COURT OF APPEALS
STATE OF NEW YORK

CHARLES COX, individually and on behalf
of all others similarly situated,

Plaintiff-Appellant,

-against-

MICROSOFT CORPORATION and DOES
1 through100, inclusive,

Defendant-Respondent.

NOTICE OF MOTION, AFFIDAVIT, EXHIBITS AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK IN SUPPORT OF MOTION FOR *AMICUS CURIAE* RELIEF

ELIOT SPITZER
Attorney General of the State
of New York
120 Broadway
New York, New York 10271-0332
(212) 416-8282

Caitlin J. Halligan
Solicitor General

Michael S. Belohlavek
Deputy Solicitor General

Jay L. Himes
Bureau Chief, Antitrust Bureau

Of Counsel

Table of Contents

Page[1]

Notice of Motion 1

Affidavit of Jay L. Himes in support of motion 4

Exhibit 1 — Memorandum decision in this case below, *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't 2002) 10

Exhibit 2 — Memorandum decision in *Asher v. Abbott Labs.*, 290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dep't Jan. 3, 2002) 13

Brief of the Attorney General of the State Of New York as *Amicus Curiae* in Support of Motion for Permission to Appeal 15

[1]These papers are numbered consecutively in the upper right hand corner of each page. The brief of the Attorney General also bears internal consecutive numbers located at the bottom center of each page.

COURT OF APPEALS : STATE OF NEW YORK

----------x

CHARLES COX, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

-against-

MICROSOFT CORPORATION and DOES 1 through 100, inclusive,

Defendant-Respondent.

----------x

NOTICE OF MOTION

PLEASE TAKE NOTICE, that, upon the accompanying moving affidavit of Jay L. Himes, sworn to May 31, 2002, and the annexed exhibits and accompanying brief, and upon all prior papers and proceedings, the Attorney General of the State of New York (the "Attorney General") will move this Court, at the Court of Appeals, Court of Appeals Hall, 20 Eagle Street, Albany, New York, on June 10, 2002, for an Order, pursuant to Court of Appeals Rule § 500.11(e):

(1) Granting the Attorney General (a) leave to submit the papers accompanying this notice of motion as amicus curiae in support of Plaintiff-Appellant's motion for permission to appeal to the Court of Appeals, and (b) if permission to appeal is granted, granting the Attorney General leave to file a brief as amicus curiae in support of reversal of the Order appealed from and to participate in oral argument of the appeal; on the grounds that the Attorney General would invite the Court's attention to law and arguments which might otherwise escape its consideration, and would otherwise be of special assistance to the Court; and

(2) Directing such other and further relief as the Court may deem just and proper.

Dated: New York, New York
May 31, 2002

ELIOT SPITZER
Attorney General of the State
of New York

Jay L. Himes
Chief, Antitrust Bureau
120 Broadway
New York, New York 10271
(212) 416-8282

To: David Liebov
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorneys for Defendant-Respondent

J. Douglas Richards
Michael M. Buchman
Milberg Weiss Bershad Hynes
& Lerach LLP
One Pennsylvania Plaza
New York, New York 10019-0165
(212) 594-5300

Dennis Stewart
Robert J. Gralewski, Jr.
Milberg Weiss Bershad Hynes
& Lerach LLP
401 B. Street, Suit 1700
San Diego, CA 92101-4297
(619) 231-1058

Alice McInerney
Kirby, McInerney & Squire, LLP
830 Third Avenue
New York, New York 10028
(212) 371-6600

Thomas M. Sobol
Lieff, Cabraser, Heinmann &
Bernstein, LLP
780 Third Avenue, 48th Floor
New York, New York 10017-2024
(212) 355-9500

Attorneys for Plaintiff-Appellant-Movant

COURT OF APPEALS : STATE OF NEW YORK

----------x

CHARLES COX, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

-against-

MICROSOFT CORPORATION and DOES 1 through 100, inclusive,

Defendant-Respondent.

----------x

AFFIDAVIT IN SUPPORT OF AMICUS CURIAE RELIEF

STATE OF NEW YORK)
) ss;
COUNTY OF NEW YORK)

JAY L. HIMES, being sworn, states:

1. I am the Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. I submit this affidavit in support of the Attorney General's motion: (a) for leave to submit this affidavit and annexed exhibits, and the accompanying brief, as amicus curiae, in support of Plaintiff-Appellant's motion for permission to appeal to the Court of Appeals; and (b) if permission to appeal is granted, granting the Attorney General leave to file a brief as amicus curiae in support of reversal of the Order appealed from and to participate in oral argument of the appeal.

THE INTEREST OF THE AMICI

2. 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 treble damages for persons who suffer injury from antitrust violations. *See* Gen. Bus. L. § 340(5) ("any person who shall sustain damages by reason of any violation of this section shall recover three-fold the damages sustained thereby"). The Appellate Division, First Department, ruled here 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). In consequence, the First Department held that this case may not be maintained as a class action. *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't 2002). This decision, together with another decision issued the same day by another panel of the First Department, represent the first appellate rulings on whether CPLR § 901(b) precludes Donnelly Act private treble damage actions from being brought as class actions. *See Asher v. Abbott Labs.*, 290 A.D.2d 208, 737 N.Y.S.2d (1st Dep't 2002). Copies of the First Department's decisions in *Cox* and *Asher* are annexed as Exhibits 1 and 2, respectively.[2]

3. The Attorney General is granted wide investigative and enforcement powers under the Donnelly Act.[3] Although the Attorney General's authority to bring actions under Gen. Bus. L.

---

[2] Trial level rulings are to the same effect. *See Lennon v. Philip Morris Companies, Inc.*, 189 Misc. 2d 577, 734 N.Y.S.2d 374 (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, 407 N.Y.S.2d 617 (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).

[3] *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 investigative and subpoena power).

§ 340 on behalf 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 State's antitrust laws. 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. Private treble damage actions, authorized by the Legislature in Gen. Bus. L. § 340(5), are needed as well.

4. Accordingly, the Attorney General applied for, and was granted, leave to participate as amicus curiae in the First Department. The Attorney General similarly seeks to participate as amicus curiae in this Court.

THE REASONS FOR GRANTING PERMISSION TO APPEAL

5. The Attorney General's brief in support of permission to appeal to this Court ("NYAG Brief") accompanies this motion. In summary, the First Department's construction of CPLR § 901(b) would seriously hinder private efforts to enforce the Donnelly Act on behalf of consumers and business establishments who are victimized by antitrust violations — most commonly, price-fixing. The First Department's decision is, therefore, of uncommon, statewide importance. The impact of the First Department's ruling is likely to be so significant — and to so thwart the Legislature's intent to assure effective antitrust enforcement — as to warrant review by this Court.

6. The Legislature simply did not intend CPLR § 901(b) to reach treble damage actions. *See* NYAG Brief at 8-10, 15-20.[4] Rather, the Legislature sought to bar class actions only in

---

[4]Page references are to the NYAG Brief's internal pagination, located at the bottom center of each page.

circumstances where a statute establishes a fixed or minimum damage amount, which the plaintiff is entitled to recover *regardless* of whether or not that person sustained actual damage. *See id.* at 10-14. That, however, is *not* the situation in an antitrust case, where, to recover damages, the plaintiff is subject to rigorous elements of proof. *Id.* at 8-10. To apply § 901(b) to state law treble damage antitrust actions would, therefore, ignore the Legislature's intent. It also would sap the Donnelly Act of strength in the very area where it is most needed — where it provides a state antitrust remedy that overcomes the limitations of the federal "direct purchaser" doctrine.

7. Under the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), generally only those persons who deal directly with an antitrust defendant or a co-conspirator have standing to sue under the federal antitrust laws for damages arising from anticompetititve activity. By virtue of *Illinois Brick*, if persons dealing directly with (for example) a price-fixer pass on the illegal overcharge to their customers, consumers who eventually bear the economic loss arising from the price-fixing will generally be unable to sue under federal law to recover the loss.

8. Recognizing this, in 1998 New York joined the many other States that have enacted legislation — often referred to as an "*Illinois Brick* repealer" — permitting indirect purchasers to sue as a matter of state antitrust law. *See* Gen. Bus. L. § 340(6). Under this amendment to the Donnelly Act, a consumer who "has not dealt directly with the defendant shall not [be] bar[red]" from recovery, and the Court is instructed to "take all steps necessary to avoid duplicate liability . . . ." Gen. Bus. L. § 340(6). Thus, New York law permits consumers — typical indirect purchasers — to sue under the Donnelly Act, whereas they lack standing under the federal antitrust laws. The Supreme Court has held that such state statutes are not pre-empted by federal law. *California v. ARC*

America Corp., 493 U.S. 916 (1990).

9. The illegal over-charge that any individual consumer suffers from price-fixing tends to be small. Therefore, individual consumers are unlikely to have a sufficient stake or incentive to sue under the Donnelly Act. The class action device, on the other hand, enables individual consumer injury to be aggregated, and makes resort to New York's *Illinois Brick* repealer statute viable. But by construing CPLR § 901(b) to apply to Donnelly Act private treble damage actions, the First Department's ruling precludes class actions on behalf of indirect purchasers. Because individual consumer-victims are unlikely to invoke New York's recently enacted amendment to the Donnelly Act, the State's antitrust enforcement system will suffer.

10. Thus, the ruling below frustrates the Legislature's intent in enacting not only CPLR § 901(b), but also the 1998 *Illinois Brick* repealer in the Donnelly Act. NYAG Br. at 21-24. Moreover, the First Department's ruling is inconsistent with decisions of this Court and of the United States Supreme Court, which reject the notion that a statutory multiple damage provision is a "penalty." *Id.* 5, n.6 and 19 & n.11.

CONCLUSION

11. By substantially reducing the ability of private parties to enforce the State's Donnelly Act, the First Department's decision will significantly affect all New York consumers. For this reason, the Attorney General seeks leave to participate as amicus curiae in support of plaintiff's motion for permission to appeal, and urges the Court to review the ruling below. If the Court grants plaintiff's motion, the Attorney General further seeks leave to submit a brief on the merits and to participate in oral argument of the appeal.

Jay. L. Himes

Sworn to before me this
31st day of May, 2002.

Notary Public

EMILY GRANRUD
Notary Public, State of New York
No. 02GR5084381
Qualified in Kings County
Commission Expires Sept. 2, 2005

EXHIBIT 1

against the other," a practice we have consistently condemned (*Avon Prods. v Solow*, 150 AD2d 236, 238; *see also, Bank of Tokyo-Mitsubishi v Kvaerner a.s., supra*, at 9; *Hirschfeld Prods. v Mirvish*, 218 AD2d 567, 568, *affd* 88 NY2d 1054; *Koob v IDS Fin. Servs.*, 213 AD2d 26, 35-36).

