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John C. Scott†

INTRODUCTION

Sometimes writing about and practicing antitrust law takes me back to the days when I was a Pennsylvania small-town teenager. I recall a definite feeling of embarrassment—even guilt—whenever Bill Prince and I collected the 25-cent and 3-dollar bounties the state paid for every weasel that sampled our trap-line baits and every fox my tireless beagle chased before our sights. First of all, my favorite authors of those days took a very dim view of bounty hunters. And, second, it just didn't seem right to get paid for having so much fun. That feeling comes back to me now once in a while—but not very often.

It was at the 1966 Montreal meeting of the American Bar Association's Section of Antitrust Law that I first heard a suggestion that treble-damage plaintiffs are becoming "bounty hunters."[1] The speaker's worst fears have been realized. Just last term the United States

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† Associate, Law Offices of Worth Rowley, Washington, D.C.; member of District of Columbia and Pennsylvania Bars; former managing editor, BNA's Antitrust & Trade Regulation Report; member, Legislation Committee and Committee on Publications, ABA Section of Antitrust Law.

1. Pollack, *Standing to Sue, Remoteness of Injury, and the Passing-on Doctrine*, 32 ABA ANTITRUST L.J. 5, 38 (1968).

Supreme Court sustained[2] the very line of decisions he criticized as developing a "bounty-hunter device . . . that Congress quite plainly never adopted."[3]

The "Passing-On" Defense

Section 4 of the Clayton Act[4] allows recovery of treble damages by "any person injured in his business or property by reason of anything forbidden in the antitrust laws." Once a private plaintiff has proven an antitrust violation and established standing to sue, he next must show that he was in fact injured in his business or property. Almost every antitrust damage claimant has sought recompense for one or more of three types of injury: (1) loss of profits he would have earned in a freely competitive market, including increased cost of doing business; (2) loss of capital or decrease in value of investment; and (3) excessive price he had to pay for a product he consumed, resold, or blended with others to make a new product.

Price fixing is the most common charge made in antitrust treble-damage complaints. Consequently, proof of damages frequently consists of showing the difference between the prices a complaining buyer paid his defendant-supplier and the prices he would have paid but for the antitrust violation. If the complaining buyer is not an ultimate consumer or a public agency representing consumers, he need not always absorb the entire overcharge passively. He may be able to preserve his profit level by increasing his own price, by cutting other costs, or by increasing his sales volume. Prior to *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[5] the federal courts engaged in considerable backing and filling on the issue whether the supplier can disprove damages by showing that the overcharge was passed along to the buyer's customers.

In the *Hanover Shoe* case, an 8-1 Supreme Court majority declared the passing-on defense inoperative in almost all buyer-supplier situations.

> If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should

2. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).
3. Pollack, *supra* note 1, at 38.
4. Act of Oct. 15, 1914, c. 323, § 4, 38 Stat. 731; 15 U.S.C. § 15 (1965).
5. 392 U.S. 481 (1968).

> and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower. . . .[6]
>
> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact . . . . Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.[7]

The Court was also apprehensive that injection of the passing-on issue into treble-damage litigation would mean that damage actions "would be substantially reduced in effectiveness." Although the task of showing that the particular plaintiff could not or would not have raised his prices in the absence of the overcharge "would normally prove insurmountable," the Court thought it "not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability." As a result, "treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories," and the damage claim would pass along to ultimate consumers with "only a tiny stake in a lawsuit and little interest in attempting a class action."[8]

There might be situations, the opinion acknowledged, where the passing-on defense could succeed:

> for instance, when on overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been

6. *Id.* at 489.
7. *Id.* at 492-93.
8. *Id.* at 493-94.

> damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer.[9]

In a footnote to the last quoted sentence the court stated:

> Some courts appear to have treated price discrimination cases under the Robinson-Patman Act in this category. See, *e.g.*, American Can Co. v. Russellville Canning Co., 191 F.2d 38 (C.A.8th Cir. 1951); American Can Co. v. Bruce's Juices, 187 F.2d 919, opinion modified, 190 F.2d 73 (C.A.5th Cir.), cert. dismissed, 342 U.S. 875 (1951).[10]

Visible between the lines of the *Hanover Shoe* opinion is an impressive cache of weapons for the bounty hunter. The Court's outspoken desire to avoid any impairment of the effectiveness of treble-damage actions as an antitrust enforcement tool leads one to believe that it may not regard the amount of an illegal overcharge as the exclusive measure of the buyer's lost profits. Conceivably, the buyer could show that the actual economic effects of increased prices went beyond the amount of the overcharge. He might prove, for examples, added carrying charges involved in financing a more expensive inventory, loss of profits on further sales he would have made if he had not had to raise his own prices, or increased selling costs incurred in attempting to prevent a drop in sales.

On the other hand, the Court was explicit in saying that in most commercial contexts the seller cannot reduce recovery below the amount of the overcharge—whether by proof of passing-on, cost reduction, or increased sales volume. It simply makes no difference what happened to the buyer's profit level. Through his overcharge, the seller took "more than the law allows,"[11] and the buyer is entitled to full reimbursement plus the full benefit of any measures he took to mitigate his damage. Since he had a right to, and might have, taken those mitigating steps even in the absence of the alleged overcharge, the gains he realized from them are not really related to, and hence do not reduce his damage from, the antitrust violation.

Neither of the situations that the Court says might allow applica-

9. *Id.* at 494.
10. *Id.* at 494, n.10.
11. *Id.* at 489.

tion of the passing-on defense creates a very broad exception. The Court itself recognizes it won't often be "easy to prove that [the buyer] has not been damaged"; earlier it had called that burden of proof "normally . . . insurmountable."[12] And situations "where differential can be proved between the price lawfully charged and some price that the seller was required by law to charge"[13] are rare by definition.

Quite possibly, the only set of facts that will fit the definition is the price-discrimination example mentioned by the Court. The complaining buyer in a Robinson-Patman Act[14] case is the one who paid the higher of the two discriminatory prices. He complains that one of his competitors was given a discount that enabled his competitor to lure customers with price cuts. The antitrust violation here does not involve the seller's taking from the complaining buyer of "more than the law allows." There is no overcharge. Dozens of other buyers might have been charged the higher price and yet have no right of action for damages; they may not have had to compete with the favored buyer. Rather, what the seller probably did was to take less from the favored buyer than the law requires him to take. But this benefit to his competitor can in no sense be regarded as a measure of the damage suffered by the buyer who brought suit. The damage he is ordinarily complaining about is loss of profits on sales he would have made if his competitor had not been given an unfair price advantage. So he must prove that he lost sales and profits. This analysis is not reconcilable with the dictum in *Bruce's Juices, Inc., v. American Can Co.* that: "If the prices are illegally discriminatory [plaintiff] has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination."[15] But the *Hanover Shoe* opinion can be construed as a retreat from that dictum.

Even aside from the problem of measuring damages, evidence that a price differential was passed along to the complaining buyer's customers may have a significant role in treble-damage suits based on the Robinson-Patman Act. In a price-discrimination case, proof of passing-on is relevant to an issue other than damages. Surely the defendant seller can rebut proof of competitive injury—an essential element of a substantive violation—with evidence that the buyer was

12. *Id.* at 493.
13. *Id.* at 494.
14. Act of June 19, 1936, c. 592, § 1, 49 Stat. 1526; 15 U.S.C. § 13 (1965).
15. 330 U.S. 743, 757 (1947).

able to pass along the price differential to his customer without suffering a loss of profits, even if introduction of this evidence will cause "additional long and complicated proceedings." Once the passing-on evidence is introduced, there would appear to be no reason for not considering it in determining damages. There is authority requiring a buyer complaining of price discrimination to show that he mitigated his damages, by lowering his own resale prices or developing his own promotions, etc., before claiming injury to himself.[16]

How will the *Hanover Shoe* rationale affect recovery in a series of treble-damage suits by successive buyers? If Hanover, a shoe manufacturer, is to recover the full amount of excessive rentals for shoe machinery supplied by United Shoe Machinery Co., can Hanover's wholesaler and retailer customers sue United Shoe for the amount by which their costs were increased when Hanover passed on the machinery costs? If it is a "normally . . . insurmountable" task to trace an illegal overcharge as the cause of a corresponding price increase by the buyer, then a subsequent buyer may have a "normally . . . insurmountable" burden in attempting to prove that the original overcharge—and hence the antitrust violation—was the proximate cause of his cost increase. But this time the "additional long and complicated proceedings involving massive evidence and complicated theories" would be introduced at the election of the damage claimant and would be action in furtherance of the damage suit, not something that would substantially reduce the effectiveness of treble-damage actions.

