

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

-----X
Anne Cunningham and Norman Mermelstein, :
Individually And On Behalf Of All Others :
Similarly Situated, :

Plaintiffs-Appellants, :

-against- :

Bayer AG, , Bayer Corporation, Barr Laboratories, Inc., :
The Rugby Group, Inc., Watson Pharmaceuticals, Inc. :
and Hoechst Marion Roussel, Inc. :

Defendants-Respondents. :
-----X

NOTICE OF MOTION

(New York Co.
Index No. 603820/00)

PLEASE TAKE NOTICE that, upon the accompanying moving affirmation of Jay L. Himes, dated January 23, 2006, and the annexed exhibits, and upon all prior papers and proceedings, the Attorney General of the State of New will move this Court, at the Courthouse of the Appellate Division, First Department, located at 27 Madison Avenue, New York, New York, on February 17, 2006 at 10 a.m., or as soon thereafter as counsel may be heard, for an Order: (a) granting the State of New York permission to appear as *amicus curiae* and, if permission is granted, for leave to file the State of New York's proposed memorandum in support of Plaintiffs-Appellants' motion for permission to appeal to the Court of Appeals, on the grounds that such memorandum would be of special assistance to the Court and would invite the Court's attention to law or arguments that might otherwise escape its consideration; and (b) directing such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 23, 2006

ELIOT SPITZER
Attorney General of the State
of New York



Jay L. Himes
Chief, Antitrust Bureau
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a minimum measure of recovery created or imposed by statute,” unless the statute itself specifically authorizes recovery in a class action. The Donnelly Act 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 court below granted dismissal on the basis of this Court’s decision in Cox v. Microsoft Corp., 290 A.D.2d 206 (1st Dep’t 2002). More specifically, the court below held that the treble damages provided by the Donnelly Act constitute a “penalty” within the meaning of CPLR § 901 (b), and that because the Donnelly Act “does not specifically authorize the recovery of treble damages in a class action, as required under CPLR 901, plaintiffs may not maintain a class action under GBL § 340.” (Ex. A. 7, 8). By Order entered on December 13, 2005, this Court declined to revisit its precedents in Cox and Asher v. Abbott Labs., 290 A.D.2d 208 (1st Dep’t 2002), which similarly applied CPLR § 901(b) to a Donnelly Act treble damage action. (Ex. B.) Accordingly, this Court affirmed the dismissal below.

The Interests of the Amicus

5. The Attorney General is granted wide investigative and enforcement powers under the Donnelly Act.¹ Although the Attorney General’s authority to bring antitrust actions is not based on or derived from CPLR § 901(b), he is, nevertheless, directly interested in the effective enforcement of the Donnelly Act. Preservation of competition cannot depend solely on actions brought by the Attorney General.

6. Private treble damage actions, authorized by the Legislature in Gen. Bus. L. § 340(5)

¹ 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).

and (6), are “a chief tool in the antitrust enforcement scheme.” Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 635 (1985). But private antitrust actions simply may not be economically viable without the class action mechanism. The damage sustained by any single victim, particularly a consumer, is often too small. Accordingly, “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citation and internal quotations omitted). The State of New York, therefore, has a strong interest in ensuring that consumers are not precluded from bringing class actions under the Donnelly Act.

7. The CPLR § 901(b) issue presented in this case is identical in all material respects to that presented in Paltre v. General Motors Corp., Nos. 2004-04642 and 2004-04677, and Sperry v. Crompton Corp., No. 2004-06517, both of which are *sub judice* in the Second Department. The Attorney General was granted permission to file as *amicus curiae* in support of reversal in both cases. The Attorney General also participated as *amicus curiae* in both Cox and Asher.

Reasons for Granting Permission to Appeal

8. For the reasons more fully discussed in its memorandum accompanying this motion, the State of New York submits that this Court should grant permission to appeal this Court’s affirmance to the Court of Appeals. This Court’s construction of CPLR § 901(b), first adopted in Cox and Asher and followed in this case, seriously hinder private enforcement of the Donnelly Act on behalf of consumers who are victimized by antitrust violations. The Court’s construction, we submit, lacks support in the language of the statute itself, and also is directly contrary to the Legislature’s intent to ensure effective antitrust enforcement. The issue thus presented will recur

absent review by the Court of Appeals or legislative intervention.

9. Both the words of the statute and the underlying legislative history of CPLR § 901(b) demonstrate that the Legislature sought to bar class actions only where a statute establishes a fixed or minimum damage amount, which the statute itself prescribes, and which the plaintiff is entitled to recover regardless of whether or not the plaintiff sustained any actual injury. That, however, is not the situation in an antitrust case, where, to recover damages, the plaintiff must satisfy rigorous elements of proof of injury in fact, as well as show injury of the kind legally cognizable under the antitrust laws.

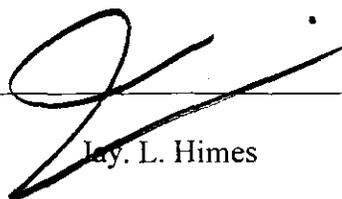
10. Equally important, in enacting the Donnelly Act's treble damage provision, the Legislature used the federal antitrust laws as a model. The federal treble damage provision has long been recognized as primarily remedial in nature, and not as a penalty. Moreover, the Legislature also distinguished the treble damage remedy from the civil and criminal penalties expressly authorized in other parts of the Donnelly Act. Thus, the Legislature simply did not intend CPLR § 901(b)'s limited ban on class actions to reach a Donnelly Act treble damage action.

11. Indeed, in 1998 the Legislature amended the Donnelly Act to assure that indirect purchasers - typically consumers - could sue under state antitrust law to recover damages caused by price fixing or monopoly overcharges that had been passed on to them - despite the Supreme Court's ruling in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), barring indirect purchaser cases. The Legislature specifically envisioned that consumers would be able to maintain class actions for treble damages under the Donnelly Act. Accordingly, to apply CPLR § 901(b) to Donnelly Act treble damage antitrust actions would defeat the Legislature's express intent to strengthen the area most needed for antitrust enforcement - class actions by consumers.

12. By substantially reducing the ability of private parties to enforce the State's Donnelly Act, the decision here, together with those in Cox and Asher, significantly affect all New York consumers - and adversely so. Indeed, because of the perceived bar by CPLR § 901(b), since Asher and Cox, not only state courts, but federal district courts as well, have increasingly barred New York consumers from asserting indirect purchaser antitrust claims as class actions – thereby dis-entitling consumers from pursuing the very claims that the Legislature sought to enable through the Donnelly Act's 1998 amendment.

13. For these reasons, and for those more fully set forth in the State of New York's proposed memorandum, I respectfully request that this Court enter an Order granting the State of New York status as *amicus curiae*, and permitting the State of New York to file its accompanying memorandum in support of the motion for permission to appeal. The State of New York also urges the Court to grant plaintiffs-appellants permission to appeal to the Court of Appeals from this Court's Order affirming the dismissal below.

Dated: New York, New York
January 23, 2006



Jay. L. Himes

EXHIBIT A

ORDER, APPEALED FROM, DATED OCTOBER 17, 2003 [7-28]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE, JR.

