This brief was filed on behalf of the American Antitrust Institute by AAI Advisory Board Member Lloyd Constantine and AAI Senior Research Scholar Robert Lande, June 11, 2002

COURT OF APPEALS: STATE OF NEW YORK

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CHARLES COX, individually and on behalf of all others similarly situated, **:**

:

Plaintiff-Appellant,

:

-against-

:

MICROSOFT CORPORATION and DOES 1 through 100, inclusive, :

Defendant-Respondent. :

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BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

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BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

PRELIMINARY STATEMENT

The American Antitrust Institute[1] respectfully submits this brief, as a friend of the Court, in support of the motion of Plaintiff-Appellant Charles Cox (Appellant) for permission to appeal *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't, 2002) to the Court of Appeals. This case addresses the extremely important issue of whether CPLR §901(b) prevents private class actions from seeking relief under the Donnelly Act, the antitrust law for the State of New York.

[1]The American Antitrust Institute is a non-profit consumer-oriented organization that believes that the national economy is best served by the vigorous enforcement of the antitrust laws. For more information see www.antitrustinstitute.org. The views and positions set forth in this brief are not necessarily the views of any particular members of the American Antitrust Institute's Board of Advisors. Moreover, Advisors who are involved in the litigation have recused themselves from participating in the determination of whether to file this brief and what the brief should say.

We believe that this issue is of such importance to the economy of New York State, and also to the effective enforcement of antitrust laws nationally, that it should be resolved by the Court of Appeals. The American Antitrust Institute believes, moreover, that the January 3, 2002 decision of the Supreme Court of New York County should be overturned, and that private persons should be permitted to bring treble damage actions on a class basis under the Donnelly Act because such actions are not in any manner a "penalty."

ARGUMENT

A. The Issue Is Crucial To The Enforcement of The Antitrust Laws

Ever since the United States Supreme Court's decision in *Illinois Brick Co. v Illinois*, 431 U.S. 720, 97 S.Ct. 2061 (1977) ("*Illinois Brick*") the antitrust world has been in turmoil. This decision held that only direct purchasers could sue antitrust violators, such as illegal cartels, for damages. Indirect purchasers were denied this right. This decision met with criticism for a number of reasons.

Firms that directly purchased from cartels or other antitrust violators often were able to pass the overcharges on to the next level in the distribution chain. Sometimes these overcharges were passed on in full, and there also were times when these overcharges were subjected to dealers' normal markup and then passed on, so that the ultimate consumer paid more than the original overcharge. Moreover, since the direct purchasers often needed to maintain good business relations with the antitrust violators, they were frequently reluctant to take any actions that might antagonize their suppliers. Therefore, direct purchasers often failed to sue for damages even when they were entitled to do so. The indirect purchasers had, of course, been denied this remedy by *Illinois Brick*, which meant that consumers were often denied any damage recovery at all. It also meant that antitrust violators were often able to keep most, or even all of their illegally acquired

gains. This situation was regarded by many as simply unfair. It also had the effect of under-deterring future violations of the antitrust laws.

The reaction of many states to this unfortunate situation was to pass so-called *"Illinois Brick* Repealer" amendments to their state antitrust laws, that permitted their citizens to sue for antitrust damages when they were indirect purchasers. More than 20 States have enacted such amendments to their state antitrust laws.

The antitrust community remains divided as to whether these laws are truly in the public interest. Opinion also is divided as to whether this issue should be addressed on a State by State basis, or whether a Federal solution is optimal. This area is the subject of intense scholarly debate, and is the subject of heated discussions at national antitrust symposia. A wide variety of legislative solutions have been proposed at both the Federal and State levels, although no consensus has yet to emerge concerning the issue.

Although antitrust suits by indirect purchasers are now permitted by many states, including most significantly New York and California, the opportunity for New Yorkers to maintain such suits is almost purely theoretical if they cannot be maintained as class actions. Most indirect purchaser claims, as contrasted with claims by direct purchasers involve relatively small sums for each of the injured indirect purchasers. Such claims are unlikely to be maintained on an individual basis. Consider a hypothetical price-fixing agreement among three auto makers which raises the price of their autos by $1000 per vehicle. These higher prices are then charged to independent auto dealers who in turn (non-conspiratorially) mark-up the illegal overcharge by 10%. Consumers eventually buy these autos for $1100 more than they would have in a free, unconstrained market *i.e.* the $1000 price fix overcharge plus the $100 (10%) mark-up. The ultimate consumers who indirectly purchased from the price-fixers only have a $3000 treble damage claim

(3 times the $1000 per auto overcharge) and are highly unlikely to maintain individual actions to recover, at most, this amount of damages. Moreover, the $1000 (single damage) and $3000 (treble damage) amounts in this hypothetical represent sums which far exceed the typical indirect purchaser claim, which is frequently less than $100.

