To be submitted by:
KATHLEEN L. HARRIS

New York County Clerk's Index No. 123431/99

NEW YORK SUPREME COURT
APPELLATE DIVISION - FIRST DEPARTMENT

AARON ASHER and NEW UTRECHT PHARMACY, INC.,
Individually and On Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

-against-

ABBOTT LABORATORIES, GENEVA PHARMACEUTICALS, INC.,
and ZENITH GOLDLINE PHARMACEUTICALS, INC.,

Defendant-Respondent.

BRIEF OF *AMICUS CURIAE* ATTORNEY GENERAL FOR THE STATE OF NEW YORK

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

CASES **PAGE**

CASES **PAGE**

STATE CASES

CASES **PAGE**

CASES **PAGE**

STATUTES & REGULATIONS

STATUTES & REGULATIONS

MISCELLANEOUS

The Attorney General of the State of New York submits this brief in support of plaintiff-appellant's appeal seeking reversal of the order of the court below. The Attorney General moved for leave to file this brief in its Notice of Motion, dated April 24, 2001.

THE INTEREST OF THE *AMICI*

CPLR 901(b) precludes a class action in any case brought "to recover a penalty, or a minimum measure of recovery created or imposed by statute," unless the statute itself specifically authorizes recovery in a class action. Section 340 of the Donnelly Act, the New York State antitrust statute, provides for recovery of three-fold damages for injured plaintiffs who prove an antitrust violation and consequential loss: *See* GBL § 340 which provides "any person who shall sustain damages by reason of any violation of this section [Section 340] shall recover three-fold the damages sustained thereby." The court below (Freedman, J.) ruled that a private civil antitrust action brought under Section 340 is, by virtue of the law's treble damage provision, an action "to recover a penalty" for purposes of CPLR 901(b) and, hence, may not be maintained as a class action. *Asher v. Abbott Labs*, No. 123431/99 (Sup. Ct. N.Y. Co., Oct. 10, 2000). There are several other similar rulings, but no appellate court has ever decided whether CPLR 901(b) precludes a private class action brought under Section 340.[1]

The Attorney General is granted wide investigative and enforcement powers under the Donnelly Act.[2] Although the Attorney General's authority to bring actions under § 340 on behalf

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[1] *See Cox v. Microsoft Corp.*, No. 105193/00 (Sup. Ct. N.Y. Co. Nov. 22, 2000); *Rubin v. Nine West Grp. Inc.*, No. 0763/99, 1999 N.Y. Misc. LEXIS 655 (Sup. Ct. Westchester Co.); *Russo & Dubin v. Allied Maintenance Corp.*, 95 Misc.2d 344, 407 N.Y.S.2d 617 (Sup. Ct. N.Y. Co. 1978); *Blumenthal v. American Soc'y of Travel Agents, Inc.*, No. 16812/76, 1997 WL 18392 (Sup. Ct. N.Y. Co. July 5, 1977).

[2] *See* GBL § 341 (authorizing criminal prosecution of antitrust violations); § 342 (authorizing the Attorney General to seek injunctions of antitrust violations) § 342-a (authorizing the Attorney General to seek civil penalties from antitrust violators); § 342-b (authorizing the Attorney General to represent state government entities); § 343 (granting investigation and subpoena power).

of the State or as *parens patriae* on behalf of the citizens of the State is not based on or derived from CPLR 901(b), the Attorney General is, nevertheless, directly interested in the effective enforcement of the antitrust laws of the State of New York. The construction of CPLR 901(b) adopted by the lower court would seriously hinder private efforts to enforce the Donnelly Act on behalf of consumers and business establishments.

Effective antitrust enforcement cannot depend solely on actions brought by the Attorney General. Private treble damage actions are needed as well. Accordingly, for the reasons set forth below, the Attorney General, as *amicus curiae*, urges this Court to reverse the order appealed from.

PRELIMINARY STATEMENT

The construction of CPLR 901(b) adopted by the lower court is unsound. It ignores not only the language of the statute itself, but also its legislative history. The ruling below further is inconsistent with both state and federal law, which firmly establish that the Donnelly Act's treble damages provision does not constitute a "penalty" for purposes of Section 901(b).

By its express terms, Section 901(b) applies to an "action to recover a penalty, ***or*** a minimum measure of recovery created or imposed by statute . . . ." (emphasis added) This language, on its face, envisions only those statutes that provide a monetary sanction *regardless* of whether the complaining party in fact suffered actual loss. That is why the law covers statutes that create or impose either a "penalty or a minimum measure of recover." Were there any room for doubt, the legislative history dispels it. The statute that drove enactment of the CPLR provision was the federal Truth in Lending Act ("TILA"), which creates a penalty upon proof of a statutory violation without the need to prove *any* actual damages to *any* consumer. The type of liability that the Legislature sought to address was epitomized by *Ratner v. Chemical Bank*, 54 F.R.D. 412 (S.D.N.Y. 1972), where the defendant was exposed to $13,000,000 in potential TILA damages,

based on the aggregation of $100 statutory penalties. The Legislature never envisioned applying Section 901(b) to the Donnelly Act, where the plaintiff *is* required to prove actual injury before any damage recovery is permitted.

Equally important, many decisions under both state and federal law confirm that antitrust treble damage provisions are remedial and compensatory, rather than penal or punitive. These decisions establish that a statute does not create a "penalty" merely because it provides for recovery of treble damages.

