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2 WAP 2023

IN THE SUPREME COURT OF PENNSYLVANIA

2 WAP 2023

EARL JOHN DWYER AND CHRISTINE DWYER, HUSBAND AND WIFE
Appellants
v.

AMERIPRISE FINANCIAL, INC., AMERIPRISE FINANCIAL SERVICES, INC., RIVERSOURCE LIFE INSURANCE COMPANY, JAMES E. ANDERSON, JR., AND DUANE DANIELS
Appellees

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

Appeal from the July 8, 2022 Order of the Superior Court, 519 WDA 2021, affirming the April 26, 2021 Judgment of the Allegheny Court of Common Pleas, No. GD01-006612

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. Members of the Chamber and the broader business community have an interest in Pennsylvania's consumer protection laws and this Court's interpretation of them. The business community relies upon this Court to construe these laws in a predictable and fair manner that does not unduly

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[1] No one other than the amici, their members, and their counsel paid for or authored this brief, in whole or in part.

constrain commercial activity, which would ultimately harm consumers in Pennsylvania and across the nation.

ARGUMENT

I. This Court should give effect to the Consumer Protection Law's plain language, which makes an award of multiple damages discretionary.

Section 9.2 of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("CPL") provides that a "court *may*, in its *discretion*, award up to three times the actual damages sustained." Act of December 17, 1968, P.L. 1224, *as amended*, 73 P.S. § 201-9.2 (emphasis added). This language is crystal clear. By expressly providing that a trial court "may, in its discretion," award treble damages, Section 9.2 creates "no obligation for a trial court to award treble damages." *Dibish v. Ameriprise Fin., Inc.*, 134 A.3d 1079, 1091 (Pa. Super. 2016). Section 9.2 allows—but does not require—an award of multiple damages.

This legislative choice stands in stark contrast to other statutory schemes in Pennsylvania. The General Assembly has elsewhere enacted legislation that gives trial judges no discretion about whether to award treble damages. *See, e.g.*, Act of April 6,

1951, P.L. 69, *as amended*, 68 P.S. § 250.311 (imposing mandatory treble damages for violating the Landlord and Tenant Act of 1951); 65 Pa.C.S. § 1109(c) (imposing mandatory treble damages for violating the Public Official and Employee Ethics Act); Act of February 18, 1998, P.L. 146, *as amended*, 63 P.S. § 2329(a) (imposing mandatory treble damages for willful violation of the Check Casher Licensing Act). Where the General Assembly makes multiple damages mandatory, that choice is clear.

Likewise, the legislatures of other states have implemented mandatory treble damages provisions in their own consumer protection statutes. *See, e.g.*, La. R.S. 51:1409(A) ("If the court finds the unfair or deceptive method, act, or practice was knowingly used . . . the court shall award three times the actual damages sustained."); N.H. Rev. Stat. 358-A:10(I) ("If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount."); N.J.S.A. 56:8-19 ("[T]he court shall, in addition to any other appropriate legal or equitable relief, award threefold the

damages sustained by any person in interest."); N.C.G.S.A. § 75-16 (providing that "judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict"). And Congress, for its part, has imposed mandatory trebling provisions in federal statutes such as the Sherman Act, *see* 15 U.S.C. § 15(a) (providing that plaintiffs "shall recover threefold the damages . . . sustained"), and the Racketeer Influenced and Corrupt Organizations Act, *see* 18 U.S.C. § 1964(c) (providing that "[a]ny person injured" due to a violation of the Act "shall recover threefold the damages he sustains").

The common feature in all of these statutes is the directive that courts "shall" award multiple damages. That mandatory language is conspicuously absent from Section 9.2, replaced with an express grant of judicial discretion. *See Bethenergy Mines, Inc. v. W.C.A.B. (Sadvary)*, 570 A.2d 84, 86 (Pa. 1990) (holding that the word "may" should be interpreted as a grant of discretion unless there is clear evidence of legislative intent to the contrary).

