STATE OF NEW YORK
COURT OF APPEALS

PAUL SPERRY, individually and on behalf of all others similarly situated,

Plaintiff-Appellant

- against -

CROMPTON CORPORATION, UNIROYAL CHEMICAL COMPANY, INC., UNIROYAL CHEMICAL COMPANY LIMITED, FLEXSYS NV, FLEXSYS AMERICA LP, BAYER AG, BAYER CORPORATION, RHEIN CHEMIE RHEINAU GMBH, AND RHEIN CHEMIE CORPORATION,

Defendants-Respondents.

BRIEF OF STATE OF NEW YORK AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFF-APPELLANT PAUL SPERRY

ELIOT SPITZER
Attorney General of the
State of New York
120 Broadway
New York, NY 10271
(212)416-8025

Dated: November 20, 2006

CAITLIN J. HALLIGAN
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

JAY L. HIMES
Bureau Chief, Antitrust Bureau

DANIEL CHEPAITIS
Assistant Solicitor General

SARAH HUBBARD
Assistant Attorney General

of Counsel

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MISCELLANEOUS

PRELIMINARY STATEMENT

This action arises from the alleged price-fixing by Defendants-Appellants of raw materials used to produce rubber. In the ruling below, the Second Department held, first, that the plaintiff, a consumer, could not sue on behalf of a class under state antitrust law because CPLR 901(b), which bars class actions to recover "penalties," applies to a private action seeking treble damages. The Second Department further held that Plaintiff's unjust enrichment claim was legally insufficient because it failed to allege privity with Defendants. The State of New York, as amicus curiae, urges this Court to reverse both holdings below.

The CPLR 901(b) question turns on whether the treble damages award available under General Business Law ("GBL") § 340(5) is a "penalty." This is a question of legislative intent. CPLR 901(b) does not define the term "penalty." As we demonstrate below, though, other clear indicia of legislative intent establish that a treble damages award under GBL § 340(5) is not a "penalty" as the Legislature uses that term, both in the State's antitrust law, the Donnelly Act, and in legislation generally.

In summary, in the Donnelly Act, the Legislature identified the right of action authorized by GBL § 340(5) as one "to recover damages" caused by an antitrust violation, with the award to be "three-fold the actual damages sustained." GBL § 340(5). By contrast, the Legislature expressly identified as "penalties" other recoveries to which an antitrust violator may be subject. GBL §§ 341, 342-a. This distinction between treble damages and "penalties" in the antitrust law reflects the Legislature's use of the term "penalty" generally. As used by the Legislature, the term refers to monetary awards that are unrelated to or independent of any proven loss. The Legislature ordinarily does not use the term "penalty" to refer to awards that, like the treble damages recovery at issue here, are multiples of a proven loss sustained by the victim. See Bogartz v. Astor, 293 N.Y. 563 (1944) (Legislature made clear that double damages award was not a penalty); Cox v. Lykes Bros., 237 N.Y. 376 (1924) (same). In reaching a contrary conclusion, the Second Department -- and the First Department in decisions on which the Second Department relied -- simply ignored the critical inquiry into legislative intent.

On the unjust enrichment question, the Second Department's Opinion is inconsistent with a long line of cases upholding unjust enrichment claims where no privity exists. A plaintiff suing for unjust enrichment must show only that: (a) the defendant has received a benefit; (b) the benefit was at the plaintiff's expense; and (c) the defendant's retention of the benefit would be inequitable under the circumstances of the particular case. Privity is not a necessary element.

To be sure, as decisions on which the Second Department relied reflect, in a subset of unjust enrichment cases, the existence or absence of privity may be a factor that assists in deciding whether it would be inequitable for the defendant to retain the benefit. For example, a recurring fact pattern concerns a plaintiff who, having relied on one person's promise to pay for goods or services, sues another individual who received the goods or services when payment was not forthcoming. On these facts, some courts have rejected the unjust enrichment claim, absent privity between the plaintiff and the recipient. But the rationale is that such claims are contract claims dressed up as unjust enrichment claims, and that contract law defines the limits of obligations arising out of promises.

Here, however, Plaintiff and other consumers bears the economic impact the overcharge that the Defendants' illegal price-fixing created. Plaintiff's unjust enrichment claim thus seeks to deny Defendants the fruits of their unlawful conspiracy. Plainly, it would be inequitable to allow Defendants to retain the benefits of their own wrongdoing. The precedents invoked by the Second Department have no bearing on this unjust enrichment claim because Plaintiff here is not arguing that the inequity arises from a breach of pseudo-contractual promise.

INTEREST OF AMICUS CURIAE STATE OF NEW YORK

The Donnelly Act, GBL § 340 et seq., grants the Attorney General, as the State's chief law enforcer, unique and broad investigative and enforcement powers in antitrust matters. The

Attorney General is authorized: (a) to conduct investigations of, and issue subpoenas related to, possible antitrust violations, GBL § 343; (b) to prosecute antitrust violators criminally, GBL § 341; (c) to seek civil penalties from antitrust violators, as well as equitable relief, GBL §§ 342, 342-a; and (d) to represent government entities in actions to recover damages from antitrust violators, GBL § 342-b. Furthermore, the Attorney General, acting in parens patriae, may bring an action to recover damages for injuries inflicted on members of the public.

The power of private parties to bring actions to recover treble damages pursuant to GBL § 340(5) is also an essential component of the enforcement scheme enacted by the Legislature. In enacting GBL § 340(5), the Legislature recognized that preservation of competition cannot depend solely on actions brought by the Attorney General. Adequate antitrust enforcement depends in an important respect on the local knowledge of private parties who, in the course of their economic activities, are injured by anticompetitive conduct, and on the incentives such parties have to seek recovery of their losses. Because private party losses in antitrust cases are often significant in the aggregate, but individually quite small, permitting private class actions is essential to enable private parties to serve their statutory role as private attorneys general. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (citation and internal quotation marks omitted)).

The Attorney General also has a direct interest in reversal of the Second Department's erroneous ruling that a claim for unjust enrichment can be maintained only between parties in privity. In actions brought in its parens patriae capacity for the benefit of consumers, the Attorney General has alleged unjust enrichment as a basis for securing relief for injury from anticompetitive conduct. Typically, these actions arise in circumstances where the individual consumer has not dealt directly with the price-fixer or other wrongdoer. See, e.g., In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 669-71 (E.D. Mich. 2000) (rejecting arguments that either privity or a directly conferred benefit is necessary under New York or other states' laws) ("Cardizem").

The Second Department's ruling would arbitrarily foreclose unjust enrichment claims in these cases. See In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 401 (3d Cir. 2000) (end-user consumers, not middle-men, are usually the real target of the wrongful conduct); Daniel R. Karon, Undoing the Otherwise Perfect Crime – Applying Unjust Enrichment to Consumer Price-Fixing Claims, 108 W. Va. L. Rev. 395, 428 (2005) ("consumers are always squarely in price fixers' sites as their ultimate victims, without whose end-use purchases price fixers' conspiracies are pointless").

