SMORGASBORD OF REMEDIES

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The title for my remarks is derived from a comment of the trial judge in a case I tried in common pleas court a few years ago. The judge, who incidentally is now on the Ohio supreme court, had just read the special charges before argument and then called a short recess. As the jury was filing out, the judge came down to the trial table to chat with counsel. He is a very able and experienced defense counsel who had probably heard, if not delivered, most standard final arguments. After the usual chit-chat about 'how much time do you need for summation,' he smilingly remarked, "And after recess, I expect we will all be treated to a *smorgasbord of oratory*." Herein I will attempt to serve up a smorgasbord of remedies.

You may recall—in the good old days—that we only had to deal with relatively simple concepts, such as conscious parallelism, cross-elasticity of demand, and qualitative and quantitative substantiality. We've got a whole new set of buzz words in remedies these days, such as fluid class recovery, escheat, *parens patriae* and *cy pres*. You will note that the jargon of antitrust is going international. The material I would like to examine includes current and emerging remedies in antitrust suits, particularly class actions, and perhaps some limitations—practical, beneficial or otherwise—on these remedies.

The statutes we're concerned with are, of course, § 4[1] and 16[2] of the

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[1] Suits by Persons Injured; amount of recovery.

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1970).

> Judgment in favor of Government as evidence; suspension of limitations. A final judgement or decree . . . in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that defendant has violated such laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

15 U.S.C. § 16(a) (1970).

[2] Injunctive Relief for Private Parties, exceptions.

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including sections thirteen, fourteen, eighteen and nineteen of this Title, when and under the same conditions and principles as injunctive relief against threatened

Clayton Act. Section 4 simply provides that any person injured in his business or property by reason of anything forbidden in the antitrust laws shall recover threefold damages and the cost of suit, including a reasonable attorney's fee. There are a number of cases discussing and interpreting that last item—a reasonable attorney's fee—but I haven't yet been able to determine whether these courts awarded a reasonable fee for counsel or a fee for a reasonable attorney. If large fees make your mouth water, you might review the *Perkins*[3] case in which counsel fees approached $300,000, and the *TWA-Hughes*[4] case in which plaintiff's counsel were awarded $7.5 million, an average hourly rate of $128.[5] That's what I like to think of as a reasonable attorney's fee, especially in light of the fact that it was just for taking a default judgment. We will also look at the remedy of injunctive relief through private actions as authorized by § 16 of the Clayton Act.

The initial point in a discussion of remedies in private suits is the language of the Supreme Court in *Minnesota Mining and Mfg. v. New Jersey Wood Finishing Co.*:[6] "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[7] That this weapon is not being neglected is illustrated by statistics showing that the number of private suits filed under § 4—excluding the electrical equipment industry cases—has almost trebled. One might well ask whether this threefold increase in ten years reflects an increased awareness of relief through private antitrust litigation or simply an increase in crime, that is, the number of violations.

Turning to the remedy of damages, what are the current legal doctrines of damages in class action suits? Perhaps the master key cases will serve to illustrate.

In 1969, the government brought four separate *Schwinn*-[8]type cases against four manufacturers of locks and hardware, charging that vertical restrictions had been imposed by each manufacturer on its own distributors with respect to territories and customers. Three manufacturers (wisely perhaps) negotiated consent orders agreeing not to impose any restrictions on a distributor as to where or to whom it could resell master key systems,

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conduct that will cause loss of damage is granted by courts of equity, under the rules governing such proceedings. . . .

15 U.S.C. § 26 (1970).

[3] Perkins v. Standard Oil Co., 399 U.S. 22 (1970).

[4] Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 41 U.S.L.W. 4131 (U.S. Jan. 10, 1973).

[5] 449 F.2d at 79.

[6] 381 U.S. 311 (1965).

[7] *Id.* at 318.

[8] United States v. Eaton, Yale, & Towne, Inc., 1972 Trade Cas. ¶ 73,889, 74012 (D. Conn.); United States v. Sargent Corp., 1970 Trade Cas. ¶ 73,104 (D. Conn.); United States v. Emhart Corp., 1970 Trade Cas. ¶ 73,048 (D. Conn.); United States v. Ilco Corp., 1969 Trade Cas. ¶ 72,904 (D. Conn.).

an operation whereby a so-called "change" key will open one door—your office or motel room, for example—and a master key will open all the doors on one floor—for the maid—and a grand master key will permit entrance to all the doors in the building, for a security guard or janitor.

After some negotiations concerning a consent order, it was decided to try the government case. Judge Blumenfeld, Chief Judge of the District of Connecticut, found no territorial restrictions, but he did find customer restrictions in four specific instances and entered an injunction against such practices.

