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## FEDERAL PRIVATE ANTITRUST ACTION IS CHARACTERIZED AS PENAL UNDER STATE LAW

Plaintiffs brought a treble damage action under section 4 of the Clayton Act<sup>1</sup> alleging violations by defendant oil companies of sections 1 and 2 of the Sherman Act.<sup>2</sup> These violations purportedly occurred some two years prior to the filing of plaintiffs' action. The district court for the southern district of California dismissed the action on the ground that it was barred by the one year California statute of limitations relating to statutory forfeitures or penalties.<sup>3</sup> On appeal, the Court of Appeals for the Ninth Circuit affirmed. *Held*: A private anti-trust action under the Clayton Act is an action to recover a penalty within the meaning of the California statute of limitations. *Leh v. General Petroleum Corp.*, 330 F.2d 288 (9th Cir. 1964), *cert. granted*, 85 Sup. Ct. 148 (1964).<sup>4</sup>

As early as the fifteenth century, various English statutes, particularly those regulating trade, provided that any member of the public could bring an action to recover at least part of the heavy penalty imposed for a violation.<sup>5</sup> The Tudors encouraged enforcement of these statutes by granting certain persons patents to sue. This practice led to so much blackmail and other abuse that severe restrictions were placed upon these "penal" actions.<sup>6</sup> However, actions to recover damages greater than the injury suffered have not always been subject to such restrictions. Many actions to recover multiple damages or fixed minimum damages have long been held to be unrestricted remedial actions both in England and in the United States.<sup>7</sup>

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<sup>1</sup> 15 U.S.C. § 15 (1958).

<sup>2</sup> 15 U.S.C. §§ 1, 2 (1958).

<sup>3</sup> *Leh v. General Petroleum Corp.*, 208 F. Supp. 289 (S.D. Cal. 1962).

<sup>4</sup> The Supreme Court granted certiorari limited to the question whether the state statute of limitations was tolled, under section 5 of the Clayton Act, by a similar action instituted by the United States. This issue is one of independent significance. See *Wiprud, Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles*, 57 *Nw. U.L. Rev.* 29, 42-48 (1962). The issue was not, however, of major concern to either the district or circuit court in this case and is not discussed in this casenote.

<sup>5</sup> 4 *HOLDSWORTH, A HISTORY OF ENGLISH LAW* 356 (3d ed. 1923).

<sup>6</sup> "The informer was not allowed to sue by attorney, no compounding of the action was to be allowed without leave of the court, a year was fixed as the limitation for an informer's action unless the statute fixed a shorter period. Still further regulations were made by a statute of 1624. . . ." *Id.* at 356-357.

<sup>7</sup> *E.g.*, copyright infringement (minimum damages); ouster of tenant without notice (double damages); traveler injured through defect in highway (double damages). *Brady v. Daly*, 175 U.S. 148, 153, 155-56 (1899).

Although association of modern antitrust suits with traditional penal actions seems historically anomalous, the penal-remedial dichotomy has caused much difficulty for federal courts in antitrust litigation. Once the penal-remedial issue is raised, two basic questions are presented. The first is whether state or federal law should govern the characterization of a private antitrust action. The second is whether such an action should be characterized as penal or remedial.

Some lower federal courts, influenced by federal origination and dominance of antitrust legislation, have adopted federal characterization of private antitrust actions.<sup>8</sup> These courts, guided by the Supreme Court's decision in *Chattanooga Foundry & Pipe Works v. City of Atlanta*,<sup>9</sup> have concluded that such an action is remedial in character.<sup>10</sup> Other federal courts have not specifically discussed whether state or federal law should control characterization of the action. These courts have simply observed that the federal antitrust statutes included no limitation for private actions and have gone on to interpret the statutes of limitation of the forum states.<sup>11</sup> As a result of varying state statutes and interpretations, the circuit courts of appeals are sharply divided on the question whether a treble damage action under the Clayton Act is penal or remedial.<sup>12</sup>

The district court in the principal case determined, and the plaintiffs

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<sup>8</sup> See, e.g., *Fulton v. Loew's Inc.*, 114 F. Supp. 676 (D. Kan. 1953); *Momand v. Universal Film Exch.*, 43 F. Supp. 996 (D. Mass. 1942).

<sup>9</sup> 203 U.S. 390 (1906). In this case the Court held that a private antitrust action is not an action to recover a penalty within the meaning of a general federal statute of limitations requiring actions for penalties to be brought within five years. *REV. STAT. § 1047* (1875), 28 U.S.C. 2462 (1948). The decision has not been controlling because it has been limited to the particular statute there involved. E.g., *Bertha Bldg. Corp. v. National Theatres Corp.*, 269 F.2d 785 (2d Cir. 1959), *cert. denied*, 361 U.S. 960 (1960); *Sun Theatres Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284 (7th Cir. 1954).

