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Corporations - Shareholders - Right to Bring Derivative Action for Treble Damages Under Antitrust Laws

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CORPORATIONS—SHAREHOLDERS—RIGHT TO BRING DERIVATIVE ACTION FOR TREBLE DAMAGES UNDER ANTITRUST LAWS—Plaintiff, owner of 50 percent of the stock in a theater corporation, brought a derivative action in federal court for treble damages for loss of profits allegedly suffered from defendant's violation of the antitrust laws. The district court sustained defendant's motion to dismiss. On appeal to the court of appeals, *held,* reversed and remanded. Under the new federal rules,[1] a stockholder may bring a derivative action for treble damages under the antitrust laws.[2] *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.,* (2d Cir. 1953) 202 F. (2d) 731.

[1] Federal Rules of Civil Procedure, 28 U.S.C. (1946) following §723c, Act of June 19, 1934.

[2] Plaintiff here was suing under the Clayton Act, 38 Stat. L. 731 (1914), 15 U.S.C. (1946) §15.

Prior to the enactment of the Federal Rules of Civil Procedure in 1938, shareholders were frustrated in their attempts to bring derivative actions on behalf of recalcitrant corporations for damages suffered from antitrust law violations. The difficulty stemmed from the fact that, while the derivative suit is a creation of equity,[3] the statutory treble damage action is a law action requiring determination of the facts by a jury.[4] In two old Supreme Court cases, *Fleitmann v. Welsbach Street Lighting Co.*[5] and *United Copper Securities Co. v. Amalgamated Copper Co.*,[6] stockholders were successively denied the right to bring such a derivative action, first in an equity case and then in a law action. The principal case is the first one of its type to arise since the enactment of the federal rules. The fundamental purpose of the new rules, as summed up in rule 2,[7] is the elimination of the procedural distinction between law and equity actions.[8] Hence it was a simple matter for the court of appeals to permit what is in effect joinder of two actions—the equitable question of the right of the stockholder to bring the action, and the legal damage action under the Clayton Act. Although the statutory right to jury trial was waived in this case, the court stated[9] what would seem apparent, that a district court can bring in a jury to decide the fact issues relating to treble damage liability after it has disposed of matters relating to the stockholder's right to sue. The district court's decision[10] to deny the right to sue was based on the conclusion that rule 2 has not changed the doctrines of the *Fleitmann* and *United Copper* cases. The court simply stated that these were rules of substance which remained unaltered by the procedural merger effected by rule 2.[11] While it is true that the new rules were not intended to obliterate all distinctions between law and equity rules, merger was intended to be allowed to the extent that it does not constrict the traditional flexibility of equity doctrine.[12] It is submitted that the court of appeals was correct in concluding that the proposed merger offers no threat to the flexibility of equity, since in effect the two issues, stockholder's right and defendant's liability, are tried separately. Furthermore, the rule laid down by the principal case is useful in rounding out the treble-damage action

[3] Koster v. (American) Lumbermen's Mutual Casualty Co., 330 U.S. 518, 67 S.Ct. 828 (1947); United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 37 S.Ct. 509 (1917). See 13 FLETCHER, CYC. CORP. §5944 (1942); Glenn, "The Stockholder's Suit—Corporate and Individual Grievances," 33 YALE L.J. 580 (1924).

[4] Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 36 S.Ct. 233 (1916); Decorative Stone Co. v. Building Trades Council, (2d Cir. 1928) 23 F. (2d) 426.

[5] Note 4 supra.

[6] Note 3 supra.

[7] "There shall be one form of action to be known as 'civil action.'"

[8] 2 MOORE, FEDERAL PRACTICE §2.06 (1948); Holtzoff, "Equitable and Legal Rights and Remedies under the New Federal Procedure," 31 CALIF. L. REV. 127 (1943).

[9] Principal case at 735.

[10] Fanchon & Marco, Inc. v. Paramount Pictures, Inc., (D.C. N.Y. 1952) 107 F. Supp. 532. The district court opinion is criticized in a note, 52 COL. L. REV. 1069 (1952), which was cited by the court of appeals in reversing.

[11] District court opinion, note 10 supra, at 541.

[12] See Judge Frank's discussion of this point in Bereslavsky v. Caffey, (2d Cir. 1947) 161 F. (2d) 499 at 500.

as an effective method of curbing antitrust law violation. It is particularly helpful in cases such as this one where the antitrust law violator is the principal obstacle to direct action by the corporation itself.

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