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Private Antitrust Suits: The In Pari Delicto Defense

Norman C. Sabbey

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INTRODUCTION

Section 4 of the Clayton Act[1] permits private law suits by injured parties against violators of the antitrust laws and encourages these suits by providing that the injured party may collect from the defendant threefold the damages which he has sustained.[2] Private antitrust suits provide supplementary enforcement of the antitrust laws and thus avoid an unduly large and expensive antitrust division in the Justice Department.[3] They also serve as an extremely effective weapon for achieving congressional purpose and social objectives, *i.e.*, maintaining a freely competitive economic system.[4] Thus, while giving redress to the injured party, the private antitrust suit reveals and eliminates the antitrust violation and acts as a deterrent to potential violators.

One factor which has complicated the private antitrust suit is the legislative silence concerning defenses to these suits.[5] Although Congress had considered alternate antitrust bills which permitted a defense to these actions,[6] the final version of the law contains no such defenses. As a result, the courts have been compelled to decide whether common law defenses should be available to defendants.

This comment will discuss the present status of certain common law defenses to a private antitrust suit and the resultant effect on actual and potential antitrust violations. It will focus especially on the effects of the recent Supreme Court case of *Perma Life Mufflers, Inc. v. International Parts Corp.*[7]

I. HISTORY OF DEFENSES

Although no defenses are mentioned in the statute and although the courts regard the public policy of enforcing the antitrust laws, even to the

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[1] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

[2] The Clayton Act further encourages private antitrust suits by permitting the use of a final judgment or decree in an antitrust suit brought by the government as prima facie evidence in an action brought by any other party against the same defendant. 38 Stat. 731 (1914), 15 U.S.C. § 16(a) (1964).

[3] See Bruce's Juices v. American Can Co., 330 U.S. 743, 751 (1947).

[4] Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955).

[5] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968); see Bushby, The Unknown Quantity In Private Antitrust Suits—The Defense Of *In Pari Delicto*, 42 Va. L. Rev. 785, 787 (1956).

[6] See compilation of bills in debates in Congress in S. Doc. No. 147, 57th Cong., 2d Sess. (1903). For a good review of this matter see Bushby, supra note 5, at 787-788; Lockhart, Violation Of The Anti-trust Laws As A Defense In Civil Actions, 31 Minn. L. Rev. 507, 508-512 (1947).

[7] 392 U.S. 134 (1968).

extent of allowing an "undeserving party" to benefit,[8] as a higher goal than the balance of the equities between the parties, the courts have permitted defenses to treble damage suits in the past. This result has occurred when the court felt that the plaintiff had no right to complain because of his involvement in an antitrust violation.[9] The defense, the plaintiff's violation of an antitrust law, was an application of the "unclean hands" doctrine. However, judicial decisions have gradually narrowed the scope of this defense to the point where it may now be virtually nonexistent.[10]

Where an "unclean hands" defense is accepted, the court will not aid the plaintiff because he also was involved in a transaction forbidden by the statute and, therefore, it would be unconscionable to allow him to assert rights growing out of the statute.[11] This doctrine is exemplified by patent infringement cases where, in the past, the courts denied relief to the owner of the patent against an infringer when the owner, through misuse of the patent, restricted competition in the unpatented items and thereby soiled his hands.[12] However, in treble damage suits, the courts have not applied the broad "unclean hands" doctrine but have held that a plaintiff's violation of an antitrust law which is related to the defendant's violation is not a defense to his treble damage actions as long as the plaintiff was not participating with the defendant in the violation.[13]

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[14] the defendant liquor distillers tried to utilize an "unclean hands" defense in a private antitrust suit brought by a liquor wholesaler. The distillers had conspired to fix the resale prices of liquor while the wholesaler in a completely separate transaction had entered into an agreement with other wholesalers to fix a minimum retail price for the liquor. The Court held that the wholesaler's alleged misconduct would not immunize the distillers from liability, and thereby rejected a broad application of the "unclean hands" defense.[15] The Court reasoned that if the wholesaler had violated an antitrust provision, he would then be open to prosecution, but that this result would not affect the suit against the distiller who had violated an antitrust law and who was also liable under the statute.