PART 56

0603820/2000

ALTMAN, MARCY
vs
BAYER CORPORATION

INDEX NO. 600

MOTION DATE 5/30/03

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 10

DISMISS

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

SCANNED
OCT 27 2003

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 10/17/03

RICHARD B. LOWE, JR.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 56

..... x
 ANNE CUNNINGHAM AND NORMAN
 MERMELSTEIN, individually and on behalf of
 all others similarly situated,

Plaintiffs,

-against-

Index No. 603820/00

BAYER AG, BAYER CORPORATION, BARR
 LABORATORIES, INC., THE RUGBY GROUP,
 INC., WATSON PHARMACEUTICALS, INC.
 and HOECHST MARION ROUSSEL, INC.,

Defendants.

-----x
 LOWE, J.:

In Motion Sequence number 010, defendants Bayer AG, Bayer Corporation (collectively, Bayer), Barr Laboratories, Inc. (Barr), Hoechst Marion Roussel, Inc. (HMR), Watson Pharmaceuticals, Inc. (Watson), and The Rugby Group, Inc. (Rugby) move, pursuant to CPLR 3211 (a) (7), for an order dismissing the action for failure to state a cause of action under General Business Law (GBL) § 340 and 349.

In Motion Sequence number , plaintiffs Anne Cunningham and Norman Mermelstein move for an order: (1) pursuant to CPLR 901 and 902, certifying this action as a class action; and (2) designating the law firms of Milberg Weiss Bershad Hynes & Lerach LLP and Lieff Cabraser Heimann & Bernstein LLP as counsel for the class.

These motion sequences are consolidated for disposition.

I Background

Plaintiffs bring this action on behalf of individuals residing in the United States who indirectly purchased the prescription drug Ciprofloxacin hydrochloride (Cipro) from defendant

Bayer AG or its United States subsidiary, defendant Bayer Corporation, between January 4, 1995 and the present. Plaintiffs base their complaint on the following allegations underlying the alleged antitrust and deceptive trade practices claims.

Cipro was developed by Bayer and patented in the United States under patent number 4,670,444 (the '444 Patent). Bayer filed a patent application on May 29, 1984, which was approved three years later. In October 1987, the Food and Drug Administration (the FDA) approved the marketing of Cipro. Bayer started marketing Cipro in the United States, and it quickly became one of the most widely prescribed and used antibiotics.

On August 16, 1991, Barr filed an abbreviated new drug application (ANDA) 74-124 for a generic equivalent of Cipro, and made a paragraph IV certification with the FDA as required in order to put patentholders on notice of the pending ANDA. Barr estimated that a generic equivalent of Cipro would capture 39% of the market within one year of introduction of a generic drug, 72% within two years, 82% within three years, and 85% within four years of introduction, steering more than \$750 million in yearly revenues to producers of a generic equivalent.

On December 6, 1991, Barr sent to Bayer a notice of its ANDA, stating that it considered the '444 Patent invalid and unenforceable, and notifying Bayer of its intent to start manufacturing and marketing a corresponding generic equivalent. Prompted by this notice, on January 16, 1992, Bayer commenced an action for patent infringement against Barr in the United States District Court for the Southern District of New York (the Patent Litigation). According to the Hatch-Waxman amendments to Federal Food, Drug and Cosmetics Act,' the filing of a patent

If the applicant made a certification described in subclause (IV) of paragraph (2)(A)(vii), the approval shall be made effective

infringement action triggers a 30-month waiting period during which an ANDA applicant may not market a generic drug absent a court decision in its favor. This waiting period was to end on January 4, 1995. However, on November 30, 1992, only 10 months after the filing of the Patent Litigation, Bayer and Barr entered into a stipulation extending the waiting period until a final

immediately unless an action is brought for infringement of a patent which is the subject of the certification before the expiration of forty-five days from the date the notice provided under paragraph (2)(B)(i) is received. If such an action is brought before the expiration of such days, the approval shall be made effective upon the expiration of the thirty-month period beginning on the date of the receipt of the notice provided under paragraph (2)(B)(i) or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action, except that--

(I) if before the expiration of such period the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of the court decision,

(II) if before the expiration of such period the court decides that such patent has been infringed, the approval shall be made effective on such date as the court orders under section 271(e)(4)(A) of Title 35, or

(III) if before the expiration of such period the court grants a preliminary injunction prohibiting the applicant from engaging in the commercial manufacture or sale of the drug until the court decides the issues of patent validity and infringement and if the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of such court decision.

In such an action, each of the parties shall reasonably cooperate in expediting the action. Until the expiration of forty-five days from the date the notice made under paragraph (2)(B)(i) is received, no action may be brought under section 2201 of Title 28, for a declaratory judgment with respect to the patent. Any action brought under section 2201 shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business.

21 USC 355 (j) (5) (B) (iii).

judgment in the Patent Litigation, which would therefore extend to the conclusion of all appeals to the Court of Appeals for the Federal Circuit, or the expiration of the time permitted for such appeals. Affirmation of William V. O'Reilly, Exhibit A. On December 8, 1992, the federal judge signed the stipulation and order.

On January 4, 1995, the FDA tentatively approved Barr's ANDA, allowing Barr to market its generic equivalent of Cipro.

On March 29, 1996, Barr and Rugby entered into an agreement (the Litigation Funding Agreement) for Rugby to assist Barr in funding its patent litigation against Bayer in exchange for a share in any rights and profits from the marketing and distribution of Barr's generic equivalent. According to the Litigation Funding Agreement, any settlement of the Patent Litigation was subject to approval by Rugby, and both Barr and Rugby would share benefits from such settlement in equal parts.

On December 20, 1996, Barr, Rugby, and its parent company, HMR, entered into an amendment to the Litigation Funding Agreement, according to which HMR succeeded to all rights and obligations of Rugby in the agreement, and Rugby agreed to continue to perform "in distribution capacity" with respect to the subject matter of the agreement.

On January 8, 1997, Bayer, Barr, HMR and Rugby entered into four agreements: a settlement agreement and mutual release between Bayer and Barr (the Barr Settlement Agreement), a settlement agreement and mutual release between Bayer, HMR and Rugby (the HMR/Rugby Settlement Agreement), a settlement agreement and mutual release between Bayer and two other parties, Bernard Sherman and Apotex, Inc., (the Apotex Settlement Agreement) and a supply agreement between Bayer, Barr and HMR (the Cipro Supply Agreement)

(collectively, the New York Cipro Agreements).

According to the Barr Settlement Agreement, Barr and Bayer agreed to enter a consent judgment in which Barr would acknowledge the validity and enforceability of the '444 Patent. HMR and Rugby also acknowledged the validity and enforceability of the '444 Patent, and agreed not to infringe the patent or seek reexamination, revocation or nullification of any of the patents in the HMR/Rugby Settlement Agreement. Also, Apotex, Inc. and Sherman, the majority shareholder of Barr and Apotex, Inc., acknowledged the validity of Bayer's patents and agreed not to infringe or seek reexamination of the patents in the Apotex Settlement Agreement. Further, Barr and Bayer entered into the Cipro Supply Agreement, according to which Bayer had an option either to license and supply Barr and HMR with Cipro for resale under a generic label, or to pay quarterly amounts to Barr in the period between 1998 and 2003. As a part of the arrangement, Bayer initially paid \$24.5 million each to Barr and Rugby.² According to plaintiffs, the total amount paid by Bayer to Barr and Rugby in the course of this settlement arrangement amounted to approximately \$400 million.