ARGUMENT

POINT I

AN ACTION BROUGHT PURSUANT TO GBL § 340, WHICH THE LEGISLATURE EXPLICITLY DENOMINATED AN "ACTION TO RECOVER DAMAGES," IS NOT AN "ACTION TO RECOVER A PENALTY" WITHIN THE MEANING OF CPLR 901(B)

CPLR 901(b) provides that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute[,] may not be maintained as a class action," absent express legislative authorization. The issue presented here is whether private actions to recover treble damages for violations of the State's antitrust laws, which are brought pursuant to GBL § 340, are actions for "penalt[ies]," thus barring plaintiffs from bringing such actions as class actions. GBL § 340(5) authorizes an "action to recover damages," specifically providing that "[t]he state . . . or any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby."

In holding that the "action to recover damages" authorized by GBL § 340(5) is an "action to recover a penalty" within the meaning of CPLR 901(b), the Second Department adopted, without significant additional analysis, the conclusions reached in earlier decisions of the First Department.[1] But the First Department decisions are erroneous: They ignored longstanding precedent of this Court instructing courts to look to legislative intent in making such a determination. They ignored the Legislature's identification of a GBL § 340 action as an "action to recover damages" (GBL §§ 340 & 342-b), in clear contrast to the antitrust remedies available under GBL §§ 341 and 342-a, which the Legislature identified as "penalt[ies]." They ignored the Legislature's general usage of the term "penalty" to refer to a narrow class of awards that are calculated independent of proven loss. They ignored prior precedent of this Court holding that similar multiple or exemplary damages awards, recoverable by an injured party, are not "penalt[ies]." And, finally, they adopted a test for whether an award is a "penalty" that is not only wholly divorced from legislative intent, but also fundamentally unworkable. This Court should reverse.

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[1] See Cox v. Microsoft Corp., 290 A.D.2d 206 (1st Dep't 2002); Asher v. Abbott Labs., 290 A.D.2d 208 (1st Dep't 2002); see also Paltre v. Gen. Motors Corp., 26 A.D.3d 481 (2d Dep't 2006) (following Cox and Asher); Cunningham v. Bayer AG, 24 A.D.3d 216 (1st Dep't 2005) (following Cox and Asher without opinion).

A. The Appellate Division's Treatment Of The Treble Damages Recovery Available Under GBL § 340 As A Penalty Is Contrary To Legislative Intent.

1. Clear legislative intent is controlling.

CPLR 901(b) does not define the term "penalty." This Court's decisions therefore teach that the first place to look in determining whether the monetary award at issue is a "penalty" is the text of the Act that created the award, here, the Donnelly Act. See Matter of Sackolwitz v. Hamburg & Co., Inc., 295 N.Y. 264, 267 (1946); Bogartz v. Astor, 293 N.Y. 563 (1944); Cox v. Lykes Bros., 237 N.Y. 376 (1924) (Cardozo, J.); see also Pruitt v. Rockefeller Center Properties, Inc., 167 A.D.2d 14, 27 (1st Dep't 1991) ("In determining whether a statute imposes a penalty, courts look primarily to the statute's description of the recovery it authorizes.").

Where an Act that authorizes a particular remedy clearly indicates the Legislature's intent with regard to the question whether a monetary award is to be classified as a penalty, that evidence of intent is decisive. Thus, in Cox v. Lykes Bros., this Court confronted the question whether a seaman's federal cause of action to recover double damages for wages improperly withheld was an action for a "penalty," and thus exclusively within the jurisdiction of the federal courts. The Appellate Division had concluded that, by authorizing an award of double damages, the statute "in effect" created a "penalty," finding it significant that a purpose of the double damages award was to "prevent the abuse of withholding [sic] their pay," i.e., deterrence. Cox v. Lykes Bros., 204 A.D. 442, 443 (1923). This Court reversed, noting that the statute in question "expressly said" that the remedy "'shall be recoverable as wages,'" and holding that this "would seem decisive, without more, that . . . it is not to be classified as a penalty." 237 N.Y. at 379.

Later decisions make clear that an express legislative determination regarding the nature of a recovery is decisive. In Bogartz v. Astor, 293 N.Y. 563, 565 (1944), this Court reversed a lower court decision that had held that an employee's entitlement to double damages for injuries in the workplace was "in the nature of penalty." Looking to the language of the statute, this Court held that the statutory provision at issue "says nothing of that kind," but instead "speaks of 'double compensation' and 'increased compensation.'" Id. Thus, the Legislature had made it clear that "the extra payment . . . cannot be conceived as . . . anything essentially different from the other monetary benefits secured by the statute to workmen." Id. at 566; accord Matter of Sackolwitz, 295 N.Y. at 267 (multiple damages award under worker's compensation law was, "as the statute itself calls it, 'increased compensation,'" and "not a penalty").

2. **The Legislature identified a GBL § 340 action as "an action to recover damages," in direct contrast to other antitrust enforcement proceedings, which the legislature pointedly identified as proceedings to recover "penalties."**

In the Donnelly Act, as in the statutes at issue in Cox v. Lykes Bros. and Bogartz, the Legislature left no room for doubt that the treble damages recovery afforded by GBL § 340 was not to be classified as a "penalty." Indeed, the Legislature could not have been clearer in specifying which of the remedies that it afforded for antitrust violations are to be classified as "penalties," and which are not. It explicitly specified that the awards available under GBL sections 341 and 342-a are "penalties." By contrast, it used the term "damages" in describing the treble damages recovery available under GBL sections 340 and 342-b. See Matter of Charter Dev. Co. v. City of Buffalo, 6 N.Y.3d 578, 581 (2006) (noting that "'all parts of an act are to be read and construed together to determine the legislative intent'") (quoting Statutes § 97, 1 McKinney's Cons. Laws of N.Y. at 211 (1971)).

Specifically, in the Donnelly Act, the Legislature identified two forms of monetary award that an antitrust violator may have to pay as "penalt[ies]." First, in GBL § 341, entitled "Penalty," the Legislature specified that those convicted of violating the state's antitrust laws are guilty of a felony, and may "be punished by a fine not exceeding one hundred thousand dollars, or by imprisonment . . . , or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding one million dollars." Second, GBL § 342-a, entitled "[r]ecovery of civil penalty by attorney-general," authorizes the Attorney General to "bring an action in the name and in behalf of the people of the state . . . to recover a penalty in the sum specified in [GBL § 341]."

These two penalty provisions are sandwiched between two provisions, GBL § 340 itself and GBL § 342-b, that refer to the recoveries they afford as "damages," not "penalties." <u>See</u> GBL § 340(5); GBL § 342-b. Thus, GBL § 340(5), which authorizes a civil action for antitrust damages, expressly identifies the treble damages action it authorizes as an "action to recover damages." GBL § 340(5). Then, evidencing equally pointed care in the terms it employs, GBL § 342-b, entitled "[r]ecovery of damages by attorney general," grants the Attorney General authority to bring an action under GBL § 340 on behalf of injured public authorities or subdivisions of the state, and again specifies that such an action is an "action . . . to recover damages." GBL § 342-b.

