SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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

Plaintiff-Appellant,

-against-

Appellate Division
Docket No. 2004-06517

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

Defendants-Respondents.

BRIEF FOR AMICUS CURIAE STATE OF NEW YORK IN SUPPORT OF APPELLANT AND URGING REVERSAL OF THE ORDER BELOW

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MISCELLANEOUS

PRELIMINARY STATEMENT

Amicus curiae State of New York submits this brief in support of Plaintiff-Appellant's appeal from an Order of the Supreme Court, County of Nassau (Parga, J.), dated November 20, 2003 (A. 5-9).[1] The Order granted Defendants' motion to dismiss Plaintiff's class action claims under the State's antitrust statute, the Donnelly Act, Gen. Bus. Law §§ 340, et seq. The State of New York urges the reversal of the Order below.

The CPLR § 901(b) issue presented in this case is identical in all material respects to that presented in Paltre v. General Motors Corp., Nos. 2004-04642 and 2004-04677, also on appeal to this Court. The Attorney General has noticed an analogous motion for permission to file as amicus curiae in support of reversal in Paltre. See Notice of Motion by the Attorney General on behalf of the State of New York, Paltre, Nos. 2004-04642 and 2004-04677 (2d Dep't filed December 30, 2004).

Plaintiff in this case is a New York consumer who brought this class action under the Donnelly Act, alleging that the defendant suppliers of rubber-processing chemicals conspired to maintain an illegal price fixing agreement. The court below granted dismissal on the basis of the First Department's decisions in Asher v. Abbott Labs, 290 A.D.2d 208 (1st Dep't 2002), and Cox v. Microsoft Corp., 290 A.D.2d 206 (1st Dep't 2002). Thus, the court wrote: "[p]rivate persons are precluded

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[1]The references that begin "A.__" refer to Plaintiff's Appendix where available.

from bringing a class action under the Donnelly Act because the treble damages remedy provided in General Business Law § 340(5) is a 'penalty' within the meaning of CPLR 901(b), the recovery of which in a class action is not specifically authorized and the imposition of which cannot be waived" (A. 6-7 (internal quotations and citations omitted)).

The lower court erred because the language and legislative history of CPLR 901(b) make clear that this provision's limited ban on class actions reaches only those statutes providing a fixed monetary payment that is awarded without regard to actual injury or loss sustained by the injured party. The Donnelly Act, in contrast, requires those injured to prove their actual damages. Indeed, the legislative history of the Donnelly Act's treble damages provision demonstrates that the Legislature intended to conform the provision to federal antitrust laws, which have long treated antitrust treble damages as a remedy, not as a penalty. Thus, treble damages awarded under the Donnelly Act do not fall within section 901(b)'s definition of "penalty."

Lest there be any doubt, the Legislature's 1998 amendment to the Donnelly Act - allowing consumers to sue for injuries even when they are not direct purchasers from an antitrust violator - confirms that consumers may bring class actions under the Donnelly Act. The Legislature clearly envisioned class actions as a means to aggregate limited individual damages, thereby

making resort to the Donnelly Act a practical and realistic remedy.

Accordingly, allowing the lower court's ruling to stand would frustrate the Legislature's clear intent to strengthen enforcement of the Donnelly Act by private class actions.

THE INTEREST OF THE AMICUS

The Attorney General is granted wide investigative and enforcement powers under the Donnelly Act.[2] Although the Attorney General's authority to bring antitrust actions is not based on or derived from CPLR 901(b), he is, nevertheless, directly interested in the effective enforcement of the Donnelly Act. Competition is the life-blood of our economic system, and effective antitrust enforcement - essential to assure such competition - cannot depend solely on actions brought by the Attorney General.

