In the

Supreme Court of the United States

TEXAS INDUSTRIES, INC.,	)	
	)	
PETITIONER,	)	
	)	No. 79-1144
V.	)	
	)	
RADCLIFF MATERIALS, INC., ET AL.	)	

Washington, D. C.
March 3, 1981

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

TEXAS INDUSTRIES, INC.,

Petitioner,

v.

RADCLIFF MATERIALS, INC., ET AL.

No. 79-1144

Washington, D. C.

Tuesday, March 3, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:38 o'clock p.m.

APPEARANCES:

BENJAMIN R. SLATER, JR., ESQ., Monroe & Lemann, 1424 Whitney Building, New Orleans, Louisiana 70130; on behalf of the Petitioner.

DANDO B. CELLINI, ESQ., Lemle, Kelleher, Kohlmeyer & Matthews, 601 Poydras Street, New Orleans, Louisiana 70130; on behalf of the Respondents.

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Texas Industries v. Radcliff Materials.

Mr. Slater, I think you may proceed when you are ready.

MR. SLATER: Thank you, Your Honor.

ORAL ARGUMENT OF BENJAMIN R. SLATER, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. SLATER: Mr. Chief Justice, and may it please the Court:

The issue before the Court in this matter this morning is whether a defendant in a federal antitrust action may seek contributions, and the threshold question we submit to the Court is whether the remedy sought here is one that is necessary to achieve the congressional intent of the antitrust laws? Will it further the congressional goals to grant contributions?

In order to address the question, we would briefly like to just review the very brief facts of this case. We are dealing here with a situation in which a plaintiff has filed a treble damage action under Section 1 of the Sherman Act and Section 4 of the Clayton Act, alleging a pricefixing conspiracy. The plaintiff has sued Texas Industries. Identified as alleged coconspirators with Texas Industries were the three respondents. The plaintiff did not sue the three

respondents, he selected Texas Industries as the target and Texas Industries in turn filed a third party demand seeking contribution.

Now, although, in order for liability to exist to the plaintiff here, there must have been some participation by one or more of these respondents along with Texas Industries, the plaintiff can do what he has done here. He can select and he can elect, as he has done, to sue a single tortfeasor. Under the existing case law all coconspirators are joint tortfeasors and have been so for many, many years. Each, as a joint tortfeasor, is liable for the whole of the damages that the plaintiff can prove. And in addition, even if the plaintiff here had elected to sue all four and had obtained a judgment against all four, he could then elect to levy his judgment on any one of the four and collect from that one.

In the absence of contribution, TXI, Texas Industries, cannot force any of these respondents to share the common burden, and had the plaintiff sued all four and obtained a judgment and decided to levy on one, that one in the absence of contribution could not force the other judgment debtors to pay any share of their judgment.

QUESTION: You don't contend, do you, that if the plaintiff had sued four and obtained a judgment against four, he could have levied on one for the entire amount?

MR. SLATER: Yes, sir, I do. I certainly do.

QUESTION: You agree that he could have done that?

MR. SLATER: Yes, sir, he could have done that.

QUESTION: And the contribution remedy would have to be worked out afterwards?

MR. SLATER: Well, in the absence of contribution there would be no way that that one who is levied on could force the other three to pay part of the deficit.

QUESTION: Well, supposing there were a contribution remedy, would you say that that prevented the plaintiff from levying on one of the four?

MR. SLATER: No, sir; it would not prevent him. Contribution does not affect the plaintiff's right to go against any one of the joint tortfeasors.

QUESTION: For the full amount?

MR. SLATER: For the full amount. The only thing that contribution would do would be to permit the one who is levied upon to get a share of that back from the others. It would not affect the plaintiff.

QUESTION: Mr. Slater, one of the amicus briefs makes the point that I found quite an intriguing point, that while you present this case as whether there is or is not a right, or should be or should not be, and you say there should be, and is -- a right of contribution in antitrust suits among joint tortfeasors, the point made by the amicus brief is

that this question can arise in a variety of ways and maybe there's no single correct answer in every context. Now, you've already given us a context that this case does not involve. This person did not sue four people, this plaintiff. He sued only one. And in this case you claim contribution from the unsued coconspirators. You have just given us an example of sued coconspirators against whom judgments are made, and talking about the execution of those judgments.

Then, there's a lot of talk in these amicus briefs about carving and contribution as against settling, codefendants and so on, which also are not involved in this case, and to which the answer might be different. Do you think it's a single question, or do you think that it's many questions, and that the answer may be different according to the question in each separate context?

MR. SLATER: Your Honor, I view contribution as a remedy that will further the goals sought by the antitrust laws and I think it is a remedy that should be recognized as such, and that even though it might arise in a variety of contexts, such as a settlement, for example, that can be handled.

QUESTION: And there'd be talk of it; we're here about to bargain now -- then, about -- and so on.

MR. SLATER: That's right. We don't have a settlement here. Yes, sir, that's correct. But our position, I think, we've said in the brief, even though we are not

involved in a settlement situation, that we would never suggest that a settling defendant should be brought back into the case. We think that once a person has settled he should be out. And that the --

QUESTION: That's one of the purposes of a settlement.

MR. SLATER: Certainly. And that the plaintiff's claiming should be reduced in some way, some way that can be fashioned by the Court.

QUESTION: Well, it's always reduced by the amount of the settlement, by the amount of the money the plaintiff gets.

MR. SLATER: Yes. That's right. And there are several ways that that can be done, depending upon how the Court --

QUESTION: That's done under the present law, isn't it?

MR. SLATER: Yes, sir, that's correct. It's reduced by the amount of the actual payment.

QUESTION: Right.

MR. SLATER: Some of the questions that have been raised are whether, for example, if a pro rata approach was taken to contributions, such as was done in the Professional Beauty Supply case, it may well be that the way to handle settlements is to count the number of conspirators, and if a

plaintiff settles with one of the ten, let's say, then his claim is reduced by ten percent. That's a simple --

QUESTION: Even though that conspirator had a 90 percent market share?