Accordingly, the order confirming the arbitrators' award should be affirmed.

2 CHARLES COX, Appellant, v MICROSOFT CORPORATION et al., Respondents. [737 NYS2d 1] —Order, Supreme Court, New York County (Barry Cozier, J.), entered on or about November 29, 2000, which, in an action under General Business Law § 340 (the Donnelly Act), granted defendants' motion to dismiss the class allegations of the complaint as barred by CPLR 901 (b) and to stay the action during the pendency of certain federal actions, unanimously modified, on the law and the facts, to the extent of vacating the stay and, except as so modified, affirmed, without costs.

Private persons are precluded from bringing a class action under the Donnelly Act (General Business Law § 340) because the treble damages remedy provided for in subdivision (5) constitutes a "penalty" within the meaning of CPLR 901 (b). General Business Law § 340 does not specifically authorize recovery in a class action and, therefore, this action may not be maintained (*Rubin v Nine W. Group*, 1999 NY Misc LEXIS 655, *10-14, 1999 WL 1425364, *4-5 [Sup Ct, Westchester County, John DiBlasi, J.]; *Russo & Dubin v Allied Maintenance Corp.*, 95 Misc 2d 344, 348-349; *Blumenthal v American Socy. of Travel Agents*, 1977 WL 18392, *3 [Sup Ct, NY County, Arnold Fein, J.]; *see also*, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C901:7). We note the specific authorization to bring class actions on behalf of governmental entities given to the Attorney General in General Business Law § 342-b, the absence of such specific authorization in section 340 (6), and the enactment of the latter provision after two courts (*Blumenthal, supra*; *Russo & Dubin, supra*) held that class actions could not be brought under the Donnelly Act because they are not specifically authorized (*see*, McKinney's Cons Laws of NY, Book 1, Statutes §§ 74, 240, 363). The conclusion that treble damages under the Donnelly Act are penal in nature is not undermined by the fact that they are mandatory, i.e., neither discretionary nor contingent upon a finding of bad faith. The mandatory imposition of multiple damages for any statutory infraction renders this statute all the more punitive, removing both the necessity to demonstrate willfulness or bad faith and the discretion customarily vested

in the court to determine the propriety of imposing a penalty under the particular circumstances of the action before it.

Plaintiff's reliance upon federal authority is unwarranted. Federal case law is at best persuasive in the absence of state authority; it is largely irrelevant to a peculiarly local question such as whether the New York State Legislature considers multiple damages provisions to be punitive or compensatory. In drafting CPLR 901 (b), the Legislature must be deemed to have chosen its language with reference to New York law, not its federal counterpart.

Prevailing opinion that treble damages are punitive is not limited to pronouncements at the trial court level. It has long been recognized that a provision for the trebling of damages is penal and subject to strict construction (*see, Newcomb v Butterfield*, 8 Johns 342, 345 [1811]). In *Lyke v Anderson* (147 AD2d 18 [wrongful eviction]), the Appellate Division, Second Department (at 28), restated the view that "multiple damage statutes are penal in nature and are to be strictly construed," acknowledging the legislative prerogative to establish criteria short of actual malice to justify imposition of the penalty (*supra*, at 31, citing *Welch v Mr. Christmas*, 57 NY2d 143, 150). This Court has also stated that punitive damages are available only under circumstances expressly contemplated by the applicable statute (*e.g., Blakeslee v Rabinor*, 182 AD2d 390, *lv denied* 82 NY2d 665 [Debtor and Creditor Law §§ 278, 279 subject to strict construction]), even where the statute recites that it is to be liberally construed (*Thoreson v Penthouse Intl.*, 179 AD2d 29, *affd* 80 NY2d 490 [provision for "such other remedies as may be appropriate" under Executive Law § 297 (9) is insufficient to support award of punitive damages]). The unusual provision in the Donnelly Act that prescribes the trebling of damages clearly reflects legislative policy that its violation is deemed to be malum in se, without necessity for the customary demonstration of malice (*cf., Lyke v Anderson, supra*, at 28 ["Under the view of the law, punitive damages are not mandatory"]).

The idea that multiple damage awards are punitive finds support in the ancestry of numerous treble damages provisions having their origins in equivalent provisions of former criminal statutes. For example, the penalty for attorney misconduct found in Judiciary Law § 487 is derived from former Penal Law § 273 (*see, People v Connolly*, 3 AD2d 943; *Fields v Turner*, Misc 2d 679). Likewise, the statutory provision for treble damages as a penalty for forcible entry and detainer (RPAPL [illegible]) has its origin in the criminal statutes governing breach of the peace (*see, Mayes v UVI Holdings*, 280 AD2d 153, 159-160;

Rental & Mgt. Assoc. v Hartford Ins. Co., 206 AD2d 288). Even provisions permitting recovery of treble damages for a rent overcharge (NY City Rent and Rehabilitation Law [Administrative Code of City of NY, tit 26, ch 3] § 26-413 [a], [d] [2]; Rent Stabilization Law of 1969 [Administrative Code of City of NY, tit 26, ch 4] § 26-516) are authorized by a penal provision of the State enabling legislation (McKinney's Uncons Laws of NY §§ 8609, 8610 [b] [Local Emergency Housing Rent Control Act §§ 9, 10 (b); L 1962, ch 21, § 1, as amended]) and clearly reflect the legislative intent that treble damages are to be imposed as a penalty.

Finally, as a general principle, the law forbids duplicate recovery (*e.g.*, *Rockefeller Univ. v Tishman Constr. Corp.*, 240 AD2d 341, 343, *lv denied* 91 NY2d 803; *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269, *lv denied* 94 NY2d 753). Logically, 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.

We modify Supreme Court's order solely to vacate the stay of the individual cause of action, which defendants concede is no longer necessary in light of the dismissal of the class action Donnelly Act claims in the pending multi-district federal action (*see*, *In re Microsoft Corp. Antitrust Litig.*, 127 F Supp 2d 702, 727 [D Md 2001]). Concur—Nardelli, J.P., Tom, Andrias, Rubin and Marlow, JJ.

3 AARON ASHER et al., Appellants, v ABBOTT LABORATORIES et al., Respondents. [737 NYS2d 4] —Order, Supreme Court, New York County (Helen Freedman, J.), entered October 12, 2000, which, in an action under General Business Law § 340 (the Donnelly Act), insofar as appealed from, denied plaintiffs' motion for class certification, unanimously affirmed, without costs.

Private persons cannot bring 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 (*Rubin v Nine W. Group*, 1999 NY Misc LEXIS 655, *10-14, 1999 WL 1425364, *4-5 [Sup Ct, Westchester County, John DiBlasi, J.]; *Russo & Dubin v Allied Maintenance Corp.*, 95 Misc 2d 344, 348-349 [Sup Ct, NY County, Hilda Schwartz, J., 1978]; *Blumenthal v American Socy. of Travel Agents*, 1977 WL 18392, *3 [Sup Ct, NY County, Arnold Fein, J.]; *see also*, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C901:7; *Cox v Microsoft Corp.*, — AD2d

— [decided herewit
bring class actions
the Attorney Gene
absence of such spe
the enactment of the
thal, *supra*; *Russo &*
could not be broug
specifically authorize
1, Statutes §§ 74, 2
ages under the Do
undermined by the
discretionary or con
indeed it can be arg
of multiple damages
faith is more puniti
Concur—Tom, J.P., I

4 JON SYLLMAN,
et al., Respondents.
New York County (I
15, 2000, as amended
January 9, 2001, wh
to dismiss the 15th,
mously modified, on
discretion, to the ext
the 15th cause of act
Corp. and Gino Call
without costs.

Plaintiff architect h
owed to him for servi
ment Corp. and to its
addition to claims pre
alleges, in his 15th
fraudulently misrepr
that he entered into
tion and secured con
those representations
tion allege that the
obligations to subcon
Law and to defraud i
fecting transfers to i
defendants.

Prior to joinder of
complaint pursuant to
motion as to Calleo De
these entities had no

EXHIBIT 2

Rental & Mgt. Assoc. v Hartford Ins. Co., 206 AD2d 288). Even provisions permitting recovery of treble damages for a rent overcharge (NY City Rent and Rehabilitation Law [Administrative Code of City of NY, tit 26, ch 3] § 26-413 [a], [d] [2]; Rent Stabilization Law of 1969 [Administrative Code of City of NY, tit 26, ch 4] § 26-516) are authorized by a penal provision of the State enabling legislation (McKinney's Uncons Laws of NY §§ 8609, 8610 [b] [Local Emergency Housing Rent Control Act §§ 9, 10 (b); L 1962, ch 21, § 1, as amended]) and clearly reflect the legislative intent that treble damages are to be imposed as a penalty.

Finally, as a general principle, the law forbids duplicate recovery (*e.g.*, *Rockefeller Univ. v Tishman Constr. Corp.*, 240 AD2d 341, 343, *lv denied* 91 NY2d 803; *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269, *lv denied* 94 NY2d 753). Logically, 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.

We modify Supreme Court's order solely to vacate the stay of the individual cause of action, which defendants concede is no longer necessary in light of the dismissal of the class action Donnelly Act claims in the pending multi-district federal action (*see*, *In re Microsoft Corp. Antitrust Litig.*, 127 F Supp 2d 702, 727 [D Md 2001]). Concur—Nardelli, J.P., Tom, Andrias, Rubin and Marlow, JJ.

3 AARON ASHER et al., Appellants, v ABBOTT LABORATORIES et al., Respondents. [737 NYS2d 4] —Order, Supreme Court, New York County (Helen Freedman, J.), entered October 12, 2000, which, in an action under General Business Law § 340 (the Donnelly Act), insofar as appealed from, denied plaintiffs' motion for class certification, unanimously affirmed, without costs.

Private persons cannot bring 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 (*Rubin v Nine W. Group*, 1999 NY Misc LEXIS 655, *10-14, 1999 WL 1425364, *4-5 [Sup Ct, Westchester County, John DiBlasi, J.]; *Russo & Dubin v Allied Maintenance Corp.*, 95 Misc 2d 344, 348-349 [Sup Ct, NY County, Hilda Schwartz, J., 1978]; *Blumenthal v American Socy. of Travel Agents*, 1977 WL 18392, *3 [Sup Ct, NY County, Arnold Fein, J.]; *see also*, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C901:7; *Cox v Microsoft Corp.*, — AD2d

— [decided herewi
bring class actions
the Attorney Gene
absence of such sp
the enactment of th
thal, supra; *Russo*
could not be brou
specifically authoriz
1, Statutes §§ 74, 2
ages under the D
undermined by th
discretionary or co
indeed it can be ar
of multiple damage
faith is more punit
Concur—Tom, J.P.,

4 JON SYLLMAN,
et al., Respondents
New York County (
15, 2000, as amende
January 9, 2001, wl
to dismiss the 15th
mously modified, on
discretion, to the ex
the 15th cause of ac
Corp. and Gino Cal
without costs.