Rather, "the private cause of action [also] plays a central role in enforcing" the antitrust laws. Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 635 (1985). As the U.S. Supreme Court noted of the Donnelly Act's federal counterpart, "[a] claim under the antitrust laws is not merely a private

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[2] See Gen. Bus. L. § 341 (authorizing criminal prosecution of antitrust violations); § 342 (authorizing the Attorney General to seek injunctions against 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 the Attorney General investigative and subpoena powers).

matter"; an antitrust plaintiff "has been likened to a private attorney-general who protects the public's interest." Id. (internal quotations omitted). Moreover, the Donnelly Act's treble damage provision, in particular, is an integral part of effective antitrust enforcement as it is designed to encourage those injured by antitrust violations to augment government enforcement. See Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (the treble damage remedy is intended to encourage litigants "to serve as private attorneys general") (internal quotation marks omitted).

While private treble damage actions, authorized by the Legislature in Gen. Bus. L. § 340(5), are "a chief tool in the antitrust enforcement scheme," Mitsubishi Motors, 473 U.S. at 635, they simply may not be economically viable without the class action mechanism. The damage sustained by any single victim, particularly a consumer, is often too small. Accordingly, "[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." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citation and internal quotations omitted). The State of New York, therefore, has a strong interest in ensuring that consumers are not precluded from bringing class actions under the Donnelly Act.

ARGUMENT

CPLR 901(b) DOES NOT BAR CLASS ACTIONS FOR TREBLE DAMAGES UNDER THE DONNELLY ACT

A. CPLR 901(b) Covers Only Those Statutes Imposing a Penalty or Minimum Measure of Recovery Without Requiring Proof of Actual Damages, Whereas Recovery under the Donnelly Act Depends on Proof of Actual Damages.

CPLR § 901(b) provides that:

> 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 minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Although the statute does not define the terms "penalty," the New York Court of Appeals has written that a penalty "refer[s] to something imposed in a punitive way for an infraction of a public law and do[es] not include a liability created for the purpose of redressing a private injury, even though the wrongful act be a public wrong and punishable as such." Sicolo v. Prudential Savings Bank of Brooklyn, 5 N.Y.2d 254, 258 (1959)(citation ommitted). Further, "[t]hat the recovery may exceed in some instances the actual loss does not make the liability truly penal in nature . . . ." Id. The Sicolo court instead approved those cases that "regard[ed] as penalties arbitrary exactions, unrelated to actual loss . . . ." Id. at 258.

It is, therefore, the statutorily prescribed "exaction" - unrelated to the victim's actual injury - that epitomizes a

"penalty." CPLR 901(b)'s companion standard - for statutes providing a "minimum measure of recovery" - reinforces the notion of a monetary charge imposed independent of proven injury. Cf. Pruitt v. Rockefeller Ctr. Properties, 167 A.D.2d 14, 26 (1st Dep't 1991) ("A statute that creates or imposes a 'minimum measure of recovery' is one that, upon proof of its violation, provides for the recovery of some fixed minimum amount, without regard to the amount of damages suffered.").

By contrast, the Donnelly Act's antitrust treble damage provision depends on proof of actual damages. As such, the Legislature never intended CPLR 901(b) to apply. Were there room for doubt, however, the legislative history dispels it. That history establishes that the limited ban on class actions was intended to cover only those statutes that provide a fixed monetary recovery - i.e., a monetary amount or measure that is specifically set out in the law itself, and that is imposed without requiring the plaintiff to show any actual injury or loss.

Section 901(b), enacted in 1975, was part of a comprehensive revision of New York's class action law. As initially drafted, the bill did not include section 901(b); the original bill was later amended "to exclude statutory penalties and minimum measures of recovery" because "the imposition of penalties," while appropriate in an individual action, "could produce excessively harsh results when you magnify the impact in a class

suit." Senate proceeding transcript at 5946-47 (May 28, 1975) (Senator H. Douglas Barclay).