"[I]n statutory interpretation, [the Court's] task is to discern the intent of the General Assembly, with the foremost indication

being the statute's plain language." *Oliver v. City of Pittsburgh*, 11 A.3d 960, 965 (Pa. 2011). Courts may not "insert words . . . that are plainly not there." *Frazier v. W.C.A.B. (Bayada Nurses, Inc.)*, 52 A.3d 241, 245 (Pa. 2012); *see also Sadler v. Workers' Comp. App. Bd.*, 244 A.3d 1208, 1213 (Pa. 2021) ("As with all matters of statutory construction, the plain language of the law must govern."). This Court has specifically emphasized this principle with respect to the CPL, holding that "it is best to adhere as closely as possible to the plain language of the statute." *Schwartz v. Rockey*, 932 A.2d 885, 898 (Pa. 2007). Applying these bedrock principles, the Court should reject the invitation to nullify the plain language of Section 9.2 by requiring treble damages.

Failure to give effect to Section 9.2's express grant of discretion would raise significant separation of powers concerns. The Court is not an "editor for the General Assembly," *Commonwealth v. Scolieri*, 813 A.2d 672, 668 (Pa. 2002), and "it is not the province of the judiciary to augment the legislative scheme," *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 318 (Pa. 2017). Doing so would improperly usurp the

legislative function. *See Pap's A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), *rev'd on other grounds*, 529 U.S. 277 (2000) (observing that judicial rewriting of a statute violates the separation of powers doctrine). The plain language of Section 9.2, and the unambiguous legislative intent it reflects, should control.

Plaintiffs contend that, under the facts of this case, treble damages are mandatory because the CPL is a remedial statute that should be "construed liberally to effect its object of preventing unfair or deceptive practices." (Plaintiffs' Br. at 16.) But "the rule that remedial legislation should be construed liberally does not justify interpreting a statute in a manner that is contrary to the plain and ordinary meaning of the statute's text." *Johnson v. Phelan Hallinan & Schmieg, LLP*, 235 A.3d 1092, 1100 (Pa. 2020) (rejecting an invitation to judicially "rewrite" provisions of the Loan Interest and Protection Law by appealing to its broad mortgagor protection ideals). Simply put, "courts may not look beyond the plain meaning of a statute under the guise of pursuing its spirit." *City of Johnstown v. Workers' Comp. App. Bd.*, 255

A.3d 214, 220 (Pa. 2021). That is precisely what Plaintiffs and their amici are asking the Court to do here.

II. The trial court's decision was a proper exercise of the judicial discretion granted by the General Assembly.

The CPL, "on its plain terms, does not provide any standard pursuant to which a trial court may award treble damages." *Schwartz*, 932 A.2d at 897. But the statute does not contemplate "limitless" discretion. *Id.* Rather, a trial court's decision to award multiple damages should be guided by "consideration of the occasion and necessity for the statute, the mischief to be remedied, the object to be attained, and the consequences of a particular interpretation." *Id.* (citing 1 Pa.C.S. § 1921(c)).

Trial courts should therefore consider a range of factors when exercising their discretion under Section 9.2, including the CPL's purposes. While the CPL is a remedial statute that aims to compensate consumers for harm, it also "contain[s] a deterrent, punitive element." *Meyer v. Cmty. Coll. of Beaver Cnty.*, 93 A.3d 806, 815 (Pa. 2014); *see also Schwartz*, 932 A.2d at 897-98 (characterizing consumer protection statutes as "hybrid[s]" given the multiple purposes they serve). The statute's treble damages

provision, when applied by a trial court exercising its discretion, facilitates those purposes by punishing and deterring wrongdoing. *See Schwartz*, 932 A.2d at 897 ("[T]he trebling of damages obviously has a strong punitive dynamic."); *Commonwealth v. Monumental Props.*, 329 A.2d 812, 816-17 (Pa. 1974) (stressing that "fraud prevention" is a core purpose of the CPL).

Thus, Plaintiffs are wrong that courts should award treble damages solely to "provide additional compensation to consumers" and "encourage[] private enforcement of the law" (Plaintiffs' Br. at 11.) Trial judges should consider these aims alongside the punishment and deterrence objectives that the CPL also serves. *See Schwartz*, 932 A.2d at 897; *Dibish*, 134 A.3d at 1092.

