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Private Antitrust Plaintiffs - Additional Advantages

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Additional Advantages

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A few years ago the United States Supreme Court said:

> *Congress has expressed its belief that private antitrust litigation*[1] *is one of the surest weapons for effective enforcement of the antitrust laws.*[2]

In three important decisions respecting private antitrust treble damage litigation in recent years, the Supreme Court has expressed the same belief by substantially strengthening plaintiff's opportunities for damages in these cases. Two decisions in June, 1968, deprive defendants in such cases of important defenses previously relied upon, *Perma Life Mufflers, Inc. v. International Parts Corp.*[3] and *Hanover Shoe, Inc. v. United Shoe Machinery Corporation.*[4] On February 24, 1971, the Supreme Court enormously extended the period during which such cases may be filed by plaintiffs, allowing Zenith Radio Corporation to recover treble damages during the period of the statute of limitations even though the overt acts which caused the defendant's liability occurred much earlier.[5]

The recent head of the Antitrust Division has noted the importance of treble damage antitrust legislation,

> But antitrust enforcement is not the province of government alone. The law also authorizes private parties—individually or in

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1. Private suits are authorized by § 4 of the Clayton Act which reads:
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 (1964). Private suits for injunction are authorized by § 16 of the Clayton Act, *Id.* § 26.

2. Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).

3. 392 U.S. 134 (1968).

4. 392 U.S. 481 (1968).

5. Zenith Radio Corp. v. Hazeltine Research, Inc., 91 S. Ct. 795 (1971).

> classes—to sue for treble damages arising from antitrust violations. As you are no doubt aware, these damages can be substantial indeed—particularly after a government case has blazed a trail: in the electrical equipment cases they exceeded $400 million; in the antibiotics cases, settlements to date run in the area of $100 million; and in the plumbing cases, plaintiffs are seeking $50 million.[6]

Basic antitrust prosecution and enforcement are, of course, carried on by the Department of Justice Antitrust Division and the Federal Trade Commission. But government enforcement is inevitably selective, and is subject to political and budgetary variations. The private action is available to any injured business whether the government has shown interest in the particular matter or not. One Assistant Attorney General in Charge of the Antitrust Division has asserted that, as between governmental enforcement and that of private parties, private relief is both more desirable and more effective.[7]

Although the significance of private treble damage antitrust legislation has been growing for some time,[8] little significant private treble damage antitrust litigation occurred prior to the landmark *Bigelow v. R.K.O.* case in 1946.[9] *Bigelow* concerned the amount of damages recoverable in an antitrust action after the plaintiff shows a violation causing clear and direct injury to his business or property, and proves actual damages. Prior to *Bigelow*, it had been difficult to say to the jury and court what might have been. *Bigelow* liberalized the rules of what evidence might be considered in computing damages,

> Even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But . . . "juries are allowed to act upon probable and inferential, as well as direct and positive proof" . . . . The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong act has created.[10]

6. Address by Richard W. McLaren, Assistant Attorney General, Antitrust Division, before the American Bar Association National Institute, New York City, October 21, 1971.

7. Statement by Lee Loevinger, *Hearings Before the Subcomm. on the Study of Monopoly Power of the Senate Select Comm. on Small Business*, 85th Cong., 2d Sess., at 7 (1958).

8. Prior to World War II there were few cases litigated, and plaintiffs succeeded in only a small percentage of them. *See* ATT'Y GEN. NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS REPORT 378 (1955); MACINTYRE, THE ROLE OF THE PRIVATE LITIGANT IN ANTITRUST ENFORCEMENT 113, 116-17, 122, 129 (1962).

9. 327 U.S. 251 (1946).

10. *Id.* at 264-65.