For example, the Banking Law Committee of the New York State Bar argued that "severe statutory penalties unrelated to actual damages," together with class actions, would create excessive liability exposure. Bill Jacket, L.1975, c. 207, N.Y.S. Bar Association Legislation Report No. 1 (Revised) at 1, 2 (1975) (emphasis). As the Banking Law Committee explained:

> In the typical class action suit brought under the Federal Truth In Lending statute [15 U.S.C. §1640(e)], for example, not a single penny of actual damages to any consumer is involved, and this would generally be the case with regard to other consumer laws.
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> * * *
>
> The 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.

Id. at 1, 2 (1975) (emphasis added). The concern with excessive liability was thought to be particularly grave because "New York statutory law contain[ed] many 'penalty' and similar provisions establishing arbitrary measures of liability for noncompliance." Bill Jacket, L.1975, c. 207, N.Y.S. Bar Association Legislation Report No. 15 at 2 (1975) (emphasis added).

Similarly, the Empire State Chamber of Commerce had critiqued that "[p]enalties and class actions simply do not mix. This was proved in Ratner v. Chemical Bank [New York Trust Co.,

54 F.R.D. 412 (S.D.N.Y. 1972)], where the combination caused a potential liability of $130 million, although the actual damages to individual plaintiffs were zero!" Bill Jacket, L.1975, c. 207, Memo. by Stanford H. Bolz, February 14, 1975, at 3 (emphasis added). Ratner was a Federal Truth in Lending Act case in which the court denied class certification in part because allowing each class member to recover the $100 statutorily-prescribed minimum, "without any participation in the lawsuit or proof of damages, would impose a penalty not intended by Congress." 54 F.R.D. at 416.

Recovery under the Donnelly Act, in contrast, depends on proof of actual damages. To prevail on an antitrust claim, a plaintiff must prove actual injury that is causally connected to the unlawful conduct, and then must quantify that injury. See, e.g., Capitaland United Soccer Club, Inc. v. Capital District Sports & Entertainment, Inc., 238 A.D.2d 777, 780 (3d Dep't 1997) (finding that plaintiff's factual allegation sufficiently stated an injury to its competitive business interest); Lerner Stores Corp. v. Parklane Hosiery Co., 86 Misc.2d 215, 217 (Monroe Co. Sup. Ct.) (dismissing complaint where plaintiff failed to allege injury "directly attributable to the violation"), aff'd, 54 A.D.2d 1072 (4th Dep't 1976).

The same is true under federal antitrust laws. See Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931) (both "the fact" and "the extent" of damage must be

proven); Zenith Radio Corp. v. Hazeltime Research, Inc., 395 U.S. 100, 114 n.9 (1969) (plaintiff must prove both "the fact of damage . . . flowing from the unlawful conspiracy," and "the amount" of damage); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) ("To recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent").

In fact, for plaintiffs to recover treble damages for antitrust violations, they must prove more than actual injury. They must also show "antitrust injury" - "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Blue Shield of Virginia v. McCready, 457 U.S. 465, 482 (1982). "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause." Id. (internal citation and quotations omitted). Thus, a private antitrust plaintiff seeking to recover damages under the Donnelly Act is subject to burdens of proof not imposed on a plaintiff suing under a statute - such as the Federal Truth in Lending Act - that provides for an automatic monetary payment once the violation of law is shown.

B. Section 901(b)'s Reference to "Penalty" Does Not Cover the Donnelly Act's Treble Damage Provision, Which Is Primarily Remedial.

Even if section 901(b) might be construed to cover certain treble damage provisions, it does not cover the Donnelly Act section, which is primarily remedial and intended to compensate antitrust victims for actual damages and the additional intangible cost of bringing litigation against, often, the largest of corporations.