MR. SLATER: Well, that would have to be the case in that situation.

QUESTION: Or even if that conspirator had a one percent market share.

MR. SLATER: That's right; that's right.

QUESTION: It would still be ten percent under that.

MR. SLATER: Right. But that would not impair the settlement process in any way, because --

QUESTION: And even though that conspirator had never done business with the plaintiff?

MR. SLATER: That's right; that's immaterial.

QUESTION: Mr. Slater, do we know why the plaintiff did not sue the respondents?

MR. SLATER: I think it was purely fortuitous, Your Honor. In this situation the concrete market, the customers that are involved in concrete, the purchasers of concrete, will buy from the suppliers that are closest to them, and even though in this case there were no purchases made by the plaintiff from the respondents, as we point out in the reply brief there, they were --

QUESTION: What I was going to suggest is that the

distinction between a settlement and a prelitigation decision not to sue somebody may be a fairly fine line. You might want to do business -- say, in the Olson Brothers case, where you may want to do business with somebody and said, we won't sue you if you give us a good price for the next three years. Would that be a settlement? And then you wouldn't have any right of contribution there.

MR. SLATER: Well, I would not think that would be a settlement; no, sir. But certainly --

QUESTION: How do you draw the distinction between --

MR. SLATER: What you raise there could happen. And it could happen, for example, in the example that I made to the Court, had we all been sued and four of us been sued, and this plaintiff wanted to do business with the three respondents and decided to forego any business relations with Texas Industries, he'd simply levy against Texas Industries and that would be as far as they could go.

QUESTION: Or he might settle with each of them for $1,000 apiece, so if I understand your view, then you'd lose your right of contribution that you claim you have.

MR. SLATER: But his claim would be reduced, though, under my theory.

QUESTION: But his claim wouldn't be reduced by anything here because he didn't buy anything from you.

MR. SLATER: No, sir. What I would suggest in that case would be that, and as Justice Stewart points out, we're getting into some areas where there are a lot of answers and a lot of questions; but the pro rata approach, as taken by the Court would be -- in our situation, for example, had the plaintiff settled with three of the four, then his claim would have been reduced by 75 percent.

Now, before he settled with the three of those four, he would give some serious thought, if he knew that, and assuming he knew the law. Then, before he would settle for $1,000, he would think very hard, because he would be giving up a substantial part of his claim.

On the other hand, he would know what he was giving up. If it turned out that there were more coconspirators than four, then the amount he's given up would simply be

QUESTION: Do the individual defendants count as coconspirators for the purpose of your rule?

MR. SLATER: No, sir, we would not count them. If there was a company and an employee, I think that should be handled as one. You would not distinguish and cause that to be two.

QUESTION: And couldn't -- if three people settled for less than the claim, couldn't the plaintiff just tailor the cloth to meet the situation by increasing the ad damnum in his complaint?

MR. SLATER: Well, he could increase the ad damnum, Your Honor, but the question, I think, would arise as to what the judgment was when he finally got it.

QUESTION: Well, you never know that in advance.

MR. SLATER: No, you don't, but you should have some idea in most of these cases of generally what damages are going in. And certainly sometimes they'll claim that there's been an overcharge in a pricefixing case of $10 a yard, when in fact it's gone up $2. But the parties who were actually involved in that sort of thing should have some idea as to what the evidence will show, and be able to handle what they feel are the damages.

If Your Honors please, the ultimate effect of a no contribution rule is that the coconspirators whose joint illegal activities create the liability may escape that liability and go scot free at the whim of a plaintiff. That really is the end line of a rule against contribution.

QUESTION: You do agree that the rule against contribution among joint tortfeasors is fairly well established in tort law, do you not?

MR. SLATER: Your Honor, the rule in favor of contribution has been evolving consistently through the courts in the last several years in the -- there's a case that we've cited in the brief, the Kohr case, which involved a mid-air collision. I think it's around 1970 or thereabouts.

The doctrine has evolved in the civil rights area in the Glus case, just very recently.

QUESTION: Well, what about the nonstatutory cases in tort law? Isn't the restatement ruled a contribution? Or is it?

MR. SLATER: Your Honor, I don't have the answer to that.

QUESTION: This trend you speak of, Mr. Slater, to whatever extent there is a trend, that cuts against the ancient equity doctrine in pari delicto the condition of the defendant is the better, is it not?

MR. SLATER: Well, Your Honor, it gets into the question of, I think, of fairness. What is fair?

QUESTION: The old equity. Whether it's relevant here or not. Perhaps relief would fall short, but if they're in equal fault, the courts, the law leaves them where it found them, that's the general thrust, isn't it?

MR. SLATER: Well, I think that probably is true, although I've read Perma Life a number of times, and I must confess I really don't thoroughly understand the decision. And as I say, I think that you have to consider the question of fairness, whether it's among joint wrongdoers or whether it's among nonwrongdoers. And it's a question of what is fair and that's -- the evolution of this doctrine of permitting contribution has evolved along that line.

This Court, for example, in the Cooper Stevedoring case, the admiralty case, I think talks in terms of --

QUESTION: Well, admiralty is a very, very special sort of set of rules, isn't it?

MR. SLATER: Yes, sir, it is sort of different than the ordinary situation. But you have the -- we have the Glus case in the civil rights area; it's a 1980 case. And in the securities area we've had the recent Heizer Corporation case, and before that there were several cases.

QUESTION: Well, in the securities area the federal statutes themselves provide for contribution, do they not? Many of them?

MR. SLATER: Some of them do; yes, sir. The 10(b)(5) cases, there the court implied a right of action, cause of action.

QUESTION: Of course the right of action is an implied -- ?

MR. SLATER: That's correct, under 10(b)(5). But you're correct that there is, in the statute, there are some references to contribution.

