Sperry v. Crompton: New York Court of Appeals Limits State-Law Antitrust Claims

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In its recent decision in *Sperry v. Crompton Corp.*,[1] the New York Court of Appeals clarified two significant limits on claims brought under the Donnelly Act,[2] New York's antitrust statute. First, the Court made clear that class actions are not permitted under the Donnelly Act where plaintiffs seek treble damages. Second, the Court also held that in many circumstances indirect purchasers are too remote from actual commercial transactions to bring claims for unjust enrichment under New York law. This decision will likely serve to significantly limit antitrust and related claims brought under New York law and may also be relied upon by the courts of other jurisdictions to limit such claims.

The Claims in the *Sperry* Case

The claims brought by Paul Sperry, a New York resident, and other New York residents involve "rubber processing chemical products."[3] Rubber processing chemicals play a role in the manufacture of rubber and rubber articles. These chemicals help cure and protect the rubber, increase durability and fatigue life, control color and provide heat resistance. The chemicals are used for rubber product applications in automobiles, aircraft, as well as in truck tires, belts, hoses and footwear. Tire companies, for example, use small quantities of rubber processing chemicals to process rubber used in the manufacture of tires. The defendants in the *Sperry* case produce and sell rubber processing chemicals. They do not manufacture, market, distribute, or sell tires—the product that Sperry purchased and for which he claimed damages. In 2004, certain of the defendants in the case had pled guilty to participating in a conspiracy to fix the prices of certain rubber processing chemicals from approximately July 1995 through approximately December 2001. Citing this conduct, several direct purchasers of rubber processing chemicals brought suit against the defendants in federal court.[4] Flexsys, Chemtura, and Bayer settled the direct purchaser class action.

Sperry did not purchase any tires from Chemtura, Flexsys or Bayer (none of whom make tires). Nor had Sperry purchased rubber processing chemicals from the defendants (or anyone else). In November 2002, shortly after learning of the government investigations, Sperry filed his complaint, claiming to represent "[a]ll persons within the State of New York who purchased tires, other than for resale, that were manufactured using rubber-processing chemicals sold by defendants since 1994."[5] Sperry alleged that "[a]s a direct and proximate result of defendants' conduct as described herein, plaintiff and members of the Class have paid more for tires containing or utilizing rubber processed with defendants' chemicals than they would have in the absence of an anticompetitive agreement."[6]

Alleging that defendants entered into a price-fixing agreement, Sperry claimed that defendants violated New York's antitrust statute, the Donnelly Act, and sought treble damages.[7] He also claimed that the defendants' arrangement constituted a deceptive practice in violation of New York General Business Law § 349. Finally, Sperry alleged "unjust enrichment," claiming that defendants "benefited" "through the overpayments for tires manufactured by rubber-processing chemicals by plaintiff and the Class."[8] As with his antitrust actual damages claim, Sperry's unjust enrichment claim sought "the amount of such overpayments as damages or restitution."[9]

The Case's Procedural History

The defendants moved to dismiss. With respect to the Donnelly Act, defendants explained that although New York law permits class action lawsuits, it sets out specific criteria that must be fulfilled. One of those is set forth in Civil Practice Law & Rules (CPLR) §901(b), which states that an action to recover a statutorily authorized "penalty" or "minimum measure of recovery" is not amenable to class action procedures unless the substantive law "specifically authorizes" the class action mechanism.[10] Defendants argued that the Donnelly Act's treble damages remedy is a "penalty" for purposes of New York class action procedures. Furthermore, defendants argued that the treble damages remedy is a "minimum measure of recovery." Because the Donnelly Act does not specifically authorize the class action mechanism, despite repeated proposals to so amend the Act, defendants argued that Sperry could not bring a class action suit under the Act. Defendants also argued that the unjust enrichment claim failed because Sperry lacks a direct relationship with the defendants. Sperry bought tires that, he alleged, were made in a manufacturing and distribution process that at some point used small amounts of chemicals manufactured by defendants. That sort of highly attenuated connection to defendants does not meaningfully distinguish Sperry from any other consumer. Defendants therefore argued that the New York antitrust laws do not permit such roving "consumer" lawsuits. Defendants urged that Sperry's unjust enrichment claim had to be rejected because it was really just an effort to circumvent the statutory bar on Donnelly Act class actions.

