

No. 07-618

Supreme Court, U.S.
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In The
Supreme Court of the United States

—◆—
GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD., et al.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
**BRIEF FOR THE STATES OF NEW HAMPSHIRE
AND OREGON AS *AMICI CURIAE* IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI**

—◆—
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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred by holding that once a defendant pays a money judgment, the federal courts lose jurisdiction to maintain an injunction precluding the defendant from pursuing litigation in a foreign court to nullify the U.S. judgment.

2. Whether the Eighth Circuit erred by giving dispositive weight to concerns about international comity at the expense of the courts' traditional duty to enforce U.S. law on U.S. soil and protect final judgments from relitigation.

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**BRIEF FOR THE STATES OF
NEW HAMPSHIRE AND OREGON AS
AMICI CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

This brief is filed on behalf of the States of New Hampshire and Oregon as *amici curiae* in support of the petition for writ of certiorari in the above-captioned matter.¹



INTEREST OF THE *AMICI CURIAE*

The *amici* states enforce antitrust and consumer fraud statutes to protect their citizens. Many of these statutes have multiple damage components to discourage potential violations. A number of the statutes also have “private attorneys general” provisions, which permit private actions and create a further disincentive for violation of antitrust and consumer fraud laws. The threat of private enforcement, together with the bite of multiple damages, dissuades foreign entities from practices that hurt the public in the *amici* states. Federal antitrust and consumer fraud laws likewise discourage foreign companies from engaging in behavior that is directly detrimental to the states’ economies and consumers. The decision below eviscerates the deterrent effect of these federal

¹ Counsel of record for all parties received timely notice at least 10 days prior to the due date of the *amici curiae*’s intention to file this brief.

and state statutes by leaving the door open to foreign companies to claw back any judgments rendered under such statutes. Thus, the decision poses a grave threat to the health of the economy and to protections granted to consumers of the *amici* states. Neither the spirit nor the letter of U.S. law allows culpable companies (foreign or otherwise) found to be actively violating U.S. law to escape liability for their actions through a foreign “clawback” statute, or otherwise.

Amicus State of New Hampshire has an interest in the outcome of this case for an additional reason. During the pendency of the underlying case, the petitioner’s predecessor was forced into bankruptcy and shut down all of its facilities in the United States; since then, Goss International Corporation (“Goss”) has been able to once again maintain a U.S. manufacturing facility – in New Hampshire. In accordance with congressional intent, which Congress expressed by leaving the judgment in this case untouched when Congress repealed the underlying statute to conform to WTO requirements, Goss should retain the judgment and have the funds available to rebuild Goss’ domestic manufacturing capacity, which employs New Hampshire residents.

In addition, each of the *amici* states are responsible for citizens who face the day-to-day consequences of losing jobs or investments due to dishonest business schemes. As such, the *amici* states have a direct interest in maintaining the integrity of the domestic markets for consumers – an integrity threatened by the lower court’s decision. Simply put,

foreign corporations should not be able to escape the penalties U.S. and state courts assign them. The *amici* states urge the Court to grant certiorari and reverse the court's decision below.

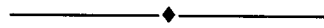
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SUMMARY OF THE ARGUMENT

The *amici* states make two principal points. First, the *amici* states demonstrate that culpable parties will be improperly shielded from liability if the decision below stands. Such culpable parties include foreign corporations, such as the Respondents, who did business in the United States, intentionally violated U.S. law, and made millions of dollars in ill-gained profits at the expense of U.S. entities and ultimately consumers. Under the decision below, foreign corporations have the ability to violate U.S. law and avoid judgment for such violations by recovering awards under foreign clawback statutes. The *amici* states oppose a rule that would allow defendants to escape liability, avoid payment of treble damages, and retain ill-gained profits. Culpable parties of all types must be deterred for the markets to function properly. Without the deterrence that antitrust and consumer protection laws provide, citizens of the *amici* states and state economies are vulnerable to unscrupulous business practices by foreign corporations.

Second, the ramifications of the decision below are far reaching, and will undermine antitrust and

consumer protection laws. Without the sanction of treble damages, the integrity and competitiveness of the markets is jeopardized. The deterrent effect of domestic damage statutes is lost on foreign corporations if they believe they might avoid such damages through a foreign clawback action. Domestic businesses, on the other hand, must still abide by consumer protection laws or face the penalty. This places U.S. companies at a disadvantage.