The contrast that the Legislature drew in the Donnelly Act between the "action to recover damages" authorized by GBL §§ 340 and 342-b and the proceedings and actions to recover "penalties" authorized by GBL §§ 341 and 342-a is clearly not accidental. In a number of similar instances, the Legislature has authorized more than one type of monetary award for the same wrongful conduct, and in so doing, has contrasted treble damages awards, not identified as "penalties," with awards that it specifically identifies as "penalties." See, e.g., GBL § 23 (illegal practices of automobile auctioneers); GBL §§ 349, 349-c, 350-d (consumer fraud); GBL § 399-p (prohibited telemarketing practices); GBL § 399-v (prohibited parking facility practices); GBL §§ 609 & 610 (unlawful detention of goods); GBL § 640 (illegal target marketing practices); GBL § 660 (illegal membership campground practices); GBL § 734 (violation of warranty requirements); Gen. Oblig. Law § 5-531 (illegal brokerage practices); Lien Law § 182 (violation of storage facility requirements); Veh. & Traf. Law § 417-a (violation of used car sales requirements); Veh. & Traf. Law § 417-b (same).

In the Donnelly Act, as in these analogous laws, the Legislature's avoidance of the term "penalty" in referring to the treble damages awards, and its use of the term "penalty" to describe other forms of award available for the same wrong, demonstrates that the Legislature does not consider such treble damages awards to be "penalties." See Statutes § 231, 1 McKinney's Cons. Laws of N.Y. at 388 (1971) ("it is a general rule that every part of an act is to receive some consideration in determining its meaning").[2]

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[2] The Cox v. Microsoft court mistakenly interpreted Section 342-b as specially authorizing the Attorney General to (continued...)

3. The Legislature's general use of the term "penalty" to refer only to sanctions available without regard to proven loss confirms that the treble damages recovery of GBL § 340 is not a penalty.

While the Legislature's use of the term "penalty" in the provisions of the Donnelly Act are the best evidence – and here are conclusive evidence – that it did not intend GBL § 340's treble damages recovery to be treated as a "penalty," a broader review of the Legislature's use of the term is instructive and

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[2] (...continued)
maintain class actions for antitrust injuries, and it relied on this interpretation to support its conclusion that the Legislature views treble damages as a "penalty" that ordinarily may not be sought in a class action. See 290 A.D.2d at 206. To the contrary, the Attorney General's authority to bring an antitrust class action exists independent of Section 342-b. See, e.g., Harper & Row Publishers, Inc ., 301 F. Supp. 484 (N.D. Ill. 1969) (before language related to class actions was added to § 342-b, certifying New York and other states as class representatives). Section 342-b was enacted in 1969 merely to confirm the Attorney General's authority to prosecute antitrust actions on behalf of state and local governments generally, regardless of whether the case was brought as an individual action or as a class action. See L. 1969, c. 635, § 1. The 1975 amendment, the only part of the law to refer to class actions, was intended to assure that, if the case were in fact brought as a class action, government entities will have an opportunity to opt out. L. 1975, c. 420, § 1. See Bill Jacket, L. 1975, c. 420, Memo. Hon. Louis J. Lefkowitz, dated June 23, 1975 ("The new sentence provides that in any class action brought by the Attorney General on behalf of subordinate government entities," those entities not opting out "shall be deemed to have requested to be treated as a class member in that action. This will bring the authority expressly granted to the Attorney General under state law into conformity with those powers he has traditionally been permitted to exercise under the provisions of the Federal Rules of Civil Procedure"). Section 342-b thus assumes a right to bring a class action.

confirms that GBL § 340's treble damages recovery is not, under ordinary legislative usage, a "penalty." In Sicolo v. Prudential Savings Bank, 5 N.Y.2d 254, 258 (1959), this Court wrote that "penalties" are "arbitrary exactions, unrelated to actual loss." As Sicolo recognized, what the Legislature ordinarily means by the term "penalty" is an award that is independent or unrelated to any proven loss -- which, for sake of brevity, this brief will refer to as a "loss-independent award." As discussed below, this Court has followed precisely this ordinary legislative usage of the term to bolster its reading of specific legislative intent or in deciding cases where no specific legislative intent is to be found.

a. Ordinary legislative usage.

The Legislature uses the term "penalty" literally hundreds if not thousands of times in the Laws of the State, often in referring to specifically defined forms of monetary award. In understanding what the Legislature means when it uses the term "penalty," it is useful to examine this extensive usage. This review shows that, with respect to civil monetary awards,[3] the Legislature ordinarily uses the term only to identify loss-independent awards; it ordinarily does not use the term to refer

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[3] Obviously, the term "penalty" also is commonly used to refer to a variety of non-monetary sanctions, such as criminal confinement. See, e.g., GBL § 341.

to civil damages of any form, so long as such damages are incidental to a proven loss.

This is made explicit in the Donnelly Act and other provisions that contrast treble damages awards with other awards identified as "penalties." Unlike the treble damages awards, the award that the Legislature identifies as a "penalty" is independent of any proven loss. See, e.g., GBL § 23(9)&(10) (in private action, court may award treble damages; in action by attorney general, court may award "penalty" of up to $1,000); GBL §§ 349(h), 349-c & 350-d (injured consumers entitled to treble damages; attorney general entitled to "penalty" of up to $500 for false advertising or "penalty" of up to $10,000 for defrauding elderly).[4] Statutory provisions contrasting penalties with other forms of recovery confirm that the Legislature ordinarily reserves the term "penalty" for loss-independent awards.[5]

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[4] See also GBL § 399-p (injured party has action for up to treble damages; attorney general entitled to "penalty" of up to $2,000); GBL § 399-v (injured party entitled to up to treble damages; wrongdoer may be assessed "penalty" of up to $150); GBL §§ 609 & 610 (injured party entitled to up to treble damages; attorney general may obtain "penalty" of up to $1,000); GBL § 640 (injured party entitled to up to treble damages; attorney general may obtain "penalty" of up to $500); GBL § 660 (injured party entitled to up to treble damages; court may assess "penalty" of up to $500); GBL § 734 (injured party entitled to award up to treble damages; attorney general may obtain "penalty" of up to $1,000); Gen. Oblig. Law § 5-531 (same); Lien Law § 182 (same); Veh. & Traf. Law § 417-a (same); Veh. & Traf. Law § 417-b (same).

[5] See, e.g., Arts & Cult. Aff. §§ 60.05 & 60.06 (contrasting damages and "penalty" up to $1,000); Educ. Law § 5003 (contrasting "penalties" of up to $2,500 for first
(continued...)

Additionally, numerous other statutory provisions, although not explicitly contrasting penalties with other forms of recovery, identify loss-independent awards as "penalties," confirming that the Legislature ordinarily reserves the term "penalty" for such awards.[6]

The independence of the award from any proven loss is a defining characteristic of "penalties," which otherwise are quite diverse. So, for example, "penalties" generally are awarded to

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5 (...continued) violations and $5000 for subsequent violations with "administrative sanctions" and "damages"); GBL § 772 (authorizing award both of damages and "penalty" of $500); GBL § 862 (authorizing award of damages and "penalty" of $250).