If Your Honors please, in order to determine whether contribution is a remedy which will achieve congressional intent, we think it's appropriate in the first place to actually first analyze the statutes, take a look at Section 1 of the Sherman and at Section 4 of the Clayton Act.

And an analysis of these statutes clearly showed that they are penal, they are punitive statutes, that they're designed to provide both civil and criminal punishment for violators of the antitrust laws. Section 1 of the Sherman Act establishes a violation, it defines illegal activities, and it provides that every contract combination of conspiracy that unreasonably restrains trade is illegal, and that every person who engages in those illegal activities is guilty. And it then provides for criminal penalties.

Section 4 of the Clayton Act provides that any person who is injured in his business or his property by reason of anything forbidden in the antitrust laws may recover treble damages.

Now, when these statutes are read together, it becomes pretty clear that what constitutes the violations of the antitrust laws and the penalties therefore, and that there are really established two groups, those that can recover treble damages and those that are liable for those damages.

QUESTION: But then to pursue that in pari delicto concept, the statute treats them all in equal fault as with a felony murder case, for example, does.

MR. SLATER: Yes, sir, it does.

QUESTION: So should any court undertake to make some different evaluations, saying one of them is more

or less at fault than the other?

MR. SLATER: Well, that is one of the possible ways of apportioning the liability among joint tortfeasors. Now, certainly that has been done in some areas where contribution is permitted. You have a comparative fault concept, or a relative culpability concept, which I think is what Your Honor is referring to, where you in effect say, one is more guilty -- put it that way -- than the others.

The difficulties with that approach is that at the present time all cotortfeasors are equally liable and if you approach it on the basis of an apportionment of fault, then you will be calling on the courts at that point to in effect referee degrees of fault as among wrongdoers and you are calling on each of the tortfeasors to attempt to show that he is not quite as wrong as the other fellow.

QUESTION: But that is a recognized doctrine in some states in tort law, isn't it? The doctrine of indemnification where a passive tortfeasor can implead an active tortfeasor, even though the plaintiff can go against the passive tortfeasors?

MR. SLATER: That's true, and it's also true that there are some jurisdictions in which they actually apportion fault, based on whether you felt there's really a comparative fault in order to achieve contributions.

I think the indemnity situation is different, because there you're calling on someone to indemnify you for

100 percent, for whatever you're suing.

QUESTION: But each is importing into the antitrust laws a doctrine that has been either been rejected or accepted in the orthodox law of torts, whether it's comparative negligence, indemnity, or contribution.

MR. SLATER: Yes. If Your Honors please, we believe that it is clear that Congress intended that all persons who violated the antitrust laws would be punished, would be penalized, would be subjected to civil liability.

QUESTION: Well, one way to guarantee that would be to make them all defendants, wouldn't it?

MR. SLATER: Yes, sir; that's correct.

QUESTION: It would not guarantee it, necessarily, but that would be the opening --

MR. SLATER: That is precisely why we need contribution, because in order to make certain --

QUESTION: What I meant was, suing them in the first instance.

MR. SLATER: Yes, sir, that could be done. But when a plaintiff elects not to do that, there is at present no way that a civil defendant who is sued can demand contribution from his alleged cotortfeasors.

QUESTION: Well, the 1946 amendment to Rule 14 was deliberately designed to prohibit a defendant from forcing a plaintiff to sue another defendant, wasn't it?

MR. SLATER: Yes, sir. And we're not suggesting that you in effect bring in a defendant and say, defendant, you're in the case, as you do in admiralty, you're in here for all purposes. What we're saying is that under Rule 14 you can third-party your cotortfeasors and bring them in and say, you are liable to me, and I am liable -- if I am liable to the plaintiff.

In order to achieve what we perceive to be this congressional intent as expressed in the statutes themselves, we believe that it is essential that contribution be permitted among joint tortfeasors. Without contribution there is no mechanism whatever by which the liability of all civil violators can be assured, where the plaintiff can elect to sue one or more coconspirators or levy against one or more coconspirator judgment debtors.

Now, if Your Honors please, the courts have recognized that one of the major goals, or one of the major purposes of the federal antitrust laws was to penalize wrongdoers, to deprive violators of the antitrust laws of the fruits of their illegal acts. And this Court, in the Brunswick case in 1977, stated that treble damages play an important role in penalizing wrongdoers. In the Pfizer case, in 1978 --

QUESTION: Mr. Slater, if we can believe the arithmetic of your opponents, your rule will leave you with a net profit, won't it?

MR. SLATER: Your Honor, I've read that formula, and --

QUESTION: What's wrong with it?

MR. SLATER: Well, what's wrong with it is that without -- we cannot be liable to this plaintiff without joint activity on behalf of one or more of these respondents, so their activities caused whatever damages this plaintiff has sustained, just as much as we have. Now --

QUESTION: Of course, they may not be liable to this plaintiff at all, since they never sold him anything.

MR. SLATER: I beg your pardon?

QUESTION: This plaintiff might not be able to sue them at all.

MR. SLATER: Oh, yes, sir, under the existing case law he could sue them and if they had not sold him a single thing --

QUESTION: They still could?

MR. SLATER: -- he could collect 100 percent of his judgment from these people. Now, what in effect they're saying is that we didn't sell, therefore we have a defense. That's not the case; there's no defense.

QUESTION: No; all right.

MR. SLATER: Whether you've sold or haven't sold is really immaterial. And I think we've cited some cases in the brief --

QUESTION: Their argument is that if you've got more than three conspirators, the one conspirator who had all the sales will wind up with a net profit.

MR. SLATER: Well, Your Honor, in this case it's purely fortuitous and I think we've pointed out in the reply brief that this is not the only litigation arising out of this conspiracy.

QUESTION: That would only be true, wouldn't it, when you had more than three conspirators, if you're talking about treble damages?

MR. SLATER: The formula?

QUESTION: Wouldn't it?

MR. SLATER: I think it would be true if you had a particular -- there's a certain number that you reach that works that way, and then after you pass that, then you're outside that formula.

