

**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. :

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO CHEP USA’S
MOTIONS IN LIMINES SEEKING A LIMITATION ON BUCKEYE’S
EVIDENCE OF DAMAGES (MOTIONS IN LIMINE ## 8 and12)**

I. Introduction

CHEP USA has now filed a total of fifteen motions in limine – nine in April 2003 and an additional six on January 30, 2004. The issues raised by these Motions overlap, and Buckeye will shortly be filing a consolidated response to most of them. However, CHEP, in a conference with the Court’s chambers on February 18, 2004, asserted that its Motions in Limine regarding Buckeye’s claim for damages – presumably meaning Motions in Limine # 8 (Docket # 56) and # 12 (Docket #76) – may require a delay in the trial of this case. Because in Buckeye’s view CHEP’s position is without merit, and CHEP has no cause to delay the trial in this case either by these motions or its dilatory disclosure of its damage calculations, Buckeye is filing this separate motion to address these overlapping motions in limine.

The basic premise of both of these motions in limine is that Buckeye must present as damage evidence the sort of proof CHEP wants to use to minimize the damages it

should pay for unjustly enriching itself at Buckeye expense. CHEP's argument is essentially that Buckeye can only present evidence of damages on a theory of damages that it has not pursued and that the law does not require it to pursue. Put simply, the evidence CHEP may wish to present to minimize Buckeye's damage claim is not the baseline or boundary of relevance on these damage claims. To the contrary, the law is clear the Buckeye on its claim for unjust enrichment is entitled to present evidence both as to how the marketplace values the services it unwillingly performs for CHEP and of reasonable measures of the value to CHEP of the return of such pallets.

II. Argument

A. Buckeye's Damages Need Not and Should Not Be Measured by Its Sorting and Storage Costs

By its Decision and Entry of August 11, 2003, the Court granted summary judgment to CHEP on all of Buckeye's claims other than Count 4 of its complaint, its claim for unjust enrichment. As the Court recognized in its decision, to prevail on its unjust enrichment claim, Buckeye must establish "(1) it conferred a benefit upon the defendant, (2) the defendant knew of the benefit, and (3) the defendant would be unjustly enriched to retain the benefit without compensating the plaintiff." Id. at 41-42.

The fundamental premise of CHEP's motions is that on this claim Buckeye can only seek damages based upon its cost of separating and sorting pallets marked with CHEP's logo. This argument was specifically rejected by the Franklin County Court of Appeals in one of the two cases¹ CHEP cites in its motions regarding damages for unjust

¹ The other case cited by CHEP, Saraf v. Maronda Homes, Inc. of Ohio, 2002 WL 31750249 (Franklin Cty. Ct. App. Dec. 10, 2002), does not bear on the issues raised by CHEP's motions, other than to state in dicta that "[t]he doctrine of unjust enrichment provides an equitable remedy, under which the court implies a

enrichment. Specifically, in U.S. Heath Practices, Inc. v. Byron Blake M.D., Inc., 2001 WL 277291 (Franklin Cty. Ct. App. Mar. 22, 2001) (copy attached at Tab A) (cited in CHEP's Motion in Limine #12, at p. 2, n. 1), the court indicated that on an unjust enrichment claim, the plaintiff's damages are measured exactly as Buckeye seeks to measure them here, by the amount in which the defendant benefited:

The difference between quantum meruit and unjust enrichment is the manner in which damages are computed. ***For unjust enrichment, damages are conferred in the amount the defendant benefited.*** For quantum meruit, damages are the measure of the value of the plaintiff's services, less any damages suffered by the other party.

Id. at *2 (citations omitted; emphasis added). While in its more recent motion (Motion in Limine #12, page 6, n. 3) CHEP suggests that Buckeye has somehow inadequately pled its damage claim for unjust enrichment, review of the full paragraph from Buckeye's Complaint (¶ 42) reveals that this is exactly what Buckeye pled:

Buckeye is entitled to money damages in compensation for its unjust enrichment of CHEP, together with a declaration pursuant to O.R.C. § 2721 of CHEP's obligation to reimburse it in the future for such services.