6 See, e.g., Educ. Law § 213-b ("penalty" of up to $1,000); Educ. Law § 5003 ("penalty" of up to $2,500 for first violation or $5,000 for subsequent violation); E.C.L. § 71-0703 (criminal "penalty" of up to $250 and civil "penalty" of $10 to $100 or, in case of specific types of violations, specified dollar amounts); E.C.L. § 71-0925 ("penalty" in specific dollar amount, depending on type of violation); Exec. Law § 297 ("penalty" of up to $50,000 or $100,000, depending on type of violation); GBL § 33 ("penalty" of $10); GBL § 899-o ("penalty" of up to $25,000); GBL § 899-aa ("penalty" of $10 per violation or up to aggregate of $5,000). The Legislature, when authorizing "penalties," sometimes provides for formulas that are not as simple as a fixed or maximum amount. But the critical point is that the award amount is independent of proven loss. For example, where persons use electricity or gas with knowledge that the meter is not properly monitoring the use, Pub. Serv. Law § 65 authorizes a court to award utilities a civil penalty in an amount a court deems "just and reasonable," not to exceed three times the retail value of the electricity or gas used. Notably, three times the retail value of the electricity or gas used is not a measure of, or necessarily even related to, any proven loss. The utility is not required to show that the user failed to pay for all or any of the electricity or gas used; all that must be shown is that the user knew that the meter was not working properly.

government officials or entities on behalf of the people of the State, its subdivisions, or its agencies. See, e.g., Educ. Law § 213-b (in action by attorney general for illegal sale of dissertations, theses, and term papers, penalty forfeited to people of State). In some of the State's laws, though, "penalties" are recoverable by private parties. See, e.g., GBL § 21 (auctioneers who charge commissions higher than that permitted by law forfeit "penalty" to each person from whom the auctioneer demands an excessive commission). But what makes the award a "penalty" in both cases — whether recovered by the government or by private parties — is the fact that the "penalty" is received without regard to any proven loss. See, e.g., CPLR 7003(c) (judges wrongfully denying writ of habeas corpus forfeit $1,000 penalty to wrongfully detained person).[7]

[7] See also Exec. Law § 297 (housing supplier forfeits "penalty" up to $50,000 to persons claiming to be aggrieved by housing discrimination, in addition to damages); GBL § 21 (auctioneers who charge commissions higher than that permitted by law forfeit "penalty" of $250 to each person from whom the auctioneer demands or obtains an excessive commission); GBL § 206 (hotels forfeit a "penalty" of three times the amount charged to guests not advised of daily rates); GBL § 271 (agent or owner of milk cans may recover "penalty" of $50 from persons illegally possessing or using them); GBL § 284 (common carriers improperly caring for unclaimed luggage forfeit $ 5 "penalty" to luggage owners for each violation); GBL § 390 (persons falsely representing that oil supplied is trademarked oil forfeits $100 "penalty" to manufacturer of trademarked oil); High. Law § 324 (person cutting down trees on land occupied by another forfeits $1 "penalty" per tree per day the tree is not removed); Ins. Law § 2123 (in addition to damages actions, seller of insurance forfeits "penalty" in amount of compensation or commission to person induced to purchase policy in violation
(continued...)

b. This Court's Precedent.

This ordinary legislative usage is reflected in this Court's case law. Where the Legislature has not given an express direction on whether a recovery is to be treated as a "penalty," this Court has adopted the same meaning ordinarily given to the term by the Legislature, using it to denote loss-independent awards. Thus, in Sicolo v. Prudential Sav. Bank, 5 N.Y.2d 254 (1959), the Appellate Division, Second Department, had held that a firefighter recovery under General Municipal Law § 205-a, a statute that provided a minimum $1000 recovery when the firefighter proved injury, was a "penalty." This Court reversed. The statute itself did not expressly indicate whether the Legislature intended the recovery as a penalty, as the relevant statutes in Bogartz and Cox did. See Gen. Mun. Law § 205-a. With no express legislative determination to discern, the Court looked to "the intrinsic nature of the exaction" that the Legislature had authorized. 5 N.Y.2d at 258. Reviewing prior case law, the court concluded that "New York courts . . .

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[7] (...continued)
of section 2123); Ins. Law § 4226 (same, with respect to inducements made illegal by section 4226); Not-For-Profit Corp. Law § 1208 (persons withholding property belonging to non-profit corporation in receivership forfeits "penalty" of twice the worth of the property to the receiver); Railroad Law § 59 (railroad that charges excessive fee forfeits $50 "penalty" to passenger, in addition to liability for amount of overcharge); Railroad Law § 60 (railroad that fails to provide required to provide mileage book forfeits $50 penalty to passengers wrongly refused).

regard[] as penalties arbitrary exactions, unrelated to actual loss . . ." Id. at 258 (emphasis added). The three cases cited by Sicolo for this proposition involved "penalties" that were loss-independent awards: a $50 sanction for a testator's failure to write her address next to her signature, Dodge v. Cornelius, 168 N.Y. 242 (1901); a fixed monetary sanction for unauthorized possession of milk cans, Bell v. Gibson, 71 A.D. 472 (2d Dep't 1902); and a sanction of between $20 and $100 for diluting milk, Verona Central Cheese Factory v. Murtaugh, 4 Lans. 17 (N.Y. Ch. 1871). As the Sicolo Court explained, receipt of the sanctions in all the cited cases was "unrelated to actual loss," and thus the awards were penalties. 5 N.Y.2d at 258.

The Court concluded that, in contrast, the fireman's recovery – which only a fireman who could demonstrate injury could obtain – was not a "penalty." Indeed, in explaining which awards are or are not penalties, the Court explicitly adopted the United States Supreme Court's holding that "'where a statute gives accumulative damages to the party grieved, it is not a penal action.'" Id. (quoting Huntington v. Attrill, 146 U.S. 657, 668 (1892)).[8]

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[8] A more difficult case would be presented if there were evidence in an Act that the Legislature intended to deviate from its ordinary usage. While our review of the Laws of this State shows that the Legislature ordinarily uses the term "penalty" only to refer to loss-independent awards, there may well be instances in which the Legislature has adopted an idiosyncratic usage for purposes of a particular award.

Other decisions of this Court are consistent with the ordinary legislative practice of referring only to loss-independent awards as "penalties." Thus, in Cox v. Lykes Bros., where this Court relied on specific legislative intent in holding that a seaman's double damages award was not a "penalty," it concluded that this specific intent was "fortified" by the fact that the recovery, though not entirely "compensatory," was related to the seaman's proven loss. 237 N.Y. at 379. The Court found further support for its conclusion in the fact that the United States Supreme Court did not consider the antitrust treble damages available under federal law to be a "penalty." Id. at 379-80 ("[i]n harmony with this ruling are decisions of the Supreme Court of the United States, excluding from the class of penalties . . . an action under the anti-trust law for recovery of treble damages") (internal citation omitted). In short, the awards that the Court identified as not being penalties – significantly including antitrust treble damages – were all awards that are related to proven loss.

In sum, an antitrust treble damages award, by definition, is a function of proven loss; it is not a loss-independent award. Whether one looks to ordinary legislative usage or this Court's decisions reflecting that usage, antitrust treble damages do not fall within the ordinary meaning of "penalty."