The defense to a private antitrust suit thus was limited to the defense of *in pari delicto*, a subdivision of the "unclean hands" defense. The "unclean hands" defense applies where the plaintiff has engaged in illegal or

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8 Waldron v. British Petroleum Co., 231 F. Supp. 72, 92 (S.D.N.Y. 1964); Affiliated Music Enterprises v. Sesac, Inc., 17 F.R.D. 509, 511 (S.D.N.Y. 1955); Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595, 599 (S.D.N.Y. 1952).

9 See Crest Auto Supplies, Inc. v. Ero Mfg. Co., 360 F.2d 896 (7th Cir. 1966); Eastman Kodak Co. v. Blackmore, 277 F. 694 (2d Cir. 1921).

10 See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

11 Hall v. Corcoran, 107 Mass. 251, 253 (1871). See Note, Unclean Hands In Antitrust Cases: An Uncertain Future, 48 Nw. U. L. Rev. 619, 619-20 (1953).

12 Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661 (1944); see also Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595, 597-98 (1952).

13 Lehmann Trading Corp. v. J & H Stolow, Inc., 184 F. Supp. 21, 23 (S.D.N.Y. 1960.)

14 340 U.S. 211 (1951).

15 Id. at 214.

unconscionable conduct and is a much broader doctrine than *in pari delicto* which applies only when the plaintiff and the defendant are engaged in the same illegal conduct and to a similar extent, *i.e.*, where they are of equal fault.[16] The courts, however, have used the *in pari delicto* defense where the plaintiff and the defendant have *more or less* participated together in an illegal agreement.[17]

Defendants in treble damage suits have attempted to argue that the plaintiff was *in pari delicto* where the defendant's illegal conduct was designed to counteract the effect of the plaintiff's unlawful acts. The courts, however, have held that the defendant had no right unlawfully to counteract the plaintiff's illegal actions and therefore, the defendant will not be immune from liability.[18] These decisions have narrowed the application of the *in pari delicto* defense to situations where the plaintiff and the defendant are engaged in the same activity for their mutual benefit.

In *Crest Auto Supplies, Inc. v. Ero Mfg. Co.*,[19] the plaintiffs held franchises from the manufacturer and later sued him for treble damages because of antitrust violations in their franchising agreements. The plaintiffs charged that the agreements prevented them from selling or using any products of the defendant's competitors and thus injured their business since competing products were available at lower prices. The manufacturer gained summary judgment by invoking the defense of *in pari delicto*. The court held that "where a plaintiff freely participates in alleged antitrust conduct, *pari delicto* will preclude recovery."[20]

Complementing the *Crest* rule are those cases which state that where the plaintiff is economically coerced into accepting a restraint-of-trade agreement with the defendant, the plaintiff and the defendant are not *in pari delicto* because the plaintiff did not freely participate.[21] This economic coercion exception to the *in pari delicto* defense was further enlarged by the United States Supreme Court in *Simpson v. Union Oil Co.*[22] Union Oil allegedly had an illegal price-fixing consignment agreement with its dealers. Union Oil enforced its resale price by a one year lease system, and Simpson accepted both the lease and the consignment agreement. When competitor's prices fell, Simpson cut his prices. Consequently his lease was not renewed.[23] The Court held that the private antitrust suit was not barred because the resale

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[16] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 135 (1968); see Comment, Limiting the Unclean Hands and *In Pari Delicto* Defenses in Anti-trust Suits: An Additional Justification, 54 Nw. U. L. Rev. 456, 457 (1959).

[17] Crest Auto Supplies, Inc. v. Ero Mfg. Co., 360 F.2d 896 (7th Cir. 1966); Eastman Kodak Co. v. Blackmore, 277 F. 694 (2d Cir. 1921).

[18] Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 19 F.R.D. 146 (E.D.Pa. 1956).

[19] 360 F.2d 896 (7th Cir. 1966).