CHEP's own citation of authority thus squarely defeats its effort to limit Buckeye in its damage claim to its costs. The Complaint's allegation entitles Buckeye to seek the full range of damage available for CHEP's unjust enrichment by forcing Buckeye to do work it neither sought nor negotiated freely to do.

Indeed, disgorgement of profits is widely recognized as the appropriate measure of damages for unjust enrichment. "Disgorgement is an equitable remedy designed to force a defendant to give up the amount equal to defendant's unjust enrichment." Harris v. Physicians Mutual Ins. Co., 240 F.Supp.2d 715, 722 (N.D. Ohio 2003) (Carr, J.) (citing

promise to pay a reasonable amount for services rendered" Otherwise, Saraf's discussion of unjust enrichment is limited to a recitation of the elements of such a claim and to a finding that an existing

Gavriles v. Verizon Wireless, 194 F.Supp.2d 674, 681 (E.D.Mich.2002). See also SEC v. Blavin, 760 F.2d 706, 713 (6th Cir.1985). “[T]he doctrine of unjust enrichment provides that a person shall not be allowed to profit or enrich himself inequitably at another’s expense, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made.” Glasstech, Inc. v. TGL Tempering Systems, Inc., 50 F.Supp.2d 722, 731 (N.D.Ohio 1999) (Katz, J.) (citing Norton v. City of Galion, 60 Ohio App.3d 109, 110, 573 N.E.2d 1208, 1209 (App.Dist.3, Crawford Cty.1989)). See also 18 O.Jur.3d (1980), 266, 268-69, Contracts, §342. “[A] theory of unjust enrichment, if successfully asserted, would require Defendants to disgorge all benefits to which they are not entitled.” Durant v. Servicemaster Co. Trugreen, Inc., 147 F.Supp.2d 744, 749 (E.D.Mich.2001) (citing Overstreet v. Kentucky General Life Ins. Co., 950 F.2d 931, 944 (4th Cir.1991)). In situations where the plaintiff’s loss does not coincide with the defendant’s gain, or where the plaintiff has not suffered any loss, the plaintiff nonetheless may recover the amount by which the defendant has been unjustly enriched. Shonac Corp. v. Amko Int’l, Inc., 763 F. Supp. 919, 946 (S.D. Ohio 1991) (Graham, J.) (plaintiff’s damages not measured by its losses, but rather by defendant’s gain); Durant v. Servicemaster Co. Trugreen, Inc., 147 F.Supp.2d at 749. See also Restatement (First) of Restitution §1 (1937), comment e. Accordingly, if it proves its unjust enrichment claim, may recover the profits CHEP made from Buckeye’s recovery, sorting and separation of pallets as damages.

contract between the parties bars a claim for unjust enrichment, a defense CHEP has not presented here.

B. Buckeye Appropriately Disclosed Its Calculation of Damages

CHEP's motions suggest that Buckeye disclosed the basis for its damage claims for the first time in the briefing of CHEP's Motion for Summary Judgment, but then go on to admit that Buckeye supplemented its damage disclosure on January 15, 2003, before discovery was closed. Motion in Limine #8, at p. 3. Indeed, while failing to mention it in either motion, CHEP specifically took discovery on this damage disclosure. See, e.g., Deposition of Sam McAdow Sr. (Jan. 22, 2003) at 319-23 (copy of cited pages attached at Tab B). CHEP does not and cannot claim that Buckeye failed to produce all of its supporting documentation showing the compensation it was paid by beverage distributors for the return of pallet, and documentation concerning CHEP's surcharges for shipments to non-participating distributors are uniquely within CHEP's position.