As originally enacted in 1899, the Donnelly Act did not include an express damage remedy. See L.1899, c. 690, § 1. The courts, however, permitted suits for actual damages, a result that the Legislature effectively ratified in 1957 by enacting a statute of limitations for Donnelly Act damage claims. See L.1957, c. 893, §2; Jack Greenberg, "New York Antitrust Law and Its Role in the Federal System" 46a-47a (reprinted in Robert L. Hubbard and Pamela Jones Harbour, Antitrust Law in New York State 77, 125-126 (2nd ed. 2002)). The Legislature first provided an express damage remedy for antitrust victims in 1975, a few weeks after enactment of CPLR 901(b). See L.1975, c. 333, § 1; L.1975, c. 207. Recognizing the significance of the rights at stake, and the substantial difficulties associated with successfully detecting and prosecuting antitrust claims against the often powerful forces of business, the Legislature authorized antitrust plaintiffs to "recover three-fold the actual damages sustained . . ." See L.1975, c. 333 § 1.

In so doing, the Legislature distinguished the new treble damage remedy from penalties - whether criminal or civil - which were separate features of the State's antitrust enforcement scheme. Thus, the memorandum accompanying introduction of the bill notes:

> This bill, recommended by the Attorney General, would amend §§ 340, 341 and 342 of the General Business Law (Donnelly Anti-Trust Law) by increasing criminal penalties, and providing for treble-damage actions . . . The treble-damage provisions would eliminate the necessity to resort to the federal acts in seeking damages for Donnelly Act violations. At present, the Donnelly Act provides only for recovery of actual damages sustained plus a civil penalty (which is "in lieu of" criminal penalties).

Memorandum S.3042 & A.3546, dated January 8, 1975, reprinted in New York State Legislative Annual 83 (1975); see also Bill Jacket, L.1975, c. 333, letter of Assembly introducer Harenberg, dated June 20, 1975 ("The bill amends the Donnelly Anti-trust Act by increasing criminal penalties and providing for treble-damage actions. . . At present, the Donnelly Act only provides for recovery of actual damages sustained plus a civil penalty in lieu of criminal penalties."); Secretary of State Mario Cuomo's memorandum to Counsel to the Governor, June 27, 1975 (the bill "increase[s] the damages and penalties to be similar to such provisions under federal anti-monopoly laws"). Indeed, the Donnelly Act's reference to "civil penalty" in cases brought by the Attorney General remains unchanged today. See Gen. Bus. Law § 342-a ("Recovery of civil penalty by attorney general").

Despite this history, the court below ruled that the Donnelly Act's treble damage remedy constitutes a "penalty" within the meaning of CPLR 901(b). The court relied principally on the First Department's decision in Cox, 290 A.D.2d 206, which in turn relied on state decisions, noting that treble damages may be considered "penal in nature." See Cox, 290 A.D.2d at 207 (citing non-antitrust cases for the proposition that "a provision for the trebling of damages is penal"); see also Asher, 290 A.D.2d at 208(same).[3]

However, the cases relied on by the First Department shed no light on how to interpret the Donnelly Act's treble damage provision. Although state courts have considered whether treble or other multiple damage provisions amount to a penalty, the resulting decisions are mixed. The ruling in any particular case tends to be statute-specific, and, until Cox and Asher - both First Department cases - none of the appellate rulings involved the Donnelly Act.[4] But, to resolve the issue presented under the

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[3] Trial level rulings under the Donnelly Act are to the same effect. See Lennon v. Philip Morris Companies, Inc., 189 Misc.2d 577 (Sup. Ct. N.Y. Co. 2001); Rubin v. Nine West Group Inc., 1999-2 Trade Cas. (CCH) ¶ 72,714 (Sup. Ct. Westchester Co. 1999); Russo & Dubin v. Allied Maintenance Corp., 95 Misc.2d 344 (Sup. Ct. N.Y. Co. 1978); Blumental v. American Society of Travel Agents, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,530 (Sup. Ct. N.Y. Co. 1977).

