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THE TREBLE DAMAGE PROVISION— JURY INSTRUCTIONS IN PERSPECTIVE

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Section 4 of the Clayton Act reads as follows:

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.¹

A continuing question in jury trials of private antitrust cases is whether the jury should be informed of the trebling provision of the statute.

To date, no reversible error has been found in a trial court's instructions that any awarded damages will be trebled or that reasonable attorney's fees may also be recovered; nor for the trial court's refusal to provide such instructions.

The often cited authority for informing the jury that damages will be trebled by the court is the ruling of the Court of Appeals for the Second Circuit in *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*² Authority for the position that trebling should not be mentioned is provided by *Sablosky v. Paramount Film Distributing Corporation*³ and *Webster Motor Car Co. v. Packard Motor Co.*⁴ The *Sablosky* decision was not appealed and the Court of Appeals opinion, reversing the *Webster* case on other grounds, does not reveal any consideration of the treble damage instruction. Thus neither case provides a Court of Appeals ruling on the issue. To overcome this weakness plaintiffs' attorneys frequently cite the opinion of the Court of Appeals for the Ninth Circuit in *Richfield Oil Corp. v.*

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1. 15 U.S.C. § 15 (1964).

2. 203 F.2d 676 (2d Cir. 1953). For a listing of additional cases providing authority for informing the jury that damages will be trebled by the court, see *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, 320 F.2d 285, *aff'd* 378 U.S. 123 (1960).

3. 137 F. Supp. 929, 941-2 (E.D. Pa. 1955).

4. 135 F. Supp. 4, 11 (D.D.C. 1955).

*Karseal Corp.*⁵ In the *Richfield* opinion Judge Carter noted that "The instructions on damages, unchallenged, were fair and accurate and presented fully the applicable law on damages in this type of action."⁶ The instructions there did not contain any mention of trebling.

As the issue now stands in the courts, the contradictions could not be more complete. There are reasonable, rational arguments presented by authorities on both sides of this issue. Timberlake argues that "the overwhelming weight of authority and, it is believed, the better view holds that the jury should be advised of the fact of trebling."⁷ Timberlake identifies three basic reasons authorities have developed in support of view that the jury should be advised of the fact of trebling.⁸ First, it is argued that the jury is entitled to know the terms and provisions of the statute under which the action is brought.⁹ Second, the jury may learn of trebling from other sources, e.g., the newspapers, and unless the trebling provision is clearly explained to the jury, basic misunderstanding may arise which would result in totally erroneous verdicts and judgments. And third, it is argued that the fact that damages will be trebled is a matter to be considered in weighing the credibility of the parties and witnesses.¹⁰

On the other side of the issue, Mitchell has characterized plaintiffs' attitude toward mentioning trebling as analogous to defense counsels' attitude toward mentioning liability insurance in negligence cases.¹¹ This argument was expressed by Judge Holtzoff in *Webster Motor Car Co. v. Packard Motor Car Co.*¹²

There was no reason for informing the jury that whatever damages they would award would be trebled, because this is a matter solely for the court. In fact, the jury might have taken such a statement as an intimation to keep the damages at a low level, in view of the fact that the amount allowed by the jury would be multiplied by three. This would have tended to defeat the purpose of the Act of Congress.¹³

5. 271 F.2d 709 (9th Cir. 1959).

6. *Id.* at 715.

7. E. Timberlake, *Federal Treble Damage Antitrust Actions* 280 (1965).

8. *Id.* at 280-82.

9. The following cases are cited as approving reference to the terms of the statute; *United Electrical, Radio & Machine Workers v. Oliver Corp.*, 205 F.2d 376, 387 (8th Cir. 1953); *Terminal Railroad Ass'n of St. Louis v. Howell*, 165 F.2d 135, 139-40 (8th Cir. 1948).

10. Timberlake, *supra* note 7, at 282.

11. M. Mitchell, *Private Federal Antitrust Action*, California Continuing Education of the Bar 92 (1970).

12. *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4, 11 (D.D.C. 1955).

13. *Id.* at 11.

THE IMPACT OF ALTERNATIVE INSTRUCTIONS

Clearly if the issue is to be resolved the impact of the alternatives involved must be carefully examined. More specifically we must identify and carefully examine those errors that may result if the trebling provision is not explained and those errors that may result if the trebling provision is explained to the jury.