Finally, the lower court's construction of Section 901(b) would erect a substantial obstacle to enforcement of the state's antitrust laws. Antitrust conspiracies can affect hundreds, thousands or even millions of consumers or businesses, all in almost an identical manner. However, the damages to any particular individual user of goods or services may not justify the cost of litigation. This is particularly true in consumer cases where the impact of the antitrust violation is widespread and economically substantial in the aggregate, but where the loss sustained by any individual consumer may well be very small. By aggregating individual claims that otherwise might not be pursued, the class action mechanism enables valid legal claims to be litigated, and, if proven, to be compensated.

The Donnelly Act is an especially important consumer protection statute. Because the impact of an antitrust violation is often passed on from one level of the distribution system to the next, the ultimate consumer may be one who suffers the economic injury from the violation, that is, they are an "indirect purchaser." Yet, under the federal antitrust laws, a person generally may not seek damages unless he or she purchased directly from the defendant who committed the antitrust violation, or from a coconspirator in the antitrust violation. By contrast, the New York Legislature has expressly recognized the right of *indirect* purchasers to recover antitrust damages

in an amendment to the Donnelly Act, which took effect less than three years ago. *See* GBL § 340(6). If the class action mechanism were unavailable to plaintiffs litigating claims under GBL § 340, that would effectively nullify the rights of indirect purchasers granted under the Donnelly Act.

The construction of CPLR 901(b) adopted by the court below would preclude private plaintiffs from invoking the class action mechanism in treble damage Donnelly Act cases. That would be a serious blow to enforcement of the New York state antitrust law. The language and legislative history of Section 901(b), together with the state and federal case law, establish that treble damages do not make an action one to recover a "penalty." Accordingly, the lower court erred in holding that Section 901(b) precludes a class action under Section 340 of the Donnelly Act.[3] The Court should reverse the order appealed from.

ARGUMENT

POINT I

THE LANGUAGE AND LEGISLATIVE HISTORY OF CPLR 901(b) DEMONSTRATE THAT THE STATUTE DOES NOT APPLY TO THE DONNELLY ACT

Whenever an issue of statutory construction is presented, the court's mission is to determine the intent of the legislature. *See, e.g., Albano v. Kirby*, 36 N.Y.2d 526, 529-30, 330 N.E.2d 615,

[3] Among the arguments made to support the order below, defendants argue that the Attorney General is authorized to bring a class action on behalf of "government entities and municipalities" under the Donnelly Act Sec. 342.b. (Def. Br. pp. 16-17). Insofar as defendants may suggest that the Attorney General's authority to sue on behalf of a class is so limited, the Attorney General disputes any such contention.

618, 369 N.Y.S.2d 655, 658 (1975). The starting point for this inquiry is the words of the statute itself. *Id.* at 530, 330 N.E.2d at 618, 369 N.Y.S.2d at 658. CPLR 901(b) provides:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or a minimum measure of recovery created or imposed by statute may not be maintained as a class action.

This language covers only statutes that "creat[e] or impos[e]" either "a penalty, or a minimum measure of recovery." The plain meaning of these words limits the class action prohibition to those statutes where an express sanction — a "penalty" or "minimum measure of recovery" — is provided without regard to proof of action injury or loss.

Section 340(5) of the Donnelly Act, which contains the treble damage provision, is not such a statute. Subsection (5), in pertinent part, provides that "any person *who shall sustain damages* by reason of any violation of this section shall recover three-fold the actual damages sustained thereby, a well as costs . . . and reasonable attorneys' fees." The statute expressly makes "damages" an element of the antitrust claim, and, without proof that damages were "sustain[ed]," there can be no recovery whatsoever. The Donnelly Act does *not* authorize an automatic or minimum recovery once an antitrust violation is proven, regardless of whether there is any actual loss. Thus, the law does not create the kind of "penalty" covered by CPLR 901(b).

Insofar as the statute might be thought to contain any ambiguity, as to the meaning of penalty or minimum measure of recovery, the legislative history confirms that the lower court misconstrued Section 901(b) by applying it to the Donnelly Act.

Section 901(b) was added to the third and final version of the 1975 class action bill in response to objections to the second version of the bill. [4] Although there apparently is no history of the actual legislative debate over this provision, comments sent to the governor in support of and in opposition to the final version of the bill reveal exactly what the legislature intended: by Section 901(b) the legislature sought to reach only those actions that rely on a statute directing the imposition of a sanction without regard for actual injury sustained.

The Banking Law Committee of the State Bar expressed concern that "[t]he statutory penalty provisions of consumer laws do not distinguish between insignificant or immaterial errors and substantial errors. The same penalties are assessable, and the same liabilities exist, *whether the error be substantial or trivial.*" State Bar Report at 2 (emphasis added). The consumer law on which the State Bar Report focused was the federal Truth in Lending Act ("TILA"), which creates statutory penalties without requiring proof of actual damages to any consumer. *See id.* at 1; 15 U.S.C. § 1640(e). The Empire State Memo (defined below) also addressed statutory penalties in its critique of the bill, noting 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 [sic] million, although the actual damages to individual plaintiffs were zero!" In *Ratner*, a plaintiff suing under TILA sought to certify a class, each of whose members

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[4] *See* Memo in Opposition to A. 1252-A and S.1309-A, Stanford H. Bolz, General Counsel, Empire State Chamber of Commerce, at 3 (Feb. 14 1975) (commenting on the second version of the bill and stating that a fair and reasonable class action bill must contain a prohibition on the recover of penalties) (the "Empire State Memo"); New York State Bar Association ("NYSBA") Legislation Report, Banking Law Committee of the Banking, Corporation and Business Law Section (1975) (commenting on the second version of the bill and expressing serious concerns about the intersection of consumer laws that provide statutory penalties and class action law) (the "State Bar Report"); NYSBA Legislation Report, Banking Law Committee, Business Law Committee, and the Committee on Civil Practice Law and Rules, at 2 (1975) (commenting on the second version of the bill and proposing language nearly identical to that adopted for § 901(b)).

would be entitled, under the statute, to a minimum recovery of $100. Denying certification, the court noted that "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." *Id.* at 416 (emphasis added).

