COURT OF APPEALS
STATE OF NEW YORK

PAUL SPERRY, Individually And On Behalf Of All Others Similarly Situated,

Plaintiff-Appellant,

-against-

CROMPTON CORPORATION, UNIROYAL CHEMICAL COMPANY, INC., UNIROYAL CHEMICAL COMPANY LIMITED, FLEXSYS NV, FLEXSYS AMERICA LP, BAYER AG, BAYER CORPORATION, RHEIN CHEMIE RHEINAU GBMH, and RHEIN CHEMIE CORPORATION,

Defendants-Respondents.

Supreme Court
County of New York
Index No. 17872/02

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Defendant-Appellant
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

Dated: April 19, 2006

MICHELLE ARONOWITZ
Deputy Solicitor General

JAY L. HIMES
Bureau Chief
Antitrust Bureau

PETER D. BERNSTEIN
Assistant Attorney General
Antitrust Bureau

of Counsel

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES **PAGE**

STATUTES

MISCELLANEOUS

The Attorney General of the State of New York, as amicus curiae, submits this brief, pursuant to §500.23(b) of the Rules of this Court, in support of Plaintiff-Appellant's ("Plaintif's") motion for permission to appeal to the Court of Appeals.

PRELIMINARY STATEMENT

The Appellate Division order sought to be appealed addresses two issues of significant public interest. One concerns whether C.P.L.R. 901(b) precludes a class action for treble damages under the State's antitrust law, the Donnelly Act, Gen. Bus. L. § 340 et seq. The other issue concerns whether a party allegedly injured by anticompetitive conduct - here, price-fixing - may seek recovery under the common law cause of action for unjust enrichment in the absence of "privity" with one or more of the price-fixers. We urge the Court to grant the Plaintiff permission to appeal so as to assure that both issues are heard by this Court.

C.P.L.R. 901(b) provides that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" unless authorized in the statute itself. In Cox v. Microsoft Corp., 290 A.D.2d 206 (1st Dep't 2002) ("Cox I"), appeal dismissed, 98 N.Y.2d 728 (2002), and Asher v. Abbott Labs., 290 A.D.2d 208 (1st Dep't 2002), appeal dismissed, 98 N.Y.2d 728 (2002), the First Department held that the treble damage remedy provided by the

Donnelly Act constitutes a "penalty" within the meaning of C.P.L.R. 901(b), thereby barring a class action under the private right of action provisions of the State's antitrust law. See Gen. Bus. Law § 340 (5) and (6).

Here, the Nassau County Supreme Court followed Cox I and Asher and granted summary judgment dismissing Plaintiff's antitrust class action. On appeal, the Appellate Division affirmed the lower court's dismissal, thus adopting as the law of the Second Department the Cox I/Asher construction of the C.P.L.R. provision. Sperry v. Crompton Corp., 26 A.D.3d 488, 810 N.Y.S.2d 498, 499-500 (2d Dep't 2006), relying on Paltre v. General Motors Corp., 26 A.D.3d 481, 810 N.Y.S.2d 496 (2d Dep't 2006) (issued on the same day).

The C.P.L.R. 901(b) issue has long been one of interest to the Attorney General. "[T]he private cause of action plays a central role in enforcing" the antitrust laws. Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 635 (1985). The First and Second Department's construction of C.P.L.R. 901(b) significantly impairs this role, and, indeed, does not accord with the Legislature's intent. This important issue of statutory construction is, therefore, appropriately heard by this Court.

On the unjust enrichment issue, there is a split of authority between the First and Second Departments. In Cox v. Microsoft Corp., 8 A.D.3d 39, 40 (1st Dep't 2004) ("Cox II"), the

First Department held that privity is not essential to maintaining a cause of action for unjust enrichment arising from anticompetitive conduct. The Second Department below, however, expressly declined to follow Cox II, and held instead that, absent privity, a cause of action for unjust enrichment may not be maintained. Sperry, 26 A.D.3d at 488; 810 N.Y.S.2d at 499-500.