Timberlake identified two possible errors which may result if the trebling provision of the statute is not explained to the jury:

... the jury might itself treble the amount of damages with the effect that plaintiff would recover nine times the amount of actual damages. Or the jury might divide the amount of damages by three.¹⁴

For purposes of this discussion it is, I believe, appropriate to generalize the two errors identified by Timberlake as follows: 1.) A Type I error occurs when the jury awards damages in excess of that amount supported by the evidence (*e.g.*, the jury's damage figure is as a result of misunderstanding and/or misinformation trebled by the jury only to be trebled again by the court); 2.) A Type II error occurs when the jury awards damages less than the amount supported by the evidence (*e.g.*, the jury divides their damage estimate by three).

Of course the jury award will be influenced by a variety of factors including the nature of the violation, the expert testimony, the background of the jury, the ability, conduct and personality of defendant and plaintiff attorneys and more. The errors as defined above are an attempt to isolate the impact on the award (other things equal) of the jury's knowledge of the trebling provision. The Type I and Type II errors so defined recognize that knowledge of the trebling provision (whether obtained from jury instructions or other sources) may have an independent influence of its own on the damage award.

An examination of court approved instructions relating to the treble damage provision suggests that such instructions should minimize if not eliminate the possibility of a Type I error. The two examples presented below should help to clarify this point. In the often cited case of *Cape Cod Food Products v. National Cranberry Association*,¹⁵ jury instructions included the following statement:

With respect to damages, you may be somewhat misled by something that you see in the complaint, and just to avoid any misleading I am going to make explicit one point. You are only to calculate damages, if any, or loss of profits, if any, upon the basis of single,

14. Timberlake, *supra* note 7, at 282.

15. 119 F. Supp. 900 (D. Mass. 1954).

and not treble, damages. It is true that under the antitrust act, if the plaintiff prevails, the judgment which he would ultimately get would be three times the amount of his damages and loss of profits. But the trebling of the amount is no part of the jury's function. That is a question for the court.¹⁶

More recently, in *Farmington Dowel Products Co. v. Forster Manufacturing Co.*,¹⁷ jury instructions included this statement:

If you should find that the plaintiff is entitled to recover in this action, the amount of damages, if any, is to be determined by you upon the basis of single and not treble damages. Your verdict, in other words, will be only for such amount as you find from evidence is reasonably necessary to compensate the plaintiff for any injury to his business or property by reason of any violations of the antitrust laws committed by the defendants. You as the jury will not treble that amount. You will not treble that amount nor will you as the jury include any amount for costs of suit or for a reasonable attorney's fee as the trebling of damages and the awarding of costs of suit and a reasonable attorney's fee is my function as the Judge in the event you should return a plaintiff's verdict.¹⁸

It appears most unlikely that a jury upon receiving such instructions would make the error of trebling its award. These same instructions may, however, increase the possibility of Type II errors.

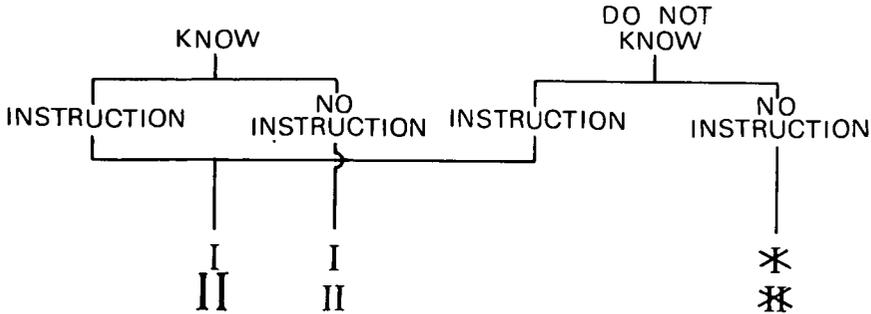
The knowledge that the jury's award will be trebled by the court provides the jury with a rationale for awarding damages less than that amount supported by the evidence.

The diagram below provides a useful summary of the probable impact of jury instructions relating to treble damages. In the construction of this diagram we assume there are some juries that know something about the trebling provision and some that do not know about the trebling provision. When the jury instruction contains an explanation of the trebling provision (INSTR.) the possibility of a Type I error is decreased and the possibility of a Type II error is increased as indicated. When the jury instruction contains no reference to the trebling provision (no instr.) the potential for Type I and Type II errors varies depending on the jury's knowledge or ignorance of the trebling provision. As indicated below, if the jury has knowledge (though imperfect knowledge) of the treble damage clause the possibility of both Type I and Type II errors may be highly significant. If the jury has no knowledge of the treble damage clause the possibility of both Type I and Type II errors is eliminated.

16. *Id.* at 911.

17. 297 F. Supp. 924 (D. Me. 1969), *modified* 421 F.2d 61 (1st Cir. 1970).

18. 297 F. Supp. at 926.