The case also established a continuing rule that juries may infer lost profits from past earning records of plaintiff's business and from current earning records of similar enterprises.[11]

Bigelow still stands for the principle that once an antitrust violation is shown to have caused the plaintiff some loss, the defendant should bear the risk of uncertainty that inheres in measuring the harm he caused. This uncertainty is especially great in trade regulation and business activity because economic harm is difficult to measure. In such cases, *Bigelow* says, precise proof of damages cannot reasonably be required of plaintiffs. In this respect *Bigelow* followed the general rule that injured parties are held to a less rigid standard of proof in fixing the amount of damages:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount.[12]

In commenting on the *Bigelow* case Judge Charles Wyzanski has suggested:

> [T]he ratio decidendi of the Bigelow case is that where the evidence in an Anti-trust case is such that the discrepancy between plaintiff's earnings and a competitor's earnings or between plaintiff's earnings in one year and another year could be found by a jury to be entirely unexplained except by acts of defendants which are unlawful under the Anti-trust laws then the jury may find defendants are the jural cause of the discrepancy, that is, of the loss.[13]

In addition to the proof of damages obstacle, earlier private antitrust treble damage actions had to meet the argument that some "public wrong" must be committed before the damages provision could be invoked. This apparent difficulty arose from language in a Seventh Circuit decision that: "[T]he Sherman Act protects the individual injured competitor and affords him relief, but only under circumstances where there is such general injury to the competitive process that the public at large suffers economic harm."[14] An important case in 1959 totally dispelled this

11. *Id.*; *accord,* Milwaukee Towne Corp. v. Loew's Inc., 190 F.2d 561 (7th Cir. 1951), *cert. denied* 342 U.S. 909 (1952).
12. Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 562 (1931).
13. Momand v. Universal Film Exchange, 72 F. Supp. 469, 481 (D.C. Mass. 1947), *aff'd.* 172 F.2d 37 (1st Cir. 1948).
14. Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 273 F.2d 196, 200 (7th Cir. 1959), *rev'd. per curiam* 364 U.S. 656 (1961).

notion. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[15] the owner of a single appliance store on Mission Street in San Francisco alleged that most of the manufacturers and distributors of well-known appliance brands, and some principal retail outlets in San Francisco, had conspired among themselves not to sell or supply such appliances to the plaintiff. The defendants merely submitted affidavits that there were literally hundreds of other household appliance retailers, often very close in location to Klor's (*i.e.* the plaintiff) itself, who sold these brands and made them available to the public. On this ground, the district court ruled that the controversy did not amount to a public wrong proscribed by the Sherman Act,[16] dismissed the complaint, and entered summary judgment for the defendants.[17] The 9th Circuit Court of Appeals affirmed, stating that: "[A] violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured."[18] The Supreme Court reversed, saying:

> As such it [the group boycott combination] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving out in large groups. In recognition of this fact, the Sherman Act has consistently been read to forbid all contracts and combinations "which tend to create a monopoly" whether "the tendency is a creeping one" or "one that proceeds at a full gallop" . . . .[19]

Still other developments mark the expansion and vitalization of the private antitrust treble damage weapon. Under Section 5(a) of the Clayton Act, the "final judgment or decree" obtained by the United States in an antitrust proceeding is admissable as "prima facie evidence" in a later private treble damage action.[20] A 1952 case in the 8th Circuit permitted a plaintiff in a subsequent treble damage suit to introduce in evidence not only the government's decree, but also its complaint, the bill of particulars, and the court's findings of fact and conclusions of law.[21]

In other cases it has become evident that more than the final judg-

15. 359 U.S. 207 (1959).
16. 15 U.S.C. §§ 1, 2 (1964).
17. 255 F.2d 214 (9th Cir. 1958).
18. *Id.* at 233.
19. 359 U.S. at 213-14.
20. 15 U.S.C. § 16(z) (1964).
21. Twentieth Century Fox Film Corp. v. Brookside Theater Corp., 194 F.2d 846 (8th Cir. 1952).

ment or decree is made available to the private antitrust treble damage plaintiff. The Supreme Court has suggested that broad access to the evidence procured by the government be permitted the damage suit plaintiffs. In *Minnesota Mining and Manufacturing Company* the Court noted a congressional intent: "[T]o assist private litigants in utilizing any benefits they might cull from government antitrust actions."[22] The Court described government cases, "as a major source of evidence for private parties."[23] Even grand jury testimony in the government criminal prosecution may become available to the private treble damage plaintiff after a *nolo contendere* plea.[24] Recently documents subpoenaed by several grand juries during an antitrust investigation of the publishing industry were ordered produced for inspection by private treble damage plaintiffs.[25]

Thus, even before 1968 there had been an accelerated trend to support and assist the private antitrust treble damage plaintiff. In 1968 and 1971, as suggested previously, plaintiffs in private antitrust litigation received still further encouragement.

