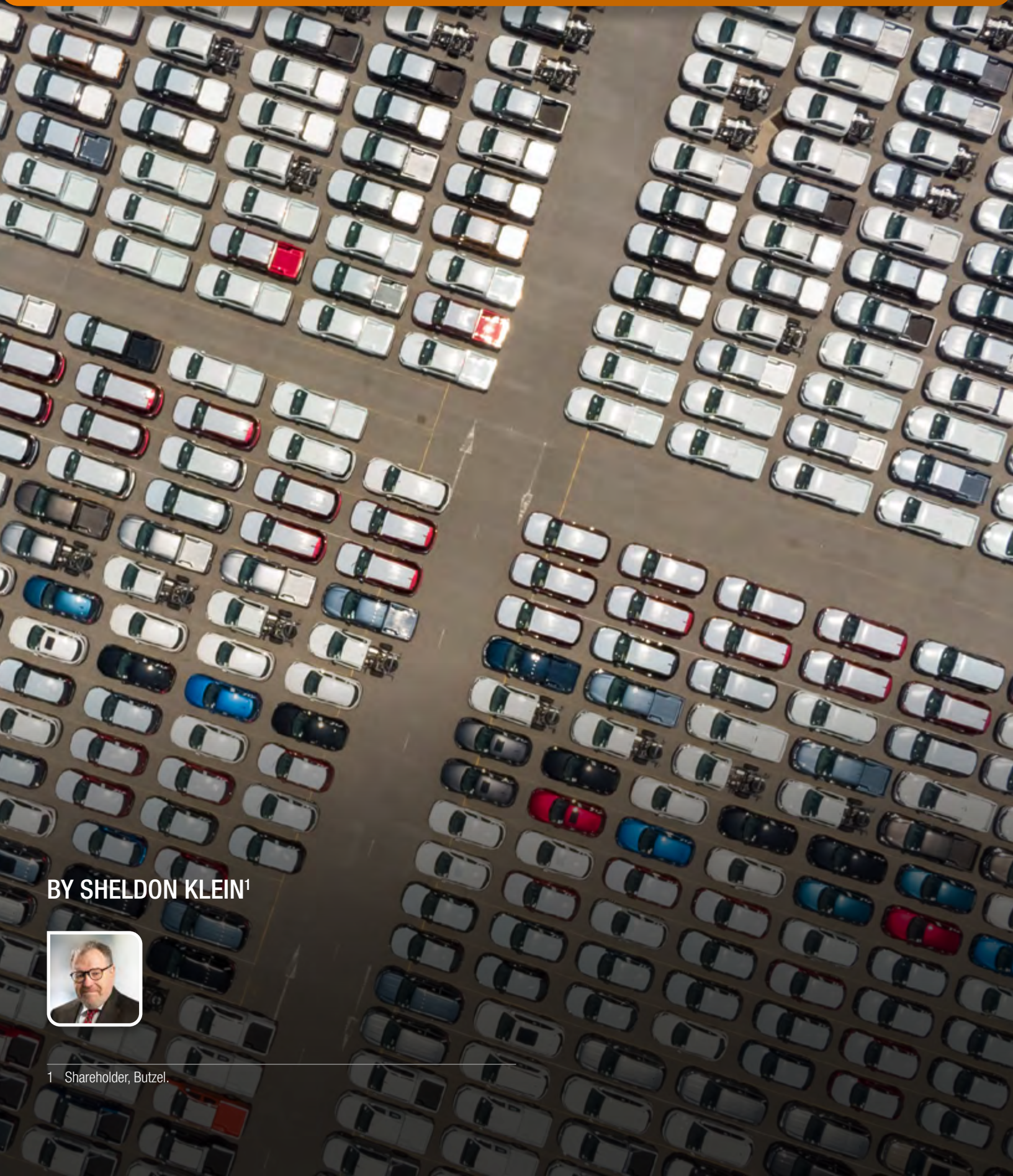
CONTRACTING AROUND THE ANTITRUST LAWS: THE AUTOMOTIVE SUPPLY CHAIN EXAMPLE



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CONTRACTING AROUND THE ANTITRUST LAWS: THE AUTOMOTIVE SUPPLY CHAIN EXAMPLE

