ANTITRUST LAW—JURY INSTRUCTIONS ON TREBLE DAMAGES HELD ERRONEOUS

In *Pollock & Riley, Inc. v. Pearl Brewing Co.* and its companion case *Wood v. Gulf Oil Corp.*,[1] the United States Court of Appeals for the Fifth Circuit reached several significant holdings.[2] This note, however, will deal only with the court's holding that the trial court should not inform the jury of the mandatory trebling provisions of 15 U.S.C. §15 (1970) and that to do so is reversible error.[3] This decision marked the first such holding on this issue by the Fifth Circuit.[4]

The appearance of these two cases before the court of appeals presented that court with two divergent and irreconcilable opinions on the necessity or advisability of informing the jury of the trebling provisions of the antitrust laws. In both cases, civil antitrust actions had been brought seeking treble damages as provided under the Clayton Act.[5] In the *Pollock & Riley* case,[6] the United States District Court for the Western District of Texas had granted the plaintiff's motion requesting that any reference to the treble-damages provision be barred.[7] In *Wood*, on the other hand, a different district court within the Western District of Texas had denied the plaintiff's motion *in limine* to restrict any reference during the trial to the treble-damages provision.[8] Thus, on review before the court of appeals were two consolidated interlocutory appeals in two civil antitrust actions, with the primary issue before the court being the propriety of advising or informing the jury that, under the provisions of 15 U.S.C. §15 (1970), any damages awarded would be tripled and a reasonable attorney's fee plus the litigation costs granted.[9]

Although federal law specifically provides that a person injured by actions which violate the antitrust laws shall recover treble damages plus the cost of his suit,[10] Congress has not spoken as to the necessity of instructions

1. 498 F.2d 1240 (5th Cir. 1974).

2. The court held that: (1) the jury should not be advised of the mandatory tripling provision of 15 U.S.C. §15; (2) it is not for the jury to determine the amount of a judgment but rather the amount of damages; and (3) the antitrust law does not require a plaintiff to retain possession of a business oppressed by an antitrust violation until the business is forced into bankruptcy or directly shut down by the violator.

3. 498 F.2d at 1242.

4. *Id.* at 1242 n.2, where the court pointed out: This conflict is more significant and demanding of a resolution because both decisions [before the court of appeals] are from district courts in the same district, the Western District of Texas.

5. 15 U.S.C. §12 *et seq.*, §44 (1970).

6. Pollock & Riley, Inc. v. Pearl Brewing Co., 362 F. Supp. 335 (W.D. Tex. 1973).

7. *Id.* at 338.

8. 498 F.2d at 1242. The district court opinion is unreported.

9. *Id.*

10. 15 U.S.C. §15 (1970) provides:

to the jury that any verdict which it reaches would be trebled by the court under the same federal antitrust laws.[11] In the absence of a direct and explicit legislative mandate, the courts have been split as to the necessity of such instructions.

In *Pollock & Riley*, the court pointed out that the traditional and usual function of a jury in a civil case is the determination of the actual damages, if any, sustained by the plaintiff.[12] Unlike other civil proceedings wherein the jury might possibly be asked to assess punitive damages, the Clayton Act specifically provides for certain punitive damages to be rendered in a civil antitrust suit as a matter of law.[13] The jury, then, is not being asked to perform anything other than its traditional function of determining what, if any, actual damages the plaintiff has sustained.

Those courts which have required the use of jury instructions on this matter of treble damages have been in the clear minority. In one early district court case,[14] the court had merely included within its general charge to the jury a reminder that the jury is to calculate damages, if any, upon the basis of single, and not treble, damages.[15] The district court made no finding that jury instructions on the matter of treble damages were necessary but its decision has still been relied upon as having reached such a holding.[16] What the court actually held was that jury instructions on this matter were not erroneous.[17] In *Bordonaro Brothers Theatres, Inc. v. Paramount Pictures, Inc.*,[18] the Court of Appeals for the Second Circuit was faced with an appeal by a plaintiff who, unhappy with the verdict of $7,500 brought in his favor, raised several assignments of error, one of which concerned references by the court and counsel to the treble damages claimed and allowable under the statute. There the court of appeals stated:

> Surely reference either to the pleadings or to the governing statute is so usual a course in jury trials as to occasion no comment. Hence the recital in the trial judge's charge of just what had happened in the former suit and what was claimed in this suit was quite appropriate. Such a statement

---

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.