These comments make clear that Section 901(b)'s ban on class actions was directed to cases brought under statutes, such as TILA, which provided for a monetary sanction — often a specified minimum recovery — that was awarded without the need to prove any actual damage. The reason for barring class actions under such statutes was to avoid the mischief of imposing enormous liability on a defendant, despite the absence of any actual injury to the plaintiff. Unlike the situation presented by statutes such as TILA — where automatic recovery follows from a statutory violation — under the Donnelly Act, the plaintiff, as an element of its antitrust claim, must prove actual damages — often a difficult and expensive undertaking that requires engaging economic experts to analyze and present the loss sustained. Significantly, none of the class action bill commentators even mentioned the Donnelly Act, where treble damages are awarded only after the plaintiff meets his or her burden of showing actual damages.

Thus, both the language of CPLR 901(b) and the legislative history of the law demonstrate that it is not intended to apply to treble damage actions under the Donnelly Act.

POINT II

THE EXISTENCE OF A PROVISION AUTHORIZING TREBLE DAMAGES DOES NOT RENDER THE DONNELLY ACT PENAL IN NATURE

Apart from the decision below and trial level cases decided under the Donnelly Act, *See supra,* n.1, there is limited law addressing whether damages awarded under various statutes constitute a "penalty" for purposes of ... CPLR 901(b). In *Felder v. Foster*, 71 A.D.2d 71, 421 N.Y.S.2d 469 (4th Dept. 1979), the Fourth Department held that punitive damages under 42 U.S.C. § 1983 are not a penalty under § 901(b). However, the court provided no explanation for its conclusion. *See also Pruitt v. Rockefeller Ctr. Prop.*, 167 A.D.2d 14, 547 N.Y.S.2d 672 (1st Dept. 1991)(damages under Securities Act § 11 are not a § 901(b) penalty).

Two decisions do hold that treble damages under the state's deceptive practices act, GBL § 349, are a penalty for purposes of Section 901(b).[5] *See Ridge Meadows Homeowners' Assoc., Inc. v. Tara Dev. Co.*, 242 A.D.2d 947, 665 N.Y.S.2d 361 (4th Dept. 1997); *Super Glue Corp. v. Avis Rent-A-Car Sys., Inc.*, 132 A.D.2d 604, 517 N.Y.S.2d 764 (2d Dept. 1987). *But see Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 499 N.Y.S.2d 693 (1st Dept. 1986) (reversing denial of class certification for action under GBL § 349(h) without mentioning CPLR § 901(b)). However, the treble damage provision of the deceptive practices act differs from that in the Donnelly Act. GBL § 349(h) authorizes recovery of a statutory *minimum* of $50, or actual damages, whichever is greater, for violation of the Act, and further permits the court, in its discretion, to increase the

[5] GBL § 349(a) provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

damages in an amount up to three times the actual damages, with a cap of $1000, upon a finding that the defendant willfully or knowingly violated the statute. Thus, unlike the Donnelly Act — where treble damages require proof of actual loss — the deceptive practices act establishes a minimum level of recovery ($50), and permits trebling (up to $1,000) based on the defendant's conduct. The minimum level of recovery is available without regard to the plaintiff actual damages. In other words, the GBL 349 is much more like the TILA damage provision that the Legislature considered in enacting Section 901(b), than is the Donnelly Act.

Moreover, although the case law under Section 901(b) is limited, a substantial body of precedent confirms that Section 340(5) of the Donnelly Act is not penal in nature. Both New York authorities generally, as well as decisions interpreting the federal antitrust laws, which are particularly persuasive authority because the Donelly Act "was modeled on the Federal Sherman Act of 1890" and generally is construed in light of federal antitrust precedents, *People v. Rattenni*, 81 N.Y.2d 166, 171, 597 N.Y.S.2d 280, 283, 613 N.E.2d 155, 158 (1993), hold that the mere availability of a double or treble damages provision does not make a statute one which imposes a penalty.

a. <u>New York Authorities</u>

In *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 102-03, 120 N.E. 198, 198 (N.Y. 1918), Chief Judge Cardozo wrote that a statute is penal in nature where it "awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong. The purpose must be, not reparation to one aggrieved, but vindication of the public justice." A few years later, in *Cox v. Lykes Brothers*, 237 N.Y. 376, 379, 143 N.E. 226, 227 (1924), Chief Judge Cardozo, writing again for the Court, held that a statute awarding double wages was *not* a suit for a penalty or forfeiture within the meaning of the state's

penal statute of limitations. As support for this conclusion, Chief Judge Cardozo noted that "[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 the recovery of treble damages (*Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390)." (emphasis added).

Similarly, in *Bogartz v. Astor*, 293 N.Y. 563, 59 N.E.2d 246 (1944), the Court of Appeals reversed a lower court ruling holding that Workmen's Comp Law, § 2, subd. 6., which provided for double compensation for illegal employment of a minor, was a penalty statute. The Court emphasized that the statute "says nothing of that kind. On the contrary, [the statute] speaks of 'double compensation' and 'increased compensation;' and this word 'compensation' is in the statute said to mean a 'money allowance payable to an employee or to his dependents as provided for in this chapter.'" 293 N.Y. 565, 563, 59 N.E.2d 246, 248. Because the statute did not refer to the double damages as a penalty, the court declined to import that meaning into the statute.[6]

Loucks, Cox and *Bogartz* demonstrate that the Donnelly Act does not create a "penalty." Treble damages are awarded only after a civil antitrust plaintiff proves actual damages sustained. They are imposed not to vindicate the public interest, but are instead compensation to the harmed victim. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635-36 (1985) (identifying the purposes of antitrust treble damages as primarily remedial, and compensatory).