Given the trial court's thoughtful balancing of those statutory purposes in this case, its decision not to award treble damages was well within the scope of its discretion. A trial court's discretionary decision of whether to award treble damages is "reviewed . . . for rationality," *Schwartz*, 932 A.2d at 898, and whether the trial judge acted outside the reasonable range of choices. *See Commonwealth v. Gill*, 206 A.3d 459, 468 (Pa. 2019)

(holding that trial court did not abuse its discretion even though "reasonable minds may differ as to how a trial court should rule" on the question at issue). The trial court easily cleared that bar.

Here, the trial court explicitly acknowledged the multiple purposes—compensation, punishment, and deterrence—that the CPL serves. (R. 31a.) It then comprehensively and thoughtfully looked at the facts of this case—including the previous awards of attorneys' fees and punitive damages—and reasonably concluded that an additional award of treble damages was not necessary to adequately compensate the plaintiffs or to punish and deter the defendants. (*Id.*)

Plaintiffs assert that the trial court's decision contravenes *Schwartz*, where this Court held that the discretion to award treble damages under the CPL "should not be closely constrained by the common-law requirements associated with the award of punitive damages." 932 A.2d at 898. The Court also stated that "courts of original jurisdiction should focus on the presence of intentional or reckless, wrongful conduct" when deciding whether to award treble damages. *Id.* Plaintiffs and their amici take this

language to mean that treble damages were required in this case. (Plaintiffs' Br. at 42-43, 46; Amicus Br. at 9.)

Plaintiffs and their amici flip *Schwartz* on its head. Fundamentally, *Schwartz* champions the exercise of judicial discretion. *See Schwartz*, 932 A.2d at 888, 898 (ruling that trial courts are not required to first establish "outrageous or egregious conduct" before deciding whether treble damages are appropriate). *Schwartz* does not constrain the trial court's discretion or effectively require the imposition of treble damages in every single instance of intentional conduct. To do so would contradict the legislature's decision not to impose mandatory treble damages in any circumstances. Rather, *Schwartz*'s instruction to "focus" on the presence of intentional conduct is a far cry from *requiring* treble damages for all intentional violations of the CPL.

The trial court's calculus was a classic and appropriate exercise of discretion. A finding of intentional conduct does not itself require treble damages where the court rationally considers other factors, such as awards of attorneys' fees and punitive damages, in light of the statute's multiple objectives. *Cf. Presidio*

Components, Inc. v. Am. Tech. Ceramics Corp., 875 F.3d 1369, 1382 (Fed. Cir. 2017) (observing, in the patent law context, that "an award of enhanced damages does not necessarily flow" from a finding of willful infringement and that "[d]iscretion remains with the court" to determine whether treble damages are appropriate in light of the "overall circumstances of the case").

The essence of discretion is being able to choose "between two or more courses of action each of which is thought of as permissible." Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 144 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). The trial court's decision not to award multiple damages, made based on a holistic consideration of all relevant factors, was well within its discretion. The Court should not second-guess that outcome.

III. A judicially imposed mandatory treble damages rule would have a chilling effect on business and ultimately harm consumers.

Empirical research shows that treble damages, in combination with awards of attorneys' fees and punitive damages, over-incentivize private attorneys general to file lawsuits that

ultimately harm consumers. One study drawing upon consumer protection litigation data between 2000 and 2013 concluded that the "explosion in consumer protection litigation" during that timeframe did little more than "transfer money from firms to trial attorneys, . . . providing minimal benefits in terms of deterring harmful behavior." James C. Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 Antitrust L.J. 947, 947, 969 (2017). The study found that the possibility of winning a combination of attorneys' fees, multiple damages, and punitive damages "changes the litigation calculus" for plaintiffs and their attorneys, encouraging more and more marginal suits that "increase litigation costs for businesses that are ultimately passed on to consumers." *Id.* at 972-74; *see also id.* at 970 ("[I]f private incentives to sue firms for unfair or deceptive acts were insufficient prior to the advent of [state consumer protection statutes], they are excessive today."). Thus, contrary to a core assumption underlying Plaintiffs' position, "more litigation does not necessarily mean more consumer protection." *Id.* at 958.