[20] Id. at 900; accord, Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co., 209 F.2d 131 (4th Cir. 1953), cert. denied, 347 U.S. 960 (1954).

[21] Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Jewel Tea Co. v. Local Unions, 274 F.2d 217 (7th Cir. 1960), cert. denied, 362 U.S. 936 (1960); Ring v. Spina, 148 F.2d 647 (2d Cir. 1945); Allgair v. Glenmore Distilleries Co., 91 F. Supp. 93 (S.D.N.Y. 1950).

[22] 377 U.S. 13 (1964).

[23] 311 F.2d 764, 765-66 (9th Cir. 1963).

price maintenance scheme was coercively employed. Therefore, Simpson was not *in pari delicto* even though he had accepted the program. Since Simpson was not already in business, he was not really coerced by Union Oil into accepting the consignment, for he could have decided not to enter the business or he could have acquired a dealership with another company. Finding that the consignment agreement was coercively employed, while disregarding the fact that Simpson was not coerced into accepting the agreement, the Court, in effect, eliminated the *in pari delicto* defense where the plaintiff merely participates in the unlawful agreement. This conclusion rests on the fact that the restrictive consignment agreement was accepted by Simpson and therefore would not be coercively employed until Simpson no longer desired the retail price restrictions in the agreement. Thus *Simpson* narrowed the *in pari delicto* defense to the limited area where both the plaintiff and the defendant desire the unlawful agreement.[24]

II. The *Perma Life* Case

The most recent curtailment of the *in pari delicto* defense was made by the Supreme Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*[25] The plaintiffs acquired Midas Muffler Shop franchises from the defendants and approximately five years later sued them for alleged antitrust violations in the franchise agreement. The plaintiffs were obligated by the franchise agreement to purchase all of their exhaust system supplies from the defendants, to sell at resale prices fixed by the defendants and to sell no other automobile parts. The plaintiffs, in return, were to obtain territorial rights and the use of the Midas name.[26]

Counts one and two of the complaint charged the defendants with conspiring to restrain and substantially lessen competition in violation of section one of the Sherman Act[27] and section three of the Clayton Act.[28] Count three charged them with granting price discriminations to plaintiffs' competitors in violation of the Robinson-Patman Act.[29]

The United States District Court for the Northern District of Illinois gave summary judgment for the defendants. The Court of Appeals for the Seventh Circuit reversed count three but affirmed counts one and two on the ground, *inter alia,* that plaintiffs were barred by the *in pari delicto* doctrine.[30] The Court of Appeals found that each plantiff voluntarily and knowingly entered into his first franchise agreement and then sought additional shops. Noting that each plaintiff accepted the benefits and earned significant profits from the restrictive agreements while seeking to perpetuate the wrong of which they later complained, the Court of Appeals held that this was

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24 For a broader analysis of the *Simpson* case, see 5 San Diego L. Rev. 171, 173-78 (1968).

25 392 U.S. 134 (1968).

26 In addition plaintiffs were not required to pay a franchise fee or to purchase or lease substantial equipment from Midas. 392 U.S. at 137.

27 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).

28 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964).

29 49 Stat. 1526 (1936) 15 U.S.C. § 13 (1964).

30 376 F.2d 692 (7th Cir. 1967).

an appropriate case for applying the *in pari delicto* doctrine and denying recovery.[31]

The Supreme Court reversed. The Court's opinion, delivered by Justice Black, broadly held that "the doctrine of *in pari delcito*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."[32] As reasons for the rejection of the *in pari delicto* defense, the majority cited the effectiveness of private suits as a vital means of enforcing the antitrust laws and the lack of statutory support for the *in pari delicto* defense in the language of the antitrust acts. The Court stated that the injured plaintiffs were denied recovery below because they utilized the illegal arrangements formulated by others. Unlike the Court of Appeals, the majority regarded the illegal scheme as thrust upon the plaintiffs because some of the restrictions were contrary to their best interests. In justifying the restrictions favorable to the plaintiffs, the Court stated that the benefits to the plaintiffs from these restrictions were to be considered in computing damages. Although the Court held that *in pari delicto* has no place in private antitrust suits, it refused at this time to rule on the situation where the plaintiff actively supported, formulated and encouraged the continuation of a monopolistic scheme.