[4] Compare, e.g., Matter of Sackolwitz v. Charles Hamburg & Co., 295 N.Y. 264, 267 (1946)(doubling the compensation due under state worker's compensation statute was considered increased compensation, not a penalty); Bogartz v. Astor, 293 N.Y. 563, 566 (1944) (same); Oelkrug v. Gilwaldron Realty Co., 45 Misc.2d 160, 161 (2d Dep't App. Term 1964) (cause of action for treble damages

Donnelly Act, the role of treble damages in the antitrust setting should inform the court's decision. See Sicolo, 5 N.Y.2d at 258 ("It is the intrinsic nature of the action that counts" when determining whether an extraction is compensatory or punitive).

On this score, the legislative history of the Donnelly Act provision demonstrates that the treble damage remedy is intended to emulate its federal counterpart, the origins of which go back to Congress' enactment of the Sherman Act in 1890. See, e.g., Memorandum S.3042 & A.3546, Jan. 8, 1975, reprinted in New York State Legislative Annual 83 (1975) ("This bill . . . [would] conform[] New York's Donnelly Antitrust Act to the analogous federal provisions of law."); Bill Jacket, L.1975, c. 333, Harenberg letter to Judah Gribetz, June 20, 1975 (noting that the amendment was to "make the Donnelly Act conform to recent changes in the federal Sherman Act"); Bill Jacket, L.1975, c. 333, Ohrenstein Memorandum (undated) ("Such changes will be in

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for willful overcharge of rent was action for damages, not a penalty); with Fults v. Munro, 202 N.Y. 34, 41 (1911) (referring to treble damages under wrongful eviction statute as penal in nature); Ridge Meadows Homeowners' Assoc., Inc. v. Tara Dev. Co., 242 A.D.2d 947 (4th Dep't 1997) (CPLR § 901(b) bans class action for treble damages under deceptive practices act, Gen. Bus. L. § 349(h)); Rental & Mgmt. Assocs., Inc. v. Hartford Ins. Co., 206 A.D.2d 288 (1st Dep't 1994) (construing treble damage provision in wrongful eviction statute, RPAPL § 853, as penal in nature); Lyke v. Anderson, 147 A.D.2d 18, 28 (2nd Dep't 1989) (same, and referring to "multiple damage statutes" in general); see also Wolchonok v. Creston Spring Corp., 13 Ad.2d 846, 846 (2d Dep't 1961) (treble damages under federal veteran's benefits statute considered damages, not a penalty); Di Bitetto v. Sussman, 279 A.D. 1033, 1033 (2d Dep't 1952) (same with respect to federal rent control statute).

conformity with federal legislation."); see also Secretary of State Mario Cuomo's memorandum to Counsel to the Governor, June 27, 1975 (the bill "increase[s] the damages and penalties to be similar to such provisions under federal anti-monopoly laws").

In fact, because the Donnelly Act is modeled after the federal antitrust laws - and is often referred to as the "Little Sherman Act," Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335 (1988) - courts generally should construe the Act in light of federal precedent and should give it a different interpretation only where statutory language or state policy differences justify deviation. See X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513 (1994); Anheuser-Busch, 71 N.Y.2d at 335.

Because the issue here is an interpretation of the Donnelly Act - that is, whether the Legislature enacted the Donnelly Act's treble damage provision as primarily a remedial, rather than a punitive, measure - the most pertinent authorities are those arising under the federal antitrust laws. A review of the federal law makes it plain that, in using the federal treble damage provision as a model, the Legislature did not regard the Donnelly Act's treble damage provision as a "penalty" within CPLR 901(b)'s limited ban on class actions. At the time of the 1975 enactment of both CPLR 901(b) and the Donnelly Act's treble damages provision, antitrust treble damages in federal law had long been recognized as remedial in nature, rather than as a penalty. As then-Judge Cardozo noted in Cox v. Lykes Brothers,

237 N.Y. 376, 379-80 (1924), decisions of the United States Supreme Court excluded "from the class of penalties . . . an action under the [federal] anti-trust law for recovery of treble damages" (citation omitted).