The Second Department's view would, in effect, preclude unjust enrichment as a remedy for consumers injured by anticompetitive conduct. The question whether this equitable claim is available to consumers is similarly worthy of this Court's consideration.

Accordingly, on behalf of the State of New York, the Attorney General urges this Court to grant Plaintiff permission to appeal as to each issue.

THE INTERESTS OF THE AMICUS

As the State's chief law enforcer, the Attorney General is granted wide investigative and enforcement powers under the Donnelly Act, the Executive Law and the General Business Law. Although the Attorney General's authority to bring actions to redress injury to consumers arising from anticompetitive conduct is not based on or derived from C.P.L.R. 901(b), he is, nevertheless, directly interested in the effective protection of consumers under the Donnelly Act and other statutory and common law rights of action. Preservation of competition cannot depend

solely on actions brought by the Attorney General. Private enforcement is required as well.

The First Department granted the Attorney General leave to participate as amicus curiae in Cox I and Asher, and applied for amicus curiae status in this Court when permission to appeal was sought in those cases. The First and Second Departments have similarly granted amicus curiae applications by the Attorney General in this and other cases where the identical C.P.L.R. 901(b) issue was presented. See Cunningham v. Bayer AG, 24 A.D.3d 216, 804 N.Y.S.2d 924 (1st Dep't 2005); Paltre v. General Motors Corp., 26 A.D.3d 481, 810 N.Y.S.2d 496 (2d Dep't 2006).

The Attorney General is equally interested in resolution of the unjust enrichment issue. In actions brought for the benefit of consumers, the Attorney General has himself alleged unjust enrichment as a basis of securing relief for injury from anticompetitive conduct. See First Amended Complaint, State of New York v. Daicel Chemical Industries, Inc., Index No. 403878/02 (Sup. Ct. N.Y. County filed Oct. 2004) (on appeal from judgment of dismissal on other grounds). If, however, the Second Department's privity element must be met, the Attorney General's ability to rely on unjust enrichment to secure recovery on behalf of consumers injured by anticompetitive conduct would be jeopardized, except in those relatively unusual circumstances where the consumers dealt directly with the wrongdoer.

ARGUMENT

Under this Court's rules, permission to appeal is appropriate when a case raises questions that are "novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Divisions." 22 N.Y.C.R.R. § 500.22(b)(4); see also People ex rel. Delaney v. Mt. St. Joseph's Academy, 198 A.D. 280, 282-83 (4th Dep't 1921), aff'd on the merits without opinion, 234 N.Y. 565 (1922). The issues of law raised by this proposed appeal are of uncommon public importance to all New York consumers.

The appellate courts' C.P.L.R. 901(b) rulings are likely to sound the death knell for virtually all private damage actions on behalf of consumers under the Donnelly Act. In turn, the mixture of public and private enforcement of the Donnelly Act will change markedly. Likewise, the Second Department's privity requirement for unjust enrichment claims threatens seriously to undermine protection of consumer interests. This Court should resolve the split in the Appellate Divisions on the availability of unjust enrichment as a right of action available to persons injured by anticompetitive conduct.

POINT I

THE APPELLATE COURTS' CONSTRUCTION OF C.P.L.R. 901(b) SHOULD BE REVIEWED

A. The Proper Construction of C.P.L.R. 901(b) Has Substantial Consequences for New York Consumers, As Well as for Enforcement of the State Donnelly Act.

As discussed below, we respectfully submit that the appellate courts' construction of C.P.L.R. 901(b) frustrates the Legislature's clear intent to strengthen Donnelly Act enforcement by private class actions. It also conflicts with long-standing precedent of this Court, and the teachings of the United States Supreme Court, which establish that antitrust treble damage remedies are not "penalties" in the sense relevant here. As then-Judge Cardozo noted in Cox v. Lykes Brothers, 237 N.Y. 376, 379-80 (1924), decisions of the United States Supreme Court exclude "from the class of penalties . . . . an action under the [federal] anti-trust law for the recovery of treble damages" (citation omitted).

