff. As one lawyer testified in the Judiciary Committee hearings, "No plaintiff in his right mind is going to settle with a defendant with a small net worth and a large market share if by doing so he is going to take a 30 or 40 or 50 percent of the market value out of the case."[14]

Two observations are in order. First, the subset of companies which are small but have large market shares is very small. Most companies which are industry leaders are also large in size. Second, if a company is found guilty of price-fixing, it should not escape punishment simply because it is smaller in size, especially if it has a large market share. Justice compels that the penalty be applied uniformly across firms according to their responsibility for damages, not according to the firm's size or net worth.

Morover, under current price-fixing laws, many small companies have been left "holding the bag" with huge settlements all out of proportion to their culpability. This outcome is perverse: larger more culpable firms snap-up bargain settlements, while other firms which want to prove their innocence in trial are forced to bear the risk of enormous liability damages caused by other firms.

Griffin Bell in his testimony has argued that if S. 995 is passed by Congress, plaintiffs will have every incentive to make

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13 Senate Judiciary Committee (1979), p. 28.
14 Ibid.

fair and equitable out of court settlements with defendants. But, Bell said, settlements will more likely approximate a company' liability: "The actual effect of the carve-out formula will be to encourage plaintiffs to settle for amounts that approximate the actual treble damages attributable to the settling defendants. Where the plaintiffs receive in settlement an amount comparable to the treble damages attributable to the settling defendants, the carve-out formula will have no effect on the total liability of the defendants to the plaintiffs."[15]

Pending Cases

S. 995, as it is written now, applies only to price-fixing cases that are brought after its enactment. An amendment has been proposed which applies the provisions of contribution and claim reduction to pending cases as well as future cases. It is ironic that this amendment has generated enormous controversy. For if S. 995 is formulated not to apply to pending cases, the very cases which demonstrated the striking injustice of present laws will be excluded from the beneficent effects of the legislation.

The chief objection to applying S. 995 to pending cases is that the legislation would be retroactive and therefore unconstitutional. Many legal experts, however, have concluded that Congress' power to apply remedial legislation to pending cases is unchallenged. Griffin Bell, formerly the chief enforcer of federal antitrust laws in the U.S., has argued that "There is no Constitutional prohibition against making S. 995 apply to pending cases, since S. 995 concerns only the remedy for price-fixing. In fact, Congress has had many statutes applicable to pending cases."[16]

Professor Bork concurs with Bell's judgment. "It is customary, as already shown, to apply new law to pending cases. That is especially proper where, as here, the statute changes only the remedy that is applicable. Congress' power to alter remedies is, and has always been, supreme."[17]

The consensus of legal opinion concurs that a specific provision of law mandating that S. 995 be applied to pending cases would almost certainly not be struck down in courts as unconstitutional.

Re-Opening Settlements

In reality, the main opposition to applying S. 995 to pending cases arises from defendants in price-fixing cases who have

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[15] Bell, p. 4.

[16] Ibid., p. 6.

[17] Bork, p. 10.

already settled with plaintiffs, often at bargain prices. These companies are worried that if the Act were made applicable to pending cases, plaintiffs may try to reopen these settlements to compel greater damage claims. As might be imagined, the companies which managed to negotiate sweetheart settlements at amounts far below their liability are not eager to see the settlements re-negotiated.

Of all objections to applying S. 995 to pending cases, this one is the most unfounded. In the same amendment which has been proposed to apply S. 995 to pending cases, there is a specific provision which prohibits the re-opening of settlements already entered into by plaintiffs and defendants. The amendment specifically mandates that "No settlement agreement entered into before the enactment of this section shall be disapproved, reformed, or rescinded because of the enactment of this section." This amendment makes it explicitly clear that no company need worry that applying the remedies of S. 995 to pending cases will upset or re-open its own favorable settlement. Since Congress specifically mandates the integrity of each settlement made previous to the enactment of S. 995, no court would consider a move by plaintiffs to re-negotiate their settlements with some defendants.

Changing the Rules

Some observers have contended that applying S. 995 to pending cases would impose injustices or hardships on parties currently involved in litigation. It is argued that plaintiffs settled with defendants on the assumption that they could pursue their claims for the balance of uncompensated damages against non-settling defendants. By changing the rules for measuring the liability of defendants, plaintiffs are deprived of the opportunity to pursue the damage claims against remaining defendants.