11. *See* note 10 *supra*.
12. 362 F. Supp. at 337.
13. *See* note 10 *supra*.
14. Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F. Supp. 900 (D. Mass. 1954).
15. *Id.* at 911.
16. Lehrman v. Gulf Oil Corp., 500 F.2d 659 (5th Cir. 1974); 498 F.2d at 1242.
17. 119 F. Supp. at 911.
18. 203 F.2d 676 (2d Cir. 1953).

> is more desirable than a half-recital, . . . a method leading inevitably to an overemphasis of an otherwise not significant detail.[19]

The courts opposed to the giving of a jury charge regarding the treble-damages provision of 15 U.S.C. §15 (1970) are legion. In 1955, the United States District Court for the District of Columbia noted:

> 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.[20]

Subsequently, in *Semke v. Enid Automobile Dealers Ass'n*,[21] the Court of Appeals for the Tenth Circuit noted that the purpose of the trebling provision of 15 U.S.C. §15 (1970) is to encourage private enforcement of the antitrust laws, and the treble damages allowed by the Act provide injured parties with an economic incentive to bring before the courts alleged violations of the antitrust laws.[22]

If there was in fact a violation of the antitrust laws then, of course, the provision constitutes a penalty for the violation as well, and will therefore serve as an added deterrence. As was noted, however, in the more recent Fifth Circuit case, *Lehrman v. Gulf Oil Corp.*,[23] since the jury's function is completed as soon as it has arrived at a determination of actual damages, it serves no useful purpose to communicate this information concerning treble damages to the jury and such communication, if it occurs, is potentially harmful and therefore a reversible error.[24]

After a brief discussion of the two lines of decision, the *Pollock & Riley* court added that one other basic point urged in favor of a jury instruction on this matter is the avoidance of jury confusion.[25] The court also mentioned the additional argument that the treble-damages provision of the Clayton Act has been so well publicized that some jurors might have some knowledge of it and that those favoring instructions would argue, a "little knowledge without a complete explanation from the court will result in totally erroneous verdicts and damage awards,"[26] but went on to state:

---

19. *Id.* at 678.

20. Webster Motor Car Co. v. Packard Motor Car Co., 135 F. Supp. 4, 11 (D.D.C.), *rev'd on other grounds*, 243 F.2d 418 (1955), *cert. denied*, 355 U.S. 822 (1957); *see also*, Sablosky v. Paramount Film Distrib. Corp., 137 F. Supp. 929, 942 (E.D. Pa. 1955); C. Albert Sauter Co. v. Richard Sauter Co., 368 F. Supp. 501, 518 (E.D. Pa. 1973).

21. 456 F.2d 1361 (10th Cir. 1972).

22. *Id.* at 1370.

23. 500 F.2d 659 (5th Cir. 1974).

24. *Id.* at 667; 498 F.2d at 1243.

25. 498 F.2d at 1243.

26. *Id.*; *see also* TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTI-TRUST ACTION §19.06, at 281-82 (1965).