Plaintiff architect
owed to him for serv
ment Corp. and to it
addition to claims p
alleges, in his 15t
fraudulently misre
that he entered into
tion and secured co
those representation
tion allege that the
obligations to subco
Law and to defraud
fecting transfers to
defendants.

Prior to joinder of
complaint pursuant t
motion as to Calleo D
these entities had n

2d 288). Even
es for a rent
[Administra-
, [d] [2]; Rent
of City of NY,
l provision of
s Laws of NY
t Control Act
clearly reflect
be imposed as

ids duplicate
str. Corp., 240
e v Manhattan
94 NY2d 753).
t necessary to
award of any
pensatory, it is

ca ne stay of
s concede is no
he class action
rict federal ac-
127 F Supp 2d
, Tom, Andrias,

r LABORATORIES
eme Court, New
ctober 12, 2000
Law § 340 (the
d plaintiffs' mo
d, without costs
under the Don
provided in Ge
hin the meanin
ass action is ne
which cannot b
lisc LEXIS 65
tchester Count
intenance Corp
Hilda Schwar
vel Agents, 19
ein, J.]; *see al*
ne Cons La
f., — AD

— [decided herewith]). We note the specific authorization to bring class actions on behalf of governmental entities given to the Attorney General in General Business Law § 342-b, the absence of such specific authorization in section 340 (6), and the enactment of the latter provision after two courts (*Blumenthal, supra*; *Russo & Dubin, supra*) had held that class actions could not be brought under the Donnelly Act because not specifically authorized (*see*, McKinney's Cons Laws of NY, Book 1, Statutes §§ 74, 240, 363). The conclusion that treble damages under the Donnelly Act are penal in nature is not undermined by the fact that they are mandatory, i.e., not discretionary or contingent upon a finding of bad faith, and indeed it can be argued that a statute providing for an award of multiple damages without need to prove willfulness or bad faith is more punitive than one that does require such proof. Concur—Tom, J.P., Ellerin, Wallach, Rubin and Buckley, JJ.

4 JON SYLLMAN, Appellant, v CALLEO DEVELOPMENT CORP. et al., Respondents. [736 NYS2d 318] —Order, Supreme Court, New York County (Robert Lippmann, J.), entered November 15, 2000, as amended by order (same court and Justice) entered January 9, 2001, which granted defendants' prejoinder motion to dismiss the 15th, 16th and 17th causes of action, unanimously modified, on the law, the facts and in the exercise of discretion, to the extent of granting plaintiff leave to replead the 15th cause of action as to defendants Calleo Development Corp. and Gino Calleo and, except as so modified, affirmed, without costs.

Plaintiff architect brought this action for funds alleged to be owed to him for services rendered to defendant Calleo Development Corp. and to its various affiliates and for finder's fees. In addition to claims predicated upon breach of contract, plaintiff alleges, in his 15th cause of action, that the corporation fraudulently misrepresented its capabilities to plaintiff and that he entered into a working relationship with the corporation and secured construction projects for it in reliance upon those representations. Plaintiff's 16th and 17th causes of action allege that the corporation diverted funds to avoid its obligations to subcontractors and suppliers under the Lien Law and to defraud its creditors, particularly plaintiff, by effecting transfers to its affiliated companies, also named as defendants.

Prior to joinder of issue, defendants moved to dismiss the complaint pursuant to CPLR 3211. Supreme Court granted the motion as to Calleo Development's affiliates on the ground that these entities had no contractual relationship with plaintiff.

COURT OF APPEALS
STATE OF NEW YORK

CHARLES COX, individually and on behalf
of all others similarly situated,

Plaintiff-Appellant,

-against-

MICROSOFT CORPORATION and DOES
1 through100, inclusive,

Defendant-Respondent.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

ELIOT SPITZER
Attorney General of the State
of New York
120 Broadway
New York, New York 10271-0332
(212) 416-8282

Caitlin J. Halligan
Solicitor General

Michael S. Belohlavek
Deputy Solicitor General

Jay L. Himes
Bureau Chief, Antitrust Bureau

Of Counsel

TABLE OF CONTENTS

Page

Table of Authorities ii

Preliminary Statement 1

Statement of the Case 2

A. Donnelly Act Background 2

B. The 1998 Amendment Covering Indirect Claims 3

C. The Decision Below 5

Argument - **THE PROPER CONSTRUCTION OF CPLR §901(b) RAISES A SIGNIFICANT QUESTION THAT HAS SUBSTANTIAL CONSEQUENCES FOR NEW YORK CONSUMERS, AS WELL AS FOR ENFORCEMENT OF THE STATE DONNELLY ACT, AND WARRANTS RESOLUTION BY THIS COURT** 7

A. The Plain Language of §901(b) Does Not Cover Treble Damage Actions 8

B. The Legislative History of §901(b) and of the Donnelly Act Provisions Confirm that §901(b) Was Not Intended to Encompass Treble Damage Suits . 10

1. The Class Action Provision – §901(b) 11

2. The Donnelly Act Treble Damage Provision – §340(5) 15

3. The Indirect Purchaser Provision – §340(6) 21

C. The Lower Court's Construction of CPLR §901(b) Would Significantly Impair the Enforcement and Protections of the Donnelly Act 23

D. The Case Law and Statutory Authority Relied On by the Court Below Lack Persuasive Force 25

Conclusion 28

Table of Authorities

Cases

Page

Albano v. Kirby,
36 N.Y.2d 526, 330 N.E.2d 615, 369 N.Y.S.2d 655 (1975) 8

Alexander's Department Stores, Inc. v. Ohrbach's Inc.,
269 App. Div. 321, 56 N.Y.S.2d 173 (1st Dep't 1945) 9

Amchen Products, Inc. v. Windsor,
521 U.S. 591, 117 S.Ct. 2231 (1997) 4-5

Asher v. Abbott Labs.,
290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dep't 2002) 1, 4, 7

Baush Machine Tool Corp. v. Aluminum Company of America,
63 F.2d 778 (2d Cir.), *cert. denied*, 289 U.S. 739, 53 S.Ct. 658 (1933) 19

Bertha Building Corp. v. National Theatres Corp.,
269 F.2d 785 (2nd Cir. 1959), *cert. denied*,
361 U.S. 960, 80 S.Ct. 585 (1960) 19

Blakesless v. Rabinor,
182 A.D.2d 390, 582 N.Y.S.2d 132 (1st Dep't 1992),
leave to appeal denied, 82 N.Y.2d 655, 622 N.E.2d 305,
602 N.Y.S.2d 804(1993) 26

Bogartz v. Astor,
293 N.Y. 563, 59 N.E.2d 246 (1944) 5

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477, 97 S.Ct. 690 (1977) 9

Cabell v. Markham,
148 F.2d 737 (2nd Cir.), *aff'd*, 326 U.S. 404, 66 S.Ct. 193 (1945) 25

Chattanooga Foundry & Pipe Works v. City of Atlanta,
203 U.S. 390 (1906), *aff'g*, 127 Fed. Rep. 23 (6th Cir. 1903) 19

Page

Colon v. Aetna Casualty & Surety Co.,
48 N.Y.2d 570, 399 N.E.2d 938, 423 N.Y.S.2d 908 (1980) 25

Cox v. Lykes Brothers,
237 N.Y. 376, 143 N.E. 226 (1924) 7-8, 19

Cox v. Microsoft Corp.,
290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't, 2002) 1, 5-7

Di Bitetto v. Sussman,
279 A.D. 1033, 112 N.Y.S.2d 356 (2nd Dep't 1952) 5

Dooley v. Carsen,
41 Misc. 2d 154, 245 N.Y.S.2d 145 (N.Y.Co. Sup. Ct. 1963) 5

Fields v. Turner,
1 Misc.2d 679, 147 N.Y.S.2d 542 (N.Y. Co. Sup. Ct. 1955) 26

Fults v. Munro,
202 N.Y. 34, 95 N.E. 23 (1911) 6

General Telephone Co. of Southwest v. Falcon,
457 U.S. 147, 102 S.Ct. 2364 (1982) 9

Gwynne v. Board of Education of Union Free School District No.3,
259 N.Y. 191, 181 N.E. 353 (1932) 10

Hawaii v. Standard Oil Co.,
405 U.S. 251, 92 S.Ct. 885 (1972) 24

Hicks v. Bekins Moving & Storage Co.,
87 F.2d 583 (9th Cir. 1937) 19

Hydrolevel Corp. v. ASME, Inc.,
635 F.2d 118 (2nd Cir. 1980), *aff'd*, 456 U.S. 556, 102 S.Ct. 1935 (1982) 5, 14

Illinois Brick Co. v. Illinois,
431 U.S. 720, 97 S.Ct. 2061 (1977) 3, 4, 21

Page

Illinois v. Bristol-Myers Co.,
470 F.2d 1276 (D.C. Cir. 1972) 19

Illinois v. Harper & Row Publishers, Inc.,
301 F.Supp. 484 (N.D. Ill.1969) 19

In re Ampicillin Antitrust Litigation,
55 F.R.D. 269 (D.D.C. 1972) 19

In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions,
333 F.Supp. 278 (S.D.N.Y.), *amended*, 333 F.Supp. 291 (S.D.N.Y.),
mandamus denied sub nom. Pfizer v. Lord, 449 F.2d 119 (2nd Cir. 1971) 19

In re Master Key Antitrust Litigation,
528 F.2d 5 (2nd Cir. 1975) 19

J. Truett Payne Co. v. Chrysler Motors Corp.,
451 U.S. 557, 101 S.Ct.1923 (1981) 9

Kauffman v. Dreyfus Fund, Inc.,
434 F.2d 727, 734 (3rd Cir. 1970), *cert. denied*, 401 U.S.
974, 91 S.Ct. 1190 (1971). 9

Lerner Stores Corp. v. Parklane Hosiery Co.,
86 Misc.2d 215, 381 N.Y.S.2d 968 (Monroe Co. Sup. Ct.),
aff'd, 54 A.D.2d 1072, 388 N.Y.S.2d 760 (4th Dep't 1976) 9

Leonia Amusement Corp. v. Loew's, Inc.,
117 F. Supp. 747 (S.D.N.Y. 1953) 19

Levine v. Abbott Labs.,
Index No. 117320/95 (N.Y. Co. Sup. Ct. Nov. 25, 1996), *appeal*
withdrawn, 257 A.D.2d 978, 685 N.Y.S.2d 384 (1st Dep't 1999) 21

