SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION -- SECOND DEPARTMENT

PAUL SPERRY, Individually and on Behalf of All Others Similarly Situated

Plaintiff-Appellant,

-against-

CROMPTON CORPORATION, UNIROYAL CHEMICAL COMPANY, INC., UNIROYAL CHEMICAL COMPANY LIMITED, FLEXSYS NV, FLEXSYS AMERICA LP, BAYER AG, BAYER CORPORATION, RHEIN CHEMIE RHEINAU GBMH, and RHEIN CHEMIE CORPORATION,

Defendants-Respondents.

Docket No. 2004-06517

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S APPEAL

PRELIMINARY STATEMENT

The American Antitrust Institute respectfully submits this brief, as a friend of the Court, in support of Plaintiff-Appellant Paul Sperry's (Appellant's) appeal in Sperry v. Crompton Corp., Docket No. 2004-06517. 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. The American Antitrust Institute believes that the decision of the Supreme Court of Nassau 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."

THE INTEREST OF THE AMICUS

The American Antitrust Institute is a non-profit consumer-oriented organization which believes that the national economy is best served by the vigorous enforcement of the antitrust laws. More information about the organization is available at 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 and Directors who are involved in this litigation or might have any

type of conflict of interest either have recused themselves from participating in the determination of whether to file this brief and what the brief should say, or were never notified that the American Antitrust Institute decided to file this brief.

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"), American consumers have been unable to recover adequately the overcharges they pay to antitrust violators. This decision held that only direct purchasers could sue antitrust violators for damages. Indirect purchasers were denied this right. This decision has been harmful for several reasons.

First, the firms that directly purchase from cartels or other antitrust violators often or usually are able pass the overcharges on to the next level in the distribution chain. Sometimes these overcharges can be passed on in full, and there also are times when these overcharges are subjected to dealers' normal markup and then passed on, so that the ultimate consumers often pay even more than the original overcharge. Under the Illinois Brick

decision, however, the ultimate consumers cannot sue the antitrust violators when they are indirect purchasers.

Second, direct purchasers often need to maintain good business relations with the antitrust violators. Often they cannot afford to antagonize their suppliers by suing them, even when those suppliers violated the antitrust laws and overcharged their customers. For this reason direct purchasers often fail to sue for damages even when they are legally entitled to do so. This leads to under-deterrence of antitrust violations.

Third, because many of the direct purchasers are able to pass on most or all of the overcharges to the next level in the distribution chain, the direct purchasers often are not harmed, or are only slightly harmed, by the overcharges. For this reason the direct purchasers also often have little incentive to sue the violators. The indirect purchasers had, of course, been denied this remedy by Illinois Brick. This means that antitrust violators often are able to keep most, or even all, of their illegally acquired gains. This also leads to under-deterrence of antitrust violations.

For these reasons, the Illinois Brick decision has harmed many consumers who were the ultimate victims of antitrust violations and allowed many antitrust violators to keep all or much of the fruit of their illegal

behavior. It also has had the effect of under-deterring future violations of the antitrust laws.

These undesirable effects caused many States to enact so-called "Illinois Brick repealer" laws or amendments to their state antitrust laws which permitted their citizens to sue for antitrust damages when they were indirect purchasers. More than 20 States have enacted such laws or have so amended their State antitrust laws. The American Antitrust Institute believes that these laws are in the public interest. We firmly believe that they are in the interests of consumers who are victimized by antitrust violations, and that these laws will lead to more neatly optimal deterrence of antitrust violations.

Although antitrust suits by indirect purchasers are now permitted by many States, including most significantly New York and California, the opportunity for New Yorkers, and especially New York consumers, to maintain such suits is almost purely theoretical if these suits 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 the same amount they mark up all costs - say, 20%. Consumers eventually buy these autos for $1200 more than they would have in a free, unconstrained market - i.e., the $1000 price fix overcharge plus the $200 (20%) mark-up. The ultimate consumers who indirectly purchased from the price-fixers would receive only 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 that far exceed the typical indirect purchaser claim, which frequently are less than $100 per consumer.