<sup>10</sup> See, e.g., *Fulton v. Loew's Inc.*, 114 F. Supp. 676 (D. Kan. 1953); *Momand v. Universal Film Exch.*, 43 F. Supp. 996 (D. Mass. 1942). In *Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583 (9th Cir. 1937), a decision overruled by implication in the principal case, the Ninth Circuit stated that a private antitrust action "is not an action to recover a penalty." 87 F.2d at 585. Although the Ninth Circuit did not expressly adopt federal characterization in *Hicks*, the doctrine was strongly implied.

<sup>11</sup> See, e.g., *Gordon v. Loew's Inc.*, 247 F.2d 451 (3d Cir. 1957); *Momand v. Universal Film Exch.*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949).

<sup>12</sup> In the following cases the treble damage action has been characterized as remedial: *Momand v. Universal Film Exch.*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *Bertha Bldg. Corp. v. National Theatres Corp.*, 269 F.2d 785 (2d Cir. 1959), *cert. denied*, 361 U.S. 960 (1960); *Englander Motors, Inc. v. Ford Motor Co.*, 293 F.2d 802 (6th Cir. 1961). In the following cases the treble damage action has been characterized as penal: *Gordon v. Loew's Inc.*, 247 F.2d 451 (3d Cir. 1957); *North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673 (4th Cir. 1960); *Grengs v. Twentieth Century Fox Film Corp.*, 232 F.2d 325 (7th Cir. 1956), *cert. denied*, 352 U.S. 871 (1956); *Powell v. St. Louis Dairy Co.*, 276 F.2d 464 (8th Cir. 1960).

conceded on appeal, that state law controlled characterization of the action.<sup>13</sup> The court of appeals relied upon *Bertha Bldg. Corp. v. National Theatres Corp.*<sup>14</sup> as supporting state characterization. *Bertha Bldg.*, however, contains statements which would appear to support either state or federal characterization, and seems to leave the matter unresolved.<sup>15</sup> Concluding that California law was to be controlling, the court determined that the action was penal in character<sup>16</sup> and California's one year statute applied to bar the suit.

Congress has enacted a four year statute of limitations for private actions arising under the federal antitrust statutes which were not barred under existing law on January 7, 1956.<sup>17</sup> Because the cause of action in the principal case accrued in 1954, the Ninth Circuit concluded that the action was barred under existing law, and the new statute of limitations did not apply.

Treble damage actions in which the alleged cause of action accrued prior to 1956 will soon cease to appear. If only the statute of limitations aspect of penal characterization were involved, the importance of the principal case might be minimal. Penal characterization, however, creates at least two other significant obstacles to the bringing of a private antitrust action. First, the treble damage aspect of the action will

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<sup>13</sup> Brief for Appellants, p. 22. The court stated in a footnote, *Leh v. General Petroleum Corp.*, 330 F.2d 288, 289 (9th Cir. 1964), that amici curiae argued for federal characterization. *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962), and *Simler v. Connor*, 372 U.S. 221 (1963), were relied upon by amici curiae, but the court deemed these non-antitrust cases irrelevant. *Smith v. Cremins*, a civil rights case, contains the following statement: "[T]he federal court accepts the state's interpretation of its own statute of limitations, but determines for itself the nature of the right conferred by the federal statute." 308 F.2d at 189.

<sup>14</sup> 269 F.2d 785 (2d Cir. 1959), *cert. denied*, 361 U.S. 960 (1960). Also cited were *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941), and *Costello v. Bank of Am.*, 246 F.2d 807 (9th Cir. 1957). The latter cases support a contention that construction of a state statute of limitations is a matter of state law. But neither involves an antitrust action and neither addresses itself specifically to the issue of federal versus state characterization of the cause of action.

<sup>15</sup> The court quoted the following passage from *Bertha Bldg.*: "[F]ederal courts must accept the statutes as construed and interpreted by the... [state] courts. It is for them to determine what is meant by the word 'penalty' in the... [state] statute." The two sentences immediately following the quoted passage were left unquoted by the court: "But the purposes attributable to the federal antitrust laws must be governed by federal law. Accordingly, to determine whether a suit for treble damages under section 4 of the Clayton Act has the characteristics of actions encompassed by the three year New York statute federal decisions must be examined." 269 F.2d at 788.

<sup>16</sup> There are no California cases interpreting the character of the action created by the Cartwright Act, CAL. BUS. & PROF. CODE § 16750, which allows treble damages in private antitrust actions. In a preponderance of cases, however, California courts conclude that actions to recover multiple damages are penal. See, e.g., *Grossblatt v. Wright*, 108 Cal. App.2d 475, 239 P.2d 19 (1951); *Miller v. Municipal Court*, 22 Cal.2d 818, 142 P.2d 299 (1943).