In *Perma-Life Mufflers, Inc.* ["Midas Muffler Shops"] *v. International Parts Corp.*[26] [the manufacturer of Midas Mufflers and parts], the Court allowed the franchised shops to prevail for substantial damages against the franchiser-manufacturer even though the franchise agreements between them had been illegal. The defendant argued that the plaintiffs were equally guilty for having entered into, and enjoyed, "enormous" profits from, the restrictive agreements. The agreements included terms barring the shops from purchasing from other sources of supply, preventing a shop from selling outside a designated territory, tying the sale of mufflers to the shops to the sale of other products in the Midas line, and requiring the shops to sell at fixed retail prices.

Involved was an ancient defense in law, *in pari delicto,* literally meaning "of equal faults." The doctrine, applied for centuries where a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing, denies plaintiff any recovery. In the *Midas* case, however, the Court bluntly said,

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22. 381 U.S. at 317.
23. *Id.* at 319.
24. City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 486 (E.D. Pa. 1962); Allis-Chalmers Manufacturing Co. v. City of Fort Pierce, Florida, 323 F.2d 233 (5th Cir. 1963).
25. Harper & Row Publishers Co., Inc. v. Decker, 301 F. Supp. 484 (N.D. Ill.), *cert. denied,* 394 U.S. 944 (1969).
26. 392 U.S. 134 (1968).

> There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common law *pari delicto* doctrine a defense to treble damage actions . . . . The doctrine of *in pari delicto* . . . is not to be recognized as a defense to an antitrust action.[27]

The opinion emphasized the Court's oft repeated position that private treble damage action is essential to antitrust enforcement in the United States:

> [T]he purposes of the antitrust laws are best served by insuring that the private action *will be an ever present threat* to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of *the private action as a bulwark of antitrust enforcement* (emphasis added).[28]

The United States Supreme Court had excused plaintiff's unclean hands in an earlier private antitrust treble damage case decision. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,[29] the Court permitted a wholesaler, engaged in a price-fixing conspiracy, to recover treble damages from his suppliers who were found to be engaged in an unlawful price-fixing conspiracy of their own. Earlier, courts had rejected the *pari delicto* defense where the plaintiff was in effect coerced by economic circumstances to contract with the defendant, and the contract contained illegal provisions that were, realistically speaking, imposed unilaterally by the defendant.[30]

In *Hanover Shoe, Inc. v. United States Machinery Corp.*,[31] decided a week after *Midas*, the court disallowed the so-called "passing-on" defense. The Court ruled that despite the fact the treble damage plaintiff shoe manufacturer fully passed its higher costs (resulting from the defendant's antitrust violation) on to its shoe buyer customers, it could still prevail in court.

To understand the significance of *Hanover Shoe*, it is necessary to retrace the history of the litigation. In 1953 the United States won a

27. *Id.* at 138, 140.
28. *Id.* at 139.
29. 340 U.S. 211 (1951).
30. Ring v. Spina, 148 F.2d 647, 652-53 (2d Cir. 1945).
31. 392 U.S. 481 (1968).

civil antitrust suit against United Shoe Machinery charging among other things that United's policy of leasing its shoe machines and refusing to sell them caused a monopoly violation.[32] The Supreme Court affirmed the next year,[33] and in 1955 Hanover brought this treble damage suit. Hanover asked for damages from 1939 until the time of suit. Hanover requested that its damages be measured by the differences in costs had it been able to purchase the machines, rather than leasing them. The trial court awarded this difference in costs trebled.[34]

United raised the defense that the plaintiff Hanover had "passed on" these higher costs to its customers and was therefore not damaged. The lower courts and the Supreme Court rejected this defense. The Supreme Court's economic reasoning in rejecting the defense ran as follows:

> United seeks to limit the general principle that the victim of an overcharge is damaged within the meaning of § 4 to the extent of that overcharge. The rule, United argues, should be subject to the defense that economic circumstances were such that the overcharged buyer could only charge his customers a higher price because the price to him was higher. It is argued that in such circumstances the buyer suffers no loss from the overcharge. This situation might be present, it is said, where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales.
>
> We are not impressed with the argument that sound laws of economics require recognizing this defense. 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; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. 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

32. United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).
33. 347 U.S. 521 (1954).
34. 245 F. Supp. 258 (M.D. Pa. 1965).