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[6] *See also Sicolo v. Prudential Savings Bank*, 5 N.Y.2d 254, 258, 184 N.Y.S.2d 100, 103, 157 N.E.2d 284, 286 (1959) (distinguishing penalties as remedies "impressed for punishment" rather than for "redress of injury to an individual"); *Peekskill, State Camp and Mohegan R.R. Co. v. Village of Peekskill*, 21 A.D. 94, 96-97, 47 N.Y.S. 305, 307 (2d Dept. 1897) (defining penalty as a sum that is unreasonable in amount and disproportionate to the actual damage which may have been sustained).

The courts, however, are not a model of consistency when it comes to determining whether a statute authorizing multiple damages may be construed to create a penalty.[7] Decisions under the federal antitrust law, however, clearly establish that, in this particular settling, treble damages are not considered a penalty. These precedents, construing the federal antitrust law, are highly pertinent in deciding whether the Donnelly Act imposes a "penalty" because the 1975 amendments to the Donnelly Act — which adopted the treble damage remedy successfully used under the federal antitrust laws — replicates the federal treble damage provision.

b. Authorities under the federal antitrust laws

As Chief Judge Cardozo's citation of *Chattanooga Foundry*, 203 U.S. 390 (1906), in *Cox* suggests, there is a well-developed body of law holding that the federal antitrust laws are not "penalty" statutes. *Chattanooga Foundry* is one of the illustrative early decisions.[8] More recently,

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[7] In some cases, courts have found that the following decisions involving statutes providing for double or treble damages did not create a penalty. *See, e.g., Di Bitetto v. Sussman*, 279 A.D. 1033, 112 N.Y.S.2d 356 (2d Dept. 1952) (federal Housing and Rent Act of 1947, § 205); *Dooley v. Carsen*, 41 Misc. 2d 154, 155, 245 N.Y.S.2d 145, 146 (Sup. Ct. N.Y. Co. 1963) (state housing statute); *Moreno v. Picardy Mills, Inc.*, 173 Misc. 528, 17 N.Y.S.2d 848 (Muni. Ct. Brooklyn 1939) (federal Fair Labor Standards Act); *Syfert v. Lenett Realty Corp.*, 124 Misc. 871, 209 N.Y.S. 555 (Sup. Ct. Kings Co. 1925) (forcible entry and detainer under Real Prop Law § 535). In other cases, the courts have found that double or treble damages did create a penalty. *See, e.g., Fults v. Munro*, 202 N.Y. 34, 95 N.E. 23 (1911) (forcible entry and detainer pursuant to Code Civ. Pro. § 1669); *Rental & Management Assoc., Inc. v. Hartford Ins. Co.*, 206 A.D.2d 288, 289, 614 N.Y.S.2d 513, 514, (1st Dept. 1994) (Real Property Acts and Procedure Law § 853); *Lyke v. Anderson*, 147 A.D.2d 18, 541 N.Y.S.2d 817, (2d Dept. 1989) (same); *Heights Assoc. v. Bautista*, 178 Misc. 2d 669, 683 N.Y.S.2d 372 (App. T. 2d Dept. 1998) (Rent Stabilization Law of 1969 § 26-516(a)); *Chan v. New York State Div. of Hous. and Community Renewal*, 207 A.D.2d 552, 616 N.Y.S.2d 251 (2d Dept. 1994) (same).

[8] In *Chattanooga*, the Court was so confident in its ruling that a treble damage action under § 8 of the Clayton Act is not penalty, that the court simply cited *Huntington v. Attrill*, 146 U.S. 657, 669 (1892), and commented that *Huntington* went into all the detail necessary. *See Chattanooga*, 203 U.S. at 397 ("The construction of the phrase 'suit for a penalty' ... has been stated so fully by this court that it is not necessary to repeat [it]. Indeed the proposition hardly is disputed here.") In *Huntington v. Attrill*, 146 U.S. 657 (1892) the Supreme Court emphasized that the key characteristic

(continued...)

in *Hydrolevel Corp. v. ASME, Inc.*, 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982), the Second Circuit distinguished between antitrust treble damages — where plaintiffs must demonstrate that they suffered actual damages — and damages under a statute like the False Claims Act — where a statutory penalty is available, regardless of actual injury. The court also explained that "the trebling of antitrust damages under the antitrust laws reflects congressional recognition of the difficulty of proving antitrust damages." *Id.* at 127. On appeal, the Supreme Court affirmed the Court of Appeals' characterization of antitrust treble damages, stating, that "the antitrust private action was created primarily as a remedy for the victims of antitrust violations. Treble damages make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit under the antitrust laws." 456 U.S. at 575 (quotations and citations omitted).