In response, as to the Donnelly Act claim, Sperry argued that the Donnelly Act's treble damages provision is not a penalty under CPLR 901(b) and attempted to rely upon several New York Court of Appeals decisions.[11] He also cited to federal precedents indicating that federal antitrust treble damages are primarily remedial in nature. As to the unjust enrichment claim, Sperry argued that there is no privity requirement and that the lack of any contact between the plaintiffs and defendants was immaterial to his claim.

The New York Supreme Court dismissed Sperry's antitrust claim and unjust enrichment claims.[12] The court dismissed the antitrust claim on the ground that CPLR §901(b) barred class-action treatment of the lawsuit.[13] The court explained that the "treble damages remedy provided in General Business Law § 340(5) is a 'penalty' within the meaning of CPLR 901(b), the recovery of which in a class action is not specifically authorized . . . ."[14] The court also dismissed Sperry's unjust enrichment

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claim because it failed to allege that plaintiff (or any member of the putative class) had a direct, "substantive" relationship with defendants, that plaintiff conferred a benefit directly upon defendants, or that defendants obtained a benefit without adequately compensating plaintiff.[15] The trial court dismissed Sperry's separate deceptive business practices count, and Sperry did not appeal that ruling.[16]

The Second Department of the Appellate Division affirmed.[17] As to the state antitrust claim, the court referenced its companion decision in *Paltre v. General Motors Corp.*,[18] which held that "[t]he treble damages provision [of the Donnelly Act] is a penalty within the meaning of CPLR 901(b)." The court also rejected the unjust enrichment claim because plaintiff lacked a sufficiently direct relationship with the defendants.[19]

The Decision of the New York Court of Appeals

Plaintiff sought discretionary review in the New York Court of Appeals on both the Donnelly Act issue and the unjust enrichment issue, and the Court granted review. In *Sperry v. Crompton Corp.*,[20] the Court of Appeals fully adopted the defendants' position and affirmed in all respects the judgment of the Second Department of the Appellate Division dismissing plaintiffs' Donnelly Act and unjust enrichment claims.

With respect to the Donnelly Act claim, the Court of Appeals held that class actions for treble damages may not be brought under that statute.[21] The Court first recounted the history of enactment of the CPLR 901, which was meant to impose limits on recoveries in class actions, and of the Donnelly Act amendments adding its treble damages remedy. The Court explained that during the deliberations over CPLR 901, "various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty or minimum measure of recovery, except when expressly authorized in the pertinent statute." [22] Responding to these concerns, the Legislature included CPLR 901(b), providing that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."[23] Within weeks of passage of the class action statute, the Legislature undertook to amend the Donnelly Act. Before 1975, the Donnelly Act permitted only the recovery of actual damages. However, in 1975, the bill added the treble damages provision and provided for costs and attorneys' fees, in an effort to create "an additional deterrent to violations, and increase recoveries by public agencies."[24]

With that statutory background in mind, the Court turned to the meaning of the term "penalty" for the purposes of CPLR 901(b). The Court noted that its prior cases articulated various rules regarding the identification of penalties in other contexts. For example, where a statute expressly states that an enhanced damages provision is compensatory in nature, it will not be deemed a penalty.[25] The Court observed that "[i]t is evident that by including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status."[26] That conclusion rests in part on the notion that "class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred."[27]

Furthermore, the Court reasoned that "[t]he antitrust treble damages statute also does not state that such damages are compensatory, . . . "[n]or does its legislative history clearly indicate a compensatory purpose."[28] The Court emphasized that "the Legislature added the treble damages provision to the Donnelly Act shortly after having adopted CPLR 901(b)," and thus "was aware of the requirement of making express provision for a class action when drafting penalty statutes."[29] The Court noted that just as the Legislature chose not to have included such authorization then, several subsequent attempts to do so have failed as well.[30] Thus, based on the text and history of the statute, "Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned."[31] Notably, the Court left open the question of "whether Sperry may maintain a class action under the Donnelly Act by forgoing treble damages in favor of actual damages."[32]