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. Since establishing the applicability of the passing on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.[35] On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

In addition, if buyers are subjected to the passing on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing on defense. We recognize that there might be situations—for instance, when an overcharged buyer had a preexisting "cost-plus" contract, thus making it easy to prove that he has not been 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 profits to the buyer.[36]

35. The Court said in a footnote:
The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.
392 U.S. 481, 493 & n.9.

36. *Id.* at 491-94.

In February, 1971, the *Zenith v. Hazeltine* case[37] made its second appearance in the Supreme Court. In 1959, Hazeltine had brought a patent infringement against Zenith, and in 1963, Zenith had counterclaimed for damages alleging violations of the Sherman Act[38] by Hazeltine's participation in Canadian patent pools—cartels, legal in Canada, which prohibited Zenith, not a Canadian manufacturer, from selling in Canada. At the trial below, the court found Zenith damaged in the amount of $6,297,371,[39] which damages of course, would be automatically trebled by the statute. Hazeltine replied to Zenith's counterclaim by asserting the defense of the statute of limitations. It claimed that part or all of the damages awarded to Zenith were caused by conduct which had occurred before 1959, and the action should consequently be barred.

In the most current phase of the litigation, Mr. Justice White stated the issue as: "[W]hether Zenith can recover in its 1963 suit for damages suffered after June 1, 1959, as the consequence of pre-1954 conspira torial conduct."[40] The basic rule in the statute is that damages are recoverable only if the suit is "commenced within four years after the cause of action accrued."[41] Generally a cause of action accrues, and the statute begins to run, when a defendant commits an act that injures a plaintiff's business. This has been understood to mean that each time a plaintiff is injured by an act of the defendant in violation of the antitrust law, a cause of action accrues to the plaintiff to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

In the February, 1971, holding, the Supreme Court ruled in favor of Zenith, the treble damage claimant, even though the acts of the defendant occurred much more than four years prior to the time Zenith first asserted its claim. The Court reasoned that Zenith could not have known its future damages at the time the act occurred or during the time in which the statute would have permitted them to sue. Consequently, the Court permitted Zenith to file its suit much later—at the time when they *were able* to compute or calculate their damages. Since Zenith could not have determined its damages in 1954 or before, they were permitted to sue for them in 1963 and prevail! The Court said:

37. 91 S. Ct. 795 (1971).
38. 15 U.S.C. §§ 1, 2, 15, 26 (1964).
39. 239 F. Supp. 51 (N.D. Ill. 1965).
40. 91 S. Ct. at 806.
41. 15 U.S.C. § 15(b) (1964).

> In antitrust and treble damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action had yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted. (citations omitted) Otherwise future damages which could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve "as a bulwark of antitrust enforcement" and that the antitrust laws fully "protect the victims of the forbidden practices as well as the public."[42]

The *Zenith* case contains still further encouragement to antitrust treble damage plaintiffs. The new decision also stands as a holding that the part of the Clayton Act which tolls the statute of limitations during the period of time in which the government has brought an action respecting an alleged antitrust violations operates to toll the statute, not only respecting claims against parties who are defendants in the government action, but also tolls the statute with respect to others who might have been parties in the government suit! On this point the court said:

> The language of 15 U.S.C. § 16(b) expressly provides for tolling of the statute of limitations "in respect of *every* private right of action . . . based *in whole or in part* on any matter complained of" in the proceeding instituted by the government (emphasis added). On the face of this section, a private party who brings suit for a conspiracy against which the government has already brought suit is undeniably basing its claim in whole or in part upon the matter complained of in the government suit, even if the defendant named in the private suit was named neither as a defendant nor as a coconspirator by the government. If, that is, the government sues only certain conspirators, but also alleges and proves during trial that others were conspirators, the fact of the tolling of the statute against those so proved but not sued can hardly be denied. Nor could tolling be denied if a defendant had never been shown to be a conspirator by the evidence offered in the earlier government suit, but then had been proved to be such in the subsequent private suit.
>
> We find no indication in the legislative history of § 16(b) that Congress intended it to toll the statute of limitations only against parties defendant in the government action. Nor is anything

42. 91 S. Ct. at 807.