After the consent orders of the other manufacturers, but before the trial in our case, treble damage class actions were filed, and presently all four manufacturers are joined as co-defendants in a dozen suits by seven states, two cities (one of which, of course, is Philadelphia) two Boards of Education, and two builder-owners of apartments, motels, hotels and office buildings. All but one of the suits were filed under Federal Civil Rule 23, and the classes sought include all states, counties, cities and other political subdivisions and all builder-owners, developers and contractors of apartment houses, motels, hotels, and office buildings. The cases have all been consolidated before Judge Blumenfeld. Turning once again to my smorgasbord of remedies, which ones have the plaintiffs sought? In what can only be described as a pedestrian approach, plaintiffs pray for threefold damages (as yet unspecified), costs and a reasonable attorney's fee. Actually the cases have not proceeded to the point at which any dollar figure can even be suggested.

You are all aware, I am sure, that antitrust class cases of this kind involve some rather spectacular amounts—$400,000,000 in the electrical equipment cases,[9] $100,000,000 so far in the settlements in the antibiotic cases,[10] and, in the plumbing fixtures cases, plaintiffs are seeking $50,000,000.[11] These figures remind me of another judge's comment. Judge Decker, before whom I tried a Robinson-Patman Act case in Chicago, inquired whether the case couldn't be settled because plaintiff had only sued for $25,000. "Usually when I see these cases," said Judge Decker, "there is a string of zeros running all the way across the page."

Fortunately perhaps for the master key systems manufacturers, the states are alleging damages for their own purchases of master key systems rather than under the *parens patriae* theory raised—and rejected—in *Hawaii*.[12] There the Supreme Court ruled that a state could not sue on behalf of

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[9] Philadelphia Elec. Co. v. Westinghouse Elec. Corp., 1964 Trade Cas. ¶ 71,123 (E.D. Pa. 1964).

[10] West Virginia v. Chas. Pfizer Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

[11] Philadelphia Housing Auth. v. American Radiator and Standard Sanitary Corp., 322 F. Supp. 834 (E.D. Pa. 1971), *aff'd sub nom.*, Ace Heating and Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971).

[12] Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

all its citizens for alleged antitrust damages. Obviously the state can sue as a "person injured" under § 4, and as a representative of a class of persons injured, but not as *parens patriae*.

In *Hawaii* the state had sought to recover either damages for antitrust violations based on the alleged injury to the economy of the state over and above the injury to individual consumers or, alternatively, aggregate damages based upon the alleged injury to the individual consumers within the state. The court denied recovery on either theory, but noted that a class action under Rule 23 would be the appropriate means for redressing the injury to consumers within the state.

Consumer classes have not been treated very kindly by some courts. In the bread cases pending in the Northern District of Ohio, Judge Green allowed classes of state subdivisions and school authorities but denied a class of consumers. And in *Hackett v. General Host*,[13] the so-called "death knell" case, plaintiff was allowed to pursue her remedy of $9.00 in damages against the price-fixing bakeries, but she was not permitted class action treatment. The result is obviously an unrequited remedy.

Return for a moment to the master key cases in which the states are asserting claims for all governmental entities who directly or indirectly purchased defendants' master key systems. You should know that master key systems are sold to distributors who sell to contractors who install them in the doors of the motels, hospitals, schools and other buildings. You also should know that the government's case on which the private suits are based did not allege horizontal price-fixing or resale price-fixing. The question I raise here is whether the classes of governmental institutions who are really in effect "consumers" don't run into the defense of lack of privity between plaintiffs and defendants as was successfully raised in *Denver v. American Oil Company*.[14] You will recall that the passing-on defense (except for "cost-plus" situations) was denounced in *Hanover Shoe*,[15] in which the Supreme Court held that, to have a prima facie case of injury, a buyer must show only that he has been charged an illegally excessive price and that he can identify the amount of the overcharge. If both of these are satisfied, a buyer can maintain a suit for treble damages.

Later, however, the district court in *Philadelphia Housing Authority v. American Radiator*[16] held that in order to prevent multiple liability, the presumption created by *Hanover* against passing on by an immediate purchaser required a similar presumption that an ultimate consumer has not sustained the injury necessary to bring suit under § 4. Hence the

[13] 1972 Trade Cas. ¶ 73,800 (3d Cir.).
[14] 53 F.R.D. 620 (D. Colo. 1971).
[15] 392 U.S. 481 (1968).
[16] 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd*, 438 F.2d 1187 (3d Cir. 1971).

court ruled that individual homeowners lacked standing to sue the manufacturers of the plumbing fixtures installed in their homes.

In the *Denver* case, the court ruled that the abolition of the passing-on defense created a requirement that privity exist between the plaintiff and the alleged antitrust violator before an action for treble damages could be maintained.[17] The decision has been criticized as too restrictive and as destructive of the purposes for which § 4 was enacted. While it may be acceptable in a price-fixing situation in which the purchaser buys directly from the price-fixer, its applicability is hard to accept in the case in which the purchaser—the one in privity with the seller—is a distributor who is alleged to be a co-conspirator in the restriction of territories and customers. My conclusion here is that while *Denver* may be helpful in the master key cases, it does not mean that complete salvation is at hand.