In adopting the Sherman Act, Congress fully appreciated the difficulty confronting consumers who sought to recover damages based on antitrust violations. The treble damage remedy was offered as an incentive to take on the task. During the 1890 congressional debates, Senator Sherman argued that the damage remedy "should be commensurate with the difficulties of maintaining a private suit against a combination such as is described." 21 Cong. Rec. 2456 (1890). Senator Sherman described the damage provision then under consideration — which called for double, rather than treble, damages — as "too small," and thus, predicted that "[v]ery few actions [would] probably be brought." Id. at 2569. Senator George similarly regarded the proposed damage remedy as insufficient to give "consumers[,] [t]he people of the United States as individuals" the wherewithal to enable them to sue "a powerful and rich corporation, or combination of corporations and persons. . . . The result will be in nearly every case that, crushed by expense, wearied by the delays, he will abandon the suit in despair." Id. at 1767-68. The Senate Judiciary Committee thereafter included the treble damage provision eventually enacted. See 1 Earl W. Kintner, The

Legislative History of the Federal Antitrust Laws and Related Statutes 23 (1978).[5]

As Cox v. Lykes Brothers reflects, courts recognized early on that the federal antitrust treble damage provision was primarily remedial in nature. See, e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) (holding that action for treble damages under the antitrust laws was not an action for a penalty); Hicks v. Bekins Moving & Storage Co., 87 F.2d 583, 585 (9th Cir. 1937) (a Sherman Act damage action "is not an action to recover a penalty"); Baush Machine Tool Co. v. Aluminum Co. of America, 63 F.2d 778, 780 (2nd Cir. 1933) (an antitrust damage action "is not one for a penalty . . . . The suit is between private parties, and the enlargement of the damages does not convert it into a prosecution of a penalty"); Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785, 786, 789 (2nd Cir. 1959) (holding that New York's statute of limitations applicable to actions "for a penalty or forfeiture"

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[5] See also 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George) (the treble-damages provision "was conceived of primarily as a remedy" for "the people of the United States as individuals"); 21 Cong. Rec. 3147 (1890) (remarks of Sen. Reagan) (the treble damage provision "is giving a civil remedy. It is not in the nature of prosecution for crime. It is a civil remedy for damage done"); 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb) (the treble-damages provision of the Clayton Act was conceived primarily as "opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giving the injured party ample damages for the wrong suffered").

does not apply to federal antitrust treble damage cases, which are actions for civil damages "made exemplary in part only").

Since 1975, the U.S. Supreme Court continues to so hold. As the Court said in Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977), while treble damages "play an important role in penalizing wrongdoers and deterring wrongdoing," "[i]t nevertheless is true that 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." 429 U.S. at 485-86; accord Mitsubishi Motors Corp., 473 U.S. at 636.

The First Department in Cox nonetheless suggested that "[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, it is exemplary." 290 A.D.2d at 208. While there may be statutory contexts in which this conclusion is sound, antitrust is not one of them. Rather than a penalty, "the trebling of damages under the antitrust laws reflects congressional recognition of the difficulty of proving antitrust damages." Hydrolevel Corp. v. ASME, Inc., 635 F.2d 118, 127 (2nd Cir. 1980), aff'd, 456 U.S. 556 (1982). Accordingly, in modeling the Donnelly Act's treble damage provision after federal antitrust law, the Legislature intended that provision to provide a remedy - not a penalty.

Equally important, by 1975 - when the treble damage provision was added to the Donnelly Act - it was well-recognized that federal antitrust actions could be brought as class actions. See, e.g., In re Master Key Antitrust Litigation, 528 F.2d 5 (2nd Cir. 1975); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). Nothing in the legislative history of the 1975 Donelly Act amendment suggests that Legislature intended to deny the victims of state antitrust violations resort to this frequently invoked procedural mechanism.