<sup>17</sup> 15 U.S.C. § 15(b) (1955).

not survive the death of the wrongdoer.<sup>18</sup> Second, the treble damage action will not be assignable.<sup>19</sup>

The purpose of the treble damage action is to encourage suits by injured parties against violators of the federal antitrust statutes.<sup>20</sup> The obstacles created by penal characterization are inconsistent with this policy. The plaintiff in a private antitrust action, unlike the informer plaintiffs of early English penal actions, deserves and needs what assistance the courts can afford him.<sup>21</sup> A party injured by a conspiracy in violation of the Sherman Act, even if he obtains a judgment, frequently suffers more actual injury than treble damages can repair.<sup>22</sup> Often, as was true of the plaintiffs in the principal case, he will no longer be in business. In losing part or all of his business, he loses many intangible assets for which no damages are allowed.<sup>23</sup> By resorting to litigation, he faces the almost inevitable danger of future business harassment.<sup>24</sup> Legal damages and actual harm are always distinct concepts; in private antitrust actions the disparity between the two is particularly pronounced. In light of these factors, remedial characterization is an extremely desirable result.<sup>25</sup>

Federal characterization of the cause of action, influenced as it is by

<sup>18</sup> See, e.g., *Rogers v. Tobacco Bd. of Trade*, 244 F.2d 471 (5th Cir. 1957); *Haskell v. Perkins*, 28 F.2d 222 (D.N.J. 1928). It might well be that the action itself does not survive. See *Bowles v. Farmers Nat'l Bank*, 147 F.2d 425, 430 (6th Cir. 1945).

<sup>19</sup> Penal actions are not assignable. *Strickland v. Sellers*, 78 F. Supp. 274 (N.D. Tex. 1948); *Schreiber v. Sharpless*, 110 U.S. 76 (1884). On the other hand, decisions in which private antitrust actions have been characterized as remedial have permitted assignability. *Momand v. Twentieth-Century Fox Film Corp.*, 37 F. Supp. 649 (D. Okla. 1941); *Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583 (9th Cir. 1937). It has been held that the question of assignability is one of right, not of procedure, and that, therefore, Fed. R. Civ. P. 17(b), governing capacity to sue, does not apply. *Momand v. Twentieth-Century Fox Film Corp.*, *supra*. *But cf.*, *Coast v. Hunt Oil Co.*, 96 F. Supp. 53, 55-56 (W.D. La. 1951), *aff'd*, 195 F.2d 870 (5th Cir. 1952), *cert. denied* 344 U.S. 836 (1952).

<sup>20</sup> See *McConnell, The Treble Damage Issue: a Strong Dissent*, 50 NW. U.L. REV. 342, 342-43 (1955).

<sup>21</sup> In *Harman v. Valley Nat'l Bank*, 5 TRADE REG. REP. ¶ 71, 327, at 80, 372 (9th Cir. 1964), the Ninth Circuit stated that federal courts in private antitrust actions "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress. . . ."

<sup>22</sup> *Vold, Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L.J., 117, 120-21 (1940).

<sup>23</sup> *Id.* at 124, 139-40.

<sup>24</sup> *Id.* at 141-42; *McConnell, The Treble Damage Issue: a Strong Dissent*, 50 NW. U.L. REV. 342, 348 (1955). See *United States v. International Workers*, 100 F.2d 541 (1938).

<sup>25</sup> The following commentators indicate agreement: *Vold, supra* note 22, at 117-18; *McConnell, supra* note 24, at 342-48; *Wiprud, Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles*, 57 NW. U.L. REV. 29, 32-33 (1962). Professor Vold is particularly vigorous and persuasive in arguing against penal characterization.

*Chattanooga*,<sup>26</sup> leads to remedial characterization.<sup>27</sup> Federal characterization has the additional advantage of promoting uniformity in the application of the federal antitrust laws. Such a result is in keeping with Congressional intent, for the main purpose of the new four year statute of limitations was to eliminate state "forum-shopping."<sup>28</sup> By adopting federal characterization, the Ninth Circuit Court of Appeals would acknowledge the policy underlying treble damage actions and remove the obstacles which penal characterization now places in the path of the plaintiff in a private antitrust action.

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<sup>26</sup> *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. (1906).

<sup>27</sup> See note 10 *supra* and accompanying text.

<sup>28</sup> "The disparity in the state statutes (varying between one and twenty years) promoted 'forum-shopping' and finally resulted in an awareness of the need for a federal limitation period that would provide uniformity throughout the United States." *Kansas City, Missouri v. Federal Pac. Elec. Co.*, 310 F.2d 271, 274 (8th Cir. 1962). See Wiprud, *supra* note 25, at 31.