QUESTION: But I was just wondering --

MR. SLATER: It's an interesting formula but I don't think it has any real --

QUESTION: How persuasive your deterrence argument is in this particular case?

MR. SLATER: I'm sorry?

QUESTION: I was just considering the effect of your deterrence argument in this particular case. It doesn't seem like the rule would provide maximum deterrence to your client.

MR. SLATER: Well, Your Honor, believe me, our client has ben deterred.

QUESTION: That formula doesn't count attorneys' fees, does it?

MR. SLATER: No, sir, that's correct. And the thing is -- you're absolutely right. It's a purely fortuitous situation in this case, based upon the way the concrete industry operates.

QUESTION: Tell me again, Mr. Slater, where is the source of authority for the courts to devise the remedial concept that you're urging?

MR. SLATER: Your Honor, we believe that it's in the statutes themselves. We firmly believe that the --

QUESTION: It has to be implicit, because it's not there explicitly.

MR. SLATER: That's correct, it's not. The statutes don't say that you should have contribution, and they don't say that you don't have contributions.

QUESTION: Well, isn't that the kind of thing that ordinarily, since it involves policy, that's usually left to Congress? The federal courts don't have the same -- common law powers --

MR. SLATER: Your Honor, we believe this --

QUESTION: That state courts do, do we?

MR. SLATER: First of all, we believe you certainly

have the power to interpret the antitrust laws. This Court certainly has that power. And in fact it is a function of the Court to interpret those statutes in such a way as to carry out congressional intent. We believe that the statutes, that the antitrust laws were not comprehensive statutes -- in fact, they're quite skeletal -- and that this Court can fill in the gaps. And I believe, in fact --

QUESTION: Well, now, suppose we found we couldn't and decided that we couldn't fill in the gap to find any implicit right of contribution. Would you suggest then we should fashion one?

MR. SLATER: Yes, sir, I believe that the --

QUESTION: Are there many cases where courts have fashioned one as a judicial remedy?

MR. SLATER: Yes, sir. The cases that we cite in the brief, the Kohr case; it was a negligence case.

QUESTION: How many state cases? Seems to me I remember one that goes back to when I was a state judge.

MR. SLATER: Well, there was one -- yes, sir, you wrote an opinion when you were the Chief Justice in the New Jersey Supreme Court.

QUESTION: Where we said it had to be done by the legislature. We couldn't do it.

MR. SLATER: No, I think you did grant it, as I recall.

QUESTION: We had a statute?

MR. SLATER: Well, Louisiana has a statute, for example. There are many states that have statutes, but with respect to the Chief Justice's question, we believe that when the congressional goals of the antitrust laws are clear, that every person in a joint action who violates the antitrust laws shall be liable; that this Court has the power and the authority to fashion a remedy, if that's what Your Honor wishes to call it, to accomplish that objective. And certainly there are a number of cases that have emanated from the Court where the Court has recognized that the antitrust laws are not comprehensive in nature.

The National Society of Professional Engineers is a recent case that we have cited in the brief.

Now, in Pfizer v. Government of India -- it was a 1978 case -- this Court recognized the right of a foreign plaintiff to sue for treble damages on the theory that to deprive the plaintiff of the right to sue would permit price fixers or monopolists to escape liabilities.

QUESTION: That was based on the Dictionary Act, wasn't it?

MR. SLATER: Sir?

QUESTION: That was based on the Dictionary Act, wasn't it, that a foreign corporation was a person?

MR. SLATER: Yes, sir. That's correct. But one of the things that the Court stressed was that, if this were not the case and you had not recognized that they had the right to sue, that it would have permitted the price fixers or monopolists to escape liability. The same sort of doctrine was recognized years ago in Hanover Shoe, which we think stands for the proposition that one of the major congressional purposes of the antitrust laws is to punish violators. Those who are liable should have to pay, and without contribution that goal is defeated.

I've mentioned to Your Honors the evolution of the doctrine of contribution through the federal common law in the various areas, and we submit, if Your Honors please, that the rule denying contribution will defeat congressional intent and that it is inequitable, it is archaic, and it's unfair.

I'd like, if I may, to reserve the rest of my time for rebuttal, unless there's some questions.

QUESTION: May I ask you one question before you sit down? In Section 15 U.S.C. 15, which is the part of the Clayton Act that gives private claimants the right, it says that "The plaintiff shall have the right to recover damages by him sustained in the cost of suit, including reasonable attorney's fees." Doesn't that in effect fix the remedy of a private plaintiff, and pretty well make it a traditional common law damages action?

MR. SLATER: Well, certainly, that particular statute sets out a private cause of action in behalf of persons who were injured in their business for profit, and provides for treble damages. There's no question about that. That distinguishes it from the Cort v. Ash cases and the cases along that line. They quote Piper v. Chris-Craft and those cases. But we believe that contribution goes a step further.

QUESTION: Well, it goes at least one step.

MR. SLATER: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Cellini.

ORAL ARGUMENT OF DANDO B. CELLINI, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CELLINI: Mr. Chief Justice and may it please the Court:

This occasion marks at least two firsts for me. It's the first time I've had the privilege of arguing a case to this Court, and also the first time I've been upbraided by my adversary for attempting to focus the Court's attention on the particular facts of the case before it. I'm usually criticized for doing just the opposite. Here, however, petitioner's reply brief starts off by saying that I have attempted to focus the Court's attention on the peculiar and purely fortuitous facts of this case. That's one point in this argument that I'm going to readily concede. I have attempted to do that, I've done it for what I believe to be

good reasons. First of all, I'm mindful of the truism which this Court has often repeated that the business of the federal courts is constitutionally restricted to the cases and controversies that come before it. And secondly, I've focused on the facts now before the Court in this case, because the Petitioner has persisted in asserting a value judgment sort of argument that equates contribution with fairness and no contribution with unfairness.