By Sheldon Klein

The automotive supply chain is complex, distinctive and, susceptible to antitrust, particularly bid-rigging, conspiracies, as illustrated by the *Auto Parts Antitrust Litigation*, an unprecedently expansive conspiracy to bid rigs for many scores of components by many scores of sellers. In response, two U.S. auto manufacturers, Ford and FCA, have added antitrust specific provisions to their purchasing terms and conditions to better protect themselves against such conspiracies. FCA's provision is narrowly focused on the *Illinois Brick* problem that is inherent in a multi-tiered supply chain. Ford's is more ambitious, designed to provide a quicker and larger recovery when its suppliers are involved in criminal conspiracies. Each of the provisions are imperfect, but each provides the buyer meaningful advantages.

I. INTRODUCTION

Supply chains are a creature of contract and thus can be adapted to meet the business needs of the contracting parties. Antitrust law is not. In the automotive supply chains, several buyers have adopted contractual provisions designed to better fit antitrust law to close that gap. This Article attempts to provide an overview of how and why those buyers have done so.

In ordinary language, Ford, Toyota, etc. make cars. In industry parlance they are "Original Equipment Manufacturers" or "OEMs." But "maker" and "manufacturer" have almost become a misnomer. It was said of the Ford Rouge Plant that "iron ore, sand and coal went in one end, cars came out the other.[2] The Rouge Plant survives, but the extraordinary vertical integration which it embodied does not. Now, the OEMs themselves typically provide less than one-quarter of the vehicle value; [3] the remainder is provided by a multi-tiered supply chain in which the OEM buys vehicle components[4] from "Tier 1" suppliers, which in turn buy from "Tier 2" suppliers, and so on.[5] The components, at least manufactured components,[6] are typically vehicle-specific and purchased pursuant to long-term fixed price contracts following a competitive bidding-process.

History (and, perhaps, economic theory) has proven that this business model and antitrust law are not good fits. First, competitive bidding for relatively few bidding opportunities from a relatively small number of buyers invites bid-rigging. As discussed in Section III A, we now know that many component suppliers accepted the invitation, resulting in a vast supplier bid-rigging conspiracy[7] and many resulting criminal and civil proceedings. For convenience, these proceedings will be collectively referred to as the "Auto Parts Cases."[8] Second, there is an inherent *Illinois Brick* problem when a conspiracy is targeted at Tier 2 and lower tier suppliers.

It is hardly an insight to observe that antitrust litigation is slow, expensive, and generally unsatisfactory, and that is all the more so given the structure of the automotive supply chain and the scope of the Auto Parts conspiracy. In response, two OEMs, Ford and FCA US LLC ("FCA") (originally Chrysler, now Stellantis) have added an antitrust specific provision to their standard purchasing terms, with Ford's being directed to the unsatisfactory nature of litigation and FCA's to *Illinois Brick*.

This Article will first provide an overview of the automotive supply chain; then of the Auto Parts Cases and other conspiracies afflicting the supply chain. It will then review the contractual responses, focusing on the substance of the provisions, the underlying difficulties of antitrust law they are aimed at, and whether similar contractual provisions are potentially valuable to other buyers.

II. THE AUTOMOTIVE SUPPLY CHAIN

There are few OEMs[9] and many Tier 1 suppliers. A typical OEM has 300-500 Tier 1 production suppliers of any scale.[10] Of course, for any given component the number of potential suppliers is far lower. Further, geography is important – for many components, OEMs require geographical proximity to the assembly plant, which further narrows potential suppliers for those components.[11]

2 Ingrassia & White, "Comeback: The Fall & Rise of the American Automobile Industry," p. 384.

3 Purchased components represent approximately 72 percent of an OEM's operating costs. Bank of America Global Research, Global Automotive Supplier Review, p. 29 (June 10, 2020).