Within the remedies framework, I have two further subjects to touch upon—damage distribution and private relief in § 7 cases.

The amendment to rule 23 in 1966[18] adopted the "opt out" theory, that is, that everyone is a member of the class purported to be represented unless he acts to exclude himself from the suit. I would like to discuss the problems that arise once the class has been determined, the recovery set, and there are class members who remain silent, not attempting to collect their respective shares of the recovery.

Suppose, for example, that the class allowed consists of builder-contractors who bought and installed master key systems. The case proceeds to settlement or judgment whereby a fund is created for the satisfaction of claims. Because of the "opt out" rule, the fund is supposed to cover *all* potential claimants rather than just those who made some affirmative indication of: (1) a claim; and (2) an amount. However, at this point courts and counsel face the problem of proper distribution of uncollected or unclaimed damages.

Various solutions have been offered—all based expressly on the reasoning that defendants (the wrongdoers) should not receive the uncollected damages as a windfall. The cy pres doctrine associated with law school courses on trusts and estates suggests the availability of three approaches for the disposition of such unclaimed damages: The first is disposition to those class members who appeared in order to claim their damages. However, this method has certain deficiencies which make it generally unacceptable, such as failure to compensate, even indirectly, silent class members, and possible encouragement of class actions which are likely to result in large, uncollected damage funds. The second approach is distribution through the state as *parens-patriae* or by escheat. Here it seems clear that the Supreme Court's reasons for its restrictive interpretation of *parens*

[17] 53 F.R.D. at 636-37.

[18] FED. R. CIV. P. 23(c)(2).

patriae damage suits in *Hawaii* would not defeat the state's claim to the uncollected damage pool recovered in a proper class action. The third approach to these uncollected damages is distribution through the market. The availability of this last approach is questionable, however, after the recent Second Circuit holding in *Eisen v. Carlisle & Jacquelin*,[19] a suit by several million investors against the two major odd-lot dealers on the New York Stock Exchange for conspiracy to monopolize odd-lot trading and to charge excessive fees in violation of the Sherman Act.

The district court held the suit not maintainable as a class action due to insuperable difficulties in its management.[20] The Second Circuit was not of the same opinion as the district court though, and determined that the manageability problems did not appear to be insoluble.[21] On remand, the district court found that while individual damages were impossible to calculate, total or gross damages could be fairly established from the records of defendants and the stock exchange and it gave preliminary approval to the plaintiff's proposal for a "fluid class recovery"[22] and determined that defendants should be assessed 90% of the costs of discovery because of the probability that plaintiffs would prevail.[23]

Under this concept there would be a preliminary opportunity after gross damages were determined for each class member to prove his individual damage. Thereafter, a pool of the remainder of uncollected damages could be set up and the odd-lot differential in all transactions involving the defendants would be reduced in an amount determined by the court until this uncollected damage fund was depleted. Unfortunately for the plaintiffs in *Eisen*, the Second Circuit again heard the case and held the principal of a "fluid class recovery" to be "illegal, inadmissible as a solution of the manageability problems of the class actions, and wholly improper."[24]

One final area of remedies merits attention. I have been discussing remedies for violations of § 1 of the Sherman Act, such as price-fixing and conspiracies to allocate customers and markets. What about § 7 of the Clayton Act, the anti-merger statute, which prohibits acquisitions of stock or assets if the effect may be to substantially lessen competition or to tend to create a monopoly? The field has not been overlooked, but thus far plaintiffs have been almost uniformly unsuccessful. In the *Gottes-*

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[19] CCH FED. SEC. L. REP. ¶ 93,963 (May 1, 1973) *reh'g. denied*, CCH FED. SEC. L. REP. ¶ 93,999 (2d Cir. May 24, 1973).

[20] 41 F.R.D. 147 (S.D.N.Y. 1966).

[21] 391 F.2d 555 (2d Cir. 1968).

[22] 52 F.R.D. (S.D.N.Y. 1971).

[23] 54 F.R.D. 565 (S.D.N.Y. 1972).

[24] CCH FED. SEC. L. REP. ¶ 93,963 at p. 93,862 (2d Cir. May 1, 1973).

In denying a rehearing *en banc* the Second Circuit noted that the issue involved a matter of such import that a final determination by the Supreme Court was inevitable, and further consideration by the Second Circuit would merely delay the process.