I find that theme has been repeated consistently throughout the briefs. In fact, the last words Mr. Slater said when he sat down today, the last word he said, was "unfair." And I find that an ethereal theme. It's without substance, it's without standards, and it can't form the basis for rational decisionmaking. And I have found no better way to illustrate that point than to see how contribution would work in the facts of the case that is now before the Court.

Now, my colleague and friend, Mr. Slater, I believe, has given you all of the critical facts of this case, but I don't think he's really given you the flavor of the situation in which this case arose. So if I might take a couple of minutes of the Court's time to go back over some of these facts, this case goes back as far as 1968. According to the indictments that were handed down in 1973 by a federal grand jury in New Orleans, a conspiracy took place among petitioner,

respondents, and certain individuals, sometime in the middle of 1968 to about the middle of 1970, in which these parties agreed to fix prices on concrete. Those indictments were returned in 1973; nolo pleas were entered by the companies involved and the individuals involved.

Since we're arguing this case on Mardi Gras day, I might point out to the Court that one of the individuals involved was a former King of Carnival in New Orleans, which is the highest honor that that City can bestow upon one of its citizens. He was sent to jail. Another one of the individuals involved was the president-elect of the Chamber of Commerce of the City of New Orleans. He was sent to jail. As the Court can well imagine --

QUESTION: Are those part of the peculiar facts that you referred to?

MR. CELLINI: Well, Your Honor, what I am pointing out -- the point I am making with respect to this is that everyone in New Orleans knew about this alleged conspiracy, and in 1973 a number of plaintiffs filed suit to recover damages against the parties that were charged with this conspiracy in the indictment. And all of that, as the petitioner points out in his reply brief, was resolved by compromise.

And then, a couple of years later, in 1975, Abraham Construction Company filed this lawsuit, the original

lawsuit which gave rise to this claim. And in that lawsuit Texas Industries was the only party sued. Now, as Mr. Slater conceded in his oral argument -- I don't think that there is any question about this, there is no collusion involved here -- the only apparent reason why Texas Industries was the party that was sued by Abraham Construction is because Texas Industries is the party that sold concrete to Abraham Construction. Abraham Construction concluded that it paid overcharges in the amount of $200,000 to Texas Industries, so it filed suit against Texas Industries saying, give me that $200,000 back, trebled, under Section 4 of the Clayton Act.

Now, Texas Industries asserts this third party claim, and as Justice Stevens noted in the course of the argument of Mr. Slater, the mathematical computation that would be involved in working out how this claim would be resolved ultimately, if a contribution remedy were allowed, would allow Texas Industries to keep $50,000 of that money it got from Abraham. Not only would it escape all liability to Abraham, it would actually get to keep $50,000 of that money. Now, what's involved here is --

QUESTION: That's assuming that Mr. Slater were working for free.

MR. CELLINI: Certainly there are going to be other factors involved, Your Honor. But I point these facts out because I want to make the point that in instinctive emotional

reaction to this fact situation based on what is perceived to be fair, would lead you to the conclusion that Texas Industries ought not be allowed to keep all that money, ought not to be allowed to keep $50,000 and escape all liability to Abraham. If you were going to judge this case on the basis of an emotional response to what is fair, the way you would do it to deny the contribution remedy that Texas Industries seeks. I am not asking --

QUESTION: Do you think -- as you know, there have been a lot of amicus briefs filed in this litigation, with many of them directed to questions that aren't really at issue here.

MR. CELLINI: Yes, Your Honor.

QUESTION: Such as claim reduction and various other things, and one very appealing one, for example, by the Mead Corporation involving a question that isn't presented here. Would you reject, would your argument reject contribution in all contexts?

MR. CELLINI: My argument would reject it in all contexts, Your Honor.

QUESTION: In antitrust cases?

MR. CELLINI: Yes, sir.

QUESTION: Well, you mean without Congress saying we should?

MR. CELLINI: Without Congress saying so.

QUESTION: Right.

QUESTION: You wouldn't have us fashion it for any purpose?

MR. CELLINI: No, Your Honor. And I'm suggesting to the Court that if it considers all of these amicus briefs and considers this particular fact situation, what can be gleaned from examining all of those situations is that you need to do more than form some sort of instinctive reaction to what is fair. You can't do that. In some situations contribution looks to be fair; in some situations it looks to be unfair. So what needs to be done is, you have to look at the underlying public policy considerations that gave rise to this statute, to this no-contribution rule, and you have to look to the practical considerations.

QUESTION: Would you say that if a judgment is entered against three conspirators for treble damages, that after a successful prosecution of an antitrust case the judge enters the judgment. May he order each defendant to pay a third if the plaintiff requests him to?

MR. CELLINI: Mr. Justice, Mr. Slater is correct in stating the present rule, which is that the plaintiff can choose who he wants --

QUESTION: That wasn't my question, was it?

MR. CELLINI: I know of no case in which that has been done.

QUESTION: That still isn't my question. Could a judge order then to do that at the request of the plaintiff?

MR. CELLINI: I would not be so bold as to say he could not, Your Honor. I've never seen it done. I know of no authority for doing it.

QUESTION: Certainly, no plaintiff would have any incentive?

QUESTION: Well it might save him a lot of -- if he thought that each one should pay a third and would like to collect from them a third because they've all kicked him around a little, it would certainly save him a lot of inconvenience of they were ordered to pay a third.

QUESTION: He might think that would enhance his future business relations with one of them.

MR. CELLINI: There are specific fact situations, as I've tried to argue to the Court, in which a contribution remedy is attractive, and there are specific fact situations in which it doesn't look attractive and I suggest to the Court that you --

QUESTION: Do you agree with Mr. Slater that there have been, at least some states, that judicially have fashioned a right of contribution?

MR. CELLINI: There have been a couple of states that have fashioned --

QUESTION: You say, a couple, not -- ?

MR. CELLINI: Yes, Your Honor. In most --

QUESTION: In antitrust cases?

MR. CELLINI: No, Your Honor. These are under state laws. If there is a general rule --

QUESTION: Well, under state antitrust laws?