Lyke v. Anderson,
147 A.D.2d 18, 541 N.Y.S.2d 817 (2nd Dep't 1989) 5

Mace v. Van Ru Credit Corp.,
109 F.3d 338 (7th Cir. 1997) 5

Page

Matter of Capone v. Weaver,
6 N.Y.2d 307, 160 N.E.2d 602, 189 N.Y.S.2d 833 (1959) 25

Matter of Dutchess County Department of Social Services v. Day,
96 N.Y.2d 149, 749 N.E.2d 733, 726 N.Y.S.2d 54 (2001) 10

Matter of Sackolwitz v. Charles Hamburg & Co.,
295 N.Y. 264, 67 N.E. 2d 152 (1946) 5

Matter of Sentry Ins. Co. v. Amsel,
36 N.Y.2d 291, 327 N.E.2d 635, 367 N.Y.S.2d 480 (1975) 25

Mayes v. UVI Holdings,
280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dep't 2001) 5, 26

McInture v. Manhattan Ford, Lincoln-Mercury, Inc.,
256 A.D.2d 269, 682 N.Y.S.2d 167 (1st Dep't 1998) 27

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614, 105 S.Ct. 3346 (1985) 24

Moreno v. Picardy Mills, Inc.,
173 Misc. 528, 17 N.Y.S.2d 848 (Brooklyn Mun. Ct. 1939) 5

Murray v. Empire Ins. Co.,
175 A.D.2d 693, 572 N.Y.S.2d 909 (1st Dep't 1991) 9

Newcomb v. Butterfield,
8 John. 342 (N.Y. Sup. Ct. Jud.1811) 26

New York State Bankers Assoc. v. Albright,
38 N.Y.2d 430, 343 N.E.2d 735, 381 N.Y.S.2d 17 (1975) 25

Oelkrug v. Gilwaldron Realty Co.,
45 Misc.2d 160, 256 N.Y.S.2d 348 (2nd Dep't App. T. 1964) 5

People v. Bootman,
180 N.Y. 1, 72 N.E. 505 (1904) 10

Page

People v. Connolly,
3 A.D.2d 943, 164 N.Y.S.2d 66 (2nd Dep't 1957) 26

People ex rel. Chadbourne v. Voorhis,
236 N.Y. 437, 141 N.E. 907 (1923) 11

People ex rel. Delaney v. Mt. St. Joseph's Academy of Buffalo,
198 A.D. 280, 190 N.Y.S. 289 (4th Dep't 1921),
aff'd on the merits without opinion, 234 N.Y. 565, 138 N.E. 448 (1922) 7

Philadelphia Electric Co. v. Anaconda American Brass Co.,
43 F.R.D. 452 (E.D. Pa. 1968) 19

Ratner v. Chemical Bank New York Trust Co.,
54 F.R.D. 412 (S.D.N.Y. 1972) 11

Rental & Management Assocs., Inc. v. Hartford Ins. Co.,
206 A.D.2d 288, 614 N.Y.S.2d 513 (1st Dep't 1994) 5, 26, 27

Ridge Meadows Homeowners' Assoc., Inc. v. Tara Dev. Co.,
242 A.D.2d 947, 665 N.Y.S.2d 361 (4th Dep't 1987) 5

Rockefeller University v. Tishman Constr. Corp.,
240 A.D.2d 341, 659 N.Y.S.2d 460 (1st Dep't),
leave to appeal denied, 91 N.Y.S. 803, 691 N.Y.2d
630, 668, N.Y.S.2d 558 (1997) 27

State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970),
aff'd, 440 F.2d 1079 (2nd Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v.*
Chas. Pfizer & Co., 404 U.S. 871, 92 S.Ct. 81 (1971) 19

Story Parchment Co. v. Paterson Parchment Paper Co.,
282 U.S. 555, 51 S.Ct. 248 (1931) 19

Thoreson v. Penthouse Int'l, Ltd.,
179 A.D.2d 29, 583 N.Y.S.2d 213 (1st Dep't), *aff'd*, 80 N.Y.2d
490, 606 N.E.2d 1369, 591 N.Y.S.2d 978 (1992) 26

Page

United States v. Standard Ultramarine & Color Co.,
137 F.Supp. 167 (S.D.N.Y. 1955) 24

Walsh v. 515 Madison Ave. Corp.,
181 Misc. 219, 42 N.Y.S.2d 262 (N.Y.Co. Sup. Ct.),
aff'd without opinion, 267 A.D. 756, 45 N.Y.S.2d 927 (1st Dep't 1943),
aff'd without opinion, 293 N.Y. 826, 59 N.E. 2d 183 (1944) 5

Welch v. Mr. Christmas, Inc.,
57 N.Y.2d 143, 440 N.E.2d 1317, 454 N.Y.S.2d 971 (1982) 26

Wolchonok v. Creston Spring Corp.,
13 A.D.2d 846, 216 N.Y.S.2d 343 (2d Dep't 1961) 5

Zenith Radio Corp. v. Hazeltime Research, Inc.,
395 U.S. 100, 89 S. Ct. 1562 (1969) 9

Statutes and Rules

Federal Rules of Civil Procedure
Rule 23 . . . . . 20, 28

New York Civil Practice Law and Rules
§901(b) . . . . . passim

New York Code of Rules and Regulations, Vol. 22
§500.11(d)(1)(v) 7

New York Donnelly Act, General Business Law §§340 *et seq.*
§340(1) 2
§340(5) 3, 8, 15
§340(6) 3, 10, 21, 24
§342-a 15
§342-b 27-28

Statute of Monopolies, 21 Jac. I, ch. 3 (1623-24) 5, 15

United States Code, Title 15
§15(a) 3
§1640(e) 11

Page

Legislative Materials

Banking Law Committee of the Banking, Corporation and Business Law Section, *New York State Bar Association Legislation Report* (Rep. No. 1 (revised), 1975) 11-12

Banking Law Committee, Business Law Committee and Committee on Civil Practice Law and Rules, *New York State Bar Association Legislation Report* (Rep. No. 15, 1975) 12

Budget Report on Bills, A. 3546, dated June 17, 1975 18

Business Council Memorandum (November 19, 1998) 23

21 Cong. Rec. (1890)
- 1767-68 14
- 2456 14
- 2569 14
- 3147 19
- 3150 15

Letter by Paul E. Harenberg to Judah Gribetz, dated June 20, 1975 16-17

Letter by James J. Lack, dated December 17, 1998 22-23

Letter by Daniel B. Walsh, dated November 18, 1998 23

McKinney's Session Laws of New York (1975) 10, 11 18

Memorandum by Manfred Ohrenstein, undated 17

Memorandum by State Consumers Board, undated 13

Memorandum by Hon. Mario Cuomo to Judah Gribetz, dated June 27, 1975 17

Memorandum by Morton A. Grusky to Judah Gribetz, dated June 19, 1975 18

Memorandum by a Staff Attorney of the Law Revision Commission relating to Assembly Bill No. 3546, undated, transmitted by Myron E. Leach to Counsel to the Governor by letter, dated June 19, 1975 18

Page

Memorandum by Hon. Louis J. Lefkowitz to Hon. Hugh L. Carey, dated June 19, 1975 17-18

Memorandum S.3042 & A.3546, dated January 8, 1975 16

Memorandum in Opposition to A.1252-A and S.1309-A by Stanford H. Bolz, dated February 14, 1975 12-13

New York Bills
- A.1252 (1975-76 Reg. Sess. Jan. 21, 1975) 11
- S.1309 (1975-76 Reg. Sess. Jan. 21, 1975) 11

New York Legislative Proceedings
- Assembly transcript (May 26, 1998) 21-22
- Senate transcript (May 28, 1975) 11
- Senate transcript (June 18, 1998) 22

New York Session Laws
- L. 1975, ch. 207 10
- L. 1975, ch. 333 10

New York State Legislative Annual (1975) 16

S.1, 51st Cong., 1st Sess. (1889) 15

Thirteenth Annual Report of the Judicial Conference (Feb. 1, 1975) 11

Page

Other Authorities

I ABA, *Antitrust Law Developments* (4th ed. 1997) 9

Richard Brodsky, James Lack, Bernard Persky & Barbara Hart, "Antitrust Protections Expanded in New York," N.Y.L.J., June 22, 1999 23

Michael Conant, "Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined," 31 *Emory L. J.* 785 (1982) 5

Jack Greenberg, *New York Antitrust Law and Its Role in the Federal System* (1957) 3

Robert Hubbard & Pamela Jones Harbour, *Antitrust Law in New York State* (2nd ed. 2002) 3

1 Earl W. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1978) 14-15

New York State Bar Association Section on Antitrust Law, *Report of the Special Committee to Study the New York State Antitrust Laws* (1957) 3

Kevin J. O'Connor, "Is the *Illinois Brick* Wall Crumbling," 15 *Antitrust* 34 (Summer 2001) 4

William H. Page, "The Limits of State Indirect Purchaser Suits: Certification in the Shadow of *Illinois Brick*," 67 *Antitrust L.J.* 1 (1999) 4

Hans B. Thorelli, *The Federal Antitrust Policy* (1955) 15, 15, 24

COURT OF APPEALS : STATE OF NEW YORK

----------x

CHARLES COX, individually and on behalf of all others similarly situated, :

Plaintiff-Appellant, :

-against- :

MICROSOFT CORPORATION and DOES 1 through 100, inclusive, :

Defendant-Respondent. :

----------x

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

Preliminary Statement

The decision of the Court below — and that in *Asher v. Abbott Labs.*, 290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dep't 2002), issued the same day — hold that CPLR §901(b)'s ban on class actions under statutes providing for "a penalty" covers private treble damage antitrust suits, brought under the Donnelly Act, Gen.Bus. L. §§340 *et seq.* This construction of CPLR §901(b) may be expected to end this lawsuit entirely. It is also likely to sound the death knell for other pending private antitrust actions, similarly brought on behalf of classes of New York consumers who often did not purchase goods or services directly from those who violate the State's antitrust laws. In addition, the precedential effect of these two First Department rulings will deter many other private parties from ever filing Donnelly damage actions on behalf of injured New York consumers. The Attorney

General alone will have to bear the entire burden of enforcing the Donnelly Act on behalf of consumers, and where — for any number of reasons — the Attorney General does not sue, antitrust violators will evade liability for their actions.

For reasons fully explained below, we submit that the decision below frustrates the Legislature's clear intent in enacting the treble damage provisions of the Donnelly Act, and that even if the treble damage antitrust remedy could be viewed as a "penalty" in some sense, a private class action antitrust lawsuit nevertheless is not the kind of case that the Legislature had in mind when it enacted CPLR §901(b). Because this case raises novel issues of law that are of unquestionable public importance, this Court should grant permission to appeal from the order below.