The parties then submitted a consent judgment stating that Barr recognized the validity of the '444 Patent. However, the consent judgment did not disclose some of the terms of the agreement, chiefly that Bayer would be paying approximately \$400 million to Barr and Rugby.

Affirmation of William V. O'Reilly, Exhibit B.

In February 1998, Watson purchased Rugby from HMR. Another of Watson's

² On January 9, 1997, Barr and HMR entered into an escrow agreement (the Barr Escrow Agreement) according to which Barr and HMR agreed to split evenly funds paid by Bayer to an escrow account under the Cipro Supply Agreement.

subsidiaries, Schein Pharmaceutical, Inc. filed an ANDA for its generic version of Cipro. Bayer commenced an action against it, and the court granted summary judgment in favor of Bayer. According to plaintiffs, Schein Pharmaceutical, Inc., as an affiliate of Rugby, will be barred from marketing a Cipro generic by the HMR/Rugby Settlement Agreement even if it ultimately prevails in the patent litigation.

Plaintiffs argue that these agreements between defendants resulted in restraint of trade between horizontal competitors. According to plaintiffs, Bayer paid more than \$400 million to settle the Patent Litigation in which Barr acknowledged the validity of Bayer's Cipro patent. Cipro became one of the most widely prescribed and used antibiotics. In 1999, Cipro became the 11th most prescribed drug and the 20th most sold drug in the United States, with annual sales exceeding \$921 million. Following the settlement, Bayer increased prices for Cipro by 16.7% in the period between January 1997 and December 1998. According to plaintiffs, consumers were compelled to pay substantially higher prices than they would have paid absent the agreements.

Plaintiffs assert the following claims for: (1) unreasonable restraint of trade and commerce in violation of GBL § 340; (2) conspiracy to monopolize the market for the manufacture, distribution and sale of Cipro; and (3) deceptive acts and practices in violation of GBL § 349.

II Analysis

A. Motion to Dismiss

For purposes of defendants' motion to dismiss, plaintiffs' factual allegations are accepted

as true and plaintiffs are afforded the benefit of all reasonable inferences.³

1. Counts I and II

Defendants argue that plaintiffs' class action allegations of unreasonable restraint of trade and commerce, and conspiracy to monopolize the Cipro market should be dismissed because plaintiffs may not maintain a class action for violations of Donnelly Act (GBL § 340)⁴

According to CPLR 901 (b),

[u]nless a statute creating or imposing a penalty, or a minimum measure or 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.

Section 340 (5) of the GBL provides that, "any person who shall sustain damages by reason of

³ On a motion to dismiss under CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction, allegations are accepted as true, and plaintiffs are accorded the benefit of every possible favorable inference. P.T. Bank Cent. Asia v ABN AMRO Bank N.V., 301 AD2d 373, 375-76 (1st Dept 2003).

⁴ New York's antitrust statute, Donnelly Act was modeled on the Sherman Act, and it provides that,

[e]very contract, agreement, arrangement or combination whereby
 A monopoly in the conduct of any business, trade or commerce or
 in the furnishing of any service in this state, is or may be
 established or maintained, or whereby
 Competition or the free exercise of any activity in the conduct of
 any business, trade or commerce or in the furnishing of any service
 in this state is or may be restrained or whereby
 For the purpose of establishing or maintaining any such monopoly
 or unlawfully interfering with the free exercise of any activity in
 the conduct of any business, trade or commerce or in the furnishing
 of any service in this state any business, trade or commerce or the
 furnishing of any service is or may be restrained, is hereby declared
 to be against public policy, illegal and void.

NY Gen Bus Law § 340.

any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees." The Appellate Division in Cox v Microsoft Corp. (290 AD2d 206,206 [1st Dept 20021) affirmed the dismissal of class action allegations holding that a private person may not bring a class action under GBL § 340. The court held that, "the treble damages remedy provided for in subsection 5 constitutes a 'penalty' within the meaning of CPLR 901 (b)," and that because section 340 of the GBL does not specifically authorize the recovery of treble damages in a class action, as required under CPLR 901, plaintiffs may not maintain a class action under GBL § 340.

Plaintiffs concede that, under the First Appellate Division holding in Cox, plaintiffs' first and second causes of action for violations of GBL § 340 may not be maintained as a class action, but they present their arguments in order to preserve related issues for appeal. Plaintiffs argue that, although their claims fail under Cox, the Cox decision was erroneous, and plaintiffs should be able to maintain a class action for violation of GBL § 340. Nevertheless, this court does not need to address the merits of plaintiffs' arguments at this time because, "[d]oubt of the soundness of the decisions of ... the Appellate Division, even if such doubtfulness were conceded, [does not] afford any basis for this court to refuse or fail to follow the authority of those decisions." Vanilla v Moran, 188 Misc 325,334 (Sup Ct, Albany County), affd on other grounds, 272 AD 859 (3rd Dept 1947), affd 298 NY 796 (1949); In re Weinbaum's Estate, 51 Misc 2d 538, 539 (Sur Ct, Nassau County 1966).

Plaintiffs fail to provide any authority that would mandate the opposite conclusion, and this court is not aware of the existence of such authority at this time. Thus, under the holding in Cox (290 AD2d 206), plaintiffs' class action allegations of violations of GBL § 340 stating their

first and second causes of action fail.

2. Count III

Defendants seek dismissal of the third cause of action for consumer deception.

Defendants maintain that plaintiffs' allegations of antitrust conspiracy do not represent allegations of deceptive acts for purposes of GBL § 349. Defendants argue that a mere allegation of wrongful or otherwise unlawful acts, without more, is not sufficient to support the claim. Defendants also argue that plaintiffs' mere conclusory assertions of deception are not sufficient to state any consumer oriented deceptive conduct by defendants.

Plaintiffs allege that Barr agreed to withdraw its challenge of the '444 Patent in exchange for payments by Bayer of approximately \$400 million. Plaintiffs allege that defendants issued a press statement in which they stated that Bayer and Barr had reached a settlement, and that Bayer would pay \$24.5 million each to Barr and Rugby, and would either supply them with Cipro to be marketed under a single trade name pursuant to a license from Bayer, or make additional payments. Plaintiffs state that, even though defendants made this public statement, defendants concealed the material terms of the settlement and omitted all mention of the substantial payments in the consent judgment submitted to the District Court.

Plaintiffs contend that these allegations of a self-concealing antitrust conspiracy are sufficient to sustain a claim under GBL § 349. It is plaintiffs' contention that, as a result of these anticompetitive agreements, the consuming public unknowingly paid high prices for Cipro. Defendants argue that allegations of unfair practices, such as the allegations of the anticompetitive agreements in violation of the antitrust laws, without more, do not state deceptive acts for purposes of this section.

In interpreting statutory provisions, courts are bound, "to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention." Niesig v Team I, 76 NY2d 363,368 (1990). Courts should construe statutes reasonably so as not to deprive citizens of their important rights. Pansa v Damiano, 14 NY2d 356,359 (1964). It is not for the courts, "to determine the wisdom or propriety of any particular statute, or to correct supposed errors, omissions or defects." National Org. for Women v Metropolitan Life Ins. Co., 131 AD2d 356,358 (1st Dept 1987).

