

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

BUCKEYE DIAMOND LOGISTICS, INC. :
fka BUCKEYE RECYCLERS, INC. :

Plaintiff, :

Case No. C3-01-440

v. :

Judge Walter Herbert Rice

CHEP USA, a general partnership :

Defendant. :

**BUCKEYE DIAMOND LOGISTICS’ REPLY MEMORANDUM IN
SUPPORT OF MOTION IN LIMINE REGARDING EVIDENCE OF
PARTICIPATION IN CHEP USA’S PALLET RETURN PROGRAM**

CHEP USA’s (“CHEP”) opposition to Buckeye Diamond Logistics’ (“Buckeye”) Motion in Limine regarding Evidence of Participation in CHEP USA’s Pallet Return Program rests its argument on the assertion that such evidence is relevant to “the ultimate determination of whether or not CHEP has been unjustly enriched by Buckeye’s activities.” Mem. Opp. at 1 (emphasis in original). In fact, such evidence has no relevance to the unjustness of CHEP’s enrichment for at least three reasons:

- It rests on an erroneous understanding of the meaning of “unjustly enriched”;
- It ignores that recyclers might choose to participate in CHEP’s return program for a variety of reasons that have nothing to do with the justness of the compensation;
and
- It confuses the relevance of CHEP’s offer of the return program with independent decisions of other businesses as to whether to participate.

Each of these reasons alone would support rejection of CHEP's argument; together they compel that Buckeye's Motion in Limine regarding Evidence of Participation in CHEP USA's Pallet Return Program be granted.

The third prong of an unjust enrichment claim under Ohio law requires a showing of a "retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." See Hambleton v. R.G. Barry Corp., 12 Ohio St.3d 179, 183, 465 N.E.2d 1298, 1302 (1984). While the determination of whether retention of a benefit is "unjust" is "subjective and not necessarily open to a clear and decisive answer," Reisenfeld & Co. v. Network Group, Inc., 277 F.3d 856, 860 (6th Cir. 2002) proof of whether the benefit was received unjustly is based on the circumstances of the receipt of the benefit to the defendant: "Unjust enrichment ... results from a failure to make restitution where it is equitable to do so. That may arise when a person has passively received a benefit which it would be unconscionable for him to retain." Cosby v. Cosby, 141 Ohio App.3d 320, 750 N.E.2d 1207, 1213 (2001) (citations omitted). Thus in this case, the issue of "unjustness" should be determined in the context of CHEP's system of placing pallets containing its logo into circulation (particularly, but not exclusively, to non-participating distributors) with little hope of recovery, and the burden that practice creates for Buckeye.

In addition, whether another recycler chooses to accept CHEP's minimal offer of compensation is irrelevant to whether CHEP is unjustly enriched because recyclers other than Buckeye could have a variety of reasons for choosing to accept CHEP programs. Such reasons could include:

- Receipt of an insufficient number of pallets to make litigating with CHEP worthwhile;
- Fear of criminal prosecution by CHEP;
- Other business relationships with CHEP;
- Ignorance, as the result of CHEP's insistence on secrecy, of CHEP's own calculation of the benefit it receives from recyclers returning pallets (CHEP 00795), which show that the benefit CHEP receives is substantially greater than the amount CHEP pays;
- Customer requests or pressure; or
- A simple desire to spend one's time developing ones business rather than litigating with CHEP, or a lack of funds to do so.

Allowing CHEP to offer summary information about participation in its program, with no testimony or cross-examination as to why particular participant chose to participate invites jury confusion and speculation. CHEP has not identified as witnesses any participants in its program who could clarify their reasons for joining, or in any way proposed to give the jury any evidence linking their participation with the justness of the compensation being offered.¹

To the extent CHEP claims the jury should be able to compare its program with the benefit CHEP receives from the return of the pallets, it will have the opportunity to do so. Buckeye has not objected to evidence of the terms of the program offered to Buckeye – its objection is to evidence as to whether other recyclers have accepted those terms.

¹ CHEP's Memorandum in Opposition make reference to proof of Buckeye's costs in the recovery of pallets for CHEP as a ground for admitting evidence concerning the number and identity of participants in CHEP's program. Putting aside the irrelevance of Buckeye's costs to proof of unjust enrichment, CHEP

CHEP is perfectly free to offer testimony as to those terms or to cross-examine Buckeye as to why it did not accept those terms. What it should not be allowed to do is suggest to the jury that the decisions by other businesses to accept those terms are proof that its actions are just as to Buckeye.

As the Court indicated in its September 8, 2004 Decision and Entry (at p. 18), the issues to be tried in this case concern the relationship between Buckeye and CHEP, and not the relationship between other recyclers and CHEP. Accordingly, for the reasons set forth in its Motion in Limine and above, Buckeye respectfully requests that the Court enter an order in limine excluding evidence regarding participation by other recyclers in CHEP's pallet return programs.

s/ James A. Wilson

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never explains how participation by another recycler in the program could in any way be proof of Buckeye's costs.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Memorandum was served on
October 4, 2004, by electronic delivery or facsimile upon:

John C. McDonald
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s/ James A. Wilson
James A. Wilson