The concurring opinions of Justices White, Fortas and Marshall agreed that the *in pari delicto* defense should not be available where the plaintiff merely participated in and benefited by the agreement formulated by the defendant. But, unlike the majority, the concurring Justices felt that if a plaintiff is more than or equally as responsible for the scheme as the defendant, then the *in pari delicto* defense should preclude recovery. Justice Marshall would also deny recovery to a plaintiff who had "traded off" one set of restrictions beneficial to the defendant for restrictions beneficial to him because again he is equally responsible for the formulation of the agreement. The concurring Justices grounded their decisions partly on the belief that elimination of the defense entirely would adversely affect the deterrent purposes of the treble damage suit. The other reason given was a desire to achieve an equitable result between the plaintiff and the defendant.

The dissenting opinion of Justices Harlan and Stewart also agreed that *in pari delicto* cannot be a defense in a broad "unclean hands" situation or where the plaintiff was coerced into accepting a restrictive agreement. However, like the concurring opinions, the dissenting view was that where a plaintiff is of equal fault and actually has violated an antitrust provision he should not be able to recover from his fellow offenders. Believing that the lower court did not adequately determine whether the plaintiff was actually *in pari delicto*,[33] the dissenters would remand the case for clarification.

The *Perma Life* case has greatly narrowed the *in pari delicto* defense. According to the majority, so long as the plaintiff has not actually sup-

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[31] Id. at 699.

[32] 392 U.S. at 140.

[33] The view of the dissenting opinion was that the lower court had confused consent to the restrictive agreement with *in pari delicto*. The latter, according to the dissent, applies when the plaintiff is as responsible and as legally liable as is the defendant for the agreement.

ported the entire restrictive program—participating in its formulation and encouraging its continuation—then he can recover threefold the difference between the damages he sustained and the benefits he received from the restrictive agreements. Consequently, the Supreme Court might deny recovery only to a strictly *in pari delicto* plaintiff. A strictly *in pari delicto* plaintiff is one who conspires with the defendant in formulating and encouraging the entire restrictive scheme; whereas, an ordinary *in pari delicto* plaintiff is one who merely accepts the restrictive agreement and benefits from it.

The *Perma Life* decision can be read to permit a defense to private antitrust suits only when the plaintiff and the defendant are strictly *in pari delicto;* or the decision can be read to permit an elimination in the future of even this narrow defense. The following discussion is a consideration of the consequences of these two possible interpretations.

III. Effect of a Strict *in Pari Delicto* Defense

If it is assumed that the defense of *in pari delicto* will be retained when the plaintiff and the defendant are equally responsible for the restrictive agreement, the result of this policy on the enforcement of the antitrust laws must be examined.

The adverse effects will be considered first. Even with the narrowed defense of strict *in pari delicto*, violations may still go unchecked. Since a non-conspirator is less likely to know of a conspiracy between manufacturers, distributors, or retailers, he may be unaware of the existence of the conspiracy against him and the rest of the public. Furthermore, even if there is knowledge of the conspiracy, bringing a private antitrust suit is extremely laborious and expensive for a plaintiff not a party to the conspiracy.[34] On the other hand, a party to the conspiracy obviously has knowledge of the conspiracy and has records and other data readily available which would facilitate the initiation of the private antitrust suit. Therefore, in one sense, permitting this narrow defense allows more violations to go undetected than completely eliminating the *in pari delicto* defense. Since the co-conspirator will not be permitted to bring a private suit because it would be barred by the strict *in pari delicto* defense, the injured public and the Justice Department will not be able to rely on the private treble damage suit as a source for learning of the conspiracy.

In addition, allowing the narrow defense could permit more violations to materialize because potential violators would be less likely to fear forming a conspiracy if they knew they were immune from suit by a dissatisfied conspirator. Thus not only would this defense enable violations to go undetected, but also it would weaken the deterrent factor of the private antitrust suit and thereby cause more violations to occur.