Section 349 (a) of GBL provides that,

[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

The language of GBL § 349, on its face, does not include a prohibition of unfair practices or otherwise unlawful acts under the scope of the provision. The provision prohibits only "deceptive acts or practices."

Plaintiffs argue that price-fixing activities constitute deceptive practices per se, relying on State of New York v Feldman (210 F Supp 2d 294 [SD NY 20021]). In Feldman, New York State asserted a claim under GBL § 349 alleging that defendants conducted secret pre-auction bidding to determine a highest-bidding-co-defendant who would then bid at subsequent public auctions, while other co-defendants would refrain from bidding at the public auctions in exchange for a part of the winning co-defendant's profits. The court held that, because the New York courts frequently interpret section 349 by reference to the federal counterpart statute, section 5 of the Federal Trade Commission Act (the FTCA), and because antitrust violations fall under the scope of section 5 of the FTCA, defendants' antitrust violations were within the scope of section 349.

Feldman, 210 F Supp 2d at 302. While the alleged collusive activity in Feldman may have been deceptive, this court disagrees with the proposition that a mere antitrust violation, without more, falls under the scope of section 349.

According to section 5 of the FTCA, the federal counterpart of section 349 of the GBL,

[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

15USCA § 45.

Section 349 of the GBL, like corresponding provisions adopted in other jurisdictions, was modeled after section 5 of the FTCA. Various states have enacted similar provisions intending, "to follow in the steps of the Federal Trade Commission with respect to the interpretation of deceptive acts and practices outlawed in Section 5 of the Federal Commission Act." State of New York by Lefkowitz v Colorado State Christian Coll. of Church of Inner Power, Inc., 76 Misc 2d 50, 54 (Sup Ct, NY County 1973). While modeled on section 5, GBL § 349 mirrors the prohibition of "deceptive acts or practices" contained in section 5 of the FTCA, but omits "unfair methods of competition." Where a law expressly describes a particular act to which it applies, an inference is that what is omitted, or not included in the language determining the scope of the application, is intended to be omitted or not included. GTE Spacenet Corp. v New York State Dept. of Taxation and Fin., 223 AD2d 468,469 (1st Dept 1996) (Plaintiff was subject to taxation and was not a "utility" for purposes of Tax Law § 186-a, which defined "utility" as the service to be provided by or through "wires," because the service provided by plaintiff was classified by the Federal Communications Commission as communications "by radio" and not "by wire"). Thus, the inference is that the "unfair methods of competition" were intended to be excluded from the

scope of GBL § 349. *Id.*: See also *Patently Unfair: State Unfair Competition Laws and Patent Enforcement*, 12 *Harv J Law & Tec* 469,498 (1999).

This conclusion is also supported by the Report of New York State Antitrust Law of the Antitrust Section of the New York State Bar Association,⁵ which proposed the relevant language of GBL § 349, as adopted. The report states, in part, that,

[t]he Committee considered, but rejected, a proposal that the Legislature be urged to enact a statute in the same form as Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition in commerce, and unfair or deceptive acts and practices in commerce." This was considered because the Federal Trade Commission in 1966 proposed that the States adopt "little Federal Trade Commission Acts."

Adoption by the States of such statute would fill the gap in coverage of present Section 5 which is limited to acts and practices in commerce, thus offering no protection against purely intrastate acts or practices, or acts and practices merely affecting commerce, but not in commerce. Nevertheless, the Committee is opposed to the incorporation of the concept of "unfair methods of competition" into State law. Enactment would carry with it the great body of federal law, applying "unfair methods of competition" to areas far outside the scope of consumer protection. "Unfair methods of competition" have been held to forbid any conduct prohibited by the Sherman and Clayton Acts. This includes conduct such as price discrimination, exclusive dealing, tie-in sales, territorial restrictions and mergers. Such concepts have no place in a straight forward consumer protection law. Moreover, the Federal Trade Commission's proposal would, in effect, amend the Donnelly Act in those respects in which New York antitrust enforcement under the Donnelly Act differs from federal interpretation of the Sherman and Clayton Act.

Affirmation of William O'Reilly, Exhibit D, at 127-28. While this report does not represent legislative history, it is a contemporaneous commentary on the development of the statute and

⁵ The report accompanied the bill on the way through the Legislature, and on to the Governor. *Lefkowitz*, 76 *Misc 2d* ad 53.

sheds light on the intent of section 349.

In addition, this interpretation is consistent with the antitrust scheme of the Donnelly Act. Plaintiffs are asserting, as a class action claim, a claim for consumer deception under GBL § 349, for what is actually an antitrust claim under the Donnelly Act. As discussed above, plaintiffs may not maintain a class action under the Donnelly Act. Allowing plaintiffs to maintain this claim as a class action would undermine the bar on maintaining class actions for violations under the Donnelly Act. Otherwise, such an expansive interpretation of section 349 of the language prohibiting unfair practices would change the entire New York antitrust enforcement scheme, which the authors of GBL § 349 specifically intended to avoid by limiting the language of section 349 to deceptive acts and practices and omitting "unfair methods of competition."

Numerous states have enacted statutes that are analogous to section 5 of the FTCA and that prohibit unfair, unlawful or deceptive trade practices. State Antitrust Enforcement, 1371 PLJ/Corp 765,773; see e.g. Cal Bus & Prof Code § 17200 ("any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising"); NJ Stat Ann, tit. 56, ch.8, §2 ("any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact"); Fla Stat Ann § 501.204 ("unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices"); Ill Compiled Stat Ann, ch. 815, act 505, § 2 ("[u]nfair methods of competition and unfair or deceptive acts or practices"); Mass Gen Laws Ann, ch. 93A, § 2 ("[u]nfair methods of competition and unfair or deceptive acts or practices"); Texas Bus & Com Code, tit. 2, § 17.46 ("[f]alse, misleading, or deceptive acts or practices"). Despite the existence of similar statutes in a number of jurisdictions, there is a little guidance

helpful in determining the issue before this court.

Defendants cite the Florida, Texas and New Jersey decisions. Mack v Bristol-Myers Squibb Co., 673 So 2d 100 (Fla App 1st Dist 1996) (A purchaser of infant formula asserted a claim against a manufacturer under the Florida deceptive trade practices act for unfair competition by selling and marketing infant formula at excessively high prices); Abbott Lab. Inc. (Ross Lab. Div.) v Segura, 907 SW2d 503 (Tex 1995) (A claim by purchasers of infant formula under the Texas deceptive trade practices act based on allegations of agreements to fix prices and monopolize market); and Kieffer v Mylan Lab., 1999 WL 1567726 (NJ Super 1999) (Plaintiffs alleged anticompetitive agreements to fix prices and control supply of active pharmaceutical ingredients necessary for the production of generic drugs).