Since these successive actions would be tort actions, not litigation over title to a specific fund or res, technically there would be no "double recovery." In theory, however, it is difficult to see how the first buyer could recover the overcharge on the ground that it cannot be traced to his own price increase and then the second buyer recover it as traceable to the same price increase. Yet multiple claims of this sort are likely to come before different juries, so all plaintiffs conceivably could win.[17]

16. Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949); Enterprise Industries v. Texas Co., 240 F.2d 457 (2d Cir. 1957). In the *Enterprise Industries* case, the second circuit refused to give literal effect to the dictum, quoted in the text from the *Bruce's Juices* opinion, pointing out that a provision making the price differential the measure of damages was eliminated in conference from the Senate bill that became the Robinson-Patman Act.

17. As a practical matter, the "double recovery" problem can be over-emphasized. Few antitrust cases ever get to juries. They are "resolved by attrition rather than by trial . . . decided by calculating minds putting price tags on peace and expense, rather

IN PARI DELICTO

While the bounty hunter of the Old West is seldom portrayed as an admirable character, his need to deal regularly with the authorities probably forced him to maintain at least an appearance of strict compliance with the law. Today's counterpart may not have to be quite so circumspect.

In *Perma Life Mufflers, Inc. v. International Parts Corp.*[18] the Supreme Court declared that "the doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."[19] But the five opinions that accompanied the Court's decision suggest that the doctrine has some definitions that may still be operative in private antitrust damage actions. (The in pari delicto doctrine should be distinguished from the "unclean hands" defense sometimes discussed in antitrust decisions.[20])

The declaration in the five-justice majority opinion that "the doctrine of in pari delicto, with its complex scope, contents, and effects," is not to be applied in antitrust litigation followed a statement of the applicable rule in other terms: "Once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him."[21] Earlier, Mr. Justice Black indicated he was talking about "the common-law pari delicto doctrine" and pointed out that, "although in pari delicto literally means 'of equal fault,' the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing."[22] But the justices "have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes."[23] "There is nothing in the language of the antitrust acts which indicates that

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than by triers of fact attempting to price real damage." Hoffman, *Proof of Damages in Private Litigation*, 36 ABA ANTITRUST L.J. 151 (1967).

18. 392 U.S. 134 (1968).

19. *Id.* at 140.

20. *See, Damage-Suit Defenses—In Pari Delicto and Unclean Hands*, BNA ANTITRUST & TRADE REGULATION REPORT No. 322, at B-1 (September 12, 1967).

21. 392 U.S. at 140.

22. *Id.* at 138.

23. Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951); Simpson v. Union Oil Co., 377 U.S. 13 (1962).

Congress wanted to make the . . . doctrine a defense to treble-damage actions."[24]

However, the Court refrained from deciding whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of pari delicto, for barring a plaintiff's cause of action."[25] The facts of the case before the Court made such a holding unnecessary. The damage claimants were retail dealers operating "Midas Muffler Shops" under franchise agreements obligating each dealer to purchase all his exhaust-system parts from the franchisor, to carry a complete line of the franchisor's products, and to resell Midas Mufflers at prices and locations specified by the franchisor. In return the franchised dealer received permission to use registered trademarks and was granted an exclusive right to sell "Midas" products within his defined territory. In these circumstances, the majority opinion noted, there could not have been complete involvement by the dealers in the illegal restraints of trade created by the exclusive-dealing and full-line requirements, for neither of those provisions could be in a dealer's self interest. Moreover, there was evidence that the dealers tried to get out from under these two restrictions.