The court in *Ethicon, Inc. v. Aetna Casualty and Surety Co.*, 737 F. Supp. 1320 (S.D.N.Y. 1990) reached a similar conclusion, in considering whether an insurance policy indemnified an antitrust violator for full treble damages, or whether an exclusion for punitive damages applied to the treble damage award for which coverage was sought. After surveying federal case law on the nature of antitrust treble damages, the court wrote that "the treble-damages provision, which makes awards available only to injured third parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.'" *Id.* at 52-53 (quoting *Brunswick Corp. v. Pueblo Bowl-o-Mat*, 429 U.S. 477, 485-86 (1977)). Finding that antitrust treble damages are primarily remedial

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[8](...continued)
of a "penal statute" or "penalty" is that it is prosecuted for the sole purpose of punishment, and is enforceable or pardonably by the state alone: *see Huntington v. Attrill, supra* at page 667, ("Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strickly penal").

and compensatory rather than punitive, the court upheld coverage under the insurance policy. *See id.* at 52. *See also Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583, 585 (9th Cir. 1937) ("An action to recover damages resulting from a violation of the Sherman Anti-Trust Act is not an action to recover a penalty.") (*Baush Mach. Tool Co. v. Aluminum Co. of America*, 63 F.2d 778, 780 (2d Cir. 1933) (holding that antitrust treble damages are not penalties and noting that plaintiff must prove damages to succeed, as there is no fixed penalty in the statute).

Indeed, until Congress enacted an antitrust statute of limitations in 1955, the federal antitrust limitations period was determined by the applicable statute of limitations of the state where the antitrust violation took place. *See Chattanooga*, 203 U.S. 390 (1906). Consequently, dozens of courts ruled on whether the limitations period for a federal antitrust action was governed by the relevant state's statute of limitations applicable to actions for a "penalty," or by the limitations statute governing claims for damages other than a penalty or forfeiture.

In this context, many courts held that, under New York law, a federal antitrust treble damage action was *not* an action for a "penalty." *See Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747 (S.D.N.Y. 1953); *Winkler-Koch Eng'g Co. v. Universal Oil Prod. Co.*, 100 F. Supp. 15 (S.D.N.Y. 1951); *Bascom Launder Corp. v. Farny*, 10 F.R.D. 421 (S.D.N.Y. 1950); *Dipson Theatres v. Buffalo Theatres*, 8 F.R.D. 86 (W.D.N.Y. 1948); *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, 3 F.R.D. 157 (S.D.N.Y. 1942); *Pastor v. American Tel. & Tel. Co.*, 76 F. Supp. 781 (S.D.N.Y.1940); *Seaboard Terminals Corp. v. Standard Oil Co.*, 24 F. Supp. 1018 (S.D.N.Y.1938), *aff'd on other grounds*, 104 F.2d 659 (2d Cir. 1939).

In one of the last of these cases, *Leonia Amusement*, the court reviewed federal court opinions from across the country to distill the essential nature of treble damages. *See* 117 F. Supp. at 753-56. The court concluded that a suit for antitrust treble damages "'[i]s not in its nature and substance a

penal action; its vindication does not rest with the state; it has been repeatedly held to be a civil remedy for private injury, compensatory in its purpose and effect.'" *Id.* at 756 (quoting *Strout v. United Shoe Mach. Co.*, 195 F. 313 (D. Mass. 1912)). The court specifically considered whether the New York courts would hold a treble damage action to be one for penalty within the meaning of section 49(3) of the New York Civil Practice Act ("NYCPA"), which covered actions based "upon a statute for a penalty or forfeiture." The court held that "under New York law, when recovery may be had not only for the actual monetary damage but also for three times this amount and this treble recovery is incidental to and dependent upon the verdict returned and the operation of law, the suit is not deemed one for a statutory penalty." *Leonia*, 117 F. Supp. at 756.

Six years later, in *Bertha Building Corp. v. National Theaters Corp.*, 269 F.2d 785 (2d Cir. 1959), the Second Circuit agreed, holding that antitrust treble damages actions were governed by New York's non-penalty statute of limitations, NYCPA § 48(2).[9] The Second Circuit relied heavily on a New York Court of Appeals case, *Sicolo v. Prudential Savings Bank of Brooklyn*, 5 N.Y.2d 254, 184 N.Y.S.2d 100, 157 N.E.2d 284 (1959), which held that the double damage provision of General Municipal Law § 205-a did not make the action one for "a penalty or forfeiture"for limitations purposes. The Second Circuit thus concluded that "the New York Court of Appeals does not regard actions for civil damages which are made exemplary in part only, as falling within § 49, subd. 3. A suit for treble damages under the anti-trust laws is plainly of this character." *Bertha Building*, 269 F.2d at 789.[10]

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[9] NYCPA § 48(2) provided a six year limitations period for "[a]n action to recover upon a liability created by statute, except penalty or forfeiture."

[10] The conclusion reached as a matter of New York law — that federal treble damage (continued...)

In sum, a substantial body of precedents — decided under New York law — holds that the existence of the statutory treble damage remedy under the antitrust laws does not render the antitrust proceeding an action for a "penalty." The Legislature is presumed to have know of this existing case law when it enacted both Section 340(b) of the Donnelly Act and CPLR § 901(b). ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new position is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they all should be construed together." 2B Norman J. Singer, Statutes and Statutory Construction sec. 51.02 at 176-78 (6th Ed. 2000) (footnotes omitted). Citing, among other cases *Allen v. Grand Central Aircraft Co.*, 347 U.S .535; *U.S. v. Carr*, 880 F.2d 1550 (2d Cir.).) The Legislature also