Plaintiffs correctly note that these cases are distinguishable, because the issue in these cases was whether indirect purchasers may maintain a claim under a state deceptive trade practices law alleging price-fixing activities by defendant, where indirect purchasers lack standing to bring such claims under the state antitrust law. In Abbott, the Texas court held that the indirect purchasers' deceptive trade practices claim alleging price-fixing agreements failed, because allowing indirect purchasers to maintain that claim would conflict with the policies underlying the statutory antitrust scheme and circumvent the limitations imposed by the antitrust laws since indirect purchasers did not have standing to maintain a claim under the Texas antitrust law. Abbott, 907 SW2d at 506-507. The Florida court in Mack noted the approach formulated in Abbott, and reached the contrary conclusion, holding that price-fixing activities fall under the scope of the Florida deceptive trade practices laws because the plain reading of the language of the statute includes within its scope unfair methods of competition. Mack, 673 So 2d at 104. As

the New Jersey court in Kieffer noted, courts have held that antitrust violations equal unfair practices for purposes of the FTCA section 5. Kieffer, 1999 WL 1567726, at *6. Because the language of the Florida deceptive trade practices act explicitly includes unfair methods of competition, and because the statute provides that it should be interpreted in accordance with the FTCA and decisions rendered under the FTCA, antitrust violations fall under the scope of the Florida deception act. Id., citing: Mack at 103-104. The Kieffer court concluded, accordingly, that, "[i]t is thus significant that the New Jersey CFA does not, despite its broad reach, contain the phrase 'unfair methods of competition' under its umbrella," and held that the New Jersey deceptive trade practices act does not afford remedies to indirect purchasers alleging anticompetitive conduct. Id.

Unlike many of the statutes modeled after section 5 of the FTCA, the language of GBL § 349, is narrower in scope.⁶ The language of GBL § 349, like the New Jersey deceptive trade practices act, does not explicitly include "unfair methods of competition" under the scope of the provision.⁷ Even though the language of GBL § 349 "deceptive acts or practices" is broadly formulated, this court sees no compelling reason to employ a strained interpretation to extend the scope of this language to include all conduct that violates antitrust laws. One theory underlying

⁶ See e.g. Cal Bus & Prof Code § 17200; Fla Stat Ann § 501.204; Ill Compiled Stat Ann, ch. 815, act 505, § 2; Mass Gen Laws Ann, ch. 93A, § 2; Conn Gen Stat Ann, tit. 42, § 110b; and Penn Stat and Cons Stat Ann, tit. 73, ch.4, § 201-2.

⁷ The Illinois court went further in limiting the applicability of the consumer deception act in Gaebler v New Mexico Potash Co. (676 NE 2d 228 [Ill App 1st Dist 1996]). The court stated that, even though the statute covers unfair methods of competition and unfair or deceptive acts or practices, "[t]here is no indication that the legislature intended that the Consumer Fraud Act be an additional antitrust mechanism," and allegations of the price-fixing agreement must be brought under the antitrust law and not under the consumer deception act. Id. at 544 (internal quotations and citation omitted).

the approach that antitrust violations are under the scope of an unfair and deceptive practices provision is, "that consumers are entitled to assume that prices and other conditions of sale have been determined by competitive market forces." State Antitrust Enforcement, 1371 PLU/Corp 765,773-74 (2003). While this court recognizes the merits of the reasoning that consumers are entitled to assume that the prices and other conditions of sale are set by a legally functioning market, such concerns may be properly addressed under the existing antitrust laws. There is support for the position that GBL § 349 should not apply where another scheme of remedies exists to redress the alleged conduct which is not, otherwise, within the scope of the traditionally recognized areas of consumer deception. Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, § 349, at 570, citing Mendelson v Trans World Airlines, Inc., 120 Misc 2d 423 (Sup Ct, Queens County 1983). It is not for courts to create statutory protections where the Legislature did not intend to provide one.

Therefore, this court rejects plaintiffs' argument that price-fixing anticompetitive acts, without more, fall under the scope of GBL § 349. However, while allegations of an anticompetitive act, per se, do not state a claim under GBL § 349, allegations of such an act which is deceptive and consumer-oriented may state a claim for consumer deception.

Plaintiffs argue that their allegations are sufficient to sustain the claim relying on the following cases which plaintiffs claim apply GBL § 349 to "incidentally deceptive acts" Lewis v Di Donna (294 AD2d 799 [3d Dept 2002]) (Allegations of mislabeling of a drug by a licensed pharmacist are sufficient to state a claim under GBL § 349), Akgul v Prime Time Transp., Inc. (293 AD2d 631 [2d Dept 2002]), Acquista v New York Life Ins. Co. (285 AD2d 73 [1st Dept 2001]) (Allegations of the deceptive practices of delaying and denying payment on insurance

claims without reference to their viability are sufficient to state a claim under GBL § 349 against the insurer), Scalp & Blade, Inc. v Advest, Inc. (281 AD2d 882 [4th Dept 2001]) (Section 349 of the GBL prohibiting deceptive acts and practices in the furnishing of any services applied to defendant's services regardless of the fact that the services were provided in connection with securities transactions) and In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., (175 F Supp 2d 593 [SD NY 2001]) (Allegations of the distribution of pamphlets and other misrepresentations by defendant in order to mislead the public regarding hazards associated with MTBE and to induce consumer acceptance of gasoline containing MTBE were sufficient to sustain a claim under GBL § 349). Nothing in these cases supports plaintiffs' contention that the courts found the acts complained of to be merely incidentally deceptive. Instead, the courts in these cases have held that the allegations of a consumer-oriented act (Akgul at 634; Scalp at 883; MTBE at 631) likely to mislead consumers in a material way (Acauista at 82) fit within a cognizable claim and satisfy the requirements of GBL § 349.

In order to state a cause of action for violation of GBL § 349, plaintiff must allege consumer oriented acts on behalf of defendant which are misleading in a material way, and which resulted in injury to plaintiff. Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank N.A., 85 NY2d 20, 25 (1995). No cause of action may be stated to redress what is merely a private wrong, instead, plaintiffs must allege consumer-oriented practices resulting in injury to consumers. Id. While the typical case under GBL § 349 involves claims arising out of a commercial transaction between a consumer and a defendant, there is no requirement of privity and any person injured by a violation of section 349 may bring an action. MTBE at 631. Allegations of a consumer-oriented deceptive conduct that affects the public interest in New

York may be sufficient to state a claim under GBL § 349. MTBE, 175 F Supp 2d at 631.

Plaintiffs base their claim on allegations that the agreements between defendants resulted in restraint of trade between horizontal competitors and ultimately injured consumers because they were compelled to pay substantially higher prices than they would have paid absent the agreements. Plaintiffs argue that defendants' acts were deceptive because they failed to disclose the material terms of the settlement agreements and that they were consumer-oriented because defendants failed to reveal to consumers that they were paying higher prices for Cipro as a result of the anticompetitive agreements between defendants. These allegations do not state a consumer-oriented deceptive acts for purposes of GBL § 349.

Plaintiffs state that Bayer issued the following press release in connection with the settlement:

Under the terms of the agreement, Barr acknowledges the validity of Bayer's worldwide patents on the broad spectrum anti-infective. Bayer will pay \$24.5 million in 1997 each to Barr and Rugby Laboratories, Inc. From 1998 to 2003, the year the patent expires, Bayer can provide to both companies product to be marketed under a single trade name pursuant to a license from Bayer. Alternatively, Bayer could make payments to Barr and its partner.

Third Amended Class Action Complaint, ¶ 61. Plaintiffs also maintain that Barr's filing with the Securities and Exchange Commission was deceptive because it portrayed Barr's challenge of the '444 Patent as successful, by stating that,

[o]n January 6, 1995, the Company received FDA approval to manufacture and market Ciprofloxacin tablets, the generic equivalent of Miles, Inc.'s Cipro. ... The Company is currently challenging the validity of certain patents held by Bayer AG and Miles Inc. for Ciprofloxacin. ... The FDA approval will become effective with the Company's success in its patent challenge, or

upon expiration of the patents in 2003, whichever occurs first.