True, the complaining dealers sought their franchises enthusiastically; but they did not actively seek each and every clause of the agreement. They accepted many of the restraints "solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity."[26] The courts have no power "to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others."[27] Nor is it significant that the territorial restrictions benefited the complaining dealers. "They cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business."[28] These "possible beneficial by-products," on the other hand, "can of course be taken into consideration in computing damages."[29]

While Mr. Justice White joined in the majority opinion and in

24. 392 U.S. at 138.
25. *Id.*
26. *Id.* at 139.
27. *Id.*
28. *Id.* at 140.
29. *Id.*

rejecting "the in pari delicto defense in its historic formulation,"[30] he filed a special concurring opinion. "I would deny recovery where plaintiff and defendant bear substantial equal responsibility . . . but permit recovery in favor of the one least responsible where one is more responsible than the other." He saw the issue before the court as being a causation problem, maintaining that a damage claimant equally responsible with the defendant for the antitrust violation should be denied recovery, "for failure of proof that [defendant] was the more substantial cause of the injury."[31]

Mr. Justice Fortas concurred only in the result. He agreed that " 'private attorneys general' . . . cannot be denied [recover] on the basis of the doctrine of in pari delicto." But he insisted that the doctrine does have "a significant if limited role in private antitrust law. If the fault of the parties is reasonably within the same scale—if the 'delicto' is approximately 'pari'—then the doctrine should bar recovery."[32]

Mr. Justice Marshall likewise concurred only in the result. His thinking was "perhaps, less related to the public interest in eliminating all forms of anti-competitive business conduct and more related to the equities as between the parties." He would look not only for substantial equality of fault but also for active participation by the complaining party in the formation and implementation of the illegal scheme. He would deny recovery to the claimants who "actually participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action (such as the tying and exclusive dealing provisions) for anticompetitive restraints intended for their benefit (such as resale price maintenance or exclusive territories)."[33]

Justices Harlan and Stewart concurred in part and dissented in part. They held out for application of "the true in pari delicto standard" and expressed the view that much of the judicial disagreement that the case has occasioned relates to the definition of "in pari delicto." "Plaintiffs who are truly in pari delicto are those who have themselves violated the law in cooperation with the defendant."[34] They saw the *Kiefer-Stewart* decision—that a supplier sued for resale price main-

30. *Id.* at 143.
31. *Id.* at 146.
32. *Id.* at 147.
33. *Id.* at 150-51.
34. *Id.* at 153.

tenance cannot defend by proving the complaining buyer's participation in a horizontal price-fixing conspiracy—as distinguishable from true in pari delicto because there the defendants' illegal actions were taken in reprisal against altogether independent illegal actions by the plaintiff. And they would deal with large supplier-small customer situations like those involved in the *Simpson* case,[35] *Albrecht v. Herald Co.*,[36] and perhaps the present case "on the theory of a 'coercion' exception to the in pari delicto doctrine."[37]

Despite the majority opinion's broad assertions, an "in pari delicto" doctrine will continue to function in private antitrust litigation. After all, Mr. Justice Black excluded the in pari delicto doctrine only as it was defined and applied at common law, "with its complex scope, contents, and effects." Like the passing-on defense, in pari delicto, as traditionally used, has ramifications that would frustrate antitrust policy. If the plaintiff "aggressively support[s] and further[s] the monopolistic scheme as a necessary part and parcel of it," even Mr. Justice Black would deny him damages.

Moreover, after disqualifying any plaintiff who "aggressively support[s] and further[s] the monopolistic scheme," the majority opinion clears one who merely engages in "understandable attempts to make the best of a bad situation." Between these two degrees of participation by the plaintiff there are conceivable levels of involvement that the Court has not expressed a view on. For plaintiffs in those categories, the best guideline available is that set out, in somewhat different terms, by Mr. Justice White, who would disqualify the "equally responsible" plaintiff; Mr. Justice Fortas, who would apply the "in pari delicto" label to "equality of position"; and Mr. Justice Marshall, who would find the plaintiff "substantially equally at fault" to be in pari delicto. Indeed, since Mr. Justice White joined in the majority opinion, his "equally responsible" test can be regarded as consistent with the majority view.

Finally, seven of the justices agree that the complaining franchisees were not real "collaborators" or "co-adventurers" (Mr. Justice Fortas' terms) in the exclusive-dealing requirements they were complaining about. If the Court should ever get a case involving "collaborators" or "co-adventurers" who are "equally responsible" with the defendant

35. 377 U.S. 13 (1962).
36. 390 U.S. 145 (1968).
37. 392 U.S. at 155.

for the illegal conduct, then at least five justices will find the "collaborators" to be in pari delicto and deny them damages.