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[10](...continued)
antitrust actions are not "penalty" actions — was the prevailing view throughout most of the United States. *See, e.g., Englander Motors Inc v. Ford Motor Co.*, 293 F.2d 802, 806 (6th Cir. 1961) ("[a] law is not penal merely because it imposes an extraordinary liability on a wrongdoer in favor of a person wronged")(internal quotation marks omitted)(applying Ohio law); *Shapiro v. Paramount Film Distrib. Co.*, 274 F.2d 743 (3d Cir. 1960) (applying Pennsylvania law); *Burnham Chem. Co. v. Borax Consol.*, 170 F.2d 569, 578 (9th Cir. 1948) (applying California law); *Fulton v. Loew's, Inc.*, 114 F. Supp. 676, 680 (D. Kan. 1953) (applying Kansas law); *Reid v. Appleton-Century-Crofts, Inc.*, 112 F. Supp. 279, (D. Ohio 1953) (applying Ohio law); *Reid v. Doubleday & Co., Inc.*, 109 F. Supp. 354, (D. Ohio 1952) (applying Ohio law); *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F. Supp. 506 (D. Col.1952) (applying Colorado law); *Christensen v. Paramount Pictures*, 95 F. Supp. 446, 449-50 (D. Utah 1950) (applying Utah law); *United West Coast Theatres Corp. v. South Side Theatres*, 86 F. Supp.109, (S.D. Cal. 1949) (applying California law); *Momand v. Universal Film Exch., Inc.*, 43 F. Supp. 996, 1008 (D. Mass. 1942) (applying Oklahoma law); *Hansen Packing Co. v. Swift & Co.*, 27 F. Supp. 364, 367 (S.D.N.Y. 1939) (applying Montana law). There were, however, several jurisdictions that held otherwise. *See Sun Theaters Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284, 287 (7th Cir. 1954)(applying Illinois law); *Powell v. St. Louis Dairy Co.*, 276 F.2d 464 (8th Cir. 1960) (applying Missouri law); *North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673 (4th Cir. 1960) (applying North Carolina law); *Grengs v. Twentieth Century Fox Film Corp.*, 232 F.2d 325 (7th Cir. 1956) (applying Wisconsin law); *Gordon v. Loew's, Inc.*, 247 F.2d 451 (3d Cir. 1957) (applying New Jersey law); *Sandidge v. Rogers*, 167 F.Supp 553 (S.D. Ind. 1958) (applying Indiana law).

is presumed to intend that Section 901(b) be construed in conformity with this existing case law. ("All legislation must be interpreted in the light of the common law and the scheme of jurisprudence existing at the time of its enactment." *Id.* sec. 50:01 at 137 (footnote omitted). Citing, among other case, *Isbrandsten Company Inc. v. Johnson*, 343 U.S. 779; *Transit Commission v. Long Island Railroad Company*, 253 N.Y. 345, 171 N.E. 565). And, indeed, as we demonstrated above, the legislative history confirms that Section 901(b) was intended to apply only to a those statutes that create a monetary sanction which is awarded irrespective of actual damage — not to the Donnelly Act.

POINT III

THE CONSTRUCTION OF CPLR § 901(b) ADOPTED BY THE COURT BELOW RUNS COUNTER TO THE PURPOSES OF BOTH THE DONNELLY ACT AND ARTICLE 9 OF THE CPLR

In construing a statute, the court must be mindful of "the spirit and purpose of the act and the objects to be accomplished," and should avoid an interpretation that "defeat[s] the general purpose and manifest policy intended to be promoted." *Council of the City of New York v. Giuliani*, 93 N.Y.2d 60, 69, 687 N.Y.S.2d 609, 613, 710 N.E.2d 255, 259 (1999)(internal quotations omitted). Moreover, "courts must read statutes to give effect to all of their parts." *Brown v. Wing*, 93 N.Y.2d 517, 523, 693 N.Y.S.2d 475, 478, 715 N.E.2d 479, 481 (1999). The lower court's order ignores these well-settled principles of statutory construction.

a. The Donnelly Act

Both the interrelationship of the various sections of the Donnelly Act, *and* the titles of the sections themselves, strongly supports the view that the law does not create a penalty. *See Pruitt v. Rockefeller Ctr. Prop.*, 167 A.D.2d 14, 27, 547 N.Y.S.2d 672, 679 (1st Dept. 1991)(to determine whether a statute creates a § 901(b) penalty, the court should look at the statute's description of the recovery authorized).[11]

First, the order below disregards the overall structure of the statutory provisions comprising the Donnelly Act. The Legislature specifically provided for "penalties" in two individual sections of the Act and it did so under express statutory headings. Section 341, entitled "Penalty," contains the Donnelly Act's criminal penalties. Section 342-a, entitled "Recovery of a civil penalty by attorney-general," authorizes recovery of the criminal fine as a civil penalty. By contrast, Section 340 of the Donnelly Act, which contains the treble damages provision in subsection (5), is entitled "Contracts or agreements for monopoly or in restraint of trade illegal and void." Further, as we showed above, subsection (5) speaks in terms of "damages" that are "sustain[ed]" — not in terms of any "penalty." Though title alone is not dispositive, the heading of a section enacted by the Legislature "may

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[11] In *Holley v. Coggin Pontiac,* 43 N.C. App 229, 259 S.E. 2d 1 (1979 N.C. App.) the North Carolina Court of Appeals construed similar provisions under the state's unfair trade practices law. The statute provided for civil penalties, enforceable by the state, and for treble damages for those sustaining injury. The Court held:

> [I]t would not be proper for this Court to strain to infer that the General Assembly meant the treble damages provision of Chapter 75 to be a penalty where, in the preceding statutory section, the General Assembly has expressly created a "penalty" denominated as such and reserved the authority to enforce the "penalty" to the States' chief law enforcement officer. The language of [the statute] is sufficiently particular for us to conclude that had the General Assembly intended its sister provision also to be a penalty, the General Assembly would have expressly provided for a second penalty; (43 N.C. App. 229, 236, 259 S.E.2d 1).

properly be considered to 'clarify or point the meaning of . . . [a] provision.'" *Effective Communications West, Inc. v. Board of Co-op.*, 57 A.D.2d 485, 491, 395 N.Y.S.2d 296, 300 (4th Dept. 1977) (quoting McKinney's Cons. Laws of N.Y., Statutes, § 123(b), pp. 248-250).