Third Amended Class Action Complaint, ¶ 46.

While deceptive conduct does not necessarily have to rise to the level of fraud, the alleged conduct must be materially deceptive. Stutman v Chemical Bank, 95 NY2d 24, 29 (2000); Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330,341 (1999). Plaintiffs' allegations fail to state such conduct. Contrary to plaintiffs' contention, defendants' public press release discloses the material terms of the settlement agreement, despite the non-disclosure provision contained in the settlement agreements. Also, the language contained in Barr's filing does not portray its challenge of the '444 Patent as successful. To the contrary, this filing discloses that Barr will not be able to enter the market with a generic equivalent of Cipro until it either wins the Patent Lawsuit, or until 2003, when the '444 Patent expires.

Furthermore, even though defendants did not disclose that the settlement of the Patent Litigation would yield more than \$400 million to Barr and its partners, this would not render defendants' acts deceitful for purposes of GBL § 349. Consumers were aware that they were paying a price for Cipro that resulted from the fact that Bayer was a brand name manufacturer of a patented drug for which, at the time of purchase, there was no generic equivalent available in the market. The fact that Bayer had a monopoly as a holder of the '444 Patent under patent laws was the condition of the market, regardless of whether the '444 Patent was valid or no one challenged, or agreed not to challenge, the validity of the patent. Also, even if Bayer passed a part of the settlement costs to consumers by raising prices after the settlement of the Patent Litigation, there is nothing that mandates Bayer to disclose specific components of the price charged for Cipro.

Whether the lack of a generic equivalent and recognition of the validity of the '444 Patent resulted from the anticompetitive agreements and whether the agreements between defendants were legal and proper are issues that fall under the scope of the antitrust scheme. While the allegations presented may state a claim for antitrust violations, they are not sufficient to state a consumer-oriented claim for deception. Thus, plaintiffs' third cause of action for violation of GBL § 349 is dismissed.

In addition, defendants argue that plaintiffs' claim is barred by the three-year statute of limitations, that plaintiffs may not seek to recover treble damages in a class action and that plaintiffs may not assert a claim under GBL § 349 on behalf of a nationwide class. However, because plaintiffs' claim under GBL § 349 fails for the abovementioned reasons, there is no need to address these arguments.

B. Motion to Certify Class

Because plaintiffs may not maintain their claims under GBL § 340 as a class action, and the remaining claim under GBL § 349 fails, plaintiffs' motion to certify the proposed class is denied.

III Conclusion

Plaintiffs may not maintain class action claims under GBL § 340. Plaintiffs also fail to state a claim under GBL § 349. Plaintiffs maintain that the Legislature intended to include "unfair practices" within the scope of section 349 even though the language, "unfair practices," is omitted from the provision. This court concludes that, "unfair practices," without more, do not fall under the scope of acts prohibited under GBL § 349. Because plaintiffs fail to allege any consumer-oriented deceptive acts by defendants, plaintiffs' claim fails. Defendants' motion to

dismiss is granted and plaintiffs' motion to certify the class is denied.

Accordingly, it is hereby

ORDERED that the motion by defendants Bayer AG, Bayer Corporation, Barr Laboratories, Inc., Hoechst Marion Roussel, Inc., Watson Pharmaceuticals, Inc. and The Rugby Group, Inc. is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiffs are granted leave to serve an amended complaint so as to replead their first and second causes of action as individual claims within 20 days after service on plaintiffs' attorney of a copy of this order with notice of entry. In the event that plaintiffs fail to serve an amended complaint within such time, leave to replead shall be deemed denied and the action shall be deemed dismissed with prejudice; and it is further

ORDERED that the motion by plaintiffs Anne Cunningham and Norman Mermelstein for an order certifying this action as a class action and designating the law firms of Milberg Weiss Bershad Hynes & Lerach LLP and Lief Cabraser Heimann & Bernstein LLP as counsel for the class is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 15, 2003

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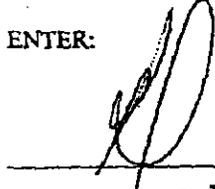

RICHARD B. LOWE III

EXHIBIT B

Mazzarelli, J.P., Saxe, Friedman, Sullivan, Williams, JJ.

7339 Anne Cunningham, et al.,
 Plaintiffs-Appellants,

Index 603820/00

-against-

Bayer AG, et al.,
Defendants-Respondents.

Milberg Weiss Bershad & Schulman LLP, New York (J. Douglas Richards of counsel), for appellants.

Jones Day, Washington, DC (Lawrence D. Rosenberg, of the District of Columbia Bar, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about October 28, 2003, which, to the extent appealed from as limited by the brief, denied plaintiffs' motion for class certification and granted defendants' motion for summary judgment dismissing the class action claims brought under General Business Law § 340, unanimously affirmed, with costs.

Plaintiffs concede that their argument on appeal is contrary to the decisions of this Court in *Cox v Microsoft Corp.* (290 AD2d 206 [2002], lv dismissed 98 NY2d 728 [2002]) and *Asher v Abbott Labs.* (290 AD2d 208 [2002], lv dismissed 98 NY2d 728 [2002]), and

we decline to revisit those precedents.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 13, 2005

Catherine O'Hagan Wolfe
CLERK

EXHIBIT C

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

-----X
Anne Cunningham and Norman Mermelstein, :
Individually And On Behalf Of All Others :
Similarly Situated, :

Plaintiffs-Appellants, :

(New York Co.
Index No. 603820/00)

-against- :

Bayer AG, , Bayer Corporation, Barr Laboratories, Inc., :
The Rugby Group, Inc., Watson Pharmaceuticals, Inc. :
and Hoechst Marion Roussel, Inc. :

Defendants-Respondents. :

-----X
**MEMORANDUM OF THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF MOTION FOR
PERMISSION TO APPEAL TO THE COURT OF APPEALS**

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Attorney General

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Deputy Solicitor General

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

-----x

Anne Cunningham and Norman Mermelstein, :
Individually And On Behalf Of All Others :
Similarly Situated, :

Plaintiffs-Appellants, :

(N.Y. Co. Index No.
603820/00)

-against- :

Bayer AG, , Bayer Corporation, Barr Laboratories, Inc., :
The Rugby Group, Inc., Watson Pharmaceuticals, Inc. :
and Hoechst Marion Roussel, Inc. :

Defendants-Respondents. :

-----x

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

The Attorney General of the State of New York, as *amicus curiae*, submits this memorandum in support of Plaintiffs-Appellants' motion for permission to appeal to the Court of Appeals.

PRELIMINARY STATEMENT

CPLR § 901(b) provides that “an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action” unless authorized in a statute itself. In Cox v. Microsoft Corp., 290 A.D.2d 206 (1st Dep’t 2002), appeal dismissed, 98 N.Y.2d 728 (2002), and Asher v. Abbott Labs., 290 A.D.2d 208 (1st Dep’t 2002), appeal dismissed, 98 N.Y.2d 728 (2002), this Court held that the treble damage remedy provided by the Donnelly Act constitutes a “penalty” within the meaning of CPLR § 901(b), thereby barring a class action under the private right of action provisions of the state antitrust law. See Gen. Bus. Law §§ 340 (5) and (6). Following Cox and Asher, the court below granted Defendants’ motion for

summary judgment dismissing Plaintiffs' class action claims. On appeal, this Court declined to revisit its Cox and Asher decisions, and thus affirmed the lower court's dismissal.

