Nassau County Clerk's Index No. 17872/02
Appellate Division - Second Department Docket No. 2004-06517

COURT OF APPEALS
of the
STATE OF NEW YORK

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.

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE*

Dated: November 27, 2006

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PRELIMINARY STATEMENT

The American Antitrust Institute respectfully submits this brief, as a friend of the Court, in support of the brief for Plaintiff-Appellant Paul Sperry (Appellant). 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 laws for the State of New York. Specifically, the Donnelly Act authorizes the recovery of treble damages for persons who suffer injury from antitrust violations. Gen. Bus.

Law § 340(5).

THE INTEREST OF THE AMICUS

The American Antitrust Institute is an independent Washington-based non-profit consumer-oriented organization that believes that the national economy is best served by the vigorous enforcement of the antitrust laws. Its mission is to increase the role of competition, assure that competition works in the interest of consumers, and challenge abuses of concentrated economic power in the American and world economies. 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.

The American Antitrust Institute believes that the February 28, 2006 decision of the Supreme Court, Appellate Division, Second Department 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*"), American consumers have been unable to recover adequately the overcharges they indirectly 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 to 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 even when they were indirect purchasers. In 1998, the New York Legislature amended the Donnelly Act to permit suits by "indirect" purchasers or sellers. The amended statute provides that an antitrust plaintiff who "has not dealt directly with the defendant shall not [be] bar[red]" from

a recovery. Gen. Bus. L. § 340(6). This amendment takes the Donnelly Act beyond its federal antitrust counterpart, which generally permits only those persons who deal directly with the defendant or a co-conspirator to sue for damages. 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 nearly optimal deterrence of antitrust violations.

Antitrust suits by indirect purchasers are now permitted by many States, including New York and California. However, the opportunity for New Yorkers, and especially New York consumers, to maintain such suits is only 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 widget makers who raise the price of their widgets by $20 per widget. These higher prices are then charged to independent widget makers 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 widgets for $24 more than they would have in a free,

unconstrained market - *i.e.*, the $20 price fix overcharge plus the $4 (20%) mark-up. Consumers who indirectly purchased from the price-fixers would receive only a $60 treble damage claim (3 times the $20 per widget overcharge). No rational consumer in that position would hire lawyers and spend thousands if not millions of dollars pursuing such a claim. As the Seventh Circuit so aptly stated, "The very feature that makes class treatment appropriate-small individual stakes and large aggregate ones-ensures that the representative will be unwilling to vouch for the entire costs. Only a lunatic would do so. A mad man is not a good representative of the class!" *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir.1991).

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

Congress certainly did intend to authorize penalties for antitrust violators: this is why Congress passed laws providing that when antitrust violations can be proven beyond a reasonable doubt, they give rise to criminal fines and prison sentences.[1]

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[1] Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, § 6, 101 Stat. 1279, 1280 (codified at 18 U.S.C.A. § 3571(d) (2000)).

But Congress's decision to award treble damages to victims of civil antitrust violations can best be explained by its desire to fully compensate the victims of this illegal behavior.

"Treble" damages are needed because single damages would not fully compensate victims for the lack of prejudgment interest, the immense corporate and individual disruption associated with antitrust suits, and such difficult-to-quantify damages as loss of innovation and diminished quality that reduced competition can cause. In addition, treble damages are needed to compensate for the tremendous obstacles involved any time a consumer wins an antitrust suit.

The explanation provided decades ago by Professor Vold rings true today:

> "In other words, closely analyzed, the threefold damage provision is remedial to the plaintiff, compensatory in its nature in liquidating compensation for accumulative intangible harm incurred outside of and beyond the ordinarily recoverable legal damages to the business or property. It is a penalty upon the defendant only in the loose sense of penalty as signifying a burden encountered by the defendant as a consequence of his wrongdoing. In that broad sense of penalty this provision of course is a burden to the defendant in requiring him to make compensation for damage wrongfully caused, comparable to the burden that is imposed by every provision which imposes legal liability to make compensation to the injured party. The three-fold damage provision is a provision for liquidated compensation for accumulative harm, largely intangible in its nature, which is so conspicuous [a] part of the loss suffered when a going business is destroyed in violation of the anti-trust act."

Lawrence Vold, *Are Threefold Damages Under the Anti-trust Act Penal or*

Compensatory?, 28 Ky. L.J. 117, 157-58 (1940).

Congress's intent concerning these difficulties can be shown by remarks made during the Sherman Act debates. Senator Coke complained about a bill that would have provided only for double damages:

> How would a citizen who has been plundered in his family consumption of sugar by the sugar trust recover his damages under that clause? It is simply an impossible remedy offered him . . . . [H]ow could the consumers of the articles produced by these trusts, the great mass of our people--the individuals--go about showing the damages they had suffered? How would they establish the damage which they had sustained so as to get a judgment under this bill? I do not believe they could do it.