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. This will especially harm consumers and those businesses who are too small to have enough damages to warrant hiring counsel to represent them.

B. Antitrust "Treble" Damage Actions Are Not A Penalty

Antitrust "treble" damages suits are not in any sense a penalty. This is because, due to a number of factors - some of which are unique to antitrust - if antitrust's "treble" damage are viewed carefully and correctly, these payments actually constitute only approximately single damages.[1] In other words, despite the nominally "trebled" nature of antitrust damages, when they are examined carefully and correctly, for various technical reasons defendants pay, on the average, only approximately one times the total damages they cause. Moreover, victimized purchasers receive only approximately one times their total losses. Therefore there is no "penalty" from antitrust damage awards.

In order to ascertain the true level of antitrust awards, antitrust's so-called "treble" damages awards should be adjusted for: (1) their lack of prejudgment interest; (2) effects of the statute of limitations; (3) non-recovery for the "umbrella effects" of market power; (4) non-recovery for the allocative inefficiency effects of market power; (5) effects of plaintiffs' attorney fees and costs; (6) other costs to plaintiffs pursuing cases; (7) costs

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[1] See Robert H. Lande, Are Antitrust 'Treble' Damages Really Single Damages?, 54 Ohio State L.J. 115,158-74 (1993). See also Robert H. Lande, Why Antitrust Damage Levels Should Be Raised, 16 Loyola Consumer L. Rev. 329 (2004).

to the judicial system in handling antitrust cases; and (8) tax effects.[2] 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.[3] The necessary adjustments also show that defendants pay not treble damages, but approximately 35% to 201% of the overcharges, with an expected mean of 107%.[4] In other words, antitrust's so-called "treble damages" remedy probably is in reality approximately only single damages. They are in no respect a "penalty".

Moreover, even nominal treble damages - which when viewed accurately are really single damages - rarely are paid by defendants or received by consumers. According to a "rule of thumb" that frequently is used in the antitrust profession, many of the strongest cases settle for single

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[2] For the reasons behind the necessity of these adjustments see Robert H. Lande, Are Antitrust 'Treble' Damages Really Single Damages?, 54 Ohio State L.J. 115, 124-29 (1993).

[3] 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.

[4] Id. at 169.

damages. In fact, settlements for more than single damages are rare. However, these "single" damages are only nominally single damages because they have not been adjusted for any of the factors previously listed. In reality these nominal "single" damages, when adjusted by the factors that were listed above, typically only amount to roughly 1/3 of the amount required to ensure that victims recover their losses. Far from constituting a penalty, in most cases the actual damages paid are inadequate.

Some may object that allowing a recovery by indirect purchasers in addition to direct treble damage actions would result in sextuple damages, which would be a penalty, excessive and/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.[5] Representatives of the American Antitrust Institute have looked very hard for such a case and have challenged defense counsel at large public gatherings of antitrust lawyers to produce even one such example. But none has ever been brought to our attention. This lack of even one case where the actual amount paid exceeded treble damages is true even when criminal fines are added to the total of direct and indirect damages.

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

Moreover, as discussed above, when the nominal "treble" damages which are paid out are adjusted by the factors listed above, they really amount to only approximately single damages.

Therefore, the current overall level of antitrust damage payouts and fines is only a fraction of that needed for purposes of optimal deterrence,[6] and is only a fraction of the amount needed to compensate victims of antitrust offenses. Overly high antitrust damages that are a "penalty" are a myth that exists only in purely theoretical nightmare scenarios concocted by clever defendants in order to undermine laws that would cause them to pay damages closer to the optimal level, i.e., a level that would adequately compensate victims and deter future antitrust violations.

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[6] Dr. Gallo 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.

CONCLUSION

The American Antitrust Institute urges this Court to overturn the Order of the Supreme Court of Nassau County insofar as it held that the Donnelly Act does not permit a private plaintiff to sustain a class action.

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Respectfully submitted,

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