The language of the civil penalties section of the Donnelly Act, Section 342-a, itself shows that the Legislature did not intend treble damages to constitute a penalty under New York law. Section 342-a authorizes the Attorney General to bring an action to recover civil penalties "[i]n lieu of any penalty otherwise prescribed for a violation of a provision of this article." If the "any penalty" language in § 342-a included treble damages, then the Attorney General could not bring treble damages claims together with an action for civil penalties. However, it is common practice for the Attorney General to bring both civil penalty and civil damages claims against a single defendant. *See, e.g. Federal Trade Commission v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25; 1999 U.S. Dist. Lexis 10532; 1991-2 Trade Cas. (CCH) p. 72, 573 (dealing with the defendants' motion to dismiss in an antitrust case where New York State claimed civil penalties under Section 342-a and treble damages under Section 340(5) the Court held that these state law claims, among others, could go forward.) That is because an action for civil penalties under § 342-a prevents only the simultaneous filing of criminal penalties under § 341. *See People v. Texaco*, 369 N.Y.S.2d 952 954 (N.Y. Sup. Ct. 1975); also *People v. Gold Farm Inc.*, 113 Misc.2d 574, 449 N.Y.S.2d 618, 621 (N.Y. Sup. Ct. 1982). It does not prevent the Attorney General from suing for treble damages, which have never been construed as a "penalty" under the exclusivity provision of Section 342-a.

The Defendants argue that because section 342-b specifically refers to class actions brought by the Attorney General on behalf of governmental entities for treble damages resulting from violations of section 340, that the Legislature intended that all other class actions not specifically authorized

be prohibited (Def. Br. pp.16-17, n.10). However, when section 342-b is examined, the Defendants' assertion is unsustainable. Section 342-b provides that the State Attorney General has appropriate authority to sue on behalf of state government entities for recovery of damages as a result of violations of section 340 of the Donnelly Act or violations of the federal antitrust laws. Section 342-b was amended in 1975 to provide that subordinate government entities, upon receiving notice, must affirmatively opt out any class action brought by the Attorney General for violations of either section 340 of the Donnelly Act or under Rule 23 of the Federal Rules of Civil Procedure for violations of the federal antitrust statutes. Section 342-b is procedural, not proscriptive. The section does not say, and the legislative history does not support[12] a construction that the only class action that can be brought for recovery of damages under section 340 is by the Attorney General on behalf of government entities.

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[12] The legislative history of the 1975 amendment to section 342-b provides that the amendment was "An Act to amend the general business law, in relation to the recovery of damages by the Attorney General, to provide for notice in class actions brought on behalf of government entities": *See; Memorandum Accompanying Proposed Act, dated June 16, 1975; Memorandum for the Governor, Re Senate 2456, from Louis J. Lefkowitz, Attorney General, June 23, 1975.* (Copies of these documents are annexure A and B respectively to this brief). The supporting memoranda to the proposed amendment states that the intention of the amendment was "to bring the powers of the Attorney General under state law into conformity with powers the state Attorney General had been permitted to use under the provisions of the Federal Rules of Civil Procedure"*Memoranda, supra.* At the time of the amendment, State Attorney's General were bringing class actions under Rule 23 of the Federal Rules of Civil Procedure for treble damages for violations of the federal antitrust laws for both government entities and for private citizens: See: *In re Antibiotic Antitrust Action*, 333 F. Supp. 278, 280 (S.D.N.Y.) holding that state Attorney's General were proper class representatives ("It is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general"), amended by 333 F Sup. 291 (S.D.N.Y.), and amended by 333 F.Supp.299 (S.D.N.Y. 1971); see also generally: *Philadelphia v. American Oil Co.*, 53 F.R.D.. 45, 67 (D.N.J. 1971) ("a state attorney general may represent the state's consumers in a class action"), see also: *State Teachers Retirement Board v. Fluor Corp.*, 73 F.R.D. 569, 572 (S.D.N.Y. 1976) ("There is no reason, as a matter of federal law, why class suits may not be pressed by state attorneys general").

Section 342-b does, however, confirm that the Legislature envisaged the Attorney General could bring class actions for treble damages under either section 340 or the federal antitrust laws. It would seem somewhat anomalous for the Legislature, in the same legislative session, to clearly give a right for the Attorney General to bring a class action to recover treble damages for violations of section 340, yet confine the Attorney General's right to bring class actions only on behalf of government entities, as well as completely excluding all other class actions.

The Defendant's argument that the mention of one specific type of class action in section 342-b signifies a legislative intent to exclude all other class actions under section 340 assumes that specific authorization of class actions is required. The reason that there is no specific authorization of class actions in section 340, yet the Legislature at the same time passed an amendment to section 342-b which facilitated and clearly envisaged class actions under section 340, is because the language, headings and structure of the Donnelly Act all support the fundamental premise that treble damages recovered pursuant to section 340 were not intended by the Legislature to be penalties. The absence of any specific authorization for class actions is therefore irrelevant, because the Legislature intended treble damages to be damages, not penalties, for which no specific authorization was necessary.

b. Article 9 of the CPLR

The lower court's ruling runs counter not only to the Donnelly Act, but also to the class action provisions of the CPLR. When the Legislature enacted the 1975 class action provisions, it "intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it." *Friar v. Vanguard Holding*, 78 A.D.2d 83, 91, 434 N.Y.S.2d 698, 703 (2d Dept. 1980). Thus, this court has properly held that CPLR Article 9 should be liberally construed in order to carry out

the Legislature's intent. *See Pruitt v. Rockefeller Ctr. Prop.*, 167 A.D.2d 14, 20, 547 N.Y.S.2d 672, 675 (1st Dept. 1991); *In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 158, 553 N.Y.S.2d 138, 141 (1st Dept. 1990), *modified in part on other grounds*, 77 N.Y.2d 185, 565 N.Y.S.2d 755 (1991); *Brandon v. Chefetz*, 106 A.D.2d 162, 168, 485 N.Y.S.2d 55, 59 (1st Dept. 1985).