21 Cong. Rec. 2615 (1890).

Senator Sherman similarly urged that private antitrust remedies "should be commensurate with the difficulties of maintaining a private suit against a combination such as is described." *Id.* at 2456 (1890). Senator George argued that a treble damage remedy was needed to enable consumers to sue "a powerful and rich corporation, or combinations of corporations and persons...." *Id.* at 1767-68.

During the Clayton Act debates, Representative Webb stated that the damages provision "opens the door of justice in every man whenever he may be injured by those who violate the antitrust laws and gives the injured party ample damages for the wrong suffered." 51 Cong. Rec. 9073 (1914). He also stated that "we are liberalizing

the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere--anywhere you can catch the offender . . . ." *Id.* at 16274. *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("[The treble damages remedy was passed] as a means of protecting consumers from overcharges resulting from price fixing....").

The case before this Court is closely analogous to *Cox v. Lykes Bros.*, 143 N.E. 226 (1924)(Cardozo, J.). In *Cox* a federal statute provided that when a seaman's wages were not paid when due, an additional sum of money "equal to two days' pay for each and every day during which payment is delayed" is "recoverable as wages." The Court held that this seemingly "multiple" recovery was actually compensatory, and not a "penalty," because "delay means loss of opportunity to ship upon another vessel. It means hardship during the term of the waiting, the sufferer often improvident, and stranded far from home." 143 N.E. at 227. The Court wisely noted that such a reading is "in harmony with" federal case law holding actions "under the anti-trust law for the recovery of treble damages" do not constitute a "penalty." *Id.*

Here too, two thirds of the damages received merely compensate plaintiffs for the hardship, disruption and delay caused by the violation. Plaintiffs would not be made whole if they merely received single damages.

C. Antitrust "Treble" Damages, When Viewed Correctly, Are Actually Only Single Damages, and Therefore Are Not a Penalty

If the purpose of the antitrust damages remedy is compensation, the "damages" caused by an antitrust violation should consist of the sum of all relatively predictable harms caused by that violation affecting anyone other than the defendants. If antitrust's "treble damages" remedy is viewed correctly, these payments actually constitute only approximately one times the damages caused by these violations.[2] In other words, despite the nominally "trebled" nature of antitrust damages, when they are examined carefully, for the reasons given below, defendants pay, on average, only approximately single damages. Moreover, victimized purchasers receive only approximately one times their total losses. Therefore, there is no "penalty" from antitrust "treble" damage awards.

Antitrust damages should of course include the amount taken from consumers as overcharges by the firm or firms causing the violation. In order to ascertain the true level of antitrust awards, however, antitrust's so-called "treble" damages awards should first 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;

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[2] *See* Robert H. Lande, *Are Antitrust 'Treble' Damages Really Single Damages?*, 54 Ohio St. L.J. 115,158-74 (1993). *See also* Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 Loy. Consumer L. Rev. 329 (2004); Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651 (2006).

(4) non-recovery for the allocative inefficiency effects of market power; (5) other costs to plaintiffs pursuing cases; and (6) 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] 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%.[5] In other words, antitrust's so-called "treble damages" remedy probably is in reality approximately only single damages. It is 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 field, many of

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[3] For the reasons behind the necessity of these adjustments *see* Lande, *Are Antitrust 'Treble' Damages Really Single Damages?*, *supra*, at 124-29 (1993).

[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.

[5] *Id.* at 169.

the strongest cases settle for single damages.[6] 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 for the lack of prejudgment interest and the other factors 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 in antitrust suits are inadequate.

D. Permitting Indirect Purchaser Suits Would Not Lead to Over Deterrence

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 collectively paid more than treble damages.[7] Representatives of the American Antitrust Institute have looked very hard for such a case and often have challenged defense counsel in writing and at large public gatherings of antitrust lawyers to produce even one such example. But none has ever been brought to our

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[6] Lande, *Five Myths About Antitrust Damages*, *supra*, at 660-61 (2006).

[7] *Id.* at 657-62.

attention. This lack of even one case where the actual amount paid by a cartel or monopolist exceeded treble damages is true even when criminal fines are added to the total of direct and indirect damages. 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,[8] and also is less than 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 who are trying to undermine laws that would cause them to pay damages closer to the optimal level.

CONCLUSION

The American Antitrust Institute urges this Court to grant plaintiff-appellant's request to overturn the decisions below.

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[8] Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement 1955-1997: An Empirical Study*, 17 Rev. Indus. Org. 75 (2000). 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 of 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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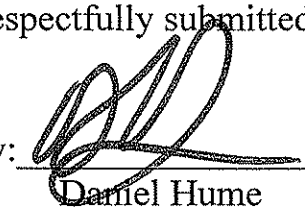
Respectfully submitted,



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