From this summary it appears that the jury with no knowledge of the treble damage clause and no instruction relating to this provision is the better alternative. It is probably unreasonable, however, to assume that the jury in a private treble damage action will not learn of the trebling provision during the trial. Realistically, therefore, the court must decide whether or not to explain the trebling provision to a jury that is probably already aware of its existence, but may have some misunderstanding about it. The choice as summarized in the diagram above is between leaving the possibility open for both Type I and Type II errors or decreasing the possibility of Type I errors while perhaps increasing the possibility of Type II errors. The fact that plaintiffs in private treble damage actions consistently prefer the first alternative while defendants consistently prefer the second should not be surprising.

A CHANGE OF PERSPECTIVE

If the jury has knowledge of the trebling provision (whether this knowledge came from jury instructions or other sources) the effect of this knowledge is to significantly alter the perspective from which the jury must determine damages. With knowledge of the trebling provision, the emphasis of the jury's deliberations, once the fact of damage has been established, is shifted from a determination of the actual amount of damages sustained by the plaintiff, to a determination of the total amount to be awarded, *i.e.*, three times the jury's award. This change of perspective has the effect of substantially altering the role of the jury in the private treble damage action.

Issues to be determined by the jury in a private treble damage suit include the following:

- (1) Has the defendant violated the antitrust laws of the United States?

- (2) Has the defendant's violation of the antitrust laws been a proximate cause of any injury to the plaintiffs?
- (3) What dollar amount of damages is supported by the evidence?

With knowledge of the trebling provision the jury *may* also consider the following questions in their deliberations:

- (4) How much should the defendant be punished for his antitrust violation(s)?
- (5) Should the plaintiff receive an award in excess of the damages sustained and if so how much?

It is obvious that the jury's considerations of these last two issues is not consistent with Congressional intent. The fact that the trebling provision was not left to the discretion of the trial judge or the jury suggests that Congress intended to limit jury deliberations to the fact of damage and the actual amount of damages resulting from the violation. With knowledge of the trebling provision it appears unlikely, however, that the jury can avoid these issues. It also seems a very natural jury reaction to the trebling provision to multiply suggested dollar estimates of damages by three, thus evaluating the total award to be made by the jury.

Recognizing the probability that juries with knowledge of the trebling provision will consider issues (4) and (5) listed above in their deliberations, it seems unwise to permit a jury to enter such deliberations without any or with inadequate instruction relating to the purpose of the trebling provision.

If the jury in a private treble damage action is to maintain a perspective consistent with the purposes of antitrust law, without prejudicing the interests of either defendant or plaintiff, the jury instruction relating to the treble damage clause must include a discussion of the purpose of the trebling provision in particular and punitive damages in general.

For example, it would be constructive for the jury to be made aware that in authorizing private treble damage actions ". . . Congress intended to provide not only for private redress but also to impose sanctions to secure the more effective enforcement of antitrust legislation."¹⁹ Thus the private treble damage action was intended by Congress to permit those injured by violations to recover damages, to deter other violations,²⁰ and "to supply an ancillary force of private

19. *Trebuhs Realty Co. v. News Syndicate Co.*, 107 F. Supp. 595, 599 (S.D. N.Y. 1955).

20. *Fanchon & Marco v. Paramount Pictures*, 100 F. Supp. 84, 88 (S.D. Cal. 1951), *aff'd* 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955); *Maltz v. Sax*, 134 F.2d 2, 4 (7th Cir. 1943), *cert. denied*, 319 U.S. 772 (1942); *Weinberg v. Sinclair Refining Co.*, 48 F. Supp. 203, 205 (E.D. N.Y. 1942); *Quemos Theatre Co. v. Warner Bros. Pictures, Inc.*, 35 F. Supp. 949 (N.J. 1940).

investigators to supplement the Department of Justice in law enforcement."²¹

PUNITIVE DAMAGES

The instruction relating to the "purpose of damage recovery, provided by Clayton Act" cited by the American Bar Association publication *Antitrust Civil Jury Instructions*²² reads as follows:

The purpose of awarding damages in a private antitrust case is to put the plaintiff in as good a position as if the conspiracy had not occurred.²³

Such an instruction may be adequate and appropriate in instructing a jury unaware of the trebling provision. For a jury aware of the trebling provision the instruction is both incomplete and misleading. It ignores the concept of "punitive" damages and provides a somewhat distorted view of the single damage award. The instruction appears to imply that the single damage award fully compensates plaintiff for injury and thus two-thirds of the treble damage award is a "windfall" for the plaintiff. In fact the division of the treble damage award into "compensatory" and "punitive" damages may vary greatly from the one-third/two-thirds division implied by the treble damage provision.²⁴ To clarify this point, a more detailed instruction relating to the interest or adjustment for inflation issues would be constructive.