4 This article uses "components" to refer to whatever product the buyer purchases from the seller. Increasingly the components supplied by Tier 1s are complex systems encompassing many distinct parts.

5 Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 Mich. L. Rev. 953, 955 (2006) ("Shahar & White").

6 Raw materials are less likely to be purchased under the contract model described in the text.

7 It would be customary to preface references to the conspiracy with a stilted "alleged," but given the large number of guilty pleas and jail sentences, this Article will not do so. That does not mean, of course, that every allegation is true or that every supplier caught up in the litigation was in fact a conspirator.

8 The author represented a party in the Auto Parts Cases, as well as the *Polyurethane* case discussed in Section III B. Of course, no confidential or privileged information learned in those representations was used in writing this Article.

9 There are roughly a dozen OEMs manufacturing at scale in North America, although there are now many emerging autonomous or electric vehicle manufacturers attempting to reach scale.

10 The estimate is based on the author's experience and discussions with industry experts.

11 However, it is not unusual for a supplier to build a plant near the OEM site if needed to obtain a significant award.

Components are typically sourced through a non-public competitive bidding process, beginning with a request for proposal ("RFP"), which leads to an award of a sole-sourced, fixed-price requirements contract to the successful bidder. The bidding process typically occurs approximately two years before the components go into production.[12] The practical duration[13] of the awards is for the life of the program, which typically varies from four to eight years, and sometime longer.[14] Thus, the successful bidder bears all risk of fluctuations in input costs, volumes, and program duration,[15]

Both sole-sourcing and life of the program commitments are driven by certain economic fundamentals. The successful supplier typically must make a large, unreimbursed, fixed investment in equipment, facilities, engineering, design, development, and other activities to get from the program award to a vehicle ready part.[16] Dual sourcing would require duplication of those large fixed investments, and it would require the supplier to recover its fixed investments over a smaller quantity of goods. Further, once the award is made, switching suppliers involves very high switching costs for the OEM, both because of duplicative investments and the significant complexities and risks of switching suppliers in the course of high-volume production.[17]

Life of the program awards means that new bidding opportunities generally arise only when a new vehicle program is launched. Thus, new vehicle launches are a rough proxy for the number of sourcing opportunities. In 2020, for example, it is estimated that the Detroit 3 had only 13 vehicle launches.[18] Although a new vehicle launch may involve many scores of RFPs, any given Tier 1 is likely invited to bid on only a few, or even one.

The components themselves are largely defined by the OEMs in the RFP, which are typically program specific, with dimensions, materials, performance requirements and other attributes rigidly defined by the OEM.[19] As a result, competition is largely price driven.[20]

Although many Tier 1 suppliers are large and sophisticated,[21] the OEMs have overwhelming contracting power, with the vast majority of components purchased pursuant to standard form boilerplate contracts with no opportunity for negotiation.[22]. As summarized by Shahar & White, "sophisticated [OEMs] use rigid boilerplate forms to govern tens of billions of dollars of sales every year. The drafters of these forms are not the least embarrassed in admitting that they draft every term in a one-sided, self-serving manner. It turns out that such unrestrained economic power in contracting is exercised not merely against the weak and ill advised, but also against sophisticated partners to relational contracts"[23]

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12 Shahar & White, *supra* at 973.

13 "Practical duration of the award" is distinct from the nominal duration of the written agreement, which ranges between OEMs from one year (complicated by an array of automatic renewals and extension options). to the life of the program. In addition, every OEM reserves to itself the right to terminate the contract for convenience. The Supplier, on the other hand, rarely has the ability to end the contract.