Without the ability to maintain an indirect purchaser suit on a class action basis, the act of the New York legislature in enabling indirect purchaser suits is a practical nullity.

Perhaps it goes without saying, but the position of the State of New York in the United States economy is critical. New York is our national financial center. It will be difficult, if not impossible, to bring national order out of the current balkanized array of inconsistent state and federal precedents without knowing the position of New York. Therefore, we urge the Court to permit this appeal in order to allow this crucial issue to be definitively decided by New York's highest Court.

B. Antitrust "Treble" Damage Actions Are Not Punitive

We also believe that antitrust "treble" damages suits are not in any sense punitive. This is in large part because we believe that if viewed correctly, antitrust "treble" damage suits will probably be found to be at most, damages at a single damage level.[2] In order to ascertain what the true multiplier is, antitrust's so-called "treble" damages awards should be adjusted for: (1) their lack of full prejudgment interest; (2) effects of the statute of limitations; (3) effects of plaintiffs' attorney fees and costs; (4) other costs to plaintiffs pursuing cases; (5) costs to the judicial system in handling antitrust cases; (6) umbrella effects of market

[2] *See* Robert H. Lande, *Are Antitrust 'Treble' Damages Really Single Damages*, 54 Ohio State L. J. 115 (1993).

power; (7) allocative inefficiency effects of market power; and (8) tax effects.[3] These adjustments show that from the perspective of consumer plaintiffs, antitrust's "treble" damages are, actually probably between 64% and 132% of actual damages, with a mean of 90% of consumers' actual losses.[4] In other words, antitrust's so-called "treble damages" remedy probably is at most only single damages.

In reality even nominal treble damages are rarely paid by defendants. According to the rule of thumb, even many of the strongest cases settle for single damages, and settlements for more than single damages are far from the norm. However, these "single" damages are only nominally single damages because they have not been adjusted for any of the factors previously listed and therefore are only a tiny fraction of the amount required to ensure that victims recover their losses.

[3]For the reasons behind the necessity of these adjustments see Lande, *id*.

[4]*Id*. at 164. These numbers should be used cautiously. The statement that antitrust "treble" damages are probably between 64% and 132% of actual damages could inadvertently give the impression of more accuracy than is warranted. This range is only an estimate. Nevertheless, it is fair to conclude that actual antitrust damages are much more likely to be at the single damage level than at the double or triple damage level.

Some may object that awarding indirect purchaser recoveries in addition to direct treble damage actions would result in sextuple damages, which would be punitive, excessive, or duplicative. However, the reality is very different. We are unaware of even a single antitrust case in the history of the United States where the defendants paid more than treble damages. This is true even when criminal fines are added to the total of direct and indirect damages.[5] Therefore, the current overall level of antitrust payouts and penalties is only a fraction of that needed for purposes of optimal deterrence.[6] Overly high antitrust damages only exist in purely theoretical nightmare scenarios concocted by defendants in order to forestall laws that would cause them to pay damages closer to the optimal level; that is a level which would adequately compensate victims and deter future antitrust violations.

CONCLUSION

The American Antitrust Institute urges this Court to grant plaintiff-appellant's motion for permission to appeal to the Court of Appeals.

Dated: New York, New York
June 11, 2002

CONSTANTINE & PARTNERS

By: _____

[5] Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement 1955* -1997*: An Empirical Study,* 17 J. Ind. Org. 75 (2000).

[6] *Id.* Dr. Gallo et al. showed that fines from 1955 to 1993 were only four-tenths of one percent of the optimal level. His calculations included a generous adjustment for jail time served. *See* Joseph C. Gallo et al., *Criminal Penalties Under The Sherman Act: A Study In Law & Economics*, 16 Res. L. & Econ. 25, 59 (1994). Although fines and jail time have increased significantly in recent years, they would have to increase more than 200 fold from Gallo's baseline to be at the optimal level.

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