> Congress's authorization in 15 U.S.C.A. §15 to triple the award of damages is a matter of law to be applied by the district court without interference from the jury. The fact that the awarded amount will be tripled has no relevance in determining the amount a plaintiff was injured by the anti-trust violation.[27]

In *Lehrman*, the court of appeals subsequently noted: "If, as everyone seems to assume, mentioning the trebling provisions would lower jury verdicts then the very purposes for which the provision is designed may be frustrated."[28] The *Lehrman* court also stated that while the treble-damages provision of 15 U.S.C. §15 (1970) is partially justifiable on compensatory grounds,[29] the primary purpose for its existence is to deter antitrust violations.[30]

The Fifth Circuit has thus sided itself with the majority of the courts which have faced this problem both in its holding and in the reasoning used to reach that holding. While it has been argued by some writers that the deterrent effect of private, treble-damages suits is minimal,[31] this contention has been repeatedly rejected by the majority of the courts who view private antitrust suits as supplementing governmental enforcement of the antitrust laws[32] and have explicitly stated their belief that the principal purpose behind the existence of the treble-damages provision is the deterrence of antitrust violations.[33]

The question as to which, if either, of the two approaches to this problem is "correct" is difficult, if not impossible, to answer with any degree of assurance. It is indeed possible that some jury confusion does exist, in varying degrees, concerning the trebling of damages under the antitrust laws. Such jury confusion would likely concern their function as to determining damages. They could conceivably believe their finding on damages should reflect malice, or the lack thereof, rather than actual damages. If this alleged confusion does exist then the question which logically follows is whether jury instructions designed to obviate this confusion do so at the expense of defeating the purpose behind the Clayton Act.

In the abstract at least, the treble-damages provision can serve either one of two separate purposes although some intermingling may occur. On

---

27. 498 F.2d at 1243.

28. 500 F.2d at 667.

29. *Id.*; *see also* Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 HARV. L. REV. 1566 (1967).

30. 500 F.2d at 667; Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1370 (10th Cir. 1972).

31. Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 NEW MEX. L. REV. 286 (1973).

32. 500 F.2d at 667; 456 F.2d at 1370; *see also* Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891, 893 (5th Cir. 1954).

33. 498 F.2d at 1242-43; *see also id.* at n.32; Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947).

the one hand, the statute could have been intended solely to compensate the wronged plaintiff for the harms that he has suffered as a direct result of the defendant. If this is the statutory purpose, then it is obvious that instructions to the jury on the trebling provision of the Clayton Act might not interfere with the plaintiff's recovery for actual damages to any measurable degree. If, on the other hand, the purpose of 15 U.S.C. §15 (1970) is to deter further antitrust violations by this or other defendants or to encourage private enforcement of the antitrust laws, then it is quite apparent that jury instructions on the treble-damages provision could hinder or defeat the statutory intent by causing lower verdicts.

The treble-damages provision of 15 U.S.C. §15 (1970) has no allowances within its parameters for a balancing of the equities or the hardships between an injured plaintiff and the defendant once a violation has been found. As soon as the jury has determined that the defendant has in fact violated the Clayton Act and has determined the damage suffered by the plaintiff, these damages are trebled as a matter of law. Therefore, it is clear that Congress intended 15 U.S.C. §15 (1970) to serve as an economic deterrent to further violations of the Clayton Act and to incidentally serve as an incentive for plaintiffs to bring private antitrust actions.

It follows that if informing the jury of the treble-damages provision of the Clayton Act could even potentially result in a reduced verdict, then the statutory purpose would be hampered and the instructions should not be allowed.[34] As the *Pollock & Riley* court noted, the plaintiff in an antitrust action has a justifiable fear that the jury will adjust its damages award downward or find no liability because of some "notions of a windfall to the plaintiff" where they have been instructed on the matter of treble-damages.[35] If even the possibility of such an occurrence is recognized, it must be clear that the Congressional mandate and encouragement of the prosecution of private claims under the antitrust laws require adoption of the *Pollock & Riley* approach.[36]

WILLIAM BISCHOFF

34. Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974); Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974); Webster Motor Car Co. v. Packard Motor Car Co., 135 F. Supp. 4, 11 (D.D.C. 1955).

35. 498 F.2d at 1243.

36. This approach was again followed by the court of appeals in Lehrman v. Gulf Oil Corp., 500 F.2d 659 (5th Cir. 1974); Embry-Riddle Aeronautical Univ. v. Ross, 504 F.2d 896 (5th Cir. 1974).