On behalf of the State of New York, the Attorney General urges this Court to grant permission to appeal to the Court of Appeals.

THE INTERESTS OF THE AMICUS

As the State's chief law enforcer, the Attorney General is granted wide investigative and enforcement powers under the Donnelly Act. Although the Attorney General's authority to bring antitrust actions is not based on or derived from CPLR § 901(b), he is, nevertheless, directly interested in the effective enforcement of the Donnelly Act. Preservation of competition cannot depend solely on actions brought by the Attorney General.

The CPLR § 901(b) issue presented in this case is identical in all material respects to that presented in Paltre v. General Motors Corp., Nos. 2004-04642 and 2004-04677 (2d Dep't), and Sperry v. Crompton Corp., No. 2004-06517 (2d Dep't), which arise from similar trial level dismissals in the Second Department. The Attorney General was granted permission to file as amicus curiae in support of reversal in both cases, which are sub judice in the Second Department. The Attorney General also participated as amicus curiae in both Cox and Asher.

ARGUMENT

POINT I

THE PROPER CONSTRUCTION OF CPLR §901(b) HAS SUBSTANTIAL CONSEQUENCES FOR NEW YORK CONSUMERS, AS WELL AS FOR ENFORCEMENT OF THE STATE DONNELLY ACT, AND WARRANTS REVIEW BY THE COURT OF APPEALS

Under the rules of the Court of Appeals, 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. § 500.22(b)(4). See also People ex rel. Delaney v. Mt. St. Joseph’s Academy of Buffalo, 198 A.D. 280, 282-83 (4th Dep’t 1921), aff’d on the merits without opinion, 234 N.Y. 565 (1922). The novel issue of law raised by this proposed appeal is one of uncommon public importance to all New York consumers. This Court’s §901(b) rulings are likely to sound the death knell for virtually all private damage actions on behalf of consumers under the Donnelly Act. In turn, the mixture of public and private enforcement of the Donnelly Act will change markedly.

We respectfully submit that this Court’s construction of CPLR § 901(b) frustrates the Legislature’s clear intent to strengthen Donnelly Act enforcement by private class actions. It also conflicts with long-standing precedent of the Court of Appeals, and the teachings of the United States Supreme Court, which establish that antitrust treble damage remedies are not “penalties” in the sense relevant here. As then-Judge Cardozo noted in Cox v. Lykes Brothers, 237 N.Y. 376, 379-80 (1924), decisions of the United States Supreme Court exclude “from the class of penalties . . . an action under the [federal] anti-trust law for the recovery of treble damages” (citation omitted).

Notably, this Court’s view of CPLR § 901(b) affects not only state court rulings, but also those in federal district courts throughout the United States. With increased frequency, New York consumers find themselves barred from asserting Donnelly Act antitrust claims as class actions, while comparable claims by consumers in other States go forward.¹ This effect could be that much more pronounced as a result of the recently-enacted federal Class Action Fairness Act (“CAFA”).

¹ See, e.g., Leider v. Ralfe, 387 F. Supp. 2d 283, 287-290 (S.D.N.Y. 2005); In re Relafen Antitrust Litigation, 221 F.R.D. 260, 284-286 (D. Mass. 2004); In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702, 727 (D. Md. 2001); U.S. v. Dentsply Int’l, Inc., Civil Action Nos. 99-005, 99-255, 99-854, 2001 U.S. Dist. LEXIS 9057, at *48-53 (D. Del. March 30, 2001).

See Pub. L. 109-2, 119 Stat. 4 (effective February 18, 2005). CAFA significantly expands the federal district court's diversity jurisdiction in class actions alleging state law claims. In consequence, state law antitrust class actions brought by consumers are expected to be heard, more and more, in federal, rather than state, court. See generally; Neal R. Stoll and Shepard Goldfein, "Antitrust Trade and Practice", N.Y.L.J., January 17, 2006, at 3, col. 1 (discussing the new federal law's impact on district court jurisdiction over state law antitrust class actions). As federal courts throughout the country are called on to address whether § 901(b) precludes class action litigation on behalf of New York consumers, the New York Court of Appeals' views on the statute will be particularly valuable.

The issue thus presented is a recurring one of great public importance. This case is, therefore, appropriately reviewed by the Court of Appeals, particularly in light of the substantial basis for divergent opinions on the proper construction of CPLR § 901(b).

POINT II

THIS COURT'S CONSTRUCTION OF CPLR § 901(b) IS ONE AS TO WHICH THERE IS SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION AND SHOULD, THEREFORE, BE REVIEWED BY THE COURT OF APPEALS

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

Although CPLR § 901(b) does not define the term "penalty," the New York Court of Appeals has written that a penalty "refer[s] to something imposed in a punitive way for an infraction of a public law and do[es] not include a liability created for the purpose of redressing a private injury, even though the wrongful act be a public wrong and punishable as such." Sicolo v. Prudential Savings Bank of Brooklyn, 5 N.Y.2d 254, 258 (1959)(citation omitted). Further, "[t]hat the recovery

may exceed in some instances the actual loss does not make the liability truly penal in nature”

Id. The Sicolo court instead approved those cases that “regard[ed] as penalties arbitrary exactions, unrelated to actual loss” Id.

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

By contrast, the Donnelly Act’s antitrust treble damage provision depends on proof of actual damages. To prevail on an antitrust claim, a plaintiff must prove actual injury that is causally connected to the unlawful conduct, and then must quantify that injury. See, e.g., Capitaland United Soccer Club, Inc. v. Capital District Sports & Entertainment, Inc., 238 A.D.2d 777, 780 (3d Dep’t 1997) (finding that plaintiff’s factual allegations sufficiently stated an injury to its competitive business interest). The same is true under federal antitrust laws. I ABA Section of Antitrust Law, Antitrust Law Developments 839, 873 (5th ed. 2002)

In fact, for plaintiffs to recover treble damages for antitrust violations, they also must prove “antitrust injury” – “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” Blue Shield of Virginia v. McCready, 457 U.S. 465, 482 (1982). Thus, a private antitrust plaintiff seeking to recover damages under the Donnelly Act is subject to burdens of proof not imposed on a plaintiff suing under a statute that provides for an

automatic monetary payment once the violation of law is shown.

Accordingly, the Legislature never intended CPLR § 901(b) to apply to private Donnelly Act cases. Were there room for doubt, however, the legislative history dispels it. Enacted in 1975, § 901(b) was part of a comprehensive revision of New York's class action law. As initially drafted, the bill did not include § 901(b), which was added to preclude aggregating, via the class action mechanism, statutorily prescribed penalties and minimum levels of recovery.

For example, the Banking Law Committee of the New York State Bar argued that “severe statutory penalties unrelated to actual damages,” together with class actions, would create excessive liability exposure. Bill Jacket, L.1975, c. 207, N.Y.S. Bar Association Legislation Report No. 1 (Revised) at 1, 2 (1975) (emphasis added). The Banking Law Committee used the Federal Truth in Lending statute (“TILA”) to illustrate. TILA creates statutory penalties, 15 U.S.C. § 1640(e), and, in consequence, “[i]n the typical [TILA] class action . . . not a single penny of actual damages to any consumer is involved The same penalties are assessable and the same liabilities exist, whether the error be substantial or trivial.” *Id.* at 1, 2 (1975) (emphasis added).

