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Client Alert Commentary

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Federal Judge Affirms Enforceability of Judgment Sharing Provisions in Antitrust Cases

A recent district court order finds that JSAs can serve a legitimate purpose of controlling parties' exposure and preventing coercive settlements.

Antitrust conspiracy claims pose significant monetary risks, including treble damages, attorney's fees, and joint and several liability without a right to contribution. In practice, these risks incentivize defendants to settle such claims early regardless of their validity or an individual defendant's relative culpability. In order to eliminate or soften the impact of these risks, defendants sometimes enter into judgment sharing agreements (JSAs). However, critics say JSAs are at odds with Congress's intent to maximize deterrence for antitrust violations, and that they violate the antitrust laws in and of themselves.

Only a few courts have considered the validity or enforceability of JSAs. Most recently, in the case *In re Broiler Chicken Antitrust Litigation*, Judge Thomas Durkin of the US District Court for the Northern District of Illinois found that, so long as JSAs do not expressly prohibit or discourage individual settlements, they can serve a legitimate purpose of controlling parties' exposure and preventing plaintiffs from forcing unfair settlements. Thus, JSAs remain a potentially powerful tool for defendants in antitrust conspiracy cases.

This Client Alert analyzes the *Broiler Chicken* ruling and prior case law and advises defendants on considerations related to JSAs.

JSAs, Joint and Several Liability, and the Right of Contribution

Antitrust claims carry a particularly pronounced risk that a defendant could face a damages award that far exceeds the harm for which it is responsible. First, antitrust claims provide for treble damages and attorney's fees.[1] Second, in conspiracy cases with multiple defendants, antitrust claims provide for joint and several liability such that a plaintiff can recover any amount, up to the full trebled damages award, from any individual defendant (or combination of defendants) of the plaintiff's choice.[2] And third, antitrust joint and several liability includes no right of contribution, such that a defendant who is forced to pay more than the amount of damages it caused cannot cross-claim for the difference from other defendants.[3]

As a result, defendants in antitrust conspiracy cases are incentivized to settle early — irrespective of the merits of the claims or the amount of damages caused by the defendant. In some instances, this reality can lead to a "rush to the exit," as defendants fear that at some point, plaintiffs who are able to obtain significant initial settlements from some defendants may stop settling with the remaining defendants and instead proceed to trial in pursuit of a windfall of treble damages and attorney's fees.

This dynamic has led some defendants in antitrust conspiracy cases to enter into JSAs that allocate their liability. In a JSA, defendants can agree to apportion the percentage of a future damages award accountable to each defendant *ex ante*, thereby removing the risk that a defendant could face a disproportionately large damages award. In essence, a JSA can create a contractual right of contribution between defendants, allowing an overpaying defendant to seek compensation from co-defendants.

To ensure that JSAs work as intended, such agreements sometimes require that signatories who settle with plaintiffs before a verdict include a provision in their settlement mandating that settling plaintiffs reduce the dollar amount to be collected from other defendants later. In this example, if Defendant A (who is apportioned 10% of the damages under a JSA) settles, then Defendant A would have to obtain an agreement from plaintiffs stating that they would only collect 90% of any future damages award after prevailing against the remaining defendants at trial.

Plaintiffs' lawyers and some commentators have argued that JSAs should be declared void as a matter of public policy. They contend that the reason antitrust laws provide for treble damages, attorney's fees, and joint and several liability is that Congress intended to maximize the deterrence of antitrust violations. These critics say that because JSAs have the effect of blunting the impact of joint and several liability, such agreements undermine a key tenet and goal of antitrust law. Some have also argued that, to the extent that JSAs discourage individual settlements, such agreements can be considered group boycotts that violate Section 1 of the Sherman Act.

Prior Case Law

Courts that have evaluated the enforceability of JSAs have noted a paucity of legal authority, but have declined to find JSAs categorically void or in contravention of public policy.