Statement of the Case

A. Donnelly Act Background

New York's Donnelly Act represents the Legislature's commitment to a bedrock principle of our economic system — that a free and open market mechanism will deliver to consumers the broadest array of goods and services at the lowest prices. The statute, in summary, declares "against public policy, illegal and void" every "contract, agreement, arrangement or combination": (1) that establishes or maintains a monopoly in the conduct of any trade or the furnishing of any service, or (2) that restrains (or may restrain) "competition or the free exercise of any activity" in the conduct of any trade or the furnishing of any service, or (3) that has a purpose of establishing or maintaining such a monopoly or restraint. Gen. Bus. L. §340(1). The statute has more than 100 years of history, and although initially it expressly authorized only the Attorney General to sue, the courts implied

a right of action by private parties to seek actual damages and equitable relief.[5]

In 1975, the Legislature amended the Donnelly Act to provide an express damage remedy for the victims of antitrust violations in cases brought either by the Attorney General or by private parties. Gen. Bus. L. §340(5). Recognizing the significance of the rights at stake, and the substantial difficulties associated with successfully prosecuting antitrust claims against the often powerful forces of business, the Legislature also authorized antitrust plaintiffs to "recover three-fold the actual damages sustained" by the reason of the antitrust violation, as well as costs and reasonable attorneys' fees. *Id.* In adopting this amendment, the Legislature reaffirmed that effective antitrust enforcement requires not only the efforts of the Attorney General, but also those of the private bar acting on behalf of injured New Yorkers. The Legislature also sought to conform the Donnelly Act to federal antitrust law, which had long provided a treble damage remedy. 15 U.S.C. §15(a).

B. <u>The 1998 Amendment Covering Indirect Claims</u>

Effective December 23, 1998, the Legislature further amended the Donnelly Act to permit suits by "indirect" purchasers or sellers. The amended statute provides that an antitrust plaintiff who "has not dealt directly with the defendant shall not [be] bar[red]" from a recovery. Gen. Bus. L. §340(6). This amendment — sometimes referred to as an "*Illinois Brick* repealer" statute — takes the Donnelly Act beyond its federal antitrust counterpart, which generally permits only those persons who deal directly with the defendant or a co-conspirator to sue for damages. *Illinois Brick Co. v.*

---

[5]*See generally* New York State Bar Association Section on Antitrust Law, *Report of the Special Committee to Study the New York State Antitrust Laws* 2-3,12 (1957); Jack Greenberg, *New York Antitrust Law and Its Role in the Federal System* 7a-14a, 46a-47a (1957), *published in* Robert Hubbard & Pamela Jones Harbour, *Antitrust Law in New York State* 77, 86-93, 125-26 (2d ed. 2002).

Illinois, 431 U.S. 720, 97 S.Ct. 2061 (1977). The legislatures of at least 18 other states have passed similar *Illinois Brick* repealer statutes. Kevin J. O'Connor, "Is the *Illinois Brick* Wall Crumbling," 15 *Antitrust* 34, 34-35 (Summer 2001).

In adopting the 1998 amendment, the New York Legislature sought to ensure that all consumers who are injured by antitrust violations have the ability to recover damages. The Legislature also was well aware, however, that the damage sustained by any individual consumer would often be too small to justify the rigors of an antitrust lawsuit. Thus, the Legislature envisioned class actions as a means to aggregate limited individual damages, thereby making resort to the Donnelly Act a practical and realistic remedy. (*See* pp. 21-23, below.) As this case and *Asher* reflect, the private bar responded accordingly — here, by commencing an action on behalf of a class of injured consumers who purchased computers using Microsoft's Windows operating system, and in *Asher* on behalf of a class of consumers who purchased the drug Hytrin that Abbott Laboratories manufactures.

If all that were involved in these two actions was the damage to any individual consumer, the cases probably would be prohibitively expensive to pursue — and so would most other antitrust actions brought by New York consumers under the Donnelly Act. The class action mechanism makes the actions economically viable, however. *See, e.g.*, 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"); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct.

2231, 2246 (1997) ("The 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," quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

C. The Decision Below

Microsoft moved to dismiss the class action allegations in the complaint here, based on CPLR §901(b)'s prohibition of class actions in cases brought under "penalty" statutes. The IAS Court granted the motion, and the First Department affirmed in a memorandum decision. *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't 2002).

Although many federal court decisions have held that the federal antitrust treble damage provision does *not* establish a "penalty" (*see* p. 19 & n. 11, below), the First Department found these rulings "largely irrelevant to . . . whether the New York State Legislature considers multiple damages to be punitive or compensatory." 290 A.D.2d at 207, 737 N.Y.S.2d at 2. The Court below then cited several non-antitrust state decisions for the proposition that "a provision for trebling of damages is penal and subject to strict construction . . . ." 290 A.D.2d at 207, 737 N.Y.S.2d at 2-3 (authority omitted). However, the state case law on this subject is clearly unsettled.[6]

---

[6]*Compare, e.g., Matter of Sackolwitz v. Charles Hamburg & Co.*, 295 N.Y. 264, 67 N.E. 2d 152 (1946) and *Bogartz v. Astor*, 293 N.Y. 563, 566, 59 N.E.2d 246, 247 (1944)(holding that worker's compensation statute did not create a penalty); *Di Bitetto v. Sussman*, 279 A.D. 1033, 1033, 112 N.Y.S.2d 356, 357 (2nd Dep't 1952)(holding that federal rent control statute did not create a penalty); *Wolchonok v. Creston Spring Corp.*, 13 A.D.2d 846, 216 N.Y.S.2d 343, 344 (2d Dep't 1961)(construing treble damages under federal rent control statute); *Oelkrug v. Gilwaldron Realty Co.*, 45 Misc.2d 160, 161, 256 N.Y.S.2d 348, 349 (2nd Dep't App. T. 1964)(construing rent control statute); *Walsh v. 515 Madison Ave. Corp.*, 181 Misc. 219, 221, 42 N.Y.S.2d 262, 264 (N.Y.Co. Sup. Ct.), *aff'd without opinion*, 267 A.D. 756, 45 N.Y.S.2d 927 (1st Dep't 1943), *aff'd without opinion*,

The Court further noted that many treble damage provisions have their origins in former criminal statutes. That, in the First Department's view, apparently also militates in favor of the notion that the Donnelly Act's provision is a "penalty" for §901(b) purposes. 290 A.D. 2d at 207-08, 737 N.Y.S.2d at 3. In fact, the ***antitrust*** treble damage provision has its own unique origin. The remedy is derived from the English Statute of Monopolies, 21 Jac. I, ch. 3 (1623-24), by which Parliament sought to curb King James I's use of the royal prerogative to grant monopolies. Much like the later federal and New York antitrust laws, one part of the English statute declared royal grants of monopolies void, and another afforded treble damages (and double costs) to those aggrieved. *See* Hans B. Thorelli, *The Federal Antitrust Policy* 26, 213 (1955) ("*Antitrust Policy*"); Michael Conant, "Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined," 31 *Emory L. J.* 785, 794-96 (1982); *Hydrolevel Corp. v. ASME, Inc.*, 635 F.2d 118, 127 n.7 (2nd Cir. 1980), *aff'd*, 456 U.S. 556, 102 S.Ct. 1935 (1982).

Finally, the First Department noted that, "as a general principle, the law forbids duplicate recovery. . . ." 290 A.D.2d at 208, 737 N.Y.S.2d at 3 (authorities omitted). Thus, an award of "any

---

293 N.Y. 826, 59 N.E. 2d 183 (1944) and *Moreno v. Picardy Mills, Inc.*, 173 Misc. 528, 530, 17 N.Y.S.2d 848, 849-50 (Brooklyn Mun. Ct. 1939)(construing Fair Labor Standards Act); *Dooley v. Carsen*, 41 Misc. 2d 154, 155, 245 N.Y.S.2d 145, 146 (N.Y.Co. Sup. Ct. 1963)(construing state housing statute); *with Fults v. Munro*, 202 N.Y. 34, 41, 95 N.E. 23, 25 (1911)(referring to treble damages under wrongful eviction statute); *Ridge Meadows Homeowners' Assoc., Inc. v. Tara Dev. Co.*, 242 A.D.2d 947, 665 N.Y.S.2d 361 (4th Dep't 1987)(referring, without discussion, to treble damages under deceptive practices act, Gen. Bus. L. §349); *Rental & Mgmt. Assocs., Inc. v. Hartford Ins. Co.*, 206 A.D.2d 288, 614 N.Y.S.2d 513, 514 (1st Dep't 1994)(construing treble damage provision for insurance purposes); *Lyke v. Anderson*, 147 A.D.2d 18, 28, 541 N.Y.S.2d 817, 823 (2nd Dep't 1989)(referring to "multiple damage statutes" in general in a case involving wrongful eviction statute)(quoted in dicta in *Mayes v. UVI Holdings, Inc.*, 280 A.D.2d 153, 160, 723 N.Y.S.2d 151, 160 (1st Dep't 2001)).

amount in excess of proven damages," the Court stated, "is not compensatory, it is exemplary." 290 A.D.2d at 208, 737 N.Y.S.2d at 3. But this conclusion simply begs the central question: did the Legislature *intend* §901(b) to cover antitrust treble damage cases?

Thereafter, the First Department denied permission to appeal to this Court. Order, dated April 9, 2002. Leave to appeal also was denied by the *Asher* panel. Order, dated May 21, 2002.

Argument

THE PROPER CONSTRUCTION OF CPLR §901(b) RAISES A SIGNIFICANT QUESTION THAT HAS SUBSTANTIAL CONSEQUENCES FOR NEW YORK CONSUMERS, AS WELL AS FOR ENFORCEMENT OF THE STATE DONNELLY ACT, AND WARRANTS RESOLUTION BY THIS COURT

Permission to appeal is appropriate when a case presents a question that is "novel or of public importance, or involve[s] a conflict with prior decisions of this court or there is a conflict among the Appellate Divisions." 22 N.Y.C.R.R. §500.11(d)(l)(v). *See also People ex rel. Delaney v. Mt. St. Joseph's Academy of Buffalo*, 198 A.D. 280, 282-83, 190 N.Y.S. 289 (4th Dep't 1921), *aff'd on the merits without opinion*, 234 N.Y. 565, 138 N.E. 448 (1922). The novel issue of law raised by this proposed appeal is one of uncommon public importance to all New York consumers. Under the First Department's decision, private actions on behalf of consumers under the Donnelly Act will likely come to an end, except in highly unusual circumstances. In turn, the mixture of public and private enforcement of the Donnelly Act will change markedly as private enforcement dries up. The decision below frustrates the Legislature's clear intent to strengthen enforcement of the Donnelly Act by private class actions, and it also conflicts with long-standing United States Supreme Court precedent and precedent of this Court, establishing that antitrust treble damage remedies are not "penalties" in the sense relevant here. *See Cox v. Lykes Brothers*, 237 N.Y. 376, 143 N.E. 226

(1924), discussed at p. 19, below.