Another study similarly found that "the typical state [consumer protection act] . . . solves the basic economic problem that [such acts] were intended to address several times over." Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 83. Most state consumer protection acts contain multiple mechanisms (*e.g.*, statutory damages, damage multipliers, and attorneys' fees) geared toward the same objectives, including incentivizing private lawsuits and deterring seller misconduct. While each mechanism might promote these objectives on its own, in the aggregate, "this redundancy in solutions" may have the effect of over-deterring businesses and harming consumers through higher prices, less innovation, and lower product quality. *Id.*; Cooper & Shepherd, *supra*, at 974.

In light of these findings, a rule that automatically awards treble damages in every instance of intentional conduct poses a serious risk of over-punishment and over-deterrence, particularly in cases like this one where punitive damages and attorneys' fees have already been awarded. Under such circumstances,

mandatory trebling would increase the number of "professional consumer protection litigators," who are more interested in extracting lucrative settlements than protecting consumers. Cooper & Shepherd, *supra*, at 959. Further, such a rule would promote a piling on of redundant sanctions, which would over-deter in many cases. *See* Butler & Johnston, *supra*, at 83. The end result would be a legal environment that hampers business activity and consequently undermines consumer interests. *See* Henry J. Hauser, Tiffany L. Lee & Thomas G. Krattenmaker, *Antitrust Reformers Should Consider the Consequences of Mandatory Treble Damages: What the Admonition Against Putting New Wine in Old Wineskins Can Teach Us About Antitrust Reform*, 107 Minn. L. Rev. Headnotes 9, 15-18 (2022).

These concerns are especially relevant in Pennsylvania, which is already a relatively inhospitable forum for businesses. In its most recent survey exploring "how fair and reasonable . . . states' liability systems are perceived to be by U.S. businesses," the U.S. Chamber Institute for Legal Reform ranked Pennsylvania 39th. U.S. Chamber Inst. for Legal Reform, *2019*

Lawsuit Climate Survey: Ranking the States 2-3 (2019).[2] In more recent surveys assessing the most business-friendly states, Pennsylvania failed to crack the top twenty. *See* Steve Kaelble, *2022 Top States for Doing Business Provide an Environment for Business Growth*, Area Dev. (Quarter 3, 2022)[3]; CNBC, *America's Top States for Business 2022: The Full Rankings* (July 13, 2022) (ranking Pennsylvania 26th for business friendliness).[4] And in a recent study of the economic waste that results from excessive tort litigation, an economic analysis firm found that Pennsylvania residents pay a "tort tax" of $1,281.12 and lose 162,680 jobs to abusive lawsuits every year. The Perryman Group, *Economic Benefits of Tort Reform: An Assessment of Excessive US Tort Costs and Potential Economic Benefits of Reform* 29, 72 (Dec. 2021).[5]

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[2] Available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/2019_Harris_Poll_State_Lawsuit_Climate_Ranking_the_States.pdf.
[3] Available at https://www.areadevelopment.com/Top-States-for-Doing-Business/q3-2022/top-states-for-doing-business-provide-an-environment-for-business-growth.shtml.
[4] Available at https://www.cnbc.com/2022/07/13/americas-top-states-for-business-2022-the-full-rankings.html.
[5] Available at https://www.perrymangroup.com/media/uploads/report/perryman-economic-benefits-of-tort-reform-02-01-22.pdf.

Against this backdrop, a judicially imposed mandatory treble damages rule would make the business climate in Pennsylvania even worse. Ultimately, the adverse effects of such a policy would not be confined to businesses. Millions of consumers would also suffer—the very people that the CPL is designed to protect.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

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May 24, 2023

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IN THE SUPREME COURT OF PENNSYLVANIA

Earl John Dwyer and Christine Dwyer, husband and wife, Appellants	:	2 WAP 2023
v.	:	
Ameriprise Financial, Inc., Ameriprise Financial Services, Inc., Riversource Life Insurance Company, James E. Anderson, Jr., and Duane Daniels, Appellees	:	

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IN THE SUPREME COURT OF PENNSYLVANIA

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