As further support for its construction of the Donnelly Act, the Cox court also referred to (1) Donnelly Act § 342-b, which the court called a "specific authorization to [the Attorney General] to bring class actions on behalf of government entities," Cox, 290 A.D.2d at 206; and (2)the absence of amendment to the Donnelly Act after two trial level courts applied CPLR § 901(b) to bar Donnelly Act class actions. This approach is unpersuasive, however.

First, the Cox court misunderstood Section 342-b. 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 (certifying New York and other states as class representatives); In re Master Key Antitrust Litig., 70 F.R.D. 23 (D. Conn. May 27, 1975) (same), appeal

dismissed, 528 F.2d 5 (2d Cir. 1975). The provision itself was enacted in 1969 merely to confirm the Attorney General's authority to prosecute antitrust actions on behalf of state and local governments generally, without regard to whether or not the case was brought as a class action. L.1969, c. 635, § 1.[6] The 1975 amendment was intended to assure that, if the case is in fact brought as a class action, government entities will have an opportunity to opt out. L.1975, c. 420, § 1.[7]

Second, as a matter of statutory construction, legislative inaction is "a weak reed upon which to lean and a poor beacon to follow in construing a statute." 2B Norman J. Singer, Statutes and Statutory Construction § 49:10, at 112-15 (2000) (internal quotation marks and footnote omitted); see also Brooklyn Union Gas Co.v. New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 90 (1976). This admonition applies with strongest force where the judicial rulings are at a trial level.

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[6] See Bill Jacket, L.1969, c. 635, Memo. Hon. Louis J. Lefkowitz, dated April 29, 1969 ("The proposed express authorization . . . will remove any doubt as to the authority of the Attorney General to bring such actions" on behalf of "political subdivisions and public agencies").

[7] 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").

C. The 1998 Amendment to the Donnelly Act Further Confirms That the Legislature Intended to Allow Consumers to Bring Treble Damage Class Actions under the Act.

Amendment of the Donnelly Act in 1998 further confirms that the Legislature specifically intended to allow New York consumers to bring antitrust class actions. This amendment 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 Gen. Bus. L. § 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.[8] Its purpose is to ensure that consumers injured by antitrust violations may recover damages. See Bill Jacket, L.1998, c. 653, Letter of Assembly Sponsor Richard L. Brodsky, Dec. 15, 1998 (the bill "allows individuals who are third parties in transactions

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[8] 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).

impacted by illegal monopolies to have legal recourse against these activities").

Importantly, the impetus for the amendment was to enable New York consumers - whose individual damage, even when trebled, is otherwise too small - to participate in class actions. As the Senate sponsor of the bill explained:

> [F]or New York indirect purchasers to commence or join an action for antitrust violations a specific statute making standing express under New York law must be enacted. The need for this legislation has been further reinforced by an additional recent case involving copper market manipulation, which left several small New York businesses without recourse. These cases, the copper and brand-name drug cases, which together have been settled for over $100 million, have left New Yorkers on the sidelines with little or no recourse to recoup the staggering over-payments they have made for these goods.

(A. 62-63: Bill Jacket, L.1998, c. 653, Letter of James L. Lack, Dec. 17, 1998, at 2). The copper case referred to by the Senate sponsor was Heliotrope General v. Sumitomo Corp., No. GIC 701679 (Super. Ct. San Diego County 1996), a state law antitrust class action filed in California by indirect purchaser of copper and copper products. See Richard Brodsky, James Lack, Bernard Persky and Barbara Hart, "Antitrust Protections Expanded in New York," N.Y.L.J., June 22, 1999 [hereinafter "Antitrust Protections"], at 1, col. 1. Heliotrope and other related cases were settled, but many New York consumers, who were indirect purchasers, were excluded from the plaintiff class, and thus ineligible to make

claims against the $43.5 million settlement fund because New York lacked an Illinois Brick repealer.