4. **The text and legislative history of CPLR 901 confirm that the Legislature, in barring class actions to recover "penalties," understood "penalty" in the ordinary sense of a loss-independent award.**

CPLR 901(b) bars class actions to recover statutorily-provided "penalt[ies], or minimum measure of recovery." As discussed above, as used by the Legislature, "penalties" are awards imposed independent of any proven loss. See Alifieris v. Am. Airlines, Inc., 63 N.Y.2d 370, 376 (1984) (A statute's "terms are construed according to their ordinary usage in the context in which they are used."). The legislative history confirms that, in enacting CPLR 901(b), the Legislature used the term "penalty" in the ordinary sense one finds in the laws of the State.

Thus, it was precisely class actions to recover loss-independent awards that those who advocated for CPLR 901(b) sought to prevent. The Banking Law Committee of the New York State Bar argued that "severe statutory penalties unrelated to actual damages," aggregated through the class action mechanism, would create excessive exposure. Bar Association Legislation Report No. 1 (Revised) (1975) ("Banking Committee Report"), at 1, 2, reprinted in Bill Jacket for ch. 207 (1975) (emphasis added). The Banking Law Committee cited the federal Truth in Lending Act ("TILA") to illustrate.

TILA authorizes private parties to recover penalties, in either specific dollar amounts or specific dollar ranges, depending on the particular requirement that has been violated. 15 U.S.C. § 1640(a). Because the specified penalty amount is not a function of any proven loss, the Banking Law Committee complained that "[i]n the typical [TILA] class action . . . not a single penny of actual damages to any consumer is involved . . . The same penalties are assessable and the same liabilities exist, whether the error be substantial or trivial." Banking Committee Report at 1-2. The danger of huge exposure in class actions involving no proven loss by anyone was thought to be particularly grave in New York because "New York statutory law contain[ed] many 'penalty' and similar provisions establishing arbitrary measures of liability for noncompliance." N.Y.S. Bar Association Legislation Report No. 15 (1975), at 2, reprinted in Bill Jacket for ch. 207 (1975) (emphasis added).

Similarly, the Empire State Chamber of Commerce contended that "[p]enalties and class actions simply do not mix. This was proved in Ratner v. Chemical Bank, [54 F.R.D. 412 (S.D.N.Y. 1972)], where the combination caused a potential liability of $130,000,000 although the actual damages to individual plaintiffs were zero!" Memorandum from Sanford H. Bolz in Opposition to A. 1252-A and S. 1309-A (Feb. 14, 1975), at 3, reprinted in Bill Jacket for ch. 209 (1975) (emphasis added). In Ratner, the district court denied class certification of an action under

TILA, precisely because the awards obtainable by class members would be independent of any proven loss. The court explained, "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act." 54 F.R.D. at 416 (emphasis added). By contrast, the Ratner court recognized that antitrust treble damages actions often are appropriate for class action status, because "treble damages are significantly different from $100 recoveries on a huge scale for claimants unlikely to be able to show any actual damages at all." Id. at 416 n.7.

In sum, the concerns that motivated CPLR 901(b)'s enactments were precisely concerns about class actions seeking what the Legislature commonly refers to as a "penalty," that is an award that is entirely independent of proven loss. There is no evidence that CPLR 901(b)'s enactment was intended to sweep more broadly, barring class actions for damages remedies that exceed losses proven in court. To the contrary, supporters of CPLR 901(b) cited case law that expressly distinguished such damage remedies and recognized that such remedies may be sought in a class action.

5. The 1998 amendment to the Donnelly Act confirms that the Legislature intended to allow consumers to bring treble damage class actions under the act.

The 1998 amendment to the Donnelly Act, codified as GBL § 340(6), further confirms that the Legislature understood that treble damages may be sought in a class action.

Section 340(6) – which was enacted more than twenty years after CPLR 901(b) – makes clear that "indirect" purchasers may sue under New York's antitrust law to recover damages caused by price fixing or monopoly overcharges passed on to them - even though the U.S. Supreme Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), bars such persons from suing under federal law. See GBL § 340(6) (the fact that "any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery").

As with the laws in more than 25 states, this amendment — sometimes referred to as an "Illinois Brick repealer" — takes the Donnelly Act beyond its federal antitrust counterpart.[9] Its

[9] See Joseph P. Bauer, "Multiple Enforcers and Multiple Remedies: Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right", 16 Loy. Consumer L. Rev. 203, 305 (2004); Daniel R. Karon, "'Your Honor, Tear Down that Illinois Brick Wall!' The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice," 30 Wm. Mitchell L. Rev. 1351, 1361 (2004).

purpose is to ensure that consumers injured by antitrust violations may recover damages. See Letter of Assembly Sponsor Richard L. Brodsky to James M. McGuire, Counselor to Governor (Dec. 15, 1998), reprinted in Bill Jacket for ch. 653 (1998), at 6 (the bill "allows individuals who are third parties in transactions impacted by illegal monopolies to have legal recourse against these activities").

The specific impetus for the amendment was to enable New York consumers to participate in class actions. During the debate on the bill, the Assembly sponsor, Richard Brodsky, engaged in the following exchange with Assemblyman Straniere:

> Mr. Straniere: The question I have, Richard, is you know, the Attorney General, I guess, under the Donnelly Act can bring an action, find a restraint of trade and illegal monopolistic practice or something so that the company now has been found to be a wrongdoer which could then lead to a class action of people who were affected –
>
> Mr. Brodsky: Right.
>
> Mr. Straniere: – by that of being able to make a claim for damages –
>
> Mr. Brodsky: It is not my understanding –
>
> Mr. Straniere: – but this is not proceeding like that.
>
> Mr. Brodsky: An action by the Attorney General is a condition precedent to bringing an action under this bill. This bill cures a standing defect.
>
> Mr. Straniere: So, this, in effect allows an individual citizen –

Mr. Brodsky: Yes.

Mr. Straniere: – or group – or a <u>class action by a group of citizens</u> –

Mr. Brodsky: Yes.

Mr. Straniere: – <u>to be able to go in and allege a violation and to prove damages</u>?

Mr. Brodsky: Yes. The scenario you set forth, however, is also a possible outcome. It's just not the only outcome.

Assembly debate transcript of ch. 653, at 33-34 (May 26, 1998)(emphasis added); <u>see also</u> Letter from James L. Lack, Senate Sponsor to James McGuire, Counsel to Governor (Dec. 17, 1998), <u>reprinted in</u> Bill Jacket for c. 653 (1998), at 4 (statement of Senate sponsor) (explaining that bill was being enacted in response to multi-state class actions from which New York State consumers were excluded); Senate proceeding transcript at 6043 (June 18, 1998) (Senator sponsor explaining that the amendment "gives indirect purchasers in this state the right to participate in such <u>federal class action suits and seek a recovery based upon our state Donnelly Act</u>" (emphasis added)).