On the other hand, some favorable results may follow from a strict *in pari delicto* defense. Violations occurring through coercive measures of one party should decrease. Adoption of a strict *in pari delicto* defense enables the plaintiff to recover in almost every case where he is not a party to the formu-

[34] Loevinger, Private Action—The Strongest Pillar Of Antitrust, 3 Antitrust Bull. 167, 171 (1958).

lations of the restrictive agreement. Consequently, under the strict *in pari delicto* defense, potential violators will have to be willing to accept the consequences before they attempt to form a restrictive agreement with anyone who is not on a less than equal basis with them. The economically stronger party could definitely feel immune from suit by the other party involved only if the other party were economically independent and an originator of the agreement. For example, if a manufacturer had a restrictive agreement with a group of distributors (assuming that the distributors did not group together and then find a manufacturer willing to participate), the distributors could easily argue that they did not formulate the agreement. Therefore, the manufacturer could not use strict *in pari delicto* as a defense in a private antitrust suit brought by the distributors. As a result, eliminating the broad *in pari delicto* defense should tend to decrease antitrust violations which are formulated through coercive means or which are formulated by one party and then merely accepted by others as a business arrangement.

Although the allowance of a strict *in pari delicto* defense may not fully satisfy the equities between the litigants, a no-defense policy would be more inequitable because an equally responsible plaintiff could recover. Thus, when the litigants are co-conspirators, a more equitable balance between the litigants results from the use of the strict *in pari delicto* defense. When the litigants are not co-conspirators, maintenance of the *in pari delicto* defense does not affect the equitable balance because *in pari delicto* does not apply to litigants who are not co-conspirators.

IV. Effect of No Defense

If the Supreme Court decision in *Perma Life* can be read to eliminate all *in pari delicto* defenses, then commentators will no doubt disagree as to the impact on the deterrent force of the treble damage suit. One argument would be that violations would increase because a potential violator would have an expectancy of obtaining treble his damages from his co-conspirators if the conspiracy proved unsuccessful. This view does not seem tenable, for the potential violator would also be aware that his co-conspirator has the same opportunity to sue for treble damages if he incurs damages instead. A treble damage suit by a fellow conspirator as well as by a customer, a competitor or a party coerced into accepting the restrictive agreement would be a constant threat to the security of the potential violator. Therefore, a no-defense policy should cause every conspirator to hesitate before entering into a conspiracy with another party.

The main objection to a no-defense policy is that it is inequitable because it aids a wrongdoer. But this objection could be raised against the non-acceptance of the "unclean hands" defense in antitrust actions.[35] Of course the objection has more value when applied to the elimination of the strict *in pari delicto* defense: in this situation a wrongdoer recovers who is equally as responsible for his loss as the defendant. The inequity, although it may be considered great, is between two equally liable parties and is tolerated in order to encourage private enforcement of the antitrust laws. Moreover, when

[35] Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Interborough News Co. v. Curtis Pub. Co., 108 F. Supp. 768 (S.D.N.Y. 1952).

damages are considered, an offsetting process should reduce the inequities between the litigants. The situation which offends the sensibilities to a greater degree occurs where the party who is the moving force of the restrictive agreement sues a party who has merely participated in the restrictive agreement, *e.g.*, the *Perma Life* litigation in reverse. In this situation the lack of a defense seems very harsh. However, a no-defense penalty, permitted by the law, might deter violations of the antitrust laws even more than the treble damage penalty enacted by Congress. A defendant who enters into a restrictive agreement has injured the public, regardless of whether he was coerced into making the agreement. A no-defense policy may supply the sanction necessary to encourage him to resist such coercion.