Notably, the Appellate Courts' view of C.P.L.R. 901(b) affects not only state court rulings, but also those in federal district courts throughout the United States. With increased frequency, New York consumers find themselves barred from asserting Donnelly Act antitrust claims as class actions, while

comparable claims by consumers in other States go forward.[1] This effect could be that much more pronounced as a result of the recently enacted federal Class Action Fairness Act ("CAFA"). See Pub. L. 109-2, 119 Stat. 4.

Effective February 18, 2005, CAFA significantly expands the federal district court's diversity jurisdiction in class actions alleging state law claims. In consequence, state law antitrust class actions brought by consumers are expected to be heard, more and more, in federal, rather than state, court. See generally Neal R. Stoll and Shepard Goldfein, "Antitrust Trade and Practice," N.Y.L.J., January 17, 2006, at 3, col. 1 (discussing the new federal law's impact on district court jurisdiction over state law antitrust class actions). As federal courts throughout the country are called on to address whether C.P.L.R. 901(b) precludes class action litigation on behalf of New York consumers, they will be constrained to predict how this Court would construe state law. See, e.g., Travelers Ins. Co. v. Carpenter, 411 F.3d 323, 329 (2nd Cir. 2005). This Court's views on the statute will, therefore, be invaluable.

---

[1] See, e.g., Leider v. Ralfe, 387 F. Supp. 2d 283, 287-290 (S.D.N.Y. 2005); In re Relafen Antitrust Litigation, 221 F.R.D. 260, 284-286 (D. Mass. 2004); In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702, 727 (D. Md. 2001); U.S. v. Dentsply Int'l, Inc., Civil Action Nos. 99-005, 99-255, 99-854, 2001 U.S. Dist. LEXIS 9057, at *48-53 (D. Del. March 30, 2001), rev'd on other grounds, 399 F.3d 181 (3rd Cir. 2005).

The issue thus presented is a recurring one of great public importance. Review is particularly warranted in light of the substantial basis for divergent opinions on the proper construction of C.P.L.R. 901(b).

B. C.P.L.R. 901(b) Covers Only Those Statutes Imposing a Penalty or Minimum Measure of Recovery Without Requiring Proof of Actual Damages, Whereas Recovery under the Donnelly Act Depends on Proof of Actual Damages.

Although C.P.L.R. 901(b) does not define the term "penalty," this Court has written that a penalty "refer[s] to something imposed in a punitive way for an infraction of a public law and do[es] 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." Sicolo v. Prudential Savings Bank of Brooklyn, 5 N.Y.2d 254, 258 (1959)(citation omitted). Further, "[t]hat the recovery may exceed in some instances the actual loss does not make the liability truly penal in nature . . . ." Id. This Court instead approved those cases that "regard[ed] as penalties arbitrary exactions, unrelated to actual loss . . . ." Id.

Accordingly, it is, the statutorily prescribed "exaction" - unrelated to the victim's actual injury - that epitomizes a "penalty." C.P.L.R. 901(b)'s companion standard - for statutes providing a "minimum measure of recovery" - reinforces the notion of a monetary charge imposed independent of proven injury. Cf.

Pruitt v. Rockefeller Ctr. Properties, 167 A.D.2d 14, 26 (1st Dep't 1991) ("A statute that creates or imposes a 'minimum measure of recovery' is one that, upon proof of its violation, provides for the recovery of some fixed minimum amount, without regard to the amount of damages suffered").

By contrast, the Donnelly Act's antitrust treble damage provision depends on proof of actual damages. To prevail on an antitrust claim, a plaintiff must prove actual injury that is causally connected to the unlawful conduct, and then must quantify that injury. See, e.g., Capitaland United Soccer Club, Inc. v. Capital District Sports & Entertainment, Inc., 238 A.D.2d 777, 780 (3d Dep't 1997) (finding that plaintiff's factual allegations sufficiently stated an injury to its competitive business interest). The same is true under federal antitrust laws. I ABA Section of Antitrust Law, Antitrust Law Developments 839, 873 (5th ed. 2002)

In addition, to recover treble damages for an antitrust violation, the plaintiff also must prove "antitrust injury" - "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Blue Shield of Virginia v. McCready, 457 U.S. 465, 482 (1982). Thus, a private antitrust plaintiff seeking to recover damages under the Donnelly Act is subject to burdens of proof not imposed

on a plaintiff suing under a statute that provides for an automatic monetary payment once the violation of law is shown.