The opponents of the legislation similarly recognized that the repealer would enable consumers – typical indirect purchasers – to bring class actions under the Donnelly Act. Thus, the Business Council of New York State, an opponent of the bill, urged the Governor to veto the bill because it would "simply provide[] an additional and unnecessary avenue for litigation of consumer class actions." Letter from Daniel Walsh, President/

CEO, Business Council of New York State, Inc., to James McGuire, Counsel to Governor, at 13 (Nov. 18, 1998), reprinted in Bill Jacket for ch. 653 (1998).

Given this consensus of proponents and opponents that the amendment authorized class actions, the Legislature clearly did not believe that GBL § 340(5) posed any bar to maintaining an ordinary private action under as a class action. This is unsurprising, given the Legislature's pervasive use of the term "penalty" to refer only to loss-independent awards, and not to treble damages.

B. The Lower Courts' Approach Is Contrary To Legislative Intent And To This Court's Precedent, And, Ultimately, Is Unworkable.

The contrary approach to interpreting the term "penalty" taken by the First and Second Departments is unsupportable and unworkable.

In Cox v. Microsoft, upon which the lower courts' subsequent decisions generally have relied, the precise reasoning of the court is frankly unclear. What is clear is that the First Department's analysis assumes that all forms of monetary award can be divided into two exclusive categories, "compensatory" and "punitive." 290 A.D.2d at 207 (articulating the question as whether "multiple damages provisions [are] punitive or compensatory"). The court further assumed, without discussion, that "penalties" and "punitive" recoveries are synonymous. See id. at 206-07 (assuming that a treble damage award's status as a "penalty" is established by showing that certain features of such an award render it "all the more punitive" and that some courts have referred to treble damage awards as "punitive").

From this premise, the court suggested two distinct tests for whether a recovery falls into the "punitive" (or "penalty") category. First, the court suggested that if a recovery has any public, retributive purpose, it must be a "punitive" recovery, and thus, in the First Department's usage, a "penalty." See id. at 207 (opining that antitrust treble damages express a legislative view that the defendant's conduct is, from society's standpoint, "malum in se" and so such an award must be "punitive" and thus a "penalty"). The court further suggested that any damages award that exceeded proven loss could not be compensatory, and so by default must be "punitive." Id. at 208 ("[l]ogically, if a plaintiff must establish the amount necessary to compensate for a loss actually sustained, the award of any amount in excess of proven damages is not compensatory," and so it must be punitive) (emphasis added).

The defects in this reasoning are manifest. The Cox v. Microsoft case and cases following it made no attempt to discern how the Legislature uses the term "penalty." As Point I.A., supra at 8-27, demonstrates, the meaning those cases attribute to the term is flatly inconsistent with the way the Legislature in fact uses it. The Legislature treats only loss-independent awards as "penalties," a result in direct conflict with the Cox v. Microsoft reasoning.

Moreover, even if courts had no legislative usage to look to, the Cox v. Microsoft approach would be untenable. As an initial matter, even assuming that the question were whether antitrust treble damages are more "compensatory" or more "punitive," the Plaintiff in this case would have the better of the argument. It is generally recognized that the purposes of antitrust treble damages are predominantly compensatory or remedial, rather than punitive. See Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 485-86 (1977) (with respect to federal antitrust treble damages awards, "the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy").

More fundamentally, the problem with the Cox v. Microsoft court's approach is that the variety of monetary awards that the Legislature authorizes cannot be neatly divided up into "compensatory" and "punitive" recoveries. Nor, for that matter, is it justifiable to equate "penalties" with "punitive" damages. With respect to the latter point, this Court's precedents strongly suggest that penalties and punitive recoveries are not equivalent concepts. Thus, in Caesar v. Chemical Bank, this Court upheld a trial court's certification of a class in an action seeking, inter alia, punitive damages under Civil Rights Law § 51. 66 N.Y.2d 698, 701 (1985). Implicit in the decision is the recognition that CPLR 901(b) does not apply because punitive damages and penalties are two different things. See also Felder v. Foster, 71 A.D.2d 71, 74 (4th Dep't 1979) ("CPLR 901[b] does not preclude a class action where plaintiffs seek punitive damages under [42 U.S.C. § 1983], since such damages are not a 'penalty'").

And, even if labeling a particular award "punitive" were sufficient to identify it as a "penalty," the Cox v. Microsoft court's categorization of all monetary awards as either compensatory or punitive fails to take account of the variety of statutorily-authorized awards and the multiple purposes they serve. Statutory provisions authorize, inter alia, awards for economic loss, non-economic loss, loss attributable to mental anguish, punitive damages, disgorgement of unjust gains, liquidated damages, restitution, and attorney's fees.[10] Many of these remedies exist for the overlapping purposes of making the aggrieved party whole, achieving the socially-desirable level of

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10 See, e.g., Raynor v. C.G.C. Grocery Corp., 159 A.D.2d 463 (2d Dep't 1990) (damages available for economic losses caused by illegal sale of alcohol, in action under Dram Shop Act, Gen. Oblig. Law § 11-101); Winje v. Cavalry Veterans of Syracuse, Inc., 124 A.D.2d 1027 (4th Dep't 1986) (damages for emotional distress available under Dram Shop Act); McCauley v. Carmel Lanes, Inc., 178 A.D.2d 835 (3d Dep't 1991) (punitive damages available under Dram Shop Act); U.C.C. §§ 2-701 to 2-725 (statutory authorization for contract-type remedies, including direct and consequential damages, restitution, and specific performance).

deterrence of wrongful conduct, and expressing social disapproval of conduct thought to be against the public interest.

Thus, once-novel awards for emotional distress caused by outrageous conduct serve both to make individuals whole and to deter conduct of which society strongly disapproves. See Freudenthal v. County of Nassau, 99 N.Y.2d 285, 291 (2003) (recognizing that award for emotional distress served both to make injured employee whole and eradicate discriminatory practices). Likewise, attorneys fees are intended to make the aggrieved party whole for the cost of litigating, a consequential loss of the other party's wrongdoing, and at the same time to ensure a socially-optimal level of enforcement. See Harradine v. Board of Supervisors, 73 A.D.2d 118, 124 (4th Dep't 1980) (holding that attorneys' fees in 42 U.S.C. § 1988 "are compensatory not punitive in nature" and, at the same time, "are . . . awarded . . . to encourage enforcement"). Indeed, even damages for pure economic loss in contractual-type relationships do more than make injured parties whole: they also serve society's interest in vindicating the public interest in promise-keeping. See generally, Charles Fried, Contract as Promise: A Theory of Contractual Obligation 16 (1981) (justifying societal enforcement of contracts on basis that a contract breach represents an "abuse of a shared social institution that is intended to invoke the bonds of trust").

If Cox v. Microsoft is read as holding that any award that is not purely compensatory is by default "punitive" and so a "penalty," 290 A.D.2d at 206-07, it is not clear that any of these awards could escape categorization as a "penalty." If, on the other hand, the decision is read as holding that any award whose purpose is more punitive than compensatory is a "penalty," id., then the approach merely promises confusion and inconsistent results. It is thus untenable for a court to attempt to draw rigid lines identifying some of these forms of recovery as compensatory and all others as punitive (or deterrent or any other simplistic alternative to compensatory). The Legislature's more careful categorization of awards allows the courts to avoid such a difficult inquiry. As discussed in Point I.A. supra, in ordinary usage, the Legislature reserves use of the term "penalty" for a particular type of award, a loss-independent award. Other types of awards are identified by their own distinct terms, for example, as actual or exemplary damages, restitution, or attorney's fees. This Court in the past likewise has reserved the term "penalty" for loss-independent awards, and it should continue to do so. See, e.g., Sicolo, 5 N.Y.2d at 258.

