JUDGMENT SHARING AGREEMENTS

IN RE BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIG.

Nos. 94 C 897, MDL 997, 1995 WL 221853 (N.D. Ill. Apr. 11, 1995)

MEMORANDUM OPINION

KOCORAS, District Judge:

This matter is before the court on Class Plaintiffs' ("Plaintiffs") motion to declare Defendants' judgment sharing agreement unlawful. For the reasons set forth below, the plaintiffs' motion is denied.

THE JUDGMENT SHARING AGREEMENT

On or about October 26, 1994, the Manufacturer Defendants and the Wholesaler Defendants entered into a judgment sharing agreement ("Agreement"), apportioning liability among the defendants in the event of an adverse judgment. The Agreement, which, according to Defendants, provides an equitable method of apportioning any judgment entered jointly against two or more Defendants, is divided into two parts. The first part, dealing with the Wholesaler Defendants, creates a defense fund under which the Manufacturer Defendants promise to reimburse the Wholesaler Defendants for the first $9 million in attorneys' fees and disbursements. In addition, the Agreement caps the Wholesaler Defendants' share of any liability at a specific dollar figure. In return, the Wholesaler Defendants agree to release the Manufacturers from any claims arising from conduct at issue in this case.

The second part of the Agreement provides a means of allocating liability among any Manufacturer Defendants who receive adverse judgments. With respect to one-half of those amounts, responsibility for payment is allocated according to the historic market share of the products of each Manufacturer Defendant. The remaining one-half of the payments also are distributed by historic market share except to the extent that one or more Defendants can affirmatively establish that the judgment being shared does not apply to one or more of its products.

With respect to settlements, the Agreement provides that any Defendant may settle at any time. However, any Defendant entering into a settlement with the plaintiffs of any or all of the claims against it will remain liable for the payment of any judgment obtained against any of the other defendants based upon sales of the settling defendant's products unless its settlement agreement expressly provides "that the Claimant or claimants with whom it has settled any Claim or Claims shall exclude from the dollar amount collectable from non-Settling Parties" the amount for which the non-settling defendant would have been responsible under the Agreement had it not settled and been found liable.

DISCUSSION

Judgment sharing agreements provide a mechanism by which Defendants may allocate a judgment entered jointly against more than one Defendant. In that antitrust law provides no other method of achieving this purpose, absent such an agreement, a successful antitrust Plaintiff conceivably could collect all of any judgment from one Defendant or a small group of Defendants. Because there is no right of contribution in antitrust cases, *see Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981), one Defendant with an otherwise insignificant role in the wrongdoing could be required to pay the full judgment amount, while others with greater culpability would pay nothing. Judgment sharing agreements have emerged as a means of ameliorating this harsh result.

Judgment sharing agreements have further been utilized as a means of discouraging coerced settlements. As the 1982 Report of the Senate Judiciary Committee on the Antitrust Equal Enforcement Act noted:

> One result of our present system is to allow plaintiff's counsel to settle relatively inexpensively with some defendants, thus placing great pressure on the remaining defendants to settle at a higher rate rather than run the risk of huge liability for not only their own damages but also for the damages of those who opted out early and cheaply.

1982 Senate Report at 3. Judgment sharing agreements minimize the likelihood of these coercive settlements by equitably apportioning any judgment that might be entered against the defendants.

The Class Plaintiffs' request this court to declare unlawful the defendants' judgment sharing agreement. The plaintiffs contend that the Agreement encourages future intentional violations of the law, provides insurance for future intentional violations of the law, and unreasonably discourages and prevents settlements. Each one of these assertions will be addressed below.

A. Encourages Future Intentional Violations of the Law

The Class Plaintiffs argue that Defendants' judgment sharing agreement is unlawful because it applies to conduct occurring after the Agreement was signed, thus perpetuating unlawful future activities by the defendants. We note that the defendants' Agreement does apply prospectively in the sense that the liability apportionment is established through the time of eventual judgment.[1] We do not believe, however, that this constitutes an encouragement of future intentional violations.

Unless or until judgment is entered against the defendants, the activities of the defendants are not presumed to be unlawful. Only after an entry of judgment against them will the defendants be deemed liable to the plaintiffs, and it is at this time that the judgment sharing agreement operates to apportion the damages owed by each defendant. The defendants under the Agreement remain potentially liable to the

[1] Defendants' Agreement provides that it applies to claims for damages "extending up to the time of trial." *See* Agreement § 2.3.

plaintiffs for three times of all of the proven damages, both past and future. The Agreement does not extinguish any part of the plaintiffs' claim. By definition, judgment sharing agreements share the judgment, and in this limited manner, they are permitted to apply prospectively. The possible condonation of future antitrust violations under the Agreement does not outweigh the overall benefits served by the existence of the Agreement.