The brand-name drug case cited by the Senate sponsor was Levine v. Abbott Labs., Index No. 117320/95 (N.Y. Co. Sup. Ct. Nov. 25, 1996), appeal withdrawn, 257 A.D.2d 978 (1st Dep't 1999), in which the trial court applied Illinois Brick to bar a putative antitrust class action brought by an indirect purchaser of prescription drugs (see A. 62-63: Bill Jacket, L.1998, c. 653, Letter of James L. Lack, Dec. 17, 1998, at 2). While appeal was pending in Levine, global settlement was reached in that case and ten similar class actions filed in other jurisdictions. New York's consumers, however, received only a small portion of the $65 million settlement amount - again, because New York lacked an Illinois Brick repealer. See Antitrust Protections, supra, at 1, col. 1. To overcome this recurring scenario, an Illinois Brick repealer bill was introduced while the appeal in Levine was pending.

The copper and drug cases illustrate that, without a class action mechanism to aggregate the limited individual damages, resort to the Donnelly Act is neither a realistic nor practical remedy for consumers.[9] Bearing in mind that the very inability

[9] See generally William H. Page, "The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick," 67 Antitrust L.J. 1, 3, 5 (1999) (noting that where state courts deny class certification, indirect purchaser cases are "effectively terminated," and the result is to "deny most indirect purchasers a practical remedy, even in states that permit them to sue").

of New York consumers to participate in antitrust class actions precipitated the 1998 amendment of the Donnelly Act, it would be illogical to assert that the Legislature intended New York consumers to bring individual actions under the Act but to deny those consumers the benefit of the class action mechanism.

To the contrary, the legislative debate of the Donnelly Act's Illinois Brick repealer leaves no doubt that the Legislature contemplated this change to permit consumers — classic indirect purchasers — to sue in class actions filed under the Donnelly Act. During the debate, the Assembly sponsor of the bill, 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 class action by a group of citizens -

Mr. Brodsky: Yes.

Mr. Straniere: - to be able to go in and allege a violation and to prove damages?

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

(A. 80-81: Assembly proceeding transcript at 33-34 (May 26, 1998)(emphasis added); see also A. 90: 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 federal class action suits and seek a recovery based upon our state Donnelly Act") (emphasis added)).

The opponents of the legislation similarly recognized that the repealer would enable consumers 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" (A. 71-72: Bill Jacket, L.1998, c. 653, Letter of Daniel Walsh, Nov. 18, 1998, at 2).

Notably, the First Department's erroneous interpretation of CPLR 901(b) in Cox, 290 A.D.2d 206, affects not only state court rulings, but also those in federal district courts. With

increased frequency, New York consumers find themselves barred from asserting indirect purchaser antitrust claims as class actions - the very claims the Legislature envisioned the Donnelly Act's Illinois Brick repealer to permit - because of the perceived CPLR 901(b) barrier. See, e.g., In re Relafen Antitrust Litigation, 221 F.R.D. 260, 284-286 (D. Mass. 2004); In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702, 727(D. Md. 2001); U.S. v. Dentsply Int'l, Inc., Civil Action Nos. 99-005, 99-255, 99-854, 2001 U.S. Dist. LEXIS 9057, at *48-53 (D. Del. March 30, 2001); see also Leider v. Ralfe, No. 01 Civ. 3137, 2004 U.S. Dist. LEXIS 15345, at *8-16 (S.D.N.Y. July 30, 2004) (magistrate's recommendation against class certification). While New York consumers are precluded from participating in such class actions, indirect purchaser claims by consumers in other states proceed - the very anomaly the Legislature intended the 1998 amendment to remedy.

CONCLUSION

For the foregoing reasons, the State of New York urges this Court to reverse the Supreme Court's dismissal of the Donnelly Act class action claims.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Appellate Division Rule 22 N.Y.C.R.R. § 670.10.3(f), I hereby certify that the foregoing brief was prepared on a computer (on a word processor). A monospaced typeface was used, as follows:

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