

06-5525 CV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE DDAVP DIRECT PURCHASER ANTITRUST LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE STATES OF NEW YORK, ALASKA, ARIZONA, ARKANSAS,
CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII,
IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE,
MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI,
MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA,
OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE,
TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND
WYOMING, AND THE DISTRICT OF COLUMBIA AND PUERTO RICO AS AMICI
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INTRODUCTION AND INTEREST OF AMICI CURIAE

The States of New York, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, and the District of Columbia and Puerto Rico submit this brief as amici curiae in support of plaintiffs-appellants. Amici States seek reversal of the District Court's holding that consumers and other purchasers who paid inflated prices for patented products lack standing to assert antitrust claims based on the defendant's procurement of the patent by fraud.

In their efforts to protect their citizens and themselves from the effects of antitrust violations, Amici States investigate and assert antitrust claims, much like the claims dismissed by the District Court, on behalf of consumers and state agency purchasers. E.g., In re Buspirone Antitrust Litig., MDL No. 1413 (JGK) (S.D.N.Y) (\$100 million settlement); Ohio v. Bristol-Myers Squibb Co., No. 02-1080 (EGS) (D.D.C.) (\$50 million settlement). Amici States also seek to foster the proper interpretation of federal antitrust laws so that others can further similar interests. The District Court's holding threatens the ability of Amici States and others to recover

damages for purchasers, including consumers and state agencies, when they are the victims of antitrust violations arising from the fraudulent procurement of patents.

QUESTION PRESENTED

Do persons who pay artificially inflated prices for patented products have standing to assert antitrust claims based on the defendant's procurement of the patent by fraud?

Amici States take no position on any other question presented in this appeal.

STATEMENT OF THE CASE

In Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965), the Supreme Court held that a party who fraudulently obtained a patent from the Patent & Trademark Office violates section 2 of the Sherman Act, 15 U.S.C. § 2, if the party uses the fraudulently obtained patent to acquire or maintain monopoly power. See C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998).

Plaintiffs here are direct purchasers of DDAVP, an antidiuretic drug manufactured by defendants (J.A. 305-306). According to plaintiffs' complaint, defendants fraudulently obtained a patent on DDAVP, which allowed them to prevent other pharmaceutical companies

from producing generic versions of the drug (J.A. 306-307). As a result, defendants have a monopoly in the market for the drug, and consumers and other purchasers, such as plaintiffs, have been forced to pay hundreds of millions of dollars in supracompetitive prices for DDAVP (J.A. 307).

Plaintiffs assert Walker Process claims against defendants under section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that defendants used their fraudulently obtained patent on DDAVP to acquire and maintain their market power. The District Court granted defendants' motion to dismiss. The court held that only competitors, not purchasers, have standing to assert Walker Process claims (J.A. 316). That holding exacerbated an existing split among the district courts on the standing question. Compare In re Remeron Antitrust Litig., 335 F. Supp. 2d 522, 529 (D.N.J. 2004), and In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005) (rejecting standing for purchasers), with Molecular Diagnostics Labs. v. Hoffman-La Roche, Inc., 402 F. Supp. 2d 276, 280 (D.D.C. 2005) (upholding standing for purchasers).

In addition to holding that plaintiffs lack standing, the District Court dismissed plaintiffs' claims on several merits-related grounds. In particular, the court held that (1) plaintiffs' complaint did not comply with Federal Rule of Civil Procedure 9(b), which requires parties to plead fraud with particularity; (2) the

factual record developed in a different lawsuit conclusively demonstrated that defendants did not obtain their patent fraudulently; and (3) defendants' efforts to enforce their patent through judicial and administrative proceedings were not a "sham" and were protected by the First Amendment (J.A. 312, 317-319).

Amici States address only the standing question and take no position on the merits. Regardless of how this Court resolves the merits-related arguments, this Court should address standing as a threshold issue implicating the Court's jurisdiction. Whether purchasers have standing to assert Walker Process claims is an important and recurring question as to which the district courts are divided and as to which no circuit has yet ruled.

ARGUMENT

Because artificially inflated prices paid by purchasers are what make antitrust violations profitable for sellers, purchasers typically are intended victims of anticompetitive conduct. Accordingly, federal antitrust law extends significant remedies to purchasers. Equally important, state law may extend to purchasers additional remedies that federal antitrust law declines to provide.

The District Court's holding should be reversed because direct purchasers have standing to sue when they allege that they have paid more for an item because of antitrust violations. Purchasers do not

lose their standing merely because competitors also have standing to assert claims based on those same antitrust violations. These principles apply to all antitrust claims, including monopolization claims premised on the fraudulent procurement of a patent.

I

**PURCHASERS HAVE STANDING TO PURSUE ANTITRUST CLAIMS
WHEN THEY HAVE PAID ARTIFICIALLY INFLATED PRICES
BECAUSE OF AN ANTITRUST VIOLATION**

Section 4 of the Clayton Act, 15 U.S.C. § 15, the antitrust treble-damages provision, provides that:

any person who shall be injured in his business
or property by reason of anything forbidden in
the antitrust laws may sue . . . and shall
recover three fold damages by him sustained.

The purpose of section 4 is to deter antitrust violations and compensate the victims of those violations. E.g., California v. ARC Am. Corp., 490 U.S. 93, 102 (1989); Am. Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575-76 (1982). "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning." Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 312 (1978) (citations omitted).

The Supreme Court has admonished that any "artificial limitations" on the breadth of section 4 do violence to its plain language and to Congress's broad remedial objective. Blue Shield of Va. v. McCready, 457 U.S. 465, 472-73 (1982). Thus, "in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting," section 4 should be applied as broadly as its language suggests. Id. at 473.