The Class Plaintiffs argue that the Agreement unlawfully impedes the likelihood that any Defendants will withdraw from "the cartel." For example, by placing a specific dollar amount on any liability of the Wholesaler Defendants, the Wholesaler Defendants would have little incentive to abandon any alleged transgressions and would be more prone to maintain their "illegal" alliance with the Manufacturers. The Defendants contend, however, that the limitation on the liability of the Wholesaler Defendants is merely the result of the Wholesalers' limited role in the alleged conspiracy. The Wholesalers are not alleged to be the recipients of any high profits, nor are they alleged to have played any role in deciding whether a particular type of pharmacy received a discount.[2] Indeed, to the extent that the Wholesaler Defendants' share of any judgment is too small, the Manufacturer Defendants would become responsible for the difference, thereby increasing the potential liability to the Manufacturer Defendants. In any case, the amount of any eventual recovery owed to the plaintiffs would not be depleted.

The plaintiffs further contend that the Agreement diminishes any incentive on the part of a Manufacturer Defendant to withdraw from the alleged conspiracy, because as to one half of any judgment, the Manufacturer would remain liable for its "historic market share." We note, however, that any Manufacturer who might choose to withdraw would not remain jointly and severally liable for damages attributable to post-withdrawal actions by the members of the conspiracy. In that the Agreement provides that a defendant must only share in a judgment "or part thereof" for which it is found to be jointly liable, no defendant would have any responsibility under the Agreement for damages caused by conduct subsequent to withdrawal by that defendant. The Agreement thus does not operate wholly to dissuade a Defendant's desire to withdraw from the alleged conspiracy. An important incentive remains.

B. Insures Against Future Violations of Law

The Class Plaintiffs contend that the Defendants' Agreement is unlawful in that it provides improper "insurance" against intentional violations of the antitrust laws. In support of this argument, the Class Plaintiffs primarily cite the Agreements' provisions as they relate to the Wholesaler Defendants, whose responsibility for payment is capped at $1 million. The Class Plaintiffs assert that such a cap on liability is unlawful as an agreement to insure against intentional violations of the law. *See Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178, 1187 (7th Cir.1980), *cert. denied*, 449 U.S. 1033 (1980). We disagree. The Agreement differs from most contracts of "insurance"

[2] It is worthy of note that, earlier in the litigation, the Class Plaintiffs offered to drop their claims against the Wholesaler Defendants for no money and no injunctive relief.

in that it does not provide for the payment of a judgment by some third party not involved in the allegedly unlawful conduct. As it relates to the Wholesaler Defendants, the Agreement merely affords a means of allotting responsibility for payment of any joint and several judgment among responsible parties. We do not believe that the Agreement effectively insures against future violations of law.

C. Unreasonably Discourages and Prevents Settlements

The Class Plaintiffs contend that Defendants' judgment sharing agreement impedes any possibility of settlement by freeing a settling Defendant of its sharing obligations only if it secures an agreement from the plaintiffs which carves out the settling defendant's share from any final judgment in the case. Studies conducted by the Senate Judiciary Committee and by the Antitrust Section of the American Bar Association have concluded that sharing agreements in practice do not pose a barrier to individual settlements. *See 1979 Senate Report* at 2, 13-17; *1979 Senate Report* at 2, 13-17, 19-20; *1982 Senate Report* at 2-3, 18-22; *1982 Senate Report* at 2-3, 18-22; *ABA Report*, 49 Antitrust L.J. at 295. Rather, as discussed above, judgment sharing agreements provide a means of discouraging coerced settlements. In order to accomplish this task, judgment sharing agreements commonly provide:

> . . . that if any signatory defendant settles, it must require the plaintiff to reduce any ultimate judgment against the other signatories by the settling defendant's percentage share of liability under the agreement. Alternatively, the settling defendant remains contractually liable to the other signatories for its share of the judgment.

Hearings Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, on Antitrust Damage Allocation, 97th Cong., 1st & 2nd Sessions, at 135 (1982) (prepared statement of Robert P. Taylor). The defendants' Agreement reflects this paradigm.

Absent a judgment sharing agreement, plaintiffs' attorneys are primed to exploit the immense exposure of the last defendant to settle. The plaintiffs "take small amounts ... at the beginning of the settlement process" and larger amounts as time progresses. 1982 Senate Hearings at 482 (testimony of Stephen D. Susman). The relative culpability of the defendant is no longer pertinent. Instead, a sort of "game theory" element emerges. Where, as under most judgment sharing agreements, each defendant is responsible for damages relating to its own sales, however, the "game theory" element of the settlement process is eliminated. "[S]ettlement discussions occur on a more rational basis ... and settlement is thus promoted." ABA Report, 49 Antitrust L.J. at 295. Given the real threat of otherwise coerced settlements and the benefits of achieving judgment based on some degree of relative fault, we do not believe that the defendants' judgment sharing agreement acts as an improper barrier to settlements. The defendants' judgment sharing agreement is not unlawful.

D. Discovery of Agreement Negotiation Materials

The Class Plaintiffs' seek discovery relating to the negotiation of the defendants' judgment sharing agreement. Judgment sharing agreements are, in effect, a form of

settlement, and drafts of settlements and settlement negotiations among counsel are generally not discoverable. *See Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 683-84 (7th Cir.1987). As such, we deny the Class Plaintiffs' request.

CONCLUSION

For the reasons set forth above, Class Plaintiffs' motion is denied.