ARGUMENT

I. U.S. COURTS MUST BE ABLE TO REQUIRE COMPANIES THAT DO BUSINESS IN THE UNITED STATES TO FOLLOW U.S. LAW.

A. Foreign Clawback Statutes Allow Foreign Companies to Escape U.S. Law.

This case presents issues of exceptional economic importance to the *amici* states. If, as the court below held, U.S. courts are unable to prevent foreign companies from recouping satisfied judgments through foreign clawback actions, foreign companies will have an increased incentive to violate domestic laws. In the decision below, the Respondents successfully argued that the court could not enjoin the Respondents from filing a “clawback” suit in Japan seeking the damages that the court awarded on a jury verdict for the Petitioner, Goss. The jury found the Respondents violated U.S. law by “dumping” millions of

dollars of equipment on the U.S. market with the intention of destroying or injuring Goss. The Respondents sued Goss in Japan for about \$38 million, representing exactly what the trial court awarded to Goss in this case including the \$31,619,847 damage award and the attorneys' fee awards. If this Court does not revisit the lower court's decision, the Respondents, who are demonstrably culpable parties, will be improperly shielded from liability. If the lower court's decision is not reversed, foreign corporations will have the ability to violate U.S. law and avoid judgment for such violations by recovering awards under foreign clawback statutes. The *amici* states oppose a rule that would allow defendants to escape liability, avoid payment of damages and retain these profits. Without the deterrence that antitrust and consumer protection laws provide, citizens of the *amici* states and their domestic economies are vulnerable to unscrupulous business practices.

Unfortunately, Japan is not alone in enacting a clawback statute. In fact, double or treble damage judgments have become the focal point for foreign clawback statutes, which permit foreign defendants to avoid domestic damage awards. For example, Britain's Protection of Trading Interest Act permits recovery of the multiple damages portions of any U.S. judgment, not just antitrust judgments. *See* Protection of Trading Interests Act, 1980, c. 11, § 6 (U.K.). Australia has a clawback statute that permits recoupment of both the actual damages and the treble damages of any U.S. antitrust judgment. *See* Foreign

Proceedings (Excess of Jurisdiction) Act, 1984, No. 3, § 10 (Austl.). Similarly, the European Union has enacted clawback statutes aimed at U.S. judgments under the Helms-Burton Act or the Iran and Libya Sanctions Act. *See* Council Regulation 2271/96, art. 6, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, 1996 O.J. (L309) 39 (EC).

B. The Eighth Circuit Allows Foreign Corporations to Avoid the Multiple Damage Statutes that Congress and the *Amici* States' Legislatures Enacted to Protect the Public.

It is precisely the enforcement of double or treble damage judgments that is of critical importance to the *amici* states. State legislatures enact these statutes specifically in areas of heightened importance to the *amici* states, such as the protection of the states' economies or their consumers' welfare. For example, the New Hampshire legislature authorizes double to treble damages for willful violations of the state's antitrust laws. *See* N.H. Rev. Stat. Ann. § 356:11. Likewise, the New Hampshire legislature has long required double to treble damages for willful violations of its consumer protection laws. *See* N.H. Rev. Stat. Ann. § 358:A-10. Other areas deemed to be critical to the state's interest are also subject to multiple damages. For example, the legislature authorized treble damages for certain violations of the state's environmental laws. *See* N.H. Rev. Stat.

Ann. § 147:58. The federal antitrust laws similarly provide important protections for the economies of the *amici* states by imposing treble damage awards for violations.

In addition, Congress and the *amici* states' legislatures have created private causes of action to ensure enforcement of most of the statutes involving multiple damages. For example, both New Hampshire's antitrust and consumer protection statutes call for private enforcement. *See* N.H. Rev. Stat. Ann. §§ 356:11, 358-A:10. The Clayton Act also gives a private cause of action to all those injured by violations of the federal antitrust laws. 15 U.S.C. § 26. The legislatures have increased the likelihood that a violator will be held liable for violating one of these important statutes by authorizing private parties, as well as the governments, to pursue violations. *See* Kevin S. Marshall, *The Economics of Competitive Injury*, 45 Brandeis L.J. 345, 345 (2007); *see also* 1 Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 3.03(b), at 3-31 (3d ed. 2006); Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 Loy. Consumer L. Rev. 303, 310-311 (2004). By permitting a defendant held liable under these laws to evade the damage awards, the lower court removes the deterrent force of these statutes.²

² As a practical matter, the foreign defendant's ability to unwind the judgment is largely dependent upon the plaintiff
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The lower court's decision also unintentionally creates an inappropriate distinction between domestic and foreign companies. The deterrent effect of domestic damage statutes applies with full force to domestic businesses. They must still abide by anti-trust and consumer protection laws, or face the penalty. Foreign entities, however, may be able to seek relief in their home, or other foreign, jurisdictions. By creating a greater incentive for domestic companies to obey antitrust and consumer protection laws than foreign companies, the lower court's decision places domestic companies at a disadvantage.