14 Shahar & White, *supra* at 981.

15 In theory, the supplier would also get the benefit of favorable changes in costs, volumes, or duration, but in practice it is common-place that OEMs recoup those favorable benefits through a variety of contractual and commercial means. Indeed, the Auto Parts Cases alleged not only a conspiracy to rig bids, but a conspiracy to coordinate their response to price reductions demanded by the OEMs. See e.g. Consolidated Amended Class Action Complaint, ¶ 110, *In Re Automotive Wire Harness Sys.s Antitrust Litig.*, No. 2:12-md-02311-MOB, Doc # 86 (May 14, 2012).

16 Shahar & White, *supra* at 959.

17 *Id.* at 973-974.

18 Bill Bregar, *Auto tooling forecast projects rough* 2020, Rubber News (11/18/19), available at https://www.rubbernews.com/automotive/auto-tooling-forecast-projects-rough-2020 (last visited March 12, 2022).

19 John M. Connor, Twilight of Prosecutions of the Global Auto-Parts Cartels, American Antitrust Institute (July 17, 2019), p. 14, available at https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Auto-Parts-Ca the conspiracies rtel-Twilight-of-AAI-WP_7.17.19.pdf. ("Connor 2019") (last visited Feb. 26, 2022).

20 *Id.* It should be noted that over time, the OEMs have gradually turned to Tier 1 suppliers for "solutions," as opposed to rigidly specified parts, which allows room for competition across more than price.

21 For example, Magna, the largest North American based Tier 1 supplier had 2020 revenues of $32.6 billion. *Selected North American automotive suppliers in 2020, based on OEM automotive parts sales*, Statista (available at https://www.statista.com/statistics/199797/10-leading-north-american-automotive-original-equipment-suppliers/#:~:text=In%202020%2C%20Magna%20International%20ranked,12.7%20billion%20U.S.%20dollars%2C%20respectively). (last visited Feb. 25, 2022)

22 Shahar & White, *supra* at 981.

23 *Id.* at 957. The particulars of the contracts and the volume of business have changed in the 16 years since Shahar & White's article was published, but the fact of non-negotiable boilerplate contracts with enormous buyer power remains. In fact, many OEMs attempt to foreclose the mere possibility of negotiation by requiring a prospective bidder to accept the standard form terms as condition of even viewing the RFP.

III. ANTITRUST CASES AFFECTING THE SUPPLY CHAIN

A. The Auto Parts Antitrust Cases

The automotive supply chain (principally, but not exclusively, the OEMs) was the target of a multi-product bid-rigging conspiracy among tiered suppliers[24] which the Department of Justice has characterized as "the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the alleged illegal conduct."[25] Predictably, the criminal investigation triggered a cavalcade of civil class action litigation, consolidated under the name *In re Automotive Parts Antitrust Litigation*[26] ("*Auto Parts*").

The scope of the *Auto Parts* conspiracy and the resulting civil and criminal proceedings was extraordinary. The United States class action proceedings alone involved 41 distinct component class actions, with most of those 41 cases including, in addition to the federal direct purchaser class, satellite state law indirect purchaser class actions for both auto dealers and "end payors." [27] According to a 2019 accounting, in the United States, 169 executives have been indicted[28] and 68 have received prison sentences.[29] The Department of Justice has imposed approximately $3.2 billion in fines.[30] Class action settlements total approximately $1.75 billion.[31]. Moreover, the OEMs opted out of the class settlements and are believed to have privately resolved their claims against their conspiring suppliers without litigation.[32] Those OEM amounts are not public, but it is probable that the value of the OEM private resolutions significantly exceed the approximately $422 million paid to direct purchasers in the class action settlements.

One study[33] offers an explanation,[34] of the market structure and forces that led to the conspiracies. He points to, (i) for some components, there are few capable suppliers, and thus high concentration, for reasons of expertise and geography; (ii) easy communication between competitors, through industry events and management connections (e.g. management often moves between competing suppliers); (iii) the rigid OEM component specifications and requirements in the RFQ, leading to competition largely based on price. The complaints in the *Auto Parts* class actions identify overlapping, but not identical, market factors. The complaint in the *Automotive Wire Harness* cases[35] is illustrative of the alleged structural factors: (i) concentration; (ii) high barriers to entry because of high capital investment; and (iii) opportunities to conspire.