> cited to us in this respect. On the contrary, as we have said earlier, Congress, believing that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws," enacted § 16(b) in order to "assist private litigants in utilizing any benefits they might cull from government antitrust action." We see nothing destructive of Congress' purpose in holding that § 16(b) tolls the statute of limitations against all participants in a conspiracy which is the object of a government suit, whether or not they are named as defendants or conspirators therein; indeed, to so hold materially furthers congressional policy by permitting private litigants to await the outcome of government suits and use the benefits accruing therefrom.[43]

The result of the Supreme Court decisions has been to establish, as a reality, enforcement of antitrust legislation through the medium of the private sector. The Court has made the important recognition that parties who have been harmed by violations of antitrust legislation must be given judicial remedies to implement the Congressional intent contained in the Clayton Act. The Court has equipped a small business with procedural advantages of its own to match the former inequities of a powerful defendant's ability to wear away his opponent through years of procedural maneuvering. As Thurmond Arnold once said, "If anybody comes to me and wants to sue a great corporation under the antitrust laws I tell them, 'Just forget about attorneys' fees for the moment. Have you got $25,000 to put on the line immediately for expenses of depositions and things of that sort?' "[44]

The burden upon the plaintiff has only begun to be eased in his attempt to enforce antitrust laws. Further moves could occur, and some have even been hinted at by the Supreme Court's opinions in the three principal cases discussed above. One procedural remedy would be the recognition by trial judges during pre-trial of a corporate defendant's delaying tactics. His control over extensive discovery and deposition procedures would greatly alleviate the cost to the plaintiff who has a fair judicial road to treble damages.

A second step in the further development of private antitrust treble damage actions may include an expansion of the concept of who may be a plaintiff—an idea hinted at in *Hanover Shoe*. Questions may again reach the courts concerning whether shareholders, officers or

43. *Id.* at 804-05.

44. Hearings Before the Subcomm. on Small Business, *The Role of Private Antitrust Enforcement in Protecting Small Business, of the Senate Select Comm. on Small Business*, 89th Cong., 2d Sess., at 164 (1965).

creditors, or others in analogous situations may recover for the antitrust damage to a firm.[45] Does a plaintiff have a loss direct enough if he is the landlord on a percentage lease with the damaged business?[46] And how about suppliers who lose sales to their usual customer, the business damaged by another's acts in violation of the antitrust precepts?[47] Although *Hanover Shoe* seems in no way to prevent the injured plaintiff's customers (to whom the cost of the antitrust violation has been "passed on") from bringing an action, in an earlier case, treble damage action was denied to a patent licensor whose patent licensee was injured by an antitrust violation.[48]

In view of recent trends, however, it seems likely that in future cases the courts will continue to widen the scope of parties who deserve redress, once they have been in some way affected by antitrust violations. It is believed, for example, that courts will increasingly fall in line with cases that have held where the defendant's customer was unable to sue, the supplier of the defendant's customer may sue.[49] If it is the purpose of the courts to enlarge the deterrent effect of the statute, they may permit new categories of plaintiffs in the private treble damage action.

We have seen that the trend has been definite in support of reasonable plaintiff positions in *Midas, Hanover Shoe,* and *Zenith.* If the Supreme Court and the lower courts are to maintain and continue the trend, they may well consider procedural reforms to relieve plaintiffs of wearying costs and delays, and they may well extend the plaintiff opportunity to some others previously thought to be only indirectly related to the violation and its effects.

45. *See* Berli v. Silk Assn. of America, 36 F.2d 959 (S.D. N.Y. 1929).
46. *See* Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied,* 352 U.S. 890 (1956).
47. *See* Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).
48. Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied,* 350 U.S. 936 (1956).
49. *See* Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322 (S.D. N.Y. 1959).

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