MR. CELLINI: I know of none under state antiturst laws.

QUESTION: Well, state torts, generally, I think, aren't there?

MR. CELLINI: Yes, Your Honor, there are.

QUESTION: There are a lot of those.

MR. CELLINI: That's the minority rule.

QUESTION: What, what, contribution, the minority rule?

MR. CELLINI: Contribution against intentional tortfeasors is a minority rule.

QUESTION: That is, at least, as a matter of -- something fashioned as a judicial remedy?

MR. CELLINI: Yes.

QUESTION: As opposed to a legislative -- ?

MR. CELLINI: Even statutory, Your Honor, because under the Uniform Contribution Among Tortfeasors Act, under the restatement on restitution, an exemption is created.

QUESTION: But then, contrary to the common law, the regular rule in the nonintentional torts is contribution?

MR. CELLINI: In nonintentional torts, the majority rule would now be in favor of contribution, taking into

consideration statutory --

QUESTION: Although the common law was opposed?

MR. CELLINI: Yes, Your Honor.

QUESTION: I take it that what you are suggesting to us is that there are so many nuances and so many elements in this that it's something for a legislative body to weigh, not for a court, which has no facilities for hearings, to get into?

MR. CELLINI: I certainly couldn't have said it any better, and I certainly couldn't have said it as forcefully, Your Honor. I think the deterrence issue is a great example of the difficulties in assessing the policy situations involved. The 5th Circuit concluded that the rule against contribution enhances deterrents, because of the uncertainty it creates among potential conspirators. In accordance with prevailing economic theory the 5th Circuit said that businessmen are risk-averse; they are less prone to take a big chance of getting a small -- they are deterred more by the slight prospect of a large loss than by the strong prospect of a small loss. And that result comports with common sense, as well as prevailing economic theory. If you could do as what Mr. Slater suggested in this case and seek contribution, you could in effect conduct a sort of cost-benefit analysis to determine whether or not it would be beneficial to you to engage in an antitrust conspiracy, and there could

be many situations where it would be of positive benefit to engage in an antitrust conspiracy. I have gauged one possible fact situation along these lines on page 20 in my brief, where I posited a situation where one company controls 45 percent of the market and knows that under a per capita contribution rule it is only going to get tagged with a by-head share of any conspiracy. And there are a dozen people in that particular market.

Under those circumstances, that company with the dominant share in the market -- I posited 45 percent, but you could pick any number -- that company would have a positive incentive under a contribution rule to go ahead and either force by threats or entice the other companies involved in the industry to join in a conspiracy, because it knows it stands to benefit far more than it could ever lose under those circumstances.

QUESTION: But, Mr. Cellini, that really is an argument against the per capita rule, not necessarily valid in all possible applications of contribution. What would you say about the Olson Farm situation? That's one that does strike one as somewhat unfair.

MR. CELLINI: That's one of the more difficult situations, Your Honor, and as I started off addressing the Court, I think that you can't look at specific situations. You have to look at the policy considerations behind the

no contribution rule, why it came into effect. I think deterrence is one of those important policies. Another one is that contributions would deter settlements. Obviously, if someone could be brought back into litigation --

QUESTION: Of course, some of the amici argue that some of these settlements are themselves somewhat unfair because the price constantly rises as the settlement progresses.

MR. CELLINI: It shows the difficulties involved in the policy considerations, Mr. Justice. You have some of these amicus briefs that argue that we need contribution because it will enhance deterrence. In fact, Mr. Slater took that position before the Court today. On the other hand, you have other amicus briefs that say that we need contribution because the present rule results in overdeterrence.

I think the best summing up of the problem before the Court was made by the Court in the Olson Farms decision when it said, this is a complex policy thinking, that we ought to leave to Congress -- and this matter is before Congress right now; there was legislation introduced in Congress in 1979 under which a contribution remedy would be created. Now, Congress has not taken action on that. It's pending on the floor of Congress right now. But I suggest to the Court that that is strong evidence that Congress did not initially mean to create a contribution remedy when it passed the antitrust laws, and that the matter ought to be

left to Congress. Now, Mr. Slater reads Section 4 of the Clayton Act in such a way that he asserts a contribution remedy could be fashioned out of it.

What he says is, that if you don't do that, people can get off scot free, and the rule was meant to punish all violators. What the statute says is that any person who shall be injured may sue therefor. It does not say, in accordance with Mr. Slater's analysis, every person who was injured must sue therefor. It creates a cause of action in favor of the person injured, not in favor of someone who has violated the statute and now seeks to either escape liability entirely, as is the case in this situation, or at least spread its liability among everyone that conceivably could have participated in the conspiracy.

I think there is no basis upon which, unlike the securities laws, a cause of action contribution could be implied from this statute. And certainly the historical background of the Sherman Act doesn't suggest any basis on which such a remedy could be implied from the statute. But that point has been dealt with at some length by the Solicitor General of the United States in his brief to this Court. I think the Solicitor General can present that point more forcefully than I could.

Unless the Court has further questions directed to me I would respectfully like to cede the remainder of my

time to the Solicitor General.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cellini. Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. McCREE: Mr. Chief Justice, and may it please the Court:

The interest of the Government in this litigation stems from its concern for the enforcement of the antitrust laws and particularly from its interest in insuring the continuing effectiveness of private actions under Section 4 of the Clayton Act, particularly to accomplish the twin goals of the Antitrust Act, which are compensation to the injured and deterrence of would-be violators.

We submit that permitting defendants to seek contribution may or may not affect the deterrence of private actions but certainly it will so complicate litigation as to hamper and perhaps frustrate the recovery by injured plaintiffs.

QUESTION: Would it be fair to say that it kind of puts a wild card in the game?

MR. McCREE: That's a metaphor that I would adopt, particularly in the deterrence. We just don't know which way it's going to fall, and we have referred to the economic analysts in our brief, as has my brother Cellini, and their conclusions are conflicting and indeterminate. But everyone

is certain that to have contribution in already complex antitrust cases would almost unmanageably confuse and complicate already complicated antitrust litigation.