POINT II

IT IS WELL ESTABLISHED THAT UNJUST ENRICHMENT MAY EXIST WITHOUT PRIVITY BETWEEN DEFENDANT AND PLAINTIFF

The Second Department concluded, in conflict with the First Department,[11] that Plaintiff could not prevail on his unjust enrichment claim because he failed to allege that there was privity with the defendants. In importing a privity requirement from contract law, the court approached unjust enrichment as a doctrine whose sole purpose is to do equity between parties who have an essentially contractual relationship, including privity, but where technical formalities of contract law might prevent courts from recognizing obligations between the parties. This is an erroneous approach to unjust enrichment.

A. There Is No Privity Requirement For An Unjust Enrichment Claim Under New York Law.

Unjust enrichment may be invoked to enforce obligations between parties who have an essentially contractual relationship. E.g., Farash v. Sykes Datatronics, Inc., 59 N.Y.2d 500 (1983). But its scope is far broader, and is certainly not limited to parties in privity. As this Court has explained, "[t]he theory of unjust enrichment lies as a quasi-contract claim," Goldman v. Metro. Life Ins. Co., 5 N.Y.3d 561, 572 (2005), but the

11 See Cox v. Microsoft Corp., 8 A.D.3d 39, 40 (1st Dep't 2004) ("Cox II").

designation of unjust enrichment as a "quasi-contract" claim "is something of a misnomer because it is not an action founded on contract at all." Parsa v. State, 64 N.Y.2d 143, 148 (1984). Rather:

> Briefly stated, a quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. The law creates it, regardless of the intention of the parties, to assure a just and equitable result.

Bradkin v Leverton, 26 N.Y.2d 192, 196 (1970).

Given that the rights and obligations recognized in unjust enrichment (or quasi-contract) case law "are not contracts at all," id., it is unsurprising that this Court has never identified any of the elements of contract breach as elements of a claim for unjust enrichment. As the federal courts have summarized New York law, "[t]o prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution." Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir. 2000) (internal quotation marks omitted); see Restatement of the Law, Restitution § 1 (1937) ("Unjust Enrichment") ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.") (hereinafter, "Restatement of Restitution").

Indeed, whereas the obligations of contract arise from actions manifesting a promise or meeting of the minds, and presume some privity, the obligations imposed by unjust enrichment usually arise in circumstances where there was no promise or meeting of the minds. Accordingly, unjust enrichment may apply in circumstances involving no privity between the unjustly enriched defendant and the unjustly deprived plaintiff. As this Court has explained:

> The theory of an action in quasi contract . . . is an obligation which the law creates, <u>in the absence of any agreement</u>, when and because the acts of the parties <u>or others</u> have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it.

<u>State v. Barclays Bank of N.Y., N.A.</u>, 76 N.Y.2d 533, 540 (1990) (internal quotation marks omitted). As the underlined language recognizes, the plaintiff may be deprived of something of value, and the defendant receive something of value, wholly through the actions of a third party.

Accordingly, this Court has applied unjust enrichment to order parties other than the wrongdoer to return property, or the value of property, that has been stolen or illegally obtained, without requiring that there be a direct relationship between plaintiff and defendant. <u>See, e.g.</u>, <u>3105 Grand Corp. v. City of New York</u>, 288 N.Y. 178, 181 (1942) (where third party stole money from plaintiff and transferred the money to the defendant,

defendant was unjustly enriched); Whiting v. Hudson Trust Co., 234 N.Y. 394 (1923) (same). Similarly, this Court has held that parties that have been wrongfully denied some benefit may sue innocent third-party recipients of the benefit, though there is only an indirect relationship between plaintiff and defendant. See, e.g., Simonds v. Simonds, 45 N.Y.2d 233, 242-43 (1978) (second wife of decedent ordered to relinquish value of life insurance policy intended for first wife); see also Restatement of Restitution § 1 comment e ("a person who refuses to return goods for which he innocently paid full value to a thief is liable to the owner for their full value, not only in an action of tort, but also in the quasi-contractual action of general assumpsit," a form of unjust enrichment).

The lower court erroneously concluded that there was a privity requirement because it mistook a narrow subset of unjust enrichment case law, cases in which service providers have sued extra-contractually for quantum meruit, as setting forth the requirements for all unjust enrichment claims. See Sperry v. Crompton Corp., 26 A.D.3d 488, 489 (2d Dep't 2006) (citing Outrigger Constr. Co. v Bank Leumi Trust Co. of N.Y., 240 A.D.2d 382 (2d Dep't 1997) (quantum meruit claim); Kagan v KTel Entertainment, 172 A.D.2d 375 (1st Dep't 1991) (same); Sybelle Carpet & Linoleum of Southampton v East End Collaborative, 167 A.D.2d 535 (2d Dep't 1990) (same); Kapral's Tire Serv. v. Aztek Tread Corp., 124 A.D.2d 1011 (4th Dep't 1986) (same)). The lower court interpreted these cases as establishing a privity requirement in all unjust enrichment claims. That misreads these cases.

These particular cases required privity only because the plaintiffs invoked unjust enrichment doctrine to enforce obligations that were contractual in origin. In all of these cases, plaintiffs provided goods or services pursuant to contractual obligations. Later, when their contractual partners failed to make payment, plaintiffs sought to shift the contract law obligations of their contractual partners to third parties who had benefitted.[12] Plaintiffs' unjust enrichment claims were held defective because the plaintiffs sought to use unjust enrichment to get around limitations of contract law. They sought to enforce promises, but not against the promisor. Given that contract law attempts to carefully set out the limits on when obligations arise from promises, this Court has recognized that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events

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[12] See Outrigger, supra (construction company, unable to obtain payment from contractual partner, sought recovery from third-party bank that allegedly benefitted from the construction); Kagan, supra (consulting company, unable to obtain payment from contractual partner, sought recovery from third-party beneficiary); Sybelle Carpet, supra (carpet supplier, unable to obtain payment from contractual partner, sought recovery from homeowner beneficiary); Kapral's Tire Serv., supra (tire supplier, unable to recover from contractual partner, sought recovery from third-party beneficiary).

arising out of the same subject matter." EBI I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 23 (2005) (citation omitted).

B. The Proposed Privity Requirement Would Contravene The Equitable Purposes Of Unjust Enrichment.

Plaintiff's claim fits squarely within the doctrine of unjust enrichment. Here, Plaintiff is not seeking to assert a claim that is premised on any promises or inducements. Rather, he argues that it would be inequitable for the defendants to retain their overcharges because they were attained by means of illegal activity, specifically, price-fixing. There is no justification for importing contract law requirements because, like many unjust enrichment claims, Plaintiff's claim is "not an action founded on contract at all." Parsa, 64 N.Y.2d at 148.