These objections have been dismissed by Professor Bork and Griffin Bell. They have argued that applying S. 995 to pending cases will not infringe upon the legitimate rights of plaintiffs. As a matter of fact, the amount of compensation which plaintiffs may receive is not affected at all by S. 995, if plaintiffs settle with defendants at their approximate liability. The bill only discourages plaintiffs from making settlements which have no relationship to a defendant's culpability. It is astonishing indeed that plaintiffs should declare it a "right" to settle with some firms at a fraction of their liability in order to coerce settlements with others at many times their liability. The only "right" denied plaintiffs is the use of unfair and coercive tactics to extort settlements unrelated to a firm's culpability.

In addition, this legislation has not taken plaintiffs by surprise. There have been well-publicized moves both in courts and in Congress to allow contribution and claim reduction in price-fixing cases. At least one federal court has urged courts to permit contribution as a matter of equity and Members of Congress have repeatedly introduced legislation in recent years

to change price-fixing laws. Bork contends that plaintiffs have had adequate warning that the laws governing the distribution of liability among defendants were set to change: "If plaintiffs settled for too little with some defendants, not only did they know the risk they were running, but those settlements were part of an unfair and coercive strategy."[18]

If Congress does not apply S. 995 to pending cases, the effects of the legislation will not be apparent for many years to come. Price-fixing cases often last for many years; the Milliken case, for example, has been proceeding for sixteen years, and it is not yet completed. A case which has only recently been filed could be going through the courts under the present inequitable law for many years to come. Not only would businesses be denied a needed remedy to a patent injustice, but similar cases would have to be treated under different principles of law, depending on whether their cases arose before or after the passage of S. 995. Cases pending would operate under the current rules governing price-fixing liability, while cases begun anew would operate under the new body of laws. In order to take advantage of the favorable provisions of the current law, plaintiffs could be expected to rush to the courthouse to file their claims before the new law takes effect. Unless S. 995 applies to pending cases, these complications, inequities, and bogus distinctions will be perpetuated.

CONCLUSION

It is generally agreed that the government has a duty to penalize businesses which engage in price-fixing. The practice clearly is opposed to consumer welfare and a free, competitive economy. However, laws which are designed to deter and punish wrongdoing should not allow plaintiffs to provide preferential treatment to the largest and most culpable defendants while coercing proportionally larger payments from smaller, less culpable ones.

Such a system is not only inequitable, it is bad economic policy. These punitive damage suits running into billions of dollars fall most heavily on smaller firms, a segment of the economy which provides the most jobs, creates the greatest innovation, and produces most of our economic growth. Damages of this magnitude can prove crippling to these companies and may force them into bankruptcy or into mergers with larger firms which can afford the risk of bearing price-fixing liability.

Ultimately, it is the consumer who loses when small business is impaired by a punitive legal code: competition is lessened, jobs are destroyed, innovation is hindered, and investment capital

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[18] Robert H. Bork, "Letter to Honorable Strom Thurmond," June 8, 1981, p. 3.

dries up. In an economic policy designed to stimulate economic growth, the reformation of a legal system which hinders small business should not be overlooked.

S. 995 is designed not only to correct an inequitable legal practice, but also to promote economic revitalization and jobs creation. The bill reduces the punitive burden of enormous liability by rendering a firm liable only for those damages for which it is responsible. Small firms will be more willing to litigate to prove their innocence, if they do not face the risk of bearing the entire liability of the industry. And large firms will less likely be offered sweetheart settlements at a fraction of their liability. Deterrence to price-fixing activity should be enhanced since all firms will be held responsible for the damages they caused.

S. 995 as currently formulated does not apply to pending cases so the inequities in current law are assured to continue for many years in the future. According to Robert Bork: "It would be a cruel irony to promise a cure for the future while leaving current victims of injustice to suffer the very fate which called forth the cure."[19] Members of Congress who sympathize with this point of view have offered an amendment which would apply the remedies of S. 995 to pending cases. These congressmen feel that the bill -- with the addition of that amendment -- removes a powerful barrier to fair trials and lifts a legal impediment to economic revitalization.

Thomas M. Humbert
Policy Analyst

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19 Bork, Statement of Milliken & Co., Inc. and Georgia Pacific Corporation, July 13, 1981, p. 3.