Accordingly, the Legislature never intended C.P.L.R. 901(b) to apply to private Donnelly Act cases. Were there room for doubt, however, the legislative history dispels it. Enacted in 1975, C.P.L.R. 901(b) was part of a comprehensive revision of New York's class action law. As initially drafted, the bill did not include C.P.L.R. 901(b), which was added to preclude aggregating, via the class action mechanism, statutorily prescribed penalties and minimum levels of recovery.

For example, the Banking Law Committee of the New York State Bar argued that "severe statutory penalties unrelated to actual damages," together with class actions, would create excessive liability exposure. Bill Jacket, L.1975, c.207, N.Y.S. Bar Association Legislation Report No. 1 (Revised) at 1, 2 (1975) (emphasis added). The Banking Law Committee used the Federal Truth in Lending statute ("TILA") to illustrate. TILA creates statutory penalties, 15 U.S.C. §1640(e), and, in consequence, "[i]n the typical [TILA] class action . . . . not a single penny of actual damages to any consumer is involved . . . . The same penalties are assessable and the same liabilities exist, whether the error be substantial or trivial." Id. at 1, 2 (1975) (emphasis added).

Similarly, the Empire State Chamber of Commerce had critiqued that "[p]enalties and class actions simply do not mix. This was proved in Ratner v. Chemical Bank, [54 F.R.D. 412 (S.D.N.Y. 1972)], where the combination caused a potential liability of $130 million, although the actual damages to individual plaintiffs were zero!" Bill Jacket, L.1975, c.207, Memo. by Stanford H. Bolz, February 14, 1975, at 3 (emphasis added). The concern with excessive liability was thought to be particularly grave because "New York statutory law contain[ed] many 'penalty' and similar provisions establishing arbitrary measures of liability for noncompliance." Bill Jacket, L.1975, c.207, N.Y.S. Bar Association Legislation Report No. 15 at 2 (1975) (emphasis added).

Thus, the legislative history establishes that the limited ban on class actions was intended to cover only those statutes that provide a fixed monetary recovery - i.e., a monetary amount or measure that is specifically set out in the law itself, and that is imposed without requiring the plaintiff to show any actual injury or loss. Recovery under the Donnelly Act, by contrast, depends on proof of actual damages - not on the imposition of a set dollar amount established by statute.

C. C.P.L.R. 901(b)'s Reference to a "Penalty" Does Not Cover the Donnelly Act's Treble Damage Provision, Which Is Primarily Remedial.

Even if C.P.L.R. 901(b) might be construed to cover certain treble damage provisions, it does not cover the Donnelly Act section, which is primarily remedial and intended to compensate antitrust victims for actual damages, and for the additional intangible cost of bringing litigation against, often, the largest of corporations.

As originally enacted in 1899, the Donnelly Act did not include an express damage remedy. See L.1899, c.690, § 1. The courts, however, permitted suits for actual damages, a result that the Legislature effectively ratified in 1957 by enacting a statute of limitations for Donnelly Act damage claims. See L.1957, c.893, § 2. The Legislature first provided an express damage remedy for antitrust victims in 1975, a few weeks after enactment of C.P.L.R. 901(b). See L.1975, c.333, § 1; L.1975, c.207. Recognizing the significance of the rights at stake, and the substantial difficulties associated with successfully detecting and prosecuting antitrust claims, the Legislature authorized antitrust plaintiffs to "recover three-fold the actual damages sustained. . . ." See L.1975, c.333 § 1. The Legislature distinguished the new treble damage remedy from penalties - whether criminal or civil - which were separate features of the State's antitrust enforcement scheme. See Memorandum S.3042 &

A.3546, dated January 8, 1975, reprinted in New York State Legislative Annual 83 (1975).