With respect to the unjust enrichment claim, the Court explained that "[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered."[33] Agreeing with Sperry that no privity is required, the Court nonetheless concluded that such a claim does not lie under the circumstances present in the case: "Here, the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support such a claim."[34] The court further explained that "in this situation it is not appropriate to substitute unjust enrichment to avoid the statutory limitations on the cause of action created by the Legislature."[35]

Accordingly, the Court affirmed the dismissal of the case.

Implications of the Decision

There are several implications of the Court of Appeals' decision. First, and most obviously, Donnelly Act claims for punitive damages cannot be asserted in class actions. This rule will likely have the effect of somewhat limiting the proliferation of Donnelly Act cases. It is not clear, however, that this aspect of the Court's ruling would have a significant effect on cases in other jurisdictions. It is not common to have a scheme such as New York's that requires specific statutory authorization for class actions whenever a statutory cause of action imposes a "penalty." Moreover, the unique legislative history of the Donnelly Act amendments that included several failed attempts to obtain such statutory authorization played an important role in the Court's decision.

Second, it is possible that plaintiffs could attempt to "waive" treble damages to assert class claims under the Donnelly Act. The Court of Appeals declined to address whether a party could do so, and thus assert a valid New York state-law antitrust class action. Such a waiver would surely implicate concerns of adequacy of the class representative who would be waiving potential treble damages for all of the class members. But, it is at least theoretically possible that plaintiffs could attempt to seek class relief for alleged

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antitrust violations under New York law by expressly waiving treble damages and seeking only actual damages.

Third, it will be very difficult for indirect purchasers to raise claims for "unjust enrichment." The Court of Appeals held that the indirect purchasers in the *Sperry* case were too remote from the transactions involved and that a common-law unjust enrichment claim cannot replace the limited statutory remedy provided by the Donnelly Act. In light of this ruling, it is difficult to imagine that other indirect purchasers would be able successfully to assert unjust enrichment claims in antitrust cases brought under New York state law. Most indirect purchaser suits are brought as class actions and most involve several steps between the ultimate purchasers and the implicated transactions. For example, in pharmaceutical cases, the ultimate consumers almost always purchase drugs from retailers, hospitals or health plans who in turn purchase drugs from wholesalers who in turn have purchased from drug companies. While it is not certain, it is possible that this aspect of the Court's ruling will have effects in other jurisdictions. Other states have recognized common-law unjust enrichment claims similar to those recognized in New York,[36] and courts in such states may look to the *Sperry* case for guidance in determining the limits on such claims.

In all events, the decision in *Sperry* has significantly affected the landscape for antitrust claims brought under New York state law.

Notes

1. __ N.E.2d __, 2007 WL 527726 (Feb. 22, 2007).
2. N.Y. Gen. Bus. Law § 340(1).
3. Sperry Compl. at 1, ¶¶ 7-15.
4. *See, e.g.*, *In re Rubber Chems. Antitrust Litig.*, MDL Docket No. 04-1648 MJJ (N.D. Cal.).
5. Compl. ¶ 16.
6. Compl. ¶ 51.
7. The Donnelly Act prohibits restraints of free trade. N.Y. Gen. Bus. Law §340(1). Enacted in 1899, Section One of the Donnelly Act bans restraints of trade and Section Two describes the "[p]enalties for violation" of the provision. Chap. 690, at 1514 (marginal note). In 1975, the Act was amended to provide increased criminal fines and imprisonment and at the same time was amended to authorize the state and any "person who shall sustain damages by reason" of an unlawful restraint of trade to recover treble damages. A. 3546, S. 3042 (codified at N.Y. Gen. Bus. Law § 340(2)&(5)). In particular, injured parties "shall recover three-fold the actual damages sustained." N.Y. Gen. Bus. Law §340(5). Injured parties may also recover "reasonable attorneys' fees." *Id*. Companies convicted of restraining trade can be penalized up to one million dollars. *Id*. §341. In 1998, the New York legislature again amended the Donnelly Act, this time to permit "indirect purchaser" lawsuits.
8. Compl. ¶ 62.
9. Compl. ¶ 63.
10. CPLR § 901 sets out the prerequisites to a class action. Under paragraph (a), "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all" if the widely used criteria of numerosity, typicality, adequacy of representation and commonality are satisfied. Unique to New York law, paragraph (b) provides an additional prerequisite for class treatment:

    Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

    CPLR § 901(b) (emphasis added). Thus, an "action" to recover a "penalty" or a "minimum measure of recovery" "may not be maintained as a class action" unless the statute authorizing those remedies "specifically authorizes" recovery using the "class action" mechanism.
11. Cox v. Lykes Bros., 237 N.Y. 376 (1924); Bogartz v. Astor, 293 N.Y. 563 (1944); Sicolo v. Prudential Sav. Bank of Brooklyn, N.Y., 5 N.Y.2d 254 (1959).
12. Sperry v. Crompton Corp., No. 17872/2002 (N.Y. Sup. Ct. Nassau County Nov. 20, 2003)).
13. Sperry, No. 17872/2002, slip op. at 2-3.
14. Id.
15. Id. at 5.
16. Id. at 3-5.
17. Sperry v. Crompton Corp., 26 A.D.3d 488, 810 N.Y.S. 2d 498 (2d Dep't 2006).
18. 26 A.D.3d 481, 483, 810 N.Y.S.2d 496, 497-98 (2d Dep't 2006).
19. Sperry, 26 A.D.3d at 489, 810 N.Y.S.2d at 499-500.
20. __ N.E.2d__, 2007 WL 527726 (N.Y.) (Feb. 22, 2007).
21. Id. at *4.
22. Id. at *2-*3.
23. Id. at *2.
24. Id. at *3.
25. Id. at *3 (citing Bogartz v. Astor, 293 N.Y. 563 (1944), Cox v. Lykes Bros., 237 N.Y. 376 (1924) for the proposition that "[double payment recoverable under Workmen's Compensation Law §14-a is not a penalty because the statute referred to 'double compensation'"]). The Court also noted that "we have found that when used in a statute of limitations, "[t]he words 'penalty or forfeiture' ... refer to something imposed in a punitive way for an infraction of a public law and do not include a liability created for the purpose of redressing a private injury, even though the wrongful act be a public wrong and punishable as such." Id. at *3 (citing Sicolo v. Prudential Sav. Bank of Brooklyn, N.Y., 5 N.Y.2d 254 (1959)).
26. Id. at *3.
27. Id.
28. Id.
29. Id. at *4.
30. Id. at * 4 & n.8.
31. Id. at *3. The Court rejected plaintiff's argument that the United States Supreme Court precedent controls this case. First, "none of these United States Supreme Court decisions considered whether treble damages should be considered a 'penalty' for purposes of a particular statute." Id. at *4. Second, Federal Rule of Civil Procedure 23 "does not contain a limitation similar to that found in CPLR 901(b)." Id.
32. Id. at *4.
33. Id. at *4.
34. Id. at *4.
35. Id. at *4.
36. See, e.g., Armstrong v. Bayer AG, Case No. 66-05 CnC, Opinion & Order at *8 (Vt. Sup. Ct. Oct. 10, 2006) (dismissing unjust enrichment claim of indirect purchasers as too remote because "the Vermont Supreme Court . . . has indicated that some sort of direct relationship is required between the parties in order to sustain an unjust enrichment claim")); In re Microsoft Corp. Antitrust Litigation, 241 F. Supp. 2d 563, 565 (D. Md. 2003), 401 F. Supp. 2d 461, 464 (D. Md. 2005) (dismissing an unjust enrichment claim brought by a putative class of indirect purchasers, barred by statute (Kentucky and South Carolina) from bringing antitrust claims, and explaining that the "specific bar" incorporated in the state antitrust statutes "prohibits" plaintiffs' "common-law claim[s]").

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