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24 The conspiracy was global, but this Article focuses on United States legal proceedings.

25 Remarks of Acting Assistant Attorney General Sharis A. Pozen, available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-sharis-pozen-speaks-briefing-department-s-enforcement (visited Feb. 24, 2022).

26 Master File No. 12-md-02311 (E.D. Mich)

27 A full inventory is available through PACER under the "Associated Cases" subpage of the Master MDL. A telling, if not sad, reflection of the scope of the proceedings is that the list of parties and counsel consumes 199 pages of the PACER docket.

28 Connor 2019, *supra* at 7.

29 *Id.*

30 *Id.* at 25.

31 *Id.* at 26, n.94. A different itemization of the settlements is contained at https://www.autopartsclass.com/faq#:~:text=Automotive%20Parts%20Antitrust%20Litigation%20%241.2%20Billion%20Settlements (last visited Feb. 25, 2022).

32 *Id.*

33 *Id.* at 13-14.

34 To be clear, the Author does not agree with Connor's explanation in its entirety. To give but one example, Connor states that "there is little evidence that the OEMs were financially stressed" during the period of the conspiracies. *Id* at 13. The assertion is puzzling, in light of the fact that the period and its immediate aftermath included bankruptcies of OEMs (General Motors and Chrysler), large suppliers (e.g. Delphi, Lear, Federal-Mogul and Dana), large wage concessions given by the UAW.

35 *In Re Automotive Wire Harness Systems Antitrust Litigation* ¶¶ 99 - 114, No. 2:12-md-02311-MOB, Doc # 86 (May 14, 2012).

B. Other Cases

The Auto Parts Cases do not stand alone. For example, there have been alleged conspiracies targeting the automotive supply chain for polyurethane foam[36] and automotive glass,[37] and a host of cases relating to chemicals and other raw materials used extensively in the industry, although not necessarily targeted at the industry.[38]

IV. THE OEMS' CONTRACTUAL RESPONSE

Both FCA and Ford have added antitrust specific terms to their boilerplate terms of purchase.

A. FCA

In 2010, FCA[39] added the following:

> **Assignment of Antitrust Claims**. Upon FCA US's request (which FCA US may make, in its discretion, provided it has a material interest in any claim described herein), Seller will execute a written assignment of [] all causes of actions under any applicable antitrust laws arising out of or relating to Seller's purchase of raw materials or ingredients used in goods sold or resold to FCA US. If FCA US recovers damages on account of any such assigned claim, and a portion of such damages is reasonably allocable to Seller, FCA US will, net of its attorneys' fees in liquidating the claim, return such allocable amount to Seller.[40]

The intent of the FCA provision is clear – to avoid *Illinois Brick*.[41] And it offers a simple "solution" to the problems that *Illinois Brick* was aimed at: the complexity of determining pass through and the risk of double recovery.[42] It cuts through the complexity by making FCA the sole arbiter of whether to require the assignment and the amount of pass-through. Given that the automotive supply chain is built on long term fixed price contracts, and thus that FCA would seemingly be largely insulated from the effect of downstream conspiracies entered into after the price for a particular component was set, there is an obvious risk that the Tier 1 supplier will be under-compensated. Although the provision allows FCA to return a portion of any recovery if it determines that portion is "reasonably allocable" to the recovery, the reliability of that part of the provision is questionable.

Does FCA's solution work? In terms of enforceability, probably. The weight of authority is that antitrust claims are assignable, at least if the assignment specifically identifies antitrust claims.[43], [44] Although there has been no public litigation regarding the enforceability of the FCA provision, there is no obvious reason why it would not be.