The privity requirement imposed by the Second Department would have significant negative consequences in cases arising from price-fixing and other types of anticompetitive conduct. Such conduct frequently produces diffused and relatively small harm or injury to large numbers of consumers. Unjust enrichment provides a valuable alternative basis for securing recovery. Although individual consumers frequently do not deal directly with price-fixers and other anticompetitive actors, consumer purchases typically are essential to the success of the unlawful scheme. As the United States Court of Appeals for the Third Circuit has explained:

> [End-user consumers] were the target of DuPont's antitrust violation. Regardless of the existence of the various links of middlemen, if there were no ultimate consumer of Coumadin, prices charged for the drug by DuPont to distributors, pharmacies, etc., would be irrelevant.

In re Warfarin Sodium Antitrust Litig., 214 F.2d 395, 401 (3d Cir. 2000); see also Daniel R. Karon, Undoing the Otherwise Perfect Crime – Applying Unjust Enrichment to Consumer Price-Fixing Claims, 108 W. Va. L. Rev. 395, 428 (2005) ("although price fixers insist that the benefits consumers ordinarily confer upon them are too remote, consumers are always squarely in price fixers' sites as their ultimate victims, without whose end-use purchases price fixers' conspiracies are pointless").

Accordingly, to allow antitrust violators to retain the fruits of their misconduct merely because they lack a direct relationship with their intended victims offends equity. The plight of prescription drug users is a compelling example of consumers victimized by anticompetitive conduct, albeit without having dealt directly with the wrongdoer. Prescription drug users typically purchase from pharmacies, hospitals and health plans. Rarely, if ever, do they purchase their medications directly from the pharmaceutical company manufacturer itself. Courts have recognized the equity of permitting prescription drug users to maintain unjust enrichment claims.[13]

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[13] See, e.g., In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 669-71 (E.D. Mich. 2000) (rejecting arguments (continued...)

The remedy often suitable in cases like these - defendant's disgorgement of ill-gotten gains - has the virtue of obviating the need to allocate the damages between direct and indirect purchasers, an approach that other grounds for recovery may require. Unjust enrichment, by contrast, focuses on the benefit to the wrongdoer, not on the injury that the victim, who may be a direct or indirect purchaser, suffers. As the Cardizem II court thus noted:

> [Disgorgement] is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does. Thus, a disgorgement order might be for an amount more or less than that required to make the victims whole.

Cardizem II, slip op. at 32-33 n.13 (quoting S.E.C. v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993)); see also FTC v. Mylan Laboratories, Inc., 62 F. Supp. 2d 25, 43-54 (D.D.C. 1999) (approving disgorgement as an equitable remedy in an action on

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13 (...continued) that either privity or a directly conferred benefit is necessary under the laws of New York and other States) ("Cardizem"); In re K-Dur Antitrust Litigation, 338 F. Supp. 2d 517, 544 (D.N.J. 2004) (noting that "[t]he critical inquiry is whether the plaintiff's detriment and the defendant's benefit are related to, and flow from, the challenged conduct," and rejecting defendant's privity argument as "without merit"); In re Cardizem CD Antitrust Litigation, Order No. 70, at 27-33 (E.D. Mich. May 23, 2003) ("Cardizem II") (upholding unjust enrichment claims under New York, Massachusetts, and Michigan law); In re Lorazepam & Clorazepate Antitrust Litigation, 295 F. Supp. 2d 30, 49-51 (D.D.C. 2003) (upholding unjust enrichment claims under various state laws).

behalf of consumers arising from anticompetitive conduct). On the other hand, requiring privity, as the Second Department did here, forecloses a time-honored equitable means of recovery – one that not only ensures consumer protection, but also dis-entitles defendants from retaining the benefits of their anticompetitive conduct.

Indeed, because the laws of many other states permit unjust enrichment claims by indirect purchasers, the Second Department's approach would specially disadvantage New York consumers.[14] Prior to the Second Department's decision in this case, courts recognized the ability of New York consumers to assert unjust enrichment claims in cases arising from anticompetitive conduct. For instance, in In re K-Dur Antitrust Litigation, 338 F. Supp. 2d 517 (D.N.J. 2004), New York consumers were among consumers from all fifty states whose unjust enrichment claims were

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[14] See, e.g., Hirsch v. Bank of America, 107 Cal. App. 4th 708, 722 (Cal. Ct. App. 1st Dist. 2003) (no privity requirement under California law); Brandt v. Wand Partners, 242 F.3d 6, 16 (1st Cir. 2001) (no privity requirement under Massachusetts law) (citing White v. White, 346 Mass. 76 (1963); Nat'l Shawmut Bank of Boston v. Fidelity Mut. Life Ins. Co., 318 Mass. 142 (1945); and Keller v. O'Brien, 425 Mass. 774 (1997)); Olson v. Synergistic Techs. Bus. Sys., Inc., 628 N.W.2d 142, 150 n.4 (Minn. 2001) (no privity requirement under Minnesota law); Benefit Life Trust Ins. Co. v. Union Nat'l Bank, 776 F.2d 1174, 1177 (3d Cir. 1985) (no privity requirement under Pennsylvania law) (citing Gee v. Eberle, 279 Pa. Super. 101, 420 A.2d 1050, 1060 (Pa. Super. Ct. 1980)); Puttkammer v. Minth, 266 N.W.2d 361, 366 (Wis. 1978) (no privity requirement under Wisconsin law); see also Daniel R. Karon, Undoing the Otherwise Perfect Crime, 108 W. Va. L. Rev. at 421 (no state's unjust enrichment law requires privity).

permitted to proceed. Similarly, in Cardizem, 105 F. Supp. 2d 618, 669-71 (E.D. Mich. 2000), the court upheld unjust enrichment claims by New York consumers and those of nine other states.

This Court's resolution of the question will affect whether courts in significant multistate antitrust matters afford parity to New York consumers – or instead saddle them with burdens that could limit recovery, or preclude it altogether, while consumers from other states suffer no such disability. Cf. D.R. Ward Construction Co. v. Rohm and Haas Co., 2006 U.S. Dist. LEXIS 61828 at *60 (E.D. Pa. May 30, 2006) (because Tennessee law imposed an element for unjust enrichment that Arizona and Vermont did not impose, claims by Tennessee consumers were dismissed, which those of Arizona and Vermont consumers proceeded).

Accordingly, this Court also should reverse the Second Department's ruling dismissing plaintiff's unjust enrichment claim.

CONCLUSION

The Second Department's order denying class certification and dismissing Plaintiff's unjust enrichment claim should be reversed.

Dated: New York, New York
November 21, 2006

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Amicus Curiae State of New York

By:___________________________
DANIEL J. CHEPAITIS
Assistant Solicitor General

120 Broadway
New York, New York 10271
(212) 416-8025

CAITLIN J. HALLIGAN
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

JAY L. HIMES
Bureau Chief
Antitrust Bureau

DANIEL CHEPAITIS
Assistant Solicitor General

SARAH HUBBARD
Assistant Attorney General

of Counsel