Moreover, the legislative history of the Donnelly Act provision demonstrates that the treble damage remedy is intended to emulate its federal counterpart, the origins of which go back to Congress' enactment of the Sherman Act in 1890. See, e.g., Memorandum S.3042 & A.3546, Jan. 8, 1975, reprinted in New York State Legislative Annual 83 (1975) ("This bill . . . [would] conform[] New York's Donnelly Antitrust Act to the analogous federal provisions of law."); Secretary of State Mario Cuomo's memorandum to Counsel to the Governor, June 27, 1975 (the bill "increase[s] the damages and penalties to be similar to such provisions under federal anti-monopoly laws").

In using the federal treble damage provision as a model, the Legislature did not regard the Donnelly Act's treble damage provision as a "penalty" within C.P.L.R. 901(b)'s limited ban on class actions. At the time of the 1975 enactment of both C.P.L.R. 901(b) and the Donnelly Act's treble damages provision, antitrust treble damages in federal law had long been recognized as remedial in nature, rather than as a penalty.

As Cox v. Lykes Brothers, 237 N.Y. 376, 379-80 (1924), quoted above, reflects, courts recognized early on that the federal antitrust treble damage provision was primarily remedial in nature. See, e.g., Chattanooga Foundry & Pipe Works v. City

of Atlanta, 203 U.S. 390 (1906) (holding that a treble damages antitrust action was not one for a penalty); Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785, 786, 789 (2nd Cir. 1959) (holding that New York's statute of limitations applicable to actions "for a penalty or forfeiture" does not apply to federal antitrust treble damage cases, which are actions for civil damages "made exemplary in part only"). Even more recently, the United States Supreme Court has said that "the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977); accord Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 636 (1985).

Equally important, by 1975 it was well-recognized that federal antitrust actions could be brought as class actions. See, e.g., In re Master Key Antitrust Litigation, 528 F.2d 5 (2nd Cir. 1975). Nothing in the legislative history of the 1975 Donnelly Act amendment suggests that Legislature intended to deny the victims of state antitrust violations resort to this frequently invoked procedural mechanism.

D. The 1998 Indirect Purchaser Amendment to the Donnelly Act Further Confirms That the Legislature Intended to Allow Consumers to Bring Treble Damage Class Actions.

Amendment of the Donnelly Act in 1998 further confirms that the Legislature specifically intended to allow New York consumers to bring antitrust class actions. This amendment makes clear that "indirect" purchasers may sue under New York's antitrust law to recover damages caused by price fixing or monopoly overcharges passed on to them - even though the United States Supreme Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), bars such persons from suing under federal law. See Gen. Bus. Law § 340(6) (the fact that "any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery").

The impetus for this legislation was twofold: First, the Supreme Court's Commercial Division in New York County had applied Illinois Brick to a Donnelly Act class action by an indirect purchaser of drugs. Levine v. Abbott Labs., Index No. 117320/95 (Sup. Ct. N.Y. County Nov. 25, 1996), appeal withdrawn, 257 A.D.2d 978 (1st Dep't 1999). Second, a series of class actions in California state court had settled for over $100 million, but had left New Yorkers without recourse to recover for their injury because they were indirect purchasers.[2]

---

[2] These were the "copper cases," Heliotrope General v. (continued...)

The legislative debate on this Donnelly Act amendment leaves no doubt that the Legislature intended this change to permit consumers - classic indirect purchasers - to sue in class actions filed under the Donnelly Act. The bill's Assembly sponsor, Richard Brodsky, explained that the bill allows class actions by indirect purchasers to proceed. Assembly proceeding transcript at 33-34 (May 26, 1998). The Senate sponsor similarly noted that the amendment "gives indirect purchasers in this state the right to participate in such federal class action suits and seek a recovery based upon our state Donnelly Act." Senate proceeding transcript at 6043 (June 18, 1998). In like vein, opponents of the legislation urged the Governor to veto the bill because it would "simply provide[] an additional and unnecessary avenue for litigation of consumer class actions." Bill Jacket, L.1998, c.653, Letter of Daniel Walsh, Nov. 18, 1998, at 2.