Conclusion

Perhaps the primary significance of both the *Perma Life* and *Hanover Shoe* opinions lies in their manifestation of the Supreme Court's continuing lively interest in the effectiveness of private damage actions as an antitrust enforcement tool. In recent years the Court's opinions have made increasingly warm statements about private antitrust litigation.[38] The attitude and trend evident in these decisions may foreshadow the answers to be expected to some of the other damage-suit issues that have not yet reached the Court—*e.g.*, standing to sue,[39] use of FTC decrees,[40] applicability of the damage provision to Section 7 Clayton Act violations,[41] and the extent to which the new class-action rule can be used to aggregate small antitrust damage claims.[42]

Actually, though, it was not the pronouncements of a Supreme Court blessing that opened the Golden Age of the antitrust bounty hunter. That era arrived with the filing of some 1900 treble-damage suits in the wake of the 1960 convictions and 1961 sentencing of the electrical-equipment industry for conspiring to fix prices.[43] It was what these cases did for bounty hunters that makes the Supreme Court's helpful attitude so significant to the business world and to the legal profession. This was not the first time customers of an industry had moved in to share the spoils of a raid by the Justice Department. It happened after *U.S. v. Paramount*,[44] and, to a lesser extent, after *U.S. v. United Shoe Machinery Corp.*[45] But the electrical-equipment damage cases were unprecedented not only in their size and number but also in the big-business status of the plaintiffs. They did more than arm the

38. Leh v. General Petroleum Corp., 382 U.S. 54 (1965); Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Poller v. CBS, 368 U.S. 464 (1962); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

39. See Scott and Rockefeller, BNA, Antitrust and Trade Regulation Today; 1967, 305 (1967).

40. *Id.* at 328.

41. *Id.* at 340.

42. See, *Class Actions for Treble Damages*, BNA Antitrust & Trade Regulation Report, No. 310 at B-1 (June 20, 1967); *Antitrust Class Actions—Recent Decisions*, BNA Antitrust & Trade Regulation Report, No. 359 at B-1 (May 28, 1968).

43. United States v. General Electric Co., et al., Criminal Actions Nos. 20235 et seq., E.D. Pa.

44. 334 U.S. 131 (1948).

45. 110 F. Supp. 295 (D. Mass. 1953).

treble-damage complainant with fearsome new discovery techniques. For the first time the treble-damage remedy won wide-spread public acceptance by the management of the large corporations in a major industry—the electric utilities. For the first time, it acquired respectability and status as an accepted commercial stratagem of big business. People with ample means to finance the long search and the complex shoot-out are now bounty hunters.[46]

Today's big bounty hunter does not ride alone; the sophistication and strength of the quarry and the intricacies of the available defenses call for the aid of a professional. Questions have already arisen concerning the proper role of the hired gun on either side of this game of bounty hunting. At a committee meeting last August during the American Bar Association convention in Philadelphia, a federal judge said:

> I think this is an area where lawyers come closest without realizing it to the very limits of what is ethically proper. It seems to me that in this area lawyers are generally closer to the line. From the plaintiff's side they are closer to the line on maintenance and champerty, claim solicitation and that sort of thing. From the defendant's side they are closer to the line in actually advising clients to cover up criminal activity. Some of the essays which I have read in the Antitrust Law Journal, if you took out the word "antitrust" and substituted "prostitution" you would think that the lawyer would be disbarred. I think that the whole field should be carefully reexamined by its practitioners.[47]

46. In a related—and perhaps consequential—development, Senator Philip A. Hart (D-Mich) recently urged the Small Business Administration to ease its standards for loans to finance antitrust suits by small business.

47. These remarks were made by Hon. John P. Fullam, U.S. District Judge for the Eastern District of Pennsylvania, during a panel discussion on the "Relationship Between Government Enforcement Actions and Private Damage Actions" held in Philadelphia, Pa. on August 3, 1968. The text of the discussion will be reported in Issue 4 of Volume 37 of the ABA ANTITRUST L.J.