Similarly, the Empire State Chamber of Commerce had critiqued that “[p]enalties and class actions simply do not mix. This was proved in *Ratner v. Chemical Bank* [New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972)], where the combination caused a potential liability of \$130 million, although the actual damages to individual plaintiffs were zero!” Bill Jacket, L.1975, c. 207, Memo. by Stanford H. Bolz, February 14, 1975, at 3 (emphasis added). The concern with excessive liability was thought to be particularly grave because “New York statutory law contain[ed] many ‘penalty’ and similar provisions establishing arbitrary measures of liability for noncompliance.” Bill Jacket, L.1975, c. 207, N.Y.S. Bar Association Legislation Report No. 15 at 2 (1975) (emphasis added).

Thus, the legislative history establishes that the limited ban on class actions was intended to cover only those statutes that provide a fixed monetary recovery – i.e., a monetary amount or measure that is specifically set out in the law itself, and that is imposed without requiring the plaintiff to show any actual injury or loss. Recovery under the Donnelly Act, by contrast, depends on proof of actual damages - not on the imposition of a set dollar amount established by statute.

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

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

As originally enacted in 1899, the Donnelly Act did not include an express damage remedy. See L.1899, c. 690, § 1. The courts, however, permitted suits for actual damages, a result that the Legislature effectively ratified in 1957 by enacting a statute of limitations for Donnelly Act damage claims. See L.1957, c. 893, §2. The Legislature first provided an express damage remedy for antitrust victims in 1975, a few weeks after enactment of CPLR § 901(b). See L.1975, c. 333, § 1; L.1975, c. 207. Recognizing the significance of the rights at stake, and the substantial difficulties associated with successfully detecting and prosecuting antitrust claims against the often powerful forces of business, the Legislature authorized antitrust plaintiffs to “recover three-fold the actual damages sustained. . . .” See L.1975, c. 333 § 1. The Legislature distinguished the new treble damage remedy from penalties - whether criminal or civil - which were separate features of the State's antitrust enforcement scheme. See Memorandum S.3042 & A.3546, dated January 8, 1975, reprinted in New York State Legislative Annual 83 (1975).

Moreover, the legislative history of the Donnelly Act provision demonstrates that the treble damage remedy is intended to emulate its federal counterpart, the origins of which go back to Congress' enactment of the Sherman Act in 1890. See, e.g., Memorandum S.3042 & A.3546, Jan. 8, 1975, reprinted in New York State Legislative Annual 83 (1975) ("This bill . . . [would] conform[] New York's Donnelly Antitrust Act to the analogous federal provisions of law."); Secretary of State Mario Cuomo's memorandum to Counsel to the Governor, June 27, 1975 (the bill "increase[s] the damages and penalties to be similar to such provisions under federal anti-monopoly laws").

In using the federal treble damage provision as a model, the Legislature did not regard the Donnelly Act's treble damage provision as a "penalty" within CPLR § 901(b)'s limited ban on class actions. At the time of the 1975 enactment of both CPLR § 901(b) and the Donnelly Act's treble damages provision, antitrust treble damages in federal law had long been recognized as remedial in nature, rather than as a penalty.

As Cox v. Lykes Brothers, 237 N.Y. 376, 379-80 (1924), quoted above, reflects, courts recognized early on that the federal antitrust treble damage provision was primarily remedial in nature. See, e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) (holding that a treble damages antitrust action was not one for a penalty); Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785, 786, 789 (2nd Cir. 1959) (holding that New York's statute of limitations applicable to actions "for a penalty or forfeiture" does not apply to federal antitrust treble damage cases, which are actions for civil damages "made exemplary in part only"). Even more recently, the Supreme Court has said that "the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477,

485-86 (1977); accord Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 636 (1985).

Equally important, by 1975 it was well-recognized that federal antitrust actions could be brought as class actions. See, e.g., Master Key Antitrust Litigation, 528 F.2d 5 (2nd Cir. 1975). Nothing in the legislative history of the 1975 Donnelly Act amendment suggests that Legislature intended to deny the victims of state antitrust violations resort to this frequently invoked procedural mechanism.

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

Amendment of the Donnelly Act in 1998 further confirms that the Legislature specifically intended to allow New York consumers to bring antitrust class actions. This amendment makes clear that “indirect” purchasers may sue under New York’s antitrust law to recover damages caused by price fixing or monopoly overcharges passed on to them - even though the U.S. Supreme Court’s decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), bars such persons from suing under federal law. See Gen. Bus. Law § 340(6) (the fact that “any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery”).

The impetus for this legislation was twofold: First, the Supreme Court’s Commercial Division in New York County had applied Illinois Brick to a Donnelly Act class action by an indirect purchaser of drugs. Levine v. Abbott Labs., Index No. 117320/95 (N.Y. Co. Sup. Ct. Nov. 25, 1996), *appeal withdrawn*, 257 A.D.2d 978 (1st Dep’t 1999). Second, a series of class actions in California state court had settled for over \$100 million, but had left several New Yorkers without

recourse to recover for their injury because they were indirect purchasers.²

The legislative debate on this Donnelly Act amendment leaves no doubt that the Legislature intended this change to permit consumers - classic indirect purchasers - to sue in class actions filed under the Donnelly Act. The bill's Assembly sponsor, Richard Brodsky, explained that the bill allows class actions by indirect purchasers to proceed. Assembly proceeding transcript at 33-34 (May 26, 1998). The Senate sponsor similarly noted 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). In like vein, opponents of the legislation urged the Governor to veto the bill because it would "simply provide[] an additional and unnecessary avenue for litigation of consumer class actions." Bill Jacket, L.1998, c. 653, Letter of Daniel Walsh, Nov. 18, 1998, at 2.

In sum, underlying the 1998 Donnelly Act amendment is the Legislature's recognition that the damage to any particular consumer, even when trebled individual damage, is generally too small to encourage Donnelly Act enforcement by private individuals. It would be illogical to assert that the Legislature intended to deny New York consumers the benefit of the class action mechanism - and to allow them, instead, to bring only individual lawsuits - when the very inability of those consumers to participate in antitrust class actions drove the legislative change. See Bill Jacket, L.1998, c. 653, Letter of Assembly Sponsor Richard L. Brodsky, Dec. 15, 1998 (the bill "allows individuals who are third parties in transactions impacted by illegal monopolies to have legal

² These were the "copper cases," Heliotrope General v. Sumitomo Corp., No. GIC 701679 (Super. Ct. San Diego County 1996), arising from alleged manipulation in the exchange market. 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.

recourse against these activities”).

CONCLUSION

For the foregoing reasons, the Attorney General of the State of New York urges this Court to grant Plaintiffs-Appellants’ motion for permission to appeal to the Court of Appeals.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copies of the Notice of Motion, Affirmation in Support of the State of New York's Motion for Permission to Appear as *Amicus Curiae*, and Memorandum in Support of Plaintiffs-appellants' Motion for Permission to Appeal to the Court of Appeals has been served via U.S. mail on January 23, 2006 on the following persons:

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