having assets in a foreign jurisdiction, either the one in which the clawback action would be filed or another that would recognize the clawback judgment. That a private plaintiff would have assets abroad, however, is quite likely in today's international economy. See, e.g., Laura Bloodgood, *Inbound and Outbound U.S. Direct Investment with Leading Partner Countries*, United States International Trade Commission Journal of International Commerce and Economics, at 1 (Jun. 2007) (in 2005, the United States direct investment abroad was \$2.1 trillion; for years 2000-2005, annual growth of United States direct investment abroad has grown 9% annually); Marcella Meirelles Aurelio, *Going Global: The Pattern of U.S. Investment Abroad*, Economic Review, at 5 (3d Quarter 2006) ("the share of U.S. investments allocated to foreign assets . . . [was] 89 percent in 2005"). Even the *amici* states have funds invested where they may come under the jurisdiction of a foreign country's courts. See, e.g., New Hampshire Center for Public Policy Studies, *Public Pension Predicament: New Hampshire's Retirement System*, at 11-12 (September 2007) (in 2006, the New Hampshire Retirement System holdings included 16% non-domestic common stock and 4% non-domestic fixed income holdings).

C. The Enforcement of Damage Awards Protects the Economy and Consumer Welfare.

Multiple damages awards protect the economy and the consumer by ensuring the violator does not profit from violations of antitrust or consumer protection laws and by deterring would-be violators. If a would-be violator does not face liability in some multiple of the harm that the would-be violator contemplates causing, the would-be violator may determine that the violation, even if detected, is economically advantageous. Faced with potential liability for a multiple of the actual damages caused, however, the would-be violator is less likely to view a violation as economically advantageous. Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 *Geo. L.J.* 1001, 1033 (April 1986) (“If measured damages understate the total injury, potential violators will be underdeterred.”).

Further, despite the vigilance of the Attorneys General and interested parties, not all violations are discovered and result in liability. Thus, the penalty must have an added “bite” to deter would-be violators from playing the averages. See Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, 1043-46 (West 2002) (“Unless the damages multiple is increased . . . , the level of deterrence will be reduced.”); Richard Posner, *Economic Analysis of Law* § 7.2, at 223-30 (4th ed. 1992) (treble

damages are necessary to counteract the possibility of escaping detection); Salop & White, *supra*, at 1033 (“[E]ven if defendants were liable for all the harms their conduct caused, they would discount their future liability accordingly if they perceived that they would be sued only ten percent of the time. The result would be underdeterrence of violators.”).

Moreover, the *amici* states recognize the need to compensate victims of such schemes. Here, the trial court found that the Respondents intentionally and illegally caused harm to a U.S. company that had to close its U.S. manufacturing facilities. Under the appellate court’s ruling, Goss would not be able to retain the damages awarded for the Respondents’ wrongful actions and, instead, Goss faces paying “back” the Respondents millions of dollars. In this situation, not only does the victim lose its recovery, but individual citizens pay the price as well when U.S. corporations cannot rebuild after being harmed by illegal activity.

II. A DOMESTIC COURT MUST BE ABLE TO PREVENT THE PARTIES BEFORE IT FROM UNDERMINING ITS JUDGMENT.

The decision below also attacks the finality of judgments. Litigants should be bound by a court’s decision after they have had a full chance to present their case and have exhausted their appeal rights, as the Respondents did in this case. That disputes have a definite end is imperative to the rule of law. *See*

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (“[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled between the parties . . .”) (quoting *Baldwin v. Iowa State Traveling Men’s Ass’n*, 283 U.S. 522, 525-526 (1931)). Twenty-five years ago, this Court reiterated the long-standing, universal need for the entire dispute between two parties to end when final judgment issues:

what we said with respect to this doctrine more than eighty years ago is still true today; it ensures “the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.” *Southern Pacific Railroad v. United States*, 168 U.S. 1, 49 (1897).

Nevada v. United States, 463 U.S. 110, 129 (1983).

Yet, under the decision below, a foreign company may continue to litigate a case in a foreign jurisdiction, even after submitting to the final judgment of the U.S. court, and the court is powerless to stop the company. Without the ability to order a litigant not to

attack a final judgment, the court's status as the final arbiter of disputes is eviscerated. A U.S. litigant will always be uncertain as to whether a final judgment means litigation with a foreign corporation has come to an end, or even if a final judgment has any meaning.



CONCLUSION

For the forgoing reasons, the *amici* states request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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