In sum, underlying the 1998 Donnelly Act amendment is the Legislature's recognition that the damage to any particular consumer, even when trebled individual damage, is generally too small to encourage Donnelly Act enforcement by private individuals. It would be illogical to assert that the

---

[2] (...continued)
Sumitomo Corp., No. GIC 701679 (Super. Ct. San Diego County 1996), arising from alleged manipulation in the exchange market. See Richard Brodsky, James Lack, Bernard Persky & Barbara Hart, "Antitrust Protections Expanded in New York," N.Y.L.J., June 22, 1999, at 1, col. 1.

Legislature intended to deny New York consumers the benefit of the class action mechanism - and to allow them, instead, to bring only individual lawsuits - when the very inability of those consumers to participate in antitrust class actions drove the legislative change. See Bill Jacket, L.1998, c.653, Letter of Assembly Sponsor Richard L. Brodsky, Dec. 15, 1998 (the bill "allows individuals who are third parties in transactions impacted by illegal monopolies to have legal recourse against these activities").

POINT II

REVIEW OF THE CONFLICT IN THE APPELLATE DIVISIONS ON THE AVAILABILITY OF UNJUST ENRICHMENT IS APPROPRIATE

This case presents a clear conflict among the Appellate Divisions on whether privity is required in order for a consumer injured by anticompetitive conduct to invoke unjust enrichment as a means to secure from wrongdoers disgorgement of ill-gotten monetary benefits. The First Department has held that indirect purchasers - individuals not in privity with antitrust violators - may maintain an unjust enrichment cause of action, irrespective of whether a benefit was directly bestowed. Cox II, 8 A.D.3d at 40. By contrast, here the Second Department expressly "declined to follow" Cox II, holding instead that privity is necessary to recover for unjust enrichment. Sperry, 26 A.D.3d at 488; 810 N.Y.S.2d at 500.

The Second Department's restrictive position on the availability of unjust enrichment would, if adopted statewide, have significant consequences. Anticompetitive conduct, such as price fixing, frequently produces diffused and relatively small harm or injury to many consumers. Unjust enrichment provides a valuable alternative basis for securing recovery. For example, prescription drug users victimized by anticompetitive conduct that inflates the cost of their medications rarely purchase directly from the pharmaceutical company manufacturer. Courts nevertheless have permitted unjust enrichment claims by consumers against the manufacturer, even in the absence of direct dealings.[3]

The remedy often suitable in such situations - defendant's disgorgement of ill-gotten gains - has the virtue of obviating

---

[3] See, e.g., In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 669-71 (E.D. Mich. 2000)(rejecting arguments that either privity or a directly conferred benefit is necessary under the laws of New York and other States); In re K-Dur Antitrust Litigation, 338 F. Supp. 2d 517, 544 (D.N.J. 2004) (upholding unjust enrichment claim; noting that "[t]he critical inquiry is whether the plaintiff's detriment and the defendant's benefit are related to, and flow from, the challenged conduct"; and rejecting defendant's privity argument as "without merit"); In re Cardizem CD Antitrust Litigation, Order No. 70, at 27-33 (E.D. Mich. May 23, 2003)("Cardizem II") (upholding unjust enrichment claims under New York and Massachusetts law) In re Lorazepam & Clorazepate Antitrust Litigation, 295 F. Supp. 2d 30, 49-51 (D.D.C. 2003)(upholding unjust enrichment claims under various state laws); FTC v. Mylan Laboratories, Inc., 62 F. Supp. 2d 25, 43-54 (D.D.C. 1999) (approving disgorgement as an equitable remedy in an action on behalf of consumers arising from anticompetitive conduct).

the need to allocate the damages between direct and indirect purchasers, an approach that other grounds for recovery may require. Unjust enrichment, however, focuses on the benefit that the wrongdoer realizes, not on the injury that the victim, who may be a direct or indirect purchaser, suffers. As the Cardizem II court thus noted:

> [Disgorgement] is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does. Thus, a disgorgement order might be for an amount more or less than that required to make the victims whole.

Cardizem II, slip op. at 32-33 n.13 (quoting S.E.C. v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993)).