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36 See "Three Foam Manufacturers Plead Guilty in Price Fixing Scheme," Department of Justice Release, January 27, 2014, available at https://www.justice.gov/opa/pr/three-foam-manufacturers-plead-guilty-price-fixing-scheme (visited Feb. 24, 2022) and *In re Polyurethane Foam Antitrust Litig.*, No. 10-MD-2196 (N.D. OH).

37 *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 377 (3d Cir. 2004). It should be noted that the case involved the replacement market, not the original equipment market, but there was evidence of an original equipment market conspiracy.

38 See, e.g. *In re Polyester Staple Antitrust Litig.*, No. MDL No. 3:03CV1516, 2007 WL 2111380, at *2 (W.D.N.C. July 19, 2007) (yarn used in automobile fabrics); *In re Rubber Chemicals Antitrust Litig.*, 504 F. Supp. 2d 777 (N.D. Cal. 2007) (chemicals used in tires); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 84 (D. Conn. 2009); *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 631 (D. Kan. 2008), *aff'd,* 768 F.3d 1245 (10th Cir. 2014).

39 Then Chrysler, now Stellantis.

40 The substance of the 2010 Term has been carried forward to the present without any variation material to this Article. See FCA "Production and Mopar Purchasing General Terms and Conditions" dated 1/2017 ("FCA Terms"), Section 30. The 2017 FCA Terms, as well as the current terms of most OEMs manufacturing in the United States, are available in the Butzel Automotive Terms & Conditions Resource Center, available at https://www.butzel.com/resources-automotive. FCA (now Stellantis) recently issued new terms with a similar provision.

41 *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

42 *Id* at 731 - 732.

43 See generally Philip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 362 ("Areeda").

44 There is a possible complication if the rights being assigned are not assignable under the contract between the assignor and the wrongdoer. In other words, if the contract between the conspiring Tier 2 supplier and the Tier 1 prohibits assignment of claims, there is a question as to whether the Tier 1 has the right to assign its antitrust claims to FCA. The answer in part depends on the wording of the anti-assignment clause, but there is also disagreement. See *United Food and Comm. Workers Local 1776 v. Teikoku Pharma USA, Inc.*, No. 14–md–02521–WHO, 2015 WI 4397396, *4-6, (N.D. Cal. July 17, 2015) for an overview of pertinent case law.

As to efficacy, there are a few notable limitations. First, the provision is limited to the Tier 1's "purchase of raw materials or ingredients." Neither term is defined, but a fabricated component purchased by a Tier 1 from a price-fixing Tier 2 supplier is not easily described as a raw material or ingredient. If so limited, it would not, for example, apply to any of the components at issue in the Auto Parts Cases. Second, the provision is in a contract between FCA and a Tier 1. It would allow for the assignment of a Tier 1's claim against a conspiring Tier 2 but does not on its face protect FCA from conspiracies below the Tier 2 level. There, the *Illinois Brick* barrier remains.

In sum, the FCA provision would seem to be at least a partial solution to the *Illinois Brick* problem in a tiered supply chain. And the two limitations noted in the preceding paragraph are at least partially fixable. The provision need not be limited to raw material and ingredients. And the privity problem could be partially addressed by a mandatory flowdown provision,[45] although such provisions are difficult to draft, police and enforce.

B. Ford

Ford's provision, added in 2021, has a different and more ambitious goal than FCA's. It provides:

> **Anticompetitive Practices** If the Supplier is found [] to have violated [] a Competition Law [] or [] admits or pleads guilty to a violation of a Competition Law for a commodity purchased by [Ford], including pursuant to a Government antitrust leniency program, the Supplier shall: (a) produce to [Ford] all documents, data, and other information produced to all Government authorities globally that is related to an investigation of a Competition Law violation, within 4 weeks of a finding or guilty plea; and (b) participate in binding arbitration to resolve any Buyer claims related to the violation. If, during arbitration, Supplier is found to have violated competition laws with respect to [Ford], the Supplier agrees to pay Buyer 15% of the purchase price of all Goods impacted by the anticompetitive conduct []. If the Supplier is found to have violated the Sherman Act in the United States, [Ford] shall be entitled to treble the amount paid [] for all purchases governed by the Sherman Act. The payment required by [this section] shall not be the sole or exclusive remedy of for Competition Law violations, and Buyer is entitled to any available statutory damages at arbitration.***[46]