Article 9 is modeled on Rule 23 of the Federal Rules of Civil Procedure, which also is intended to facilitate class actions. *See Brandon*, 106 A.D.2d at 168, 485 N.Y.S.2d at 60. Accordingly, Section 901(b) should be construed to promote — not to impair — the Legislature's purpose. *See Pruitt*, 167 A.D.2d at 20, 547 N.Y.S.2d at 675. As the Second Department explained in *Brandon*:

> The policy of this rule is to favor the maintenance of class actions and for a liberal interpretation. That policy is especially strong in instances where denial of class action status would effectively terminate further litigation.

106 A.D.2d at 20, 485 N.Y.S.2d at 60.

The court below disregarded these considerations. To deny class action treatment for private treble damage claims under the Donnelly Act would sound the death knell for much private enforcement of the state's antitrust laws. The only persons likely to suffer damages great enough to justify the rigors of an antitrust case under New York law would be large business establishments. End user consumers — the intended beneficiaries of the 1998 indirect purchaser amendment to Section 340 — would rarely suffer sufficiently great financial loss to make a Donnelly Act suit worthwhile. As a result, private civil actions under the Donnelly Act to redress widespread consumer injury would cease, leaving an action by the Attorney General as the only available remedy for consumers. The Attorney General, however, cannot litigate every Donnelly Act case that should to be brought. That is why the Legislature created the private treble damage right of action in the first place.

By adopting a construction of CPLR 901(b) that undermines both private enforcement of the state's antitrust laws and the policy favoring class action litigation to redress widespread, albeit individually small, injury, the court below misread Section 901(b).

Conclusion

The language and legislative history of Section 901(b), together with the language of the Donnelly Act itself — requiring proof of "damages sustained" as a prerequisite to recovery — demonstrate that private class actions are not precluded as a Section 901(b) "penalty." State and federal case law, particularly the decisions interpreting the federal antitrust statute, further establish that antitrust treble damages are not a penalty. To hold otherwise would undermine both the Donnelly Act and the class action provisions, which should be interpreted liberally to achieve their legislative purposes. Accordingly, this Court should reverse the lower court's decision and allow the plaintiffs' class action to proceed.

Dated: New York, New York
April 24, 2001

Respectfully submitted,

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JUN 23 1975

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY 12224

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

MEMORANDUM FOR THE GOVERNOR

Re: Senate 2456

This bill confirms the right of the Attorney General to bring antitrust class actions on behalf of subordinate governmental entities without first having to solicit the express approval of every potential class member before filing a lawsuit.

The bill amends the General Business Law by adding a new sentence to §342-b thereof. The new sentence provides that in any class action brought by the Attorney General on behalf of subordinate governmental entities for violations of state or federal antitrust laws, any governmental entity that does not affirmatively exclude itself from the action, upon due notice thereof, 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. All that will be required is that due notice of the class action be given to potential governmental class members and that each entity have an opportunity to decide for itself whether or not it wishes to participate in the lawsuit. Those entities who wish to participate need do nothing in order to avail themselves of the Attorney General's services. Any entity not wishing to participate may exclude itself from the action.

This bill is part of my legislative program and I strongly urge its approval.

Dated: June 23, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General

MEMORANDUM

Re: Senate

Assembly

AN ACT to amend the general business law, in relation to the recovery of damages by the attorney general, to provide for notice in class actions brought on behalf of subordinate governmental entities

This bill, recommended by the Attorney General, would amend the General Business Law by adding a new sentence to § 342-b thereof that would clarify the manner in which the Attorney General may be requested to bring class actions on behalf of subordinate governmental entities within the state. The bill would take effect immediately.

The new sentence provides that in any class action brought by the Attorney General on behalf of subordinate governmental entities for violations of state or federal antitrust laws, any governmental entity that does not affirmatively exclude itself from the action, upon due notice thereof, shall be deemed to have requested to be treated as a class member in that action.

Essentially, this bill confirms the right of the Attorney General to maintain antitrust class actions on behalf of these entities without first having to solicit the express approval of every potential class member before filing a lawsuit. All that is required is that due notice of the action be given to potential governmental class members and that each entity have an opportunity to decide for itself whether or not it wishes to participate in the lawsuit. Any entity not wishing to participate may exclude itself from the action. Those entities who wish to participate need do nothing in order to avail themselves of the Attorney General's services.

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.

In addition to whatever authority the Attorney General may possess under federal law, the bill is intended to confirm his authority to maintain governmental class actions in the state or federal courts as a matter of state law. It is further intended to defeat any possible claims that: (1) by maintaining a class action without the express prior approval of every class member, he may have failed to comply with the requirements of § 342-b as presently drafted; or that (2) by soliciting the express prior approval of class members, he may have failed to comply with the federal prohibitions against solicitation in class actions.

This bill is part of the legislative program of the Attorney General.