The damage disclosures of CHEP and Buckeye stand in stark contrast. CHEP disclosed its damage calculation only 12 business days before the trial date, long after discovery was completed and on the very day that the Final Pretrial Order in the case was due. In contrast, Buckeye, as CHEP's own motions disclose, made its supplemental disclosure of this damage calculation more than a year ago, before discovery was cut-off and in a manner that has allowed CHEP to have a full and fair opportunity to respond to those claims.

C. CHEP's Own Admissions Show that Its Lost Pallet Fees and Market Prices for the Return of Proprietary Pallets Are Fair Measures of the Damages to Which Buckeye Is Entitled

The final argument that both of CHEP's motions apparently rest on is that the two benchmarks of damages that Buckeye has indicated it intends to rely upon are not fair measures of the unjust enrichment in this case. However, CHEP's own admissions, as

well as the controlling case law, demonstrate that both CHEP's surcharge to customers for the right to ship to NPDs and the fees paid by other entities for the return of proprietary pallets are appropriate benchmarks of Buckeye's damages in this case.

CHEP, in Motion in Limine #8, on page 6, asserts:

In is undisputed that the amount of the surcharge that CHEP charges its customers to ship to NPDs is based on the increased dwell time (i.e., the length of time CHEP's pallet is sitting unutilized outside of the revenue generating stream), CHEP's lost revenue and CHEP's increased asset recovery cost

Assuming that this is true, and Buckeye cannot show that any element of the surcharge is to compensation for the increased risk of non-recovery of a pallet sent to a NPD,² this admission supports rather than contradicts Buckeye's use of the NPD surcharge is an appropriate measure of the benefit CHEP receives with Buckeye returns a pallet to CHEP. Buckeye's proof at trial will show that the pallets it gets and returns to CHEP (as opposed to those it returns to mutual customers under the Stipulated Order entered by the Court on November 12, 2003 (Docket # 69)) come almost exclusively from NPDs, and for the most part from the NPDs CHEP considers hostile (i.e., they do not return pallets directly to CHEP) and therefore imposes it \$8 surcharge on. Further, Buckeye will show that under its arrangements with these NPDs, CHEP gets its pallets back after no greater dwell time than for participating distributors of CHEP. Thus, Buckeye's proof will show that through its actions, CHEP avoids the increased dwell time, lost revenue and increased asset recovery cost it usually experiences with shipments to NPDs. In other

² As Buckeye will show in its response to CHEP's other Motions in Limine, Buckeye will present proof at trial that could convince a reasonable jury that at least part of the NPD surcharge is for the risk of non-return of pallets as well as for the other increased expenses CHEP incurs when pallets are shipped to NPDs. This evidence includes CHEP's asset recovery rates from various categories of NPDs and CHEP own statements regarding its expectations as to higher lost property rates when it started shipping en mass to NPDs. The fact that the Court has found such evidence does not prove abandonment on CHEP's part does not mean that it is irrelevant to the benefit CHEP receives when Buckeye get pallets back for it.

words, Buckeye will show that the benefit it provides CHEP (in addition to reducing CHEP's risk of never recovering the pallet) correlates precisely to the basis for its NPD surcharges.

Buckeye's other proffer of damage evidence will simply be proof of how entities similarly situated to CHEP value the return of proprietary pallets by Buckeye. Specifically, Buckeye will present proof as to what beverage distributors have voluntarily and in arms-length bargaining agreed to pay Buckeye for the return of pallets to them. Such freely negotiate compensation is plainly a measuring rod that is relevant to a jury's consideration of the amount by which CHEP benefits from Buckeye's return of its pallets. Obviously, others seeking the return of proprietary pallets would not pay Buckeye more than they benefit from the return of such pallets. Therefore, this evidence is likewise relevant to reasonable compensation for the services rendered by Buckeye as measured by the amount CHEP has benefited by those services.

III. Conclusion

For the forgoing reasons, CHEP's Motions in Limine #8 and #12 should be overruled, and Buckeye permitted to present the evidence of damages at trial it previously disclosed it would present.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Memorandum was served on February 19, 2004, by electronic delivery or facsimile upon:

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