V. Comparison of the Two Policies

In comparing the two possible courses, (1) no defense at all and (2) a strict *in pari delicto* defense only, the no-defense policy seems more capable of fulfilling the purposes of the antitrust laws. A no-defense policy should not increase violations. The argument that violations would increase because a potential violator would consider the possibility of recovering treble his damages if his conspiracy proved unsuccessful is rather tenuous, for if one conspirator suffers damages, more than likely the other conspirator will suffer similar damages. It is more probable that the parties will incur damages of a like nature because the concern here is with only the conspirators who are affected by the total elimination of the defense. These are the conspirators who are engaged in the same commercial activity and who will both benefit by the same restrictive agreements, *e.g.*, a group of distributors. Other sets of conspirators (*e.g.*, the *Perma Life* situation) may no longer use *in pari delicto* as a defense because the broad *in pari delicto* defense has been eliminated by the *Perma Life* case. Thus a conspirator who is affected by the elimination of the defense could not safely enter into a conspiracy expecting treble damages if the conspiracy is unsuccessful.

The equities between the parties under a no-defense policy are not as unbalanced as they may appear to be. One conspirator has made an illegal profit; the other conspirator has suffered an injury by his own illegal conduct. The plaintiff does not recover treble the profits he would have made in the illegal business, but treble the damages to his regular business.[36] As far as the parties are concerned, the defendant has lost his illegal profits and perhaps more (to the plaintiff), and the plaintiff has recovered treble the following: his legitimate losses minus his gains less any damages for which the defendant counterclaims. Thus, between the litigants there is almost an offsetting effect. Even though a wrongdoer will recover under this offsetting process, the wrongdoers recover from each other and not from innocent parties. At the same time they are promoting the enforcement of the antitrust laws and the deterrence of future potential violators.

The difficult situation occurs when the more responsible party suffers a loss and sues a party who has merely participated in the agreement. Allow-

[36] Eastman Kodak Co. v. Blackmore, 277 F. 694, 699 (2d Cir. 1921); Mason City Tent & Awning Co. v. Clapper, 144 F. Supp 754, 770 (W.D. Mo. 1956).

ing the plantiff to recover in this case would definitely force the less responsible party to resist attempts by manufacturers or others to establish restrictive schemes. Unfortunately, this course might be too harsh on the economically smaller party. Therefore, an exception should be made to permit a defense by a party who was coerced into the restrictive agreement in a suit brought by the initiator of the agreement. This exception would be a defense where the defendant had no choice (except to go out of business or to injure substantially his business) but to accept the restrictive agreement from the plaintiff, *e.g.*, when a person is in business and his only source of supply now insists that restrictive methods be employed in that business. The exception to the no-defense rule should not apply where the defendant was not actually compelled by economic necessity to accept the agreement but instead accepted it as a business venture. An instance where this exception would not apply occurs where a person not in the business accepts a franchise which contains illegal restraints of trade in order to enter the business.

VI. Conclusion

Not permitting an *in pari delicto* defense to private antitrust suits will further the congressional policy of enforcing the antitrust laws through private law suits. In the past, the courts have recognized the importance of enforcing the antitrust laws even where an undeserving party might benefit.[37] Eliminating the *in pari delicto* defense altogether should not greatly increase the inequities between the litigants. Besides, the equities between the litigants must yield to the overall public policy of eliminating restraints on competition.[38]

A great many private suits are probably not brought because of the time and expense involved, because the conspiracy is not actually known, or because the party is involved in the conspiracy and believes he cannot prevail if the defendant may use an *in pari delicto* defense. Elimination of the defense would help to cure some of these problems. The conspirator knows of the conspiracy and has information unavailable to outsiders. Permitting the conspirator to bring the suit would reduce the necessary time and expense and make the conspiracy and the court record known to other victims of the conspiracy. Furthermore, since one of the purposes of the treble damage suit is to achieve better enforcement of the antitrust laws, a plaintiff should not be expelled from court because he is involved in the conspiracy. This, in some cases, would permit the conspiracy to continue in direct opposition to the main purpose of the antitrust laws: to maintain a competitive economic atmosphere.

The *Perma Life* decision reinforces the policy of deterring future antitrust violations through private treble damage actions. A further strengthening of this deterrence would result from the complete elimination of all *in pari delicto* defenses in private antitrust suits.

Norman C. Sabbey

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[37] See cases cited in note 8 supra.

[38] Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595, 599 (1952).