Accordingly, this Court should grant permission to appeal.

A. The Plain Language of §901(b) Does Not Cover Treble Damage Actions

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.

The Donnelly Act 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. . . ." Gen. Bus. L. §340(5). CPLR §901(b) does not, on its face, cover statutes that authorize recovery of a multiple of damages. Therefore, the only basis to extend §901(b)'s ban on class actions to the Donnelly Act would be to construe the law's reference to "penalty" actions to embrace actions in which treble damage remedies are available.

When, as here, an issue of statutory construction is raised, 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, 618, 369 N.Y.S.2d 655, 658 (1975). The starting point for this inquiry is the words of the statute itself. 36 N.Y.2d at 530, 330 N.E.2d at 618, 369 N.Y.S.2d at 658.

CPLR §901(b) covers only statutes that "creat[e] or impos[e] a penalty, or a minimum measure of recovery." This language envisions statutory violations that give rise to an express sanction, without requiring the injured party to prove ***any*** actual injury or loss that in fact flows from that violation. However, under the Donnelly Act's treble damage provision, an antitrust plaintiff

must prove actual injury, which is causally connected to the unlawful conduct, and must then quantify that injury, to recovery anything at all. *See generally* I ABA, *Antitrust Law Developments* 761, 785 (4th ed. 1997) ("*ABA Treatise*").[7] Indeed, not only actual injury, but additionally what is referred to as "antitrust injury" must be proven. I *ABA Treatise* at 766. "Antitrust injury" is injury to the plaintiff that reflects "the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697 (1977). The principles for class actions are the same as those for individual actions. A plaintiff who cannot prove injury to him or herself cannot sue on behalf of a class.[8]

In consequence, a private antitrust plaintiff seeking to prove damages assumes far greater

---

[7]*See, e.g., Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250 (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, 89 S.Ct.1562,1571-72 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, 562,101 S.Ct.1923, 1927 (1981) ("To recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent"); *Alexander's Department Stores, Inc. v. Ohrbach's Inc.*, 269 App. Div. 321, 56 N.Y.S.2d 173 (1st Dep't 1945) (after Donnelly Act liability was established, plaintiff's damages were tried before an official referee; the appellate court reversed the damage award and ordered a new trial); *Lerner Stores Corp. v. Parklane Hosiery Co.*, 86 Misc.2d 215, 217, 381 N.Y.S.2d 968, 969 (Monroe Co. Sup. Ct.) (dismissing complaint where plaintiff failed to allege injury "directly attributable to the violation"), *aff'd*, 54 A.D.2d 1072, 388 N.Y.S.2d 760 (4th Dep't 1976).

[8]*See, e.g, General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 2370 (1982)("a class representative must be part of the class and possess the same interest and suffer the same injury as the class members"; internal quotation marks omitted); *Murray v. Empire Ins. Co.*, 175 A.D.2d 693, 695, 572 N.Y.S.2d 909, 911 (1st Dep't 1991)("The procedural device of a class action may not be used to bootstrap a plaintiff into standing which is otherwise lacking"); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3rd Cir. 1970) ("a predicate to [plaintiff's] right to represent a class is his eligibility to sue in his own right"), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1190 (1971).

burdens than those of a plaintiff suing under a statute that creates or imposes "a penalty, or a minimum measure of recovery." Moreover, even assuming, for argument's sake, that §901(b) is ambiguous in relation to the treble damage provision, the legislative history confirms that the Legislature did not intend §901(b) to bar private class actions under the Donnelly Act.

B. <u>The Legislative History of §901(b) and of the Donnelly Act Provisions Confirm that §901(b) Was Not Intended to Encompass Treble Damage Suits</u>

The Legislature enacted both CPLR §901(b) and the Donnelly Act's treble damage provision in 1975. L.1975, ch.207 (CPLR §901(b)); L.1975, ch.333 (treble-damage provision). Governor Hugh Carey approved the class action provision (which was part of a larger bill dealing with class actions generally) on June 17, 1975. *McKinney's Session Laws* 1748 (1975). He approved the treble damage provision (also part of a larger amendment) on July 1, 1975. *Id.* at 1751. This sequence demonstrates that, at the time that CPLR §901(b) was enacted, the Legislature *could not* have intended to apply the law's class action prohibition to Donnelly Act suits because the enactments were unrelated, and because even if they were related, the more specific Donnelly Act provision would control over the more general §901(b) provision. *See, e.g., Matter of Dutchess County Department of Social Services v. Day*, 96 N.Y.2d 149, 153, 749 N.E.2d 733, 736, 726 N.Y.S.2d 54, 57 (2001); *Gwynne v. Board of Education of Union Free School District No.3*, 259 N.Y. 191, 197, 181 N.E. 353, 355 (1932). In addition, it would be illogical to conclude that §901(b) was intended to apply to a treble-damage provision that *did not exist* when the class action section was enacted.

In these circumstances, there should be a presumption that §901(b) does *not* apply to treble damage actions brought under the subsequently enacted amendment to §340 of the General Business Law. *Cf. People v. Bootman*, 180 N.Y. 1, 7, 72 N.E. 505, 506-07 (1904) (declining to construe

statute by reference to a related law enacted three months later); *People ex rel. Chadbourne v. Voorhis,* 236 N.Y. 437, 444, 141 N.E. 907, 909 (1923) (statutes enacted at the same time should not be construed as inconsistent if they can fairly be read otherwise). Although that presumption arguably could be overcome by evidence in the legislative history demonstrating that the Legislature in fact understood the class action prohibition to reach the contemporaneously pending treble damage bill, there is *no* such evidence here. What the legislative history does show is that, in enacting §901(b), the Legislature intended to reach only statutes where an express sanction — a "penalty" or "minimum measure of recovery" — is provided for without any need to prove any *actual* injury or loss. Moreover, in amending the Donnelly Act, the Legislature *did* intend that private class actions could be brought to recover treble damages.

1. **<u>The Class Action Provision – §901(b)</u>**

Section 901(b) is part of a comprehensive revision of the New York class action provisions, which the Legislature enacted based on a proposal by the Judicial Conference. As originally introduced, the class action bill did not include a section corresponding to §901(b). *See* Thirteenth Annual Report of the Judicial Conference (Feb. 1, 1975), *published in McKinney's Sessions Laws* 1479, 1493, 1495 (1975); S.1309 & A.1252 (1975-76 Reg. Sess. Jan. 21, 1975); Senate proceeding transcript at 5946-47 (May 28, 1975) (remarks of Sen. Barclay: noting amendment of the original bill to include what became §901(b)). However, the Banking Law Committee of the State Bar urged disapproval of the bill, in part, because it would have created a potential liability exposure unrelated to actual damage suffered. The consumer law on which the Banking Law Committee focused was the federal Truth in Lending Act ("TILA"), 15 U.S.C. §1640(e), which creates statutory penalties

without requiring proof of actual damages:

> In the typical class action suit brought under the Federal Truth In Lending statute, 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.
>
> * * *
>
> 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.

Banking Law Committee of the Banking, Corporation and Business Law Section, *New York State Bar Association Legislation Report* 1, 2 (Rep. No. 1(revised), 1975) (emphasis added). *See also id.* at 3 (arguing that "severe statutory penalties unrelated to actual damages," together with class actions, would create excessive liability exposure).

In a subsequent report, the Banking Law Committee, along with two other State Bar Committees, urged the Legislature to enact an exclusionary amendment for statutes creating not only penalties or minimum measures of recovery, but also "forfeitures." The three committees noted that "New York statutory law contains many 'penalty' and similar provisions establishing ***arbitrary*** measures of liability for noncompliance . . . ." Banking Law Committee, Business Law Committee and Committee on Civil Practice Law and Rules, *New York State Bar Association Legislation Report* 2 (Rep. No. 15, 1975) (emphasis added).

Similarly, in its critique of the class action bill, the Empire State Chamber of Commerce noted that "[p]enalties and class actions simply do not mix. This was proved in *Ratner v. Chemical Bank*, where the combination caused a potential liability of $130 million, although *the actual*

damages to individual plaintiffs were zero!" Memorandum in Opposition to A.1252-A and S.1309-A by Stanford H. Bolz, dated February 14, 1975, at 3 (emphasis added), referring to *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).

The class action bill was thus amended to add what became §901(b). Urging support of the amended bill in writing to Counsel to the Governor, the State Consumers Board noted:

> Section 901(b). This section prevents a class suit to recover a penalty or "minimum damages"[15] unless the statute creating the penalty or minimum recovery authorizes recovery in a class suit. Of course, if the members of a class who would be entitled to a penalty sue only for their ***actual*** damages, they may do so in a class action.[16]
>
> [15] The Federal Truth-in-Lending Law, for example, creates a minimum recovery of $100.00 which has been construed by the courts not to be a "penalty".
>
> [16] *E.g.*, in this legislative session, bill 6890-A would create a Division of Consumer Affairs, and authorize suits by consumers for the larger of actual damages or fifty dollars where the law or the Division's regulations were violated. Class suits for the fifty dollar minimum recovery would be barred by Section 901(b), but class suits for ***actual*** damages would be permitted.

Memorandum, undated, at 4, 9 (emphasis added). Significantly, the State Consumers Board ***was*** mindful of §901(b)'s impact on one then-pending consumer protection bill, but made ***no*** mention of any effect on the similarly pending bill to add a treble damage remedy to the Donnelly Act.

These comments demonstrate that §901(b)'s limited ban on class actions is directed to cases brought under statutes, such as TILA, which provide for a monetary sanction — a fixed amount or a specified minimum recovery — that is awarded without the need to prove any actual damages. The reason for barring class actions under such statutes was to avoid the mischief of exposing a defendant

to enormous liability, despite the absence of any actual injury to the plaintiff or to those similarly situated individuals whom the plaintiff purports to represent. On the other hand, where proof of ***actual*** damages was a prerequisite to recovery, the class action ban did not apply.

As noted above, an antitrust plaintiff must prove actual damages from the antitrust violation. The plaintiff must satisfy a rigorous burden of proof, which is notoriously difficult to meet. Thus, the Second Circuit has noted that "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, 102 S.Ct. 1935 (1982). Indeed, during the 1890 congressional debates, Senator Sherman himself 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 . . . . Very few actions will probably be brought. . . . " *Id.* at 2569 (1890). Senator George similarly regarded the proposed damage remedy as insufficient to give "consumers[,] [t]he people of the United States as individuals" what was needed 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 (1890).