When a defendant commits an antitrust violation that allows it to charge supracompetitive prices, those who are overcharged have standing under section 4 to assert antitrust claims. As the Supreme Court stated in Reiter v. Sonotone Corp., 442 U.S. 330 (1979), "[t]he essence of the antitrust laws is to ensure fair price competition in an open market." Id. at 342. Thus, when a plaintiff "alleges a wrongful deprivation of her money because the price of the [product] she bought was artificially inflated by reason of [a defendant's] anticompetitive conduct, she has alleged an injury in her 'property' under § 4." Id.

Plaintiffs allege direct purchases from defendants — monopolists who committed patent fraud. Overcharging direct purchasers, accomplished in part by patent fraud, is actionable under federal antitrust law. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489 (1968) ("when a buyer shows that

the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4"); U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627-28 (7th Cir. 2003) ("the potential to establish injury through elevation of price in the affected market satisfies any distinct 'antitrust standing' requirement").

As the leading antitrust commentators have similarly reminded, buyers are usually the "preferred plaintiffs in private antitrust litigation" because "protecting consumers from monopoly prices is the central concern of antitrust." 2 Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, Antitrust Law ¶ 345, at 356 (2d ed. 2000). Thus, "consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted." Id. And "consumer" standing is not limited to end-use purchasers; although dealers who purchase for resale are not really consumers, "they too have standing to challenge illegal overcharges." Id.

II

PURCHASERS DO NOT LOSE THEIR STANDING MERELY BECAUSE THE DEFENDANT'S COMPETITORS MIGHT ALSO SUFFER HARM FROM THE SAME ANTITRUST VIOLATION

The District Court found that plaintiffs lack standing because "there has been no enforcement of the patent against the customer Plaintiffs" (J.A. 316). The court thus held that antitrust claims

based on fraudulently obtained patents may be brought only by competitors, not purchasers. The court apparently reached this conclusion because the plaintiff in Walker Process was a competitor, and the Supreme Court allowed the competitor to pursue the antitrust claim in that case. Subsequently, lower courts have held Walker Process claims may be brought by competitors only if the defendant has enforced (or threatened to enforce) the patent against those competitors. See, e.g., Indium Corp. of Am. v. Semi-Alloys, Inc., 566 F. Supp. 1344, 1352-52 (N.D.N.Y. 1983) ("[T]he plaintiff must at least be able to allege facts that indicate that the defendant has enforced, or has sought to enforce, or has threatened to enforce its fraudulently obtained patent against the plaintiff itself.") (cited by the District Court at J.A. 316).

But neither Walker Process nor later cases like Indium Corp. address whether antitrust claims based on patent fraud also may be asserted by purchasers. That competitors may bring such claims does not mean that purchasers may not. The Supreme Court's decision in McCready illustrates this point. McCready was a consumer who complained that Blue Cross's practice of "refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists," was a group boycott that violated the antitrust laws. 457 U.S. at 467. Even though McCready was not the direct target of the boycott

– and in fact had not even paid higher rates for any of the medical care she actually received, id. at 481 – the Supreme Court held that she had standing to maintain an antitrust action against Blue Cross:

[T]he remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market. . . . Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.

Id. at 479 (quotation marks and ellipses omitted).

The injury that plaintiffs claim here is equally “integral” to the alleged antitrust violation. According to plaintiffs’ allegations, defendants fraudulently procured the patent so that they could overcharge purchasers like plaintiffs. Harming competitors – by preventing them from selling a generic substitute that costs less – was merely a means to achieve the ultimate, unlawful goal of charging purchasers supracompetitive prices. See In re Warfarin Sodium Antitrust Litig., 214 F.3d 395 (3d Cir. 2000) (holding that consumers have standing to assert injunctive relief claims under the antitrust laws based on a drug manufacturer’s improper interference with the FDA approval process and public acceptance of a generic drug, because consumers were foreseeable and necessary victims, and the ultimate target, of the alleged anticompetitive conduct).

Like the consumer in McCready, plaintiffs here are asserting direct economic harm to themselves. As the Seventh Circuit explained, in such circumstances, even if "the reason the plaintiffs have been injured . . . implicates the rights of the competitors not to be excluded . . . through anticompetitive actions of Ameritech [the monopolist], . . . that does not make this a jus tertii case." Goldwasser v. Ameritech Corp., 222 F.3d 390, 398 (7th Cir. 2000). Because plaintiffs seek "lower prices and more choice," and allege that defendants have done "things to prevent that from happening," they are asserting their own rights. Id. at 398-99. Any benefit to the competitors is "incidental"; plaintiffs "do not care in principle which competitors enter their markets; they just want a competitively structured . . . market that will prevent [defendants] from inflicting antitrust injury on them." Id. at 399.

The Supreme Court's decision in Pfizer implicitly confirms that section 4 provides a remedy for Walker Process claims by consumers. In Pfizer, the nations of India, Iran, and the Phillipines brought antitrust claims premised in part on "fraud upon the United States Patent Office," which the defendants had committed by fraudulently securing a patent for antibiotics. 434 U.S. at 310; see also Charles Pfizer & Co., Inc. v. FTC, 401 F.2d 574, 577 (6th Cir. 1968). The Supreme Court held that foreign nations who purchased the antibiotics were "persons" under section 4 and were allowed to

pursue their claims, including Walker Process-type claims based on fraud on the Patent Office. 434 U.S. at 317-18. Just as those plaintiffs were permitted to assert their claims as purchasers, so too should the purchasers here. To hold otherwise would unduly restrict the scope of section 4 without good reason.

CONCLUSION

For the reasons set forth above, the District Court's alternative holding that direct purchasers lack standing to pursue Walker Process antitrust claims should be reversed.

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