In a suit where treble damages are available, the courts have concluded that interest or an adjustment for inflation is not allowed.²⁵ Although jury instructions relating to damages have frequently stated this position, further clarification is needed to place the punitive aspects of the treble damage award in proper perspective.

The jury should be made aware that a portion of the treble damage award compensates the plaintiff for the fact that the plaintiff was denied the use of these funds (the profits lost, the overcharge paid, etc.) for the period of time between the injury and the awarding of damages. If the time interval between the date at which damages were sustained and the date at which damages are awarded is substantial this will greatly increase the share of the trebled damages to be

21. *Weinberg v. Sinclair Ref. Co.*, 48 F. Supp. 203, 205 (E.D.N.Y. 1942).

22. ABA Antitrust Section, *Antitrust Civil Jury Instructions* (1972).

23. *Id.* at 207, citing *Hawaiian Oke & Liquors v. Joseph E. Seagram & Sons*, 272 F. Supp. 915 (1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1969).

24. See A. Parker, *Treble Damage Action—A Financial Deterrent to Antitrust Violations*, 16 *Antitrust Bulletin* 488, 492 (1971).

25. 15 *Am. Jur. Damages* § 169. See also *Locklin v. Switzer Bros.*, 72705 *Trade Cas.* (N.D. Ill. 1969); *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 284 F. Supp. 582 (S.D. Tex. 1968), 304 F. Supp. 845 (S.D. Tex. 1969), *rev'd*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 104 (1972); *Gorham & Johnson v. Chrysler Corp.*, 308 F.2d 462 (5th Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

properly defined as compensatory damages, while at the same time measurably reducing the share to be labeled punitive damages.

For example, assume that the plaintiff (e.g., a state highway department) was overcharged \$25,000 in 1963 as a result of an anti-trust violation and that the jury awards single damages of \$25,000 in 1973. If plaintiff could have earned a 6 percent return on the money paid in the overcharge, plaintiff must receive the amount of the overcharge *plus* the interest that would have accrued in order to be fully compensated for the injury. Thus compensatory damages would include single damages plus interest. In this example a 6 percent return on \$25,000 for the ten year interval between the injury and the awarding of damages would amount to interest of \$19,771. Compensatory damages would therefore be equal to \$44,771 (= \$25,000 + \$19,771) or 59.7 percent of the treble damage award. Accordingly, in this example, punitive damages would equal \$30,229 or 40.3 percent of the treble damage award.²⁶

The point which the jury should be made aware of is that punitive damages generally amount to significantly less than two-thirds of the treble damage award. This is particularly the case where there is a long time lag between the injury and the awarding of damages.

SUMMARY AND CONCLUSIONS

It has been the purpose of this paper to examine the question of whether the jury in private antitrust actions should be informed of the treble damage provision of the Clayton Act. The conclusions to be drawn from the preceding analysis may be summarized as follows:

First, the jury instructions relating to damages should include reference to and clarification of the treble damage clause. Second, the jury instructions relating to damages should include a clear and complete explanation of the purpose of the trebling provision in particular and punitive damages in general. Third, to insure that the jury's perspective of punitive damages is not distorted, the jury should be made aware of the "compensatory" interest element in the trebled damage award. More specifically, the jury should be made aware that because the time interval between injury and awarding of damages is normally substantial in private treble damage actions, a large portion of the *treble* damage award provides compensation for the loss of use of the *single* damages awarded by the jury, *i.e.*, compensation for the interest lost during the interval between injury and the awarding of damages. Finally, to insure that the jury understands the limits of its

26. For a more complete discussion of the division of treble damages between compensatory and punitive damages, see Parker, *supra* note 24, at 488-505.

fact-finding role, a simple, summary statement relating to its function should be included as a part of the jury instructions. This statement might read as follows:

If you find that the plaintiff is entitled to recover in this action, the amount of damages, if any, is to be determined by you from the evidence presented. Your verdict will be only for such amount (profits lost, overcharge paid, or other) as you find supported by the evidence. In the determination of the actual amount of damages you are not to take into account the trebling provision, the awarding of attorney's fees, interest, or punitive damages. It is your function to determine, on the basis of the evidence presented, the *actual damages sustained* and award that amount to the plaintiff(s).

Only when the jury is provided complete detailed instructions relating to the trebling provision, including instructions as to the purposes of the provision and instructions clarifying the interest issue, is it in a position to deal with the question of damages within a framework consistent with the minimization of both Type I and Type II errors and thus consistent with the purposes of antitrust law.