We suggest that the Congress is the proper body in the federal picture to address this subject because of its many complexities. The Court in its colloquy with counsel that have preceded me has pointed out effectively that there are many facets to this question of contribution, and that it can be applied in many ways.

The manner in which it might be afforded lends itself to at least three analyses. One, of course, the pro rata amount, which depends on numbers alone; the market share amount, which depends upon how much was sold; and the other, the degree of culpability, which of course, would require even more from the district judge confronted with this determination. Whether one or all of these would be applied in some combination in a particular case doesn't lend itself easily to judicial determination, and is more properly addressed to the Congress, which has the capacity for fine tuning.

We suggest that this Court or the --

QUESTION: How much chance do you think Congress would have of coming up with a contribution bill?

MR. McCREE: I don't like to speculate about it, but the Congress at least thought it worthy of its attention

in 1979 when it addressed the subject and invited testimony from interested sources and even came up with a bill. They failed to pass it, but --

QUESTION: Well, the Attorney General indicated general appropabation of the idea in broad terms, did he not?

MR. McCREE: Indeed, he did, but he also stressed the complexities and suggested that it was premature to take a firm position. And we think that the Congress has the capacity, at least, to receive the testimony of the economic analysts and others to inform its judgment, something that an individual district court would not have, and certainly this Court does not have, with the other matters that affect it.

We suggest that the proper analysis to this problem is to regard the antitrust laws, as they are, as creating statutory remedies, and we think the Court should pursue the analysis that it has suggested in other instances when it sought to endeavor whether the Congress implied a cause of action. In Cort v. Ash, and the Cannon v. the University of Chicago, suggest that the first inquiry should be, is the person seeking an implied cause of action a person for whose benefit the statute was enacted?

I think it's entirely clear that the law violator, the tortfeasor, is not the person for whose benefit this law was enacted. And to imply a cause of action for contribution

for him would fly in the face of the analysis that this Court has followed in addressing other questions of this sort.

The Congress which enacted, of course, the antitrust laws, has revised the antitrust laws from time to time. 1914 was the Clayton Act, of course; and again in 1974 and 1976 without ever authorizing contribution. Yet, the literature has suggested contribution before those periods, and the Congress didn't decide that it was even worth taking up until 1979 after the Professional Beauty Supply v. National Beauty Supply case, and has just begun to address it. And we suggest that this Court should properly defer to Congress's prerogative on the priority here and permit it to wrestle with some of these difficult problems that have been outlined this afternoon.

I'd like to suggest a case which is referred to on page 16 of our brief, In re Corrugated Container Antitrust Litigation. Here there were 38 named defendants in a private antitrust suit, each of which could seek contribution, and if one can only imagine the district judge confronted with third party actions of that magnitude, trying to fashion a remedy for an injured plaintiff. Also, I'd like to call the Court's attention --

QUESTION: That's the litigation, I think, Mr. Solicitor General, that has engendered a good many of the amicus briefs in this case.

MR. McCREE: Indeed it has.

QUESTION: Because I think the plaintiff in that case settled seriatim with many of the defendants and upped the ante each time, and left the Mead Corporation holding the bag, as it says.

MR. McCREE: And we would submit that there will always be appealing situations, although we think the case before the Court at this time is not such a case, and --

QUESTION: No, and that involves related questions of claim limitation and carving out, and so on, which are not -- and settling with defendants; none of which issues are present in this case.

MR. McCREE: We agree completely with the Court's observation, Mr. Justice Stewart, and we think this is another reason why we shouldn't do this.

QUESTION: Mr. Solicitor General, insofar as you stress the importance of not complicating the plaintiff's right to recover by burdening the litigation with a lot of parties and so forth, could not that problem be solved by requiring the claim for contribution to be asserted after judgment?

MR. McCREE: That is a suggestion, Mr. Justice Stevens, that has been made. However, the plaintiff would then, or the party seeking contribution, would have to go forward again and establish the liability of the person

he sought to have contribute.

QUESTION: You'd add to the burden of the courts, of course, but I'm not sure it would add to the plaintiff's burden, is what I was --

MR. McCREE: Oh, it would ease the Court's problem but it would just make for further litigation with the liability question unaddressed.

QUESTION: The plaintiff would have obtained his judgment then, presumably.

MR. McCREE: But there'd just be that many more lawsuits after the fact. The proceedings before the Congress, in considering amendments to antitrust proceedings recently -- I think this is found on page 4 of the Antitrust Procedural Improvement Act, Congressional Report -- observes that many antitrust cases take 5-1/2 years to litigate, and that the average is four years, and if one were to graft on to that burden the problem of seeking contribution, it is very difficult to determine just how far we would go. The Congress very recently --

QUESTION: What would you do if you add the IBM case in New York to those figures?

MR. McCREE: Mr. Justice Marshall, that's an entire judicial career. The Congress recently commissioned a number of new district judges and their average age, I think, was about 50. And their eligibility for taking senior status

comes at age 65, and I would think that one of those judges could spend 15 years easily with that litigation, and perhaps have it as a legacy for his successor.

QUESTION: IBM is -- about 12 up to now.

MR. McCREE: I didn't intend to have a parade of horrors before the Court but I think I've identified who should be the leader of such a procession if we did.

We suggest, then, that this is appropriately the kind of case, or the kind of matter, that should be left to the Congress for its resolution, and just because of these many complexities.

One more I'd like to refer to before I take my seat. Mr. Justice White inquired about the restatement and its position, I think, on contribution.

QUESTION: I know what it is.

MR. McCREE: Very well. Well, then I won't --

QUESTION: I've read it in the last five minutes.

MR. McCREE: Thank you. I will not have to refer to that. If there are no further questions the Government will rest on its brief as filed. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General. Do you have anything further, Mr. Slater?