The Senate Judiciary Committee thereafter re-wrote the bill and 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) ("*Antitrust Legislative History*").[9] Even as strengthened, Senator George argued that "not one suit will ever be brought . . . by any person who is simply damaged in his character as a consumer," and that the damage remedy was, therefore, "a sham, a snare and a delusion. . . ." 21 Cong. Rec. at 3150 (1890).

Thus, the Sherman Act Congress fully appreciated how difficult it would be for consumers to recover damages based on antitrust violations. The treble damage remedy — imported from the 17th century English Statute of Monopolies — was offered as an incentive to take on the task.

* * *

Nothing in the available legislature history of CPLR §901(b) suggests that the Legislature intended the law to apply to the treble-damage provision then under consideration as an amendment to the Donnelly Act, or to any then-existing law authorizing recovery of a multiple of the actual damages proven to have been sustained. Equally important, nothing in the legislative history of the treble damage provision suggests that the Legislature intended that remedy to come within the class action prohibition of the then-pending bill.

2. **<u>The Donnelly Act Treble Damage Provision – §340(5)</u>**

The state courts recognized a right of action for actual damages under the Donnelly Act prior to 1975. The 1975 bill adding the express treble damage provision was enacted together with provisions that increased the sanctions for criminal violations of the State's antitrust law. The

---

[9]*Compare* §2 of the pre-amendment version of S.1, Senator Sherman's bill, as of March 26, 1890 *with* §7 of the Senate Judiciary Committee's revision, reported April 2, 1890, *reprinted in* 1 Earl W. Kintner, *Antitrust Legislative History* 256, 257-58, 275, 277. Senator Hoar authored the treble damage provision, as Senator Sherman was not a member of the Judiciary Committee. *See id.* at 23 n.1-151; Hans B. Thorelli, *Antitrust Policy* 199, 212.

legislative history of the 1975 amendment demonstrates that Legislature recognized the difference between treble damages, available in civil actions, and the increased penalty provisions, applicable in criminal cases. Parts of the legislative history also distinguish the treble damage remedy being created from the existing civil *penalty* provision of the Donnelly Act (applicable in actions by the Attorney General), the language of which was not changed. Gen. Bus. L. §342-a. The Legislature sought to adopt a treble damage civil right of action, and to increase the criminal penalties for antitrust violations, to conform the Donnelly Act to the approach in the federal antitrust laws.

The memorandum accompanying introduction of the bill thus notes the following:

> 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, thus conforming New York's Donnelly Antitrust Act to the analogous federal provisions of law. Specifically, the criminal sanctions would make violation of this Act a felony, in accordance with the recent revision of the Sherman Act which is about to become federal law. 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) (emphasis added).

Assemblyman Harenberg, who introduced A-3546, similarly described the bill as follows in writing to Counsel to the Governor:

> The bill amends the Donnelly Anti-trust Act by increasing criminal penalties and providing for treble-damage actions. Specifically, it would make the Donnelly Act conform to recent changes in the federal Sherman Act. At present, the Donnelly Act only provides for recovery of actual damages sustained plus ***a civil penalty*** in lieu of

> criminal penalties. This bill would make violations of the Donnelly Act a felony.

Harenberg letter to Judah Gribetz, dated June 20, 1975 (emphasis added).

The Senate minority leader's bill memorandum states the following:

> Purpose: Amends various existing provision [sic] of the General Business Law by increasing both ***the penalties for violating and the damages recoverable*** with respect to an agreement in restraint of trade.
>
> Comment: The proposed bill increased [sic] the severity of a violation of the section from a misdemeanor to a felony and further, includes a provision for treble damages. Such charges will be in conformity with federal legislation.

Ohrenstein memorandum, undated (emphasis added). *See also* Secretary of State Mario Cuomo's memorandum to Judah Gribetz, Counsel to the Governor, dated June 27, 1975 (the bill "increase[s] ***the damages*** and ***penalties*** [in the Donnelly Act] to be similar to such provisions under federal anti-monopoly laws").

Attorney General Lefkowitz's memorandum to the Governor noted the following:

> The purpose of this bill, introduced at the request of the Attorney General, is to amend sections 340, 341 and 342 of the General Business Law (constituting the Donnelly Antitrust Act) by substantially increasing the criminal penalties for violation of the act, and providing for recovery of treble damages and increased costs in civil actions, in order to provide a more effective deterrent to anti-competitive activity.
>
> * * *
>
> The provision for recovery of treble damages in civil actions will not only serve as an additional deterrent to violations, and increase recoveries by public agencies, but will also eliminate the additional

> expense and cumbersome duplication of effort involved in bringing separate actions under the federal antitrust laws after a violation of the Donnelly Antitrust Act has been established (for example, by a criminal conviction).

Lefkowitz memorandum for the Governor, dated June 20, 1975.

Finally, in approving the bill, Governor Carey noted that:

> The purpose of this bill is to increase the deterrent effect of the State's anti-trust laws by increasing the criminal penalties for violations of their provisions and by providing for the recovery of treble damages and increased costs in civil actions.
>
> Effective immediately, this bill would permit any person who sustains damages by reason of a violation of the anti-trust laws to recover treble damages, as well as costs not exceeding $10,000 and reasonable attorneys' fees. The criminal penalties for a violation of the anti-trust laws is raised from misdemeanor to a class E felony.

McKinney's Session Laws of New York 1751 (1975). *See also* Memorandum by a Staff Attorney of the Law Revision Commission relating to Assembly Bill No. 3546, undated, transmitted by Myron E. Leach to Counsel to the Governor by letter, dated June 19, 1975 (the bill "provide[s] treble civil damages and increased criminal penalties for making or attempting to make a contract or agreement for monopoly or in restraint of trade").[10]

Thus, the major participants in this legislation recognized that the bill being enacted provided for both treble damages and increased criminal penalties. These were separate features of the State's

---

[10]To be sure, there are references, in the legislature materials on the treble-damage bill, to the proposed legislation offering increased or strengthened "civil and criminal penalties . . . ." *E.g.*, Budget Report on Bills, A. 3546, dated June 17, 1975, at 2; Memorandum by Morton A. Grusky to Judah Gribetz, dated June 19, 1975. These comments, however, merely describe generically the consequences sometimes said to flow from a failure to satisfy a statutory obligation imposing criminal liability. They do not support the notion that the Legislature regarded treble damages as a "penalty" for purposes of §901(b).

antitrust enforcement scheme, along with the pre-existing civil penalty provision. Moreover, the treble damage remedy was consistently described as a provision designed to conform the Donnelly Act to federal law.

Significantly, by 1975 it was well-recognized that the treble damage provision of the federal antitrust laws was *not* a penalty. As Chief Judge Cardozo said years earlier in *Cox v. Lykes Brothers*, 237 N.Y. 376, 379-80, 143 N.E. 226, 227 (1924), "decisions of the Supreme Court of the United States" exclude "from the class of penalties . . . an action under the anti-trust law for recovery of treble damages (*Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 [1906], *affg.*, 127 Fed. Rep. 23 [6th Cir. 1903])."[11] Consequently, in using the federal provision as a model for the state law, the Legislature could not have regarded the Donnelly Act's treble damage provision as a "penalty."

It was similarly well-recognized, by 1975, that federal antitrust actions could be brought as

---

[11] *See also Bertha Building Corp. v. National Theatres Corp.*, 269 F.2d 785, 789 (2nd Cir. 1959) ("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 statute of limitations applicable to actions "for a penalty or forfeiture"]. A suit for treble damages under the anti-trust laws is plainly of this character"), *cert. denied*, 361 U.S. 960, 80 S.Ct. 585 (1960); *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 Machine Tool Co. v. Aluminum Company of America*, 63 F.2d 778, 780 (2d Cir.) ("An action for damages under the Anti-Trust Laws 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"), *cert. denied*, 289 U.S. 739, 53 S.Ct. 658 (1933); *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747, 756 (S.D.N.Y. 1953) ("under New York law, when recovery may be had not only for the actual monetary damages 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"); 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").

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). Indeed, courts had permitted States to sue under Federal Rule 23 not only on behalf of government bodies, but also as representatives of classes that included consumers.[12]

Nevertheless, the legislative history of the Donnelly Act's treble damage provision contains no suggestion that the then-pending class action bill would prohibit a class action brought under the Donnelly Act. The fact that ***neither*** pending bill refers to the other is compelling evidence that the Legislature did not intend any link between the two. At the same time, the evolution of §901(b) and the discussion of TILA establish what the Legislature did have in mind when it barred class actions in penalty or minimum recovery cases. The legislative history of the later enacted *Illinois Brick* indirect purchaser repealer further demonstrates that §901(b) does not apply to Donnelly Act class actions.

---

[12]*See, e.g., State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) (certifying settlement class in which States represented, among others, consumers who bought antibiotics), *aff'd*, 440 F.2d 1079 (2nd Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871, 92 S.Ct. 81 (1971); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 333 F.Supp. 278 (S.D.N.Y.) (certifying States as class representatives in non-settlement context on behalf of, among others, consumers of antibiotics), *amended*, 333 F.Supp. 291 (S.D.N.Y.), *mandamus denied sub nom. Pfizer v. Lord*, 449 F.2d 119 (2nd Cir. 1971); *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972)(certifying States as class representatives of government bodies and consumers). *See also Illinois v. Bristol-Myers Co.*, 470 F.2d 1276, 1277 (D.C. Cir. 1972) ("Once properly in federal court on its own behalf and that of its political subdivisions, the State, like any other party, may seek to proceed under Rule 23 as the class representative of drug purchasers similarly situated, including private purchasers"; footnote omitted).

3. The Indirect Purchaser Provision – §340(6)

In a decision filed in late 1966, the Supreme Court's Commercial Division in New York County applied *Illinois Brick* to a purported antitrust class action brought by an indirect purchaser of drugs under the Donnelly Act. *Levine v. Abbott Labs.*, Index No. 117320/95 (N.Y. Co. Sup. Ct. Nov. 25, 1996), *appeal withdrawn*, 257 A.D.2d 978, 685 N.Y.S.2d 384 (1st Dep't 1999). *Levine* was the direct catalyst for 1998 amendment to the Donnelly Act, which became §340(6) of the General Business Law. In pertinent part, §340(6) provides that "the fact that the state, or any political subdivision or public authority of the state, or 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 . . . ." Explicit statements by both the Assembly and Senate sponsors of this bill establish that the Legislature intended this change to permit consumers — classic indirect purchasers — to sue in class actions filed under the Donnelly Act. This, too, is compelling proof that the Legislature *never* understood §901(b) to apply to Donnelly Act treble damage actions.

During the Assembly debate, State Assemblyman Richard Brodsky, who was the Assembly author and sponsor of the legislation, engaged in the following exchange with Assemblyman Straniere:

> Mr. Straniere: The question I have, Richard [Assemblyman Brodsky], 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.