There are several notable aspects of this provision. First, there is a difficult threshold question of whether disclosure is required at all. The provision requires disclosure for "a commodity purchased by [Ford]" for which "the supplier admits or pleads guilty to [an antitrust] violation." So, the provision is triggered only if the criminal proceeding and the Ford purchases involve the same commodity. To. the extent that a supplier can plausibly contest whether the Ford provision is triggered at all, Ford's ability to speed up and simplify antitrust recoveries is compromised.

"Commodity" is not a defined term (or otherwise used) in the contract. Although not defined in the Sherman Act, it is used in other antitrust laws to refer to tangible property (as opposed to services).[47] But that cannot be what Ford means – there must be some type of connectedness between the "commodities" at issue in the criminal proceedings and those purchased by Ford for the provision to make any sense. Alternatively, "commodity" is often used to refer to fungible or staple products.[48] Again, that cannot be what Ford means, because most components are not commodities in that meaning of the word. Further, components that might share a high-level description are often highly heterogenous. For example, the first of the Auto Parts class actions involved "wire harnesses." "Wire harness" encompasses a broad array of diverse products[49] that have little in common other than they are used to connect other components that require electricity. The products range from small, inexpensive bundles of wires to marvels of electrical engineering. If Ford purchases only a small bundle of wires and the criminal proceedings involved only the engineering marvels, does the provision apply? That and similar difficult questions have no clear and indisputable answer, so, again, Ford may find itself litigating the threshold question of whether the provision applies at all.

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45 In fact, broad flowdown provisions are common in the industry. For example, Magna's standard terms provide: "Where. the. Goods. [are sold] by. [Magna] to. an. original. equipment. manufacturer [directly. or. indirectly] Seller. shall [] do. all. [] things. [] necessary. [] to. enable [Magna] to. meet. [its] obligations [] to. the. Customer."

46 Ford "Production Purchasing Global Terms and Conditions" dated July 1, 2021 ("Ford Terms"), Section 38.09, also available in the Butzel Automotive Terms & Conditions Resource Center.

47 See e.g. Areeda, *supra* ¶ 2314a (Robinson Patman Act).

48 See (Online) Merriam-Webster Dictionary, Definition 1c. ("a mass-produced unspecialized product."), available at https://www.merriam-webster.com/dictionary/commodity, (visited March 10, 2022)

49 For example, one of the Wire Harness complaints defined the relevant product to include "wire harnesses and the following related products: automotive electrical wiring, lead wire assemblies, cable bond, automotive wiring connectors, automotive wiring terminals, high voltage wiring, electronic control units, fuse boxes, relay boxes, junction blocks, and power distributors." Consolidated Amended Class Action Complaint, *In Re Automotive Wire Harness Systems Antitrust Litigation* ¶ 10, No. 2:12-md-02311-MOB, Doc # 86 (May 14, 2012). Not all "wire harness" defendants provided all of those items.

Assuming the provision applies, the 15 percent damage amount (trebled for Sherman Act violations) is notable. The 15 percent figure is essentially stipulated or liquidated damages. In general, such damages must be reasonable.[50] There is at least some empirical literature supporting 15 percent as a reasonable approximation of a typical overcharge. For example, a recent study identified the median overcharge in bid-rigging conspiracies during the most recent time period studied (2000-2016) as 17.55 percent. [51]. At the same time, empirical literature suggests that actual private recoveries in civil litigation is far less than the actual overcharges, let alone trebled overcharges.[52] This data[53] suggests that 15 percent is of great practical benefit to Ford, which is to say that it offers Ford recoveries approximating likely actual damages (subject to trebling) and greatly in excess of the recoveries likely through civil litigation, with significantly greater speed and less expense.