On the other hand, requiring privity, as the Second Department did here, forecloses a time-honored equitable means of recovery - one that not only ensures consumer protection, but also dis-entitles defendants from retaining the benefits of their anticompetitive conduct. Moreover, rather than serving as a requirement for an unjust enrichment claim, privity, in the form of a contractual relationship, may itself block the claim altogether. As this Court recently reminded in dismissing an unjust enrichment cause of action, "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter." EBI I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d

11, 23 (2005) (citation omitted). The fact that consumers tend not to contract directly with price-fixers and other antitrust miscreants therefore militates in favor of, not against, permitting an unjust enrichment claim to be asserted.

An unjust enrichment claim "depends upon broad considerations of equity and justice." Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421 (1972). The "essential inquiry . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Id. Accordingly, the split between the First and Second Departments implicates matters of substantial public importance. The issue raised is appropriately resolved by this Court.

CONCLUSION

Accordingly, the Attorney General urges this Court to grant Plaintiffs' motion for permission to appeal.

Dated: New York, New York
April 19, 2006

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York

By: _____
JAY L. HIMES
Bureau Chief
Antitrust Bureau

Office of the Attorney General
120 Broadway, Room 26C54
New York, New York 10271-0332
(212) 416-8282

MICHELLE ARONOWITZ
Deputy Solicitor General

JAY L. HIMES
Bureau Chief
Antitrust Bureau

PETER D. BERNSTEIN
Assistant Attorney General
Antitrust Bureau

of Counsel

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Peter D. Bernstein, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of Eliot Spitzer, Attorney General of the State of New York, attorney for the State of New York. On the 19th day of April, 2006, I served three copies of the attached Brief of the Attorney General of the State of New York as Amicus Curiae in Support of Motion for Permission to Appeal to the Court of Appeals upon the following people named in the attached service list in the within entitled action, by depositing same in a properly addressed overnight delivery wrapper, and placing it into the custody of U.S. mail service at 120 Broadway, New York, New York 10271, for collection and mailing to said persons.

Sworn to before me this
19th day of April, 2006

SERVICE LIST

Attorneys for Plaintiff-Appellant Paul Sperry

J. Douglas Richards
Michael M. Buchman
Milberg Weiss Bershad & Schulman LLP
One Pennsylvania Plaza
New York, New York 10119-1065
(212) 594-5300

Bonny E. Sweeney
Lerach Coughlin Stoia Geller Rudman & Robbins LLP
401 B Street, Suite 1700
San Diego, California 92101
(619) 231-1058

Michael J. Flannery
James J. Rosemergy
Carey & Danis LLP
8235 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105
(314) 725-7700

Brian J. Robbins
Robbins Umeda & Fink, LLP
1010 Second Avenue, Suite 2360
San Diego, California 92101
(619) 525-3990

David M. Goldstein
Maricic & Goldstein LLP
10535 Foothill Blvd.,
Suite 300
Rancho Cucamongo, California 91729
(909) 945-9549

Attorneys for Defendants-Respondents Bayer Corporation and Rhein Chemie Corporation

Catherine M. Ferrara-Depp
Jones Day
222 East 41st Street
New York, New York 10017
(212) 326-3939

William V. O'Reilly
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Attorneys for Defendants-Respondents Crompton Corporation, Uniroyal Chemical Company, Inc., and Uniroyal Chemical Company Limited

Richard G. Parker
Ian Simmons
Benjamin G. Bradshaw
O'Melveny & Meyers, LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 293-7461

Jim Walden
O'Melveny & Meyers, LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000

Attorneys for Defendants-Respondents Flexsys America LP, and Flexsys NV

Daniel G. Swanson
Gibson, Dunn & Crutcher, LLP
333 South Grand Avenue
Los Angeles, California
90071-3197
(213) 229-7000

Will Wargo
Gibson, Dunn & Crutcher, LLP
200 Park Avenue, 47th Floor
New York, New York 10166-0193
(212) 351-4000

James Slear
D. Jarrett Arp
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

William D. Iverson
Michael Fanelli
Vijay Shanker
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044
(202) 662-6000