ORAL ARGUMENT OF BENJAMIN R. SLATER, JR., ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. SLATER: If Your Honors please, insofar as the

question of the fairness argument is concerned, I think perhaps the statement of the 8th Circuit in Professional Beauty Supply puts the question a great deal more accurately than I've been able to do.

In that case, that court, considering an antitrust contribution concept, said, "We believe that the question of deterrence actually cuts both ways, and on balance a rule allowing contribution is actually a greater deterrent. The fact that one tortfeasor may be held liable for the damages arising from the antitrust violation necessarily means others may go scot free. The possibility of escaping all liability might cause many to be more willing rather than less willing to engage in wrongful activity."

And it went on to say, "The deciding factor in our decision is fairness between the parties. We conclude that fairness requires a right of contribution exist among joint tortfeasors, at least under certain circumstances. There is an obvious lack of sense in 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."

If Your Honors please, there is no way that Texas Industries can be liable to this plaintiff without the joint responsibility of these respondents.

QUESTION: Yet, didn't the 1946 Amendment to Rule 14 permit the plaintiff in any civil case brought in the United States district courts to choose his defendant out of whim, spite, any other reason?

MR. SLATER: Well, he could choose his defendant; certainly in an antitrust case he can choose his defendant, aside from the federal rules, because of the case law. He can pick and choose. He could have sued one of these respondents. He could have collected from one of these respondents and never sued Texas Industries, even though he bought it from Texas Industries.

QUESTION: He presumably picks out the most convenient and the most vulnerable, wouldn't you think that would be a litigation tactic?

MR. SLATER: Perhaps that's true, Your Honor. In most instances, I think, you find that the plaintiff wants to sue all those that he knows as coconspirators. But he could have any number of reasons why he doesn't want to. He could be doing business with him, for example. I think that was the Olson Farms --

QUESTION: Well, maybe he even thinks that if there's no right of contribution he might get a little aid and comfort from some of the others.

MR. SLATER: Well, perhaps, but at the same time --

QUESTION: Anything wrong with that?

MR. SLATER: Well, I think it's wrong because I think that the antitrust laws are designed so that those who are guilty shall pay, those that are liable shall pay. They are all joint tortfeasors, and I think that --

QUESTION: But in a criminal case, the prosecution sometimes will let one guilty fellow off in order to get his help in the prosecution. Isn't that so?

MR. SLATER: That's certainly true in criminal matters; certainly true. Can't argue with that. I don't know that that's necessarily fair, but it certainly is the case in criminal matters. But it seems to me that with respect to a civil situation where you have a specific cause of action conferred on a particular group of persons who were injured against another group who caused that injury, then the plaintiff should certainly be permitted to pick and choose whom he wants to sue. We don't want to complicate his suit in any way. He can pick and choose, he can sue one, he can sue two, he can sue them all. But as between those persons who are liable, they should be able to spread the burden. That really is the crux of the --

QUESTION: Well, whether or not they're liable depends upon whether or not you win.

MR. SLATER: That's right. Their defense is, if they're not, if they did not conspire, then of course there's no liability.

Insofar as the deterrence goes, I won't harp on that, but it occurs to us that, as the Solicitor General points out, the question of deterrence can cut both ways. Certainly the argument can be made that to cause a company to be exposed to the possibility of bearing the entire risk, entire judgment, would be more of a deterring factor than it would be for them to know that they could spread the risk.

On the other hand, there is a much better chance of their knowing that they're going to get sued if there is contribution. Because if then, if one or two or three or four of the group of coconspirators are sued, you can rest assured they are going to make certain that the other coconspirators are brought into that case. So it's a question of which is the greatest deterrent? Is it the exposure to the larger dollars, or is it the greater possibility of being exposed to a judgment?

As a matter of fact, it occurs to us that the real deterrent in antitrust matters is the criminal statute, and that the possibility of fines and the possibility of jail terms to those persons who are thinking of violating the law is really the deterring factor. And if they're not concerned about jail terms and they're not concerned about felony convictions and jail terms and hundred-thousand-dollar fines, they're not going to be concerned about whether or not their employer has to pay a whole judgment or a cost.

Insofar as the complexity question is concerned, we certainly -- certainly, anytime you add parties, anytime that you permit additional causes of action, you of course increase the complexity somewhat. But the securities cases are complex cases, and they've been handled by the courts and the courts can sever, they can sever the claims, they can order new trials, separate trials. There are any number of procedural devices available to the courts to permit them to handle whatever complexity might arise. It won't complicate the plaintiff's suit in any way.

The only complexity that can arise would be the increased complexity that might be caused as a result of cross-claims and third party demands, and we submit, Your Honors, that --

QUESTION: Isn't there this factor too, Mr. Slater, that I suppose you're more apt to settle if we affirm?

MR. SLATER: Sir?

QUESTION: Aren't you more apt to settle the case if we affirm than if we reverse, if you're the only one on the line and you know you can't recover from someone else after a judgment? It seems to me you have greater motivation to settle right now.

MR. SLATER: I suppose there could be that, if that situation -- if you finally got into it, you might be more inclined to.

QUESTION: Wouldn't that be a general characteristic of these proceedings, that if you have a possible recovery over against nonparties, you'd have an additional reason for not settling in every case?

MR. SLATER: Well, I don't think so because, really, what happens in these cases, though, they're long, they're drawn out, there is long, protracted litigation. They're very expensive litigation to carry on, and I think that most defendants find themselves in a posture of wanting to settle initially if they can, in some way, as soon as it becomes apparent that they're going to have some exposure. And I don't think that the question of contribution really is going to have an adverse effect, if you were to grant it, would have an adverse effect on settlements at all.

MR. CHIEF JUSTICE BURGER: Thank you. The case is submitted.

(Whereupon, at 2:43 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1144

TEXAS INDUSTRIES, INC.

V.

RADCLIFF MATERIALS, INC., ET AL.

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BY: Will J. Gilson