Note that the 15 percent stipulated damages recovery applies to "all Goods impacted by the anticompetitive conduct . . . ." Under Section 4 of the Clayton Act, 15 USC 15, "any person who shall be injured []by reason of anything forbidden in the antitrust laws [] shall recover threefold the damages by him sustained []." Is there any difference between recoverable damages under the contractual and statutory language? It is unclear. Perhaps an arbitrator would conclude that the Ford contract provision is intended to be read *in para materia* with the statute. But certainly, the language of the two provisions need not be read identically. Section 4 brings with it a more than a century of case law glosses on the simple statutory language, both as to proximate causation and the calculation of damages.[54] To the extent that the contract and the statute aren't read *in pari materia*, the differences will need to be explored case by case and, because it will be done through arbitration, without the benefit of precedent.

The automatic disclosure of documents produced to the government is likewise of great, perhaps even greater, practical benefit to Ford. It is common-place that in civil litigation document production is slow, expensive, and grudging. A party under government investigation, and especially a leniency applicant, is likely to be far more forthcoming with the government.[55] Thus, mandatory and prompt disclosure greatly benefits Ford.

V. SO WHY AREN'T THESE TYPES OF PROVISIONS MORE COMMON?

Ford and FCA are unique among OEMs in trying to address antitrust concerns in their terms of purchase and, to the author's obviously limited knowledge, unique among other standard purchasing terms. Why is that so? More specifically: (i) why haven't other OEMs followed suit; and (ii) why haven't buyers in other industries done so? As to why other OEMs have not followed suit, it is likely that at least part of the answer is that they don't think it necessary. The OEMs have such enormous practical commercial power that they may believe that they do not need formal legal proceedings to obtain compensation. Recall that in the Auto Parts Cases, with one isolated exception, no OEM filed suit, instead relying on private commercial resolutions. Second, and mundanely, the other OEMs may simply not have gotten around to it. The OEM terms change rarely – Ford's 2021 terms were the first significant change in their terms since 2004. It might be that others will follow. As to why other industries have not followed suit, it again likely starts with the OEMs' power to largely dictate contractual terms, even harsh terms to sophisticated Tier 1 suppliers. Such terms might meet counter-party resistance in most other industries. Further, the sheer scope and volume of OEM purchasing and the susceptibility of the supply chain to antitrust abuses might mean that such provisions make economic sense for OEMs, but not for all but a few buyers in other industries.

Nevertheless, the Ford and FCA Terms discussed in this Article provide meaningful, though imperfect, benefits to a buyer that is affected by seller antitrust violations. There are no doubt other contractual provisions that could provide the buyer advantages. Whether or not other buyers in and outside of the automotive supply chain turn to contract law for this purpose remains to be seen but doing so should at lest be considered by counsel advising on purchasing terms and conditions.

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50 Since the Ford provision is in a contract for the sale of goods, arguably UCC 2-718 would apply. Under 2-718, "[d]amages for breach []may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."

51 Connor, John M. & Werner, Dan P., Variation in Bid-Rigging Cartels' Overcharges: An Exploratory Study (October 27, 2018), Table 4, p. 20. Available at https://ssrn.com/abstract=3273988. (visited March 10, 2022).

52 One study found that the median recovery in a civil overcharge case which was preceded by a criminal conviction was 52.4 percent of actual estimated damages (before trebling). John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 2010 (2015).

53 To be clear, these empirical studies are used only as a crude touch point for assessing the efficacy of the Ford provision, not as an adoption of either the methodology or the conclusions of the studies, which is beyond the scope of this article and the mathematical skills of the Author.

54 See generally, Areeda, *supra* ¶¶ 338 and 340.

55 See generally, Department of Justice Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters," available at https://www.justice.gov/atr/page/file/926521/download, (visited 3/9/22).

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