In *Cimarron Pipeline Construction, Inc. v. National Council on Compensation Insurance*, plaintiffs sought an order declaring defendants' JSA to be a violation of antitrust law and public policy.[4] Plaintiffs relied on language from a then-recent Supreme Court case[5] declining to provide a right of contribution in an antitrust case. The Western District of Oklahoma found, however, that the lack of a right of contribution under antitrust law did not prevent the defendants from creating one by private agreement.[6] While the plaintiffs also pointed to a reduced incentive to settle, the court agreed with the defendants that there was no negative impact on settlement negotiations, distinguishing the case from one in which a sharing agreement forbade signatories from entering into certain settlement agreements.[7]

In re Brand Name Prescription Drugs Antitrust Litigation involved a similar JSA. For a settling defendant to avoid liability for a later judgment against another defendant, the JSA required that their settlement agreement provide that the dollar amount collectable by the plaintiff from the non-settling parties exclude the amount the settling defendant would have been responsible for had it not settled.[8] The plaintiffs argued that the JSA unreasonably discouraged and prevented settlements. The Northern District of Illinois disagreed, relying on studies by the Senate Judiciary Committee and the ABA Antitrust Section that concluded that "sharing agreements in practice do not pose a barrier to individual settlements."[9] In contrast, the court explained that such agreements "provide a means of discouraging coerced settlements."[10]

California v. Infineon Technologies involved a suit brought by State Attorneys General against defendants who manufactured and sold dynamic random access memory (DRAM); the plaintiff states sought to void a JSA.[11] Under the JSA, the defendants were free to settle at any time, and on any terms. However, in order to extinguish their JSA obligations, a settling defendant had to negotiate and obtain a settlement offer for all other defendants that corresponded to the negotiated share percentages, and secure an agreement to

exclude the settling defendant's percentage from any judgment sought from other JSA participants.[12] The plaintiff states argued that the agreement contravened public policy. The Northern District of California disagreed. It surveyed the limited case law on point, finding that the JSA at issue did not fall into one of the categories of JSAs that had been found to be improper, including:

- JSAs containing provisions that impose absolute prohibitions on a signatory defendant's right to settle with plaintiffs individually;
- JSAs containing provisions demonstrating an improper motive to prevent resolution of litigated claims;
- JSAs where evidence otherwise demonstrates that defendants' JSA has had an adverse impact upon settlement negotiations.[13]

The *Broiler Chicken* Ruling

In October 2021, Direct Action Plaintiffs in *In re Broiler Chicken Antitrust Litigation* filed a motion to preclude enforcement of certain defendants' JSA.[14] They contended that two sections of defendants' JSA violated antitrust law and public policy. First, plaintiffs took issue with what was termed the "J&S Negation Provision," which they contended was effectively a group boycott requiring that no defendant settle unless the plaintiff agreed to a "contractual unwinding of the normal operation of the federal antitrust law":

> *Settling Plaintiff(s) agrees to reduce the dollar amount collectable from non-Settling Parties pursuant to any Final Judgment by a percentage equal to the Settling Party's Sharing Percentage as calculated pursuant to [the JSA].*[15]

Plaintiffs argued that because joint and several liability is a central tenet of antitrust law, displacing it was "directly contrary to the statutory scheme enacted and maintained by Congress."[16] Displacing joint and several liability would, according to the plaintiffs, have the effect of undermining the deterrence of antitrust violations and would result in under-enforcement of penalties.[17] Plaintiffs also argued that the J&S Negation Provision itself constituted a violation of Section 1 of the Sherman Act, since the JSA terms were imposed upon settling plaintiffs by an agreement of the JSA defendants.[18]

Plaintiffs also challenged another section of the JSA, termed the "Settlement Agreement Sharing Provision," which required the JSA defendants to provide each other with a copy of each settlement agreement. Plaintiffs argued that this provision put the defendants at a competitive advantage in settlement negotiations and discouraged settlements.[19]

In a seven-page opinion, the court rejected the plaintiffs' arguments. The court pointed to the lack of case law indicating that JSAs are unlawful or criticizing their use, and found instead that "almost all of the district courts to have addressed language similar to that of [the J&S Negation Provision] have found its use to be lawful."[20] Echoing *Infineon*, the court explained that a JSA is problematic only if it (i) imposes absolute prohibitions on a defendant's right to settle with a plaintiff, (ii) demonstrates an improper motive to prevent resolution of litigated claims, and/or (iii) otherwise has an adverse impact on settlement negotiations.[21] The court found that none of those factors were present.