Assembly proceeding transcript at 33-34 (May 26, 1998)(emphasis added).

Similarly, State Senator James J. Lack, who sponsored the legislation in the Senate, explained 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." Senate proceeding transcript at 6043 (June 18, 1998). Senator Lack also wrote the Governor's office after passage of the bill in the Assembly and the Senate, referring to the *Levine* case and to the "copper cases" — *i.e.*, class actions — which, he said, should be permitted under the Donnelly Act:

> [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.

Lack letter, dated December 17, 1998, at 2.[13] This is clear contemporaneous evidence on the part of the legislation's sponsors that *class actions* by indirect purchasers were to be permitted under the Donnelly Act.

The opponents of the legislation similarly recognized that the *Illinois Brick* repealer would enable consumer class actions to be filed under the Donnelly Act. Thus, the Business Council of New York State, an opponent of the bill, wrote to the Governor's office to urge a veto because the bill would "simply provide[] an additional and unnecessary avenue for litigation of consumer class actions." Walsh letter, dated November 18, 1998, at 2. *See also* Business Council Memorandum at 1-2 (November 19, 1998).

* * *

The legislative intent that emerges from these three pieces of legislation is clear enough. The New York Legislature intended to permit consumer class actions. Enactment of CPLR §901(b) was never envisioned to reach treble damage actions brought under the Donnelly Act, where the plaintiff is required to prove actual economic injury in order to recover.

C. The Lower Court's Construction of CPLR §901(b) Would Significantly Impair the Enforcement and Protections of the Donnelly Act

The treble damage provision is an integral part of effective antitrust enforcement at both the federal and state levels. The provision is designed to encourage those injured by antitrust violations,

---

[13]The "copper cases" are *Heliotrope General v. Sumitomo Corp.*, a California State state court class action. *See* Richard Brodsky, James Lack, Bernard Persky & Barbara Hart, "Antitrust Protections Expanded in New York," N.Y.L.J., June 22, 1999, at 1, col. 1.

acting through the private bar, to augment government enforcement activity. As Judge Weinfeld once wrote, treble damages actions are an "auxiliary policing method," adopted because the Legislature "was not content to rely solely upon official action." *United States v. Standard Ultramarine & Color Co.*, 137 F.Supp. 167, 171 (S.D.N.Y. 1955). Thus, one leading commentator similarly has noted that treble damages are designed "not only to provide redress for private wrongs but also to build into the act the feature of self-enforcement that had been typical in cases of restraint of trade at common law." Hans B. Thorelli, *Antitrust Policy* 225. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635, 105 S.Ct. 3346, 3358 (1985) ("[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators"); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 92 S.Ct. 885, 891 (1972)(the treble damage remedy is intended to encourage litigants "to serve as private attorneys general"; internal quotation marks omitted).

The impact of the State Donnelly Act itself is most significant where that law authorizes a suit that cannot be maintained under the federal antitrust laws — specifically, where the case is brought by a consumer who did not purchase directly from the antitrust violator. Indeed, after the *Levine* court's 1996 decision declining to permit indirect purchasers to sue under the Donnelly Act, the Legislature promptly remedied the ruling by enacting New York's *Illinois Brick* repealer, Gen. Bus. L. §340(6).

The First Department's construction of CPLR §901(b) would sap the Donnelly Act of its greatest potential strength in the area of private antitrust enforcement. The very consumer cases that the Legislature intended to encourage when it enacted §340(6) in 1998 — classic indirect purchaser

actions — are not likely to be brought on behalf of individual victims of antitrust violations. If those consumer actions cannot be maintained as class actions under state antitrust law, they are unlikely to be brought at all. The state treble damage remedy will fail to accomplish one of its core purposes — to supplement the Attorney General's enforcement of the Donnelly Act. The State's antitrust enforcement regime of government and private actions would be grievously injured, and the consumer will, accordingly, suffer.

Thus, the First Department's decision will have a widespread impact on the People of the State of New York. The issue raised is one that warrants review and resolution by this Court.

D. <u>The Case Law and Statutory Authority Relied On By the Court Below Decision Lack Persuasive Force</u>

The process of statutory construction is informed by the context and circumstance in which the law was enacted. *See, e.g., New York State Bankers Assoc. v. Albright,* 38 N.Y.2d 430, 434, 436-38, 343 N.E.2d 735, 737, 738-39, 381 N.Y.S.2d 17, 19, 20-21 (1975); *Matter of Capone v. Weaver,* 6 N.Y.2d 307, 309, 160 N.E.2d 602, 603-04, 189 N.Y.S.2d 833, 835 (1959); *Cabell v. Markham,* 148 F.2d 737 (2nd Cir.)(L.Hand, J.), *aff'd,* 326 U.S. 404, 66 S.Ct. 193 (1945). As noted earlier, the treble damage provision here implicates a long-standing public policy abhorring monopolies. (*See* p. 6, above.) This historical context is noteworthy because the Legislature "frequently employs the same words in different statutes with different meaning and effect." *Matter of Sentry Ins. Co. v. Amsel,* 36 N.Y.2d 291, 294-95, 327 N.E.2d 635, 637, 367 N.Y.S.2d 480, 483 (1975). *See also Colon v. Aetna Casualty & Surety Co.*, 48 N.Y.2d 570, 574 n.2, 399 N.E.2d 938, 940 n.2, 423 N.Y.S.2d 908, 910 n.2 (1980).

Thus, in construing §901(b), the most pertinent authorities are those arising under the federal

antitrust laws, illustrated by the decisions cited earlier. (*See* p. 19 & n. 11.) This is particularly so because, as demonstrated above, the Legislature sought to emulate the federal treble damage remedy when it enacted the Donnelly Act provision in 1975.

For this basic reason, it is of no moment that a particular civil treble damage remedy may be derived from a criminal statute, as were the laws that the First Department cited in its decision, and as were those remedies involved in decisions that the Court below also cited.[14] It is the *individual* context and legislature history of the antitrust laws, and of CPLR §901(b), that inform the issue of statutory construction raised in *this* case.

Significantly, none of the appellate case law on which the First Department relied in its decision arose under the Donnelly Act or any other antitrust treble damage provision, or under CPLR §901(b). Indeed, many of the cited cases are far afield. For example, decisions establishing that treble damage provisions should be strictly construed, or counseling against creating a punitive damage remedy for violating a statutory obligation, shed no light on the issue raised here. *See Welch v. Mr. Christmas, Inc.*, 57 N.Y.2d 143, 440 N.E.2d 1317, 454 N.Y.S.2d 971 (1982); *Blakeslee v. Rabinor*, 182 A.D.2d 390, 582 N.Y.S.2d 132 (1st Dep't 1992), *leave to appeal denied*, 82 N.Y.2d 655, 622 N.E.2d 305, 602 N.Y.S.2d 804 (1993); *Thoreson v. Penthouse Int'l, Ltd.*, 179 A.D.2d 29, 583 N.Y.S.2d 213 (1st Dep't), *aff'd*, 80 N.Y.2d 490, 606 N.E.2d 1369, 591 N.Y.S.2d 978 (1992); *Lyke v. Anderson*, 147 A.D.2d 18, 541 N.Y.S.2d 817 (2nd Dep't 1989); *Newcomb v. Butterfield*, 8

---

[14]*See Mayes v. UVI Holdings*, 280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dep't 2001), *Rental & Management Assocs., Inc. v. Hartford Ins. Co.*, 206 A.D.2d 288, 614 N.Y.S.2d 513 (1st Dep't 1994), *People v. Connolly*, 3 A.D.2d 943, 164 N.Y.S.2d 66 (2nd Dep't 1957); *Fields v. Turner*, 1 Misc.2d 679, 147 N.Y.S.2d 542 (N.Y. Co. Sup. Ct. 1955).

John. 342 (N.Y. Sup. Ct. Jud. 1811). No question is presented in these cases regarding the scope of the Donnelly Act's treble damage remedy; nor are punitive damages at issue.

Similarly, the common law doctrine — expressed in such cases as *Rockefeller University v. Tishman Constr. Corp.*, 240 A.D.2d 341, 659 N.Y.S.2d 460 (1st Dep't), *leave to appeal denied*, 91 N.Y.2d 803, 691 N.E.2d 630, 668 N.Y.S.2d 558 (1997), and *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269, 682 N.Y.S.2d 167 (1st Dep't 1998), *leave to appeal denied*, 94 N.Y.2d 753, 722 N.E.2d 507, 700 N.Y.S.2d 427 (1999) — disfavoring awarding a litigant two or more recoveries for the same loss has no application. That doctrine does not disable the Legislature from enacting laws providing for double or treble damages when considered appropriate to achieve policy objectives. Likewise, public policy considerations precluding indemnification against the full amount of treble damages have no bearing on whether §901(b)'s class action bar applies to private treble damage cases brought under the Donnelly Act. *See Rental & Mgmt. Assocs., Inc. v. Hartford Ins. Co.*, 206 A.D.2d 288, 614 N.Y.S.2d 513 (1st Dep't 1994).

In addition, though outside the antitrust context, the decisions in this State addressing, often in dicta, whether multiple damages constitute a penalty for a particular purpose are themselves inconsistent. (*See* p. 5, n. 6.) This unsettled state of the law further highlights the need for review by this Court.

Finally, §342-b of the General Business Law, to which the First Department also referred in its decision, does not preclude a private party from suing under the Donnelly Act on behalf of a class. Section 342-b addresses the Attorney General's authority, vis-a-vis the State and state governmental bodies in general, to bring actions under the Donnelly Act and the federal antitrust laws. Part of the

statute uses the term "class action" to describe a form of action that the Attorney General may bring on behalf of "subordinate governmental entities," from which such entities may elect to be excluded. This part of §342-b was designated to assure conformity between state law, in this specific and unique setting, and federal practice under the class action provisions of Rule 23 of the Federal Rules of Civil Procedure. Section 342-b itself does not define the scope of the Attorney General's authority to enforce the Donnelly Act (or the federal antitrust laws) in any other context, much less does it establish that the Legislature intended §901(b) to ban class actions brought by private parties under the Donnelly Act.

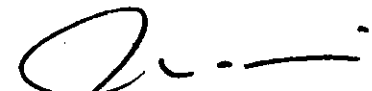
Conclusion

The Attorney General of the State of New York urges this Court to grant plaintiff-appellant's motion for permission to appeal to this Court.

Dated: New York, New York
May 31, 2002

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York



Jay L. Himes
Bureau Chief, Antitrust Bureau
120 Broadway
New York, New York 10271-0332
212-416-8282

Caitlin J. Halligan
Solicitor General

Michael S. Belohlavek
Deputy Solicitor General

Jay L. Himes
Bureau Chief, Antitrust Bureau

Of Counsel