CCH FED. SEC. L. REP. ¶ 93,999 at p. 94,009 (2d Cir. May 24, 1973).

man[25] case in the district court, in *Highland Supply*,[26] *Bailey's Bakery*[27] and *Dairy Foods*,[28] private litigants were denied remedies by way of money damages under § 7. In *Highland Supply*, the court based its ruling on plaintiff's lack of standing to attack an alleged violation of § 7.

The Second Circuit, considering *Gottesman* on appeal, agreed that a violation of § 7 does not furnish a basis for a claim of money damages under the broad language of § 4 of the Clayton Act, but the court did allow the plaintiff to show actual damages once a § 7 violation had been established.[29] Similarly, the Fifth Circuit in *Dailey*[30] has rejected the idea that private plaintiffs should be prohibited from recovering treble damages for § 7 violations. However, I am not aware of any case in which a private litigant has actually collected anything under this concept.

I should note, however, the case of *Purex v. Procter & Gamble*[31] wherein Purex has sued for more than 500 million dollars arising out of the defendant's unlawful acquisition of Clorox. The District Court for the Central District of California ruled admissible the Federal Trade Commission determination that the merger violated § 7, which determination was later approved by the Supreme Court. The precise procedural point in issue was that the district court denied defendant's motion that the Commission's order was not entitled to prima facie effect and denied plaintiff's motion that the order should have the effect of collateral estoppel. However, the point here is that Purex is going forward with its suit for treble damages because of the illegal acquisition of Clorox by Procter and Gamble.

A subject related to treble damages for violation of § 7 is whether the private litigant can have the remedy of divestiture under the same statute. There seems to be no question that the unwilling bride in a corporate marriage can seek to enjoin her would-be suitor under § 16. A company that is being acquired against its will, such as by tender offer, is clearly the direct target and thus has standing to sue for divestiture, claiming that the acquisition violates § 7. If the preliminary injunction is denied, however, the bridegroom usually effects his takeover and instructs his wife's lawyer to stop the suit.

Some courts have exhibited an unwillingness to superintend a divestiture effort at the behest of a private party, although they do not seem to exhibit a similar reluctance in response to the government's request.

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[25] Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D.N.Y. 1963).

[26] Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8th Cir. 1964).

[27] Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964), *aff'd mem.*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969), *reh'g denied*, 394 U.S. 967 (1969).

[28] Dairy Foods Inc. v. Farmer's Co-operative Creamery, 298 F. Supp. 774 (D. Minn. 1969).

[29] 414 F.2d 956 (2d Cir. 1969).

[30] 380 F.2d 484, 488 (5th Cir. 1967).

[31] 308 F. Supp. 584 (C.D. Calif. 1970) (presently being appealed).

One reason may be that presumably the policy planning section of the Antitrust Division has some economic "game plan," whereas the individual litigant cannot. Whatever the reason, the number of private divestiture suits is minimal, and certainly none has been brought as a class action.

Also of note is what might be described as the "double whammy" case in which a violation of § 7 was raised by both sides, as both a remedy and a defense.[32] In 1957, General Foods acquired SOS, the soap pad people. In 1963 all the assets of Brillo Corporation, the major competitor of SOS in soap pads, were acquired by Purex. In 1968, pursuant to an FTC finding of a violation of § 7, General Foods was ordered to divest itself of its SOS holdings. In 1969 Purex, the owner of Brillo, sued General Foods, former owner of SOS, for damages arising out of a violation of § 7 in acquiring SOS in 1957.

General Foods in turn attempted to put the double whammy on Purex by claiming that even if the acquisition of SOS violated § 7, so did Purex's acquisition of Brillo; and not only did it violate § 7, but §§ 1 and 2 of the Sherman Act as well. The effort failed, however, and the affirmative defenses were ordered stricken.

Let me leave one thought with you. In March of 1972 there appeared in the Antitrust and Trade Regulation Reporter an analysis posing the question: "Ebbtide for Class Actions?"[33] The editor's conclusion, labelled tentative, which it certainly was, stated:

> It is too early to say whether there is a backlash in the lower courts against class actions, but the cases cited above going against plaintiffs and the earlier decisions in *Denver* and *City of Philadelphia vs American Oil Company* may indicate the beginning of a trend toward a less favorable view of class actions.[34]

There are already indications that the federal courts are reconsidering whether there isn't someplace in the scheme of things for an application of the doctrine of *de minimus non curat lex.*

Undoubtedly, the major cases for per se violations of § 1 will and should persist. But other actions, for example consumer actions for delayed technology, air pollution and other environmental insults—especially when forced into an antitrust framework—will, I believe, meet with increased resistence from the courts.

All this may be summed up by saying that my smorgasbord may well be less sumptuous in the future than it has been in the past.

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[32] Purex v. General Foods Corp., 318 F. Supp. 322 (C.D. Calif. 1970).

[33] ANTITRUST AND TRADE REG. REP. (BNA March 14, 1972).

[34] *Id.* at B-4 (citations omitted).