In reaching its decision, the court reasoned that nothing in the JSA destroys plaintiffs' entitlement to the full remedies under the law for a trial verdict in their favor. The court noted that the JSA does not — and cannot — change the fact that any defendant who loses at trial will be subject to joint and several liability with no right of contribution. Instead, "the JSA simply provides incentives for defendants to reach an agreement with a plaintiff to give up some of the remedies it has if it had gone to trial, such as joint and

several liability and treble damages."[22] According to the court, parties on both sides of settlement agreements often "give up something and that is simply the nature of settlement agreements," making such JSA provisions "unremarkable proposition[s]."[23] The court also rejected the notion that entering into a JSA constituted a group boycott in violation of Section 1 of the Sherman Act. The court specifically held that "[c]oordination among defendants on how to address litigation is not a group boycott," and in any event, because defendants in the JSA remained free to settle with any plaintiff on any terms, there was no boycott at all.[24]

Finally, the court held that there was nothing improper about the JSA requirement that defendants had to provide one another with copies of their settlement agreements. While the court did not dispute that such a requirement might put defendants at a competitive advantage in future negotiations, the court noted that "nothing prevents a settling plaintiff from insisting on language in a settlement agreement that says to a settling defendant that they must keep the settlement agreement confidential."[25]

Lessons

The *Broiler Chicken* order confirms that JSAs are not unenforceable or problematic per se. The court recognized that JSAs may make it more difficult for a plaintiff to settle on more advantageous terms. Its decision nonetheless stands for the proposition that it is generally not a court's role to interfere with a private cost-benefit analysis of whether to settle or proceed to trial, so long as the JSA itself is not illegal.

Because courts have recognized the legality and enforceability of JSAs, defendants can and should explore whether entering into such agreements makes sense in their cases. However, defendants should avoid entering into a JSA on terms that could prohibit an individual defendant from settling, evince an improper motive to prevent resolution of litigated claims, or otherwise adversely impact settlement negotiations. One way to minimize the risk that a JSA could be voided is to ensure that the JSA allows for settlement outside of any mechanisms that provide settling defendants with protection from future liability.[26] Interested companies should consult with experienced antitrust counsel to craft a JSA that meets these requirements.

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Endnotes

[1] 15 U.S.C. § 15(a) (any person injured in business or property by a violation of the antitrust laws "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

[2] *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981).

[3] *Id.* ("We are satisfied that neither the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution sought here.").

[4] *Cimarron Pipeline Constr., Inc. v. Nat. Council on Compensation Ins.*, No. CIV-89-822-T, 1992 WL 350612, at *1 (W.D. Okla. Apr. 10, 1992).

[5] *See Tex. Indus.*, 451 U.S. 630.

[6] *Cimarron*, 1992 WL 350612 at *2 ("It simply does not follow from the above language that contribution is prohibited under antitrust laws. Absent a clear and specific prohibition against the right of contribution, and the plaintiffs have cited none, the provision in the Defendants' sharing agreement requiring contribution among the signatories will not be invalidated by this court."); *see also Fireman's Fund Ins. Co. v. W. Nat'l Mut. Grp.*, 851 F. Supp. 1361, 1366 (D. Minn. 1994) ("While the Court [in *Texas Industries*] concluded that no statutory or common law right of contribution exists, it did not hold that such a right would violate the antitrust laws.").

[7] *Cimarron*, 1992 WL 350612 at *3.

[8] *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 221853, at *1 (N.D. Ill. Apr. 11, 1995).

[9] *Id.* at *3.

[10] *Id.*

[11] *Cal. v. Infineon Techs. AG*, No. C 06-4333 PJH, 2007 WL 6197288, at *1 (N.D. Cal. Nov. 29, 2007).

[12] *Id.*

[13] *Id.* at *3.

[14] Mot. Preclude Enforcement Defs.' J. Sharing Agreement, *In re Broiler Chicken Antitrust Litig.*, 1:16-cv-08637 (N.D. Ill. Oct. 28, 2021), ECF 5163.

[15] *Id.* at 1-2.

[16] *Id.* at 12.

[17] *Id.* at 12-13.

[18] *Id.* at 14.

[19] *Id.* at 17.

[20] Order at 2-3, *In re Broiler Chicken Antitrust Litig.*, 1:16-cv-08637 (N.D. Ill. May 4, 2022), ECF 5578 (collecting cases).

[21] *Id.*

[22] *Id.* at 4.

[23] *Id.*

[24] *Id.* at 5.

[25] *Id.* at 6.

[26] *Infineon*, 2007 WL 6197288, at *3 (citing *In re San Juan Dupont Plaza Hotel Fire Litig.*, 1989 WL 996278 (D.P.R. 1989)).