CARTEL & CRIMINAL PRACTICE COMMITTEE
DONNELLY ACT RECOMMENDATIONS

I. **Statute of limitations**. We were asked to consider whether we should recommend changing the statute of limitations for criminal claims under the Donnelly Act from three to four years, in order to make it consistent with the statutes of limitations for civil claims under both the Donnelly Act and the Sherman Act.

In our opinion, the current lack of uniformity across statute of limitations under state and federal laws renders amending the criminal statute of limitations under the Donnelly Act pointless. The Sherman Act itself has different statute of limitations for civil and criminal claims. Under the Sherman Act, the statute of limitations applicable to a criminal violation is "five years . . . after such [an] offense shall have been committed."[1] In comparison, a four year statute of limitations applies to civil actions under the Sherman Act.[2] Therefore, amending the statute of limitations under the Donnelly Act to comport with civil federal antitrust claims will not provide any real consistency.

Moreover, the Donnelly Act itself contains a number of inconsistencies with respect to statute of limitations, in addition to the different periods for civil versus criminal claims.[3] Specifically, the statute of limitations for civil claims under the Donnelly Act varies depending on the relief sought. Civil actions seeking damages or penalties are governed by a four year statute of limitations.[4] Whereas civil actions seeking injunctive relief are governed by a six-year statute of limitations, pursuant to CPLR 213.[5] And recovery of civil penalties by the AG is subject to a three year statute of limitations.[6]

Apart from the inconsistencies within the Sherman Act and Donnelly Act, there are additional vehicles for extending statute of limitations which makes it more difficult to create consistency. For example, State AGs frequently seek tolling agreements with possible offenders, which toll the running of the limitation period.[7] Because of such tolling agreements, the official statute of limitation are oftentimes flexible and not indicative of the real deadlines.

As an aside, statute of limitations in a number of states, in addition to New York, vary from their federal counterpart.

Given the inconsistencies across federal and state laws and within the Donnelly Act itself, in addition to the frequent use of tolling agreements, we do not believe that amending the criminal statute of limitations will affect any meaningful change. For the aforementioned reasons, we do not recommend amending the statute of limitations at this time.

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[1] 18 U.S.C. § 3282(a).
[2] 15 U.S.C. §15b.
[3] N.Y. Gen. Bus. Law § 341 (criminal penalties subject to 3 year statute of limitations).
[4] *See* N.Y. Gen. Bus. Law §340(5).
[5] *See* N.Y. Gen. Bus. Law § 342.
[6] *See* N.Y. Gen. Bus. Law §342(a).
[7] *See* PRACTICING LAW INSTITUTE, *Overview of the Antitrust Laws*, ANTITRUST LAW ANSWER BOOK, 11 (2015), https://www.pli.edu/product_files/Titles/4153/58678_sample01_20141108153021.pdf (last visited Oct. 11, 2018) ("PLI").

II. **Donnelly Act penalties**. We were asked to consider whether criminal penalties under the Donnelly Act should be increased from the current $1 million fine cap to bring it closer to its federal counterpart.

Violators of the Sherman Act can be held liable for criminal penalties of up to $100 million for corporations and up to $1 million and 10 years imprisonment for individuals.[8] Violators of the Donnelly Act, on the other hand, are punishable by a criminal fine of up to $1 million for corporations and up to $100,000 and four years imprisonment for individuals.[9] As a practical matter, however, the Attorney General has the potential to impose far greater penalties on culprits.

For example, in addition to the New York-specific criminal penalties for antitrust violations, anticompetitive conduct may give rise to other criminal charges under state law, similar to those pursued by the Antitrust Division under federal law. New York, like the federal government, has criminal statutes prohibiting mail fraud, money laundering, racketeering, and conspiracy, and can combine those charges with criminal penalties.[10]

Moreover, parallel investigations on the state and federal level can lead to significant cumulative penalties. The Attorney General can assert criminal or civil charges in tandem with federal criminal claims.[11] Similarly, a state-wide investigation and prosecution would not resolve or foreclose the possibility of a federal investigation and prosecution for the same conduct.[12] In addition, criminal prosecutions for antitrust violations that take place at the state level may be followed by or carried out simultaneously with federal investigations and/or prosecutions, which carry substantial penalties.[13] Given that the Attorney General can seek both civil damages under the Donnelly Act against individuals and corporations that have been criminally prosecuted under the federal antitrust laws, there appears to be no real need to increase the penalty at the state-level in order to deter potential criminal conduct.

In practice, the Attorney General has pursued criminal sanctions only against parties who have committed the most serious violations of the Donnelly Act (e.g., bid-rigging, price-fixing among competitors, and territorial or customer allocation among competitors).[14] Furthermore, in the few instances were criminal sanctions are sought, they can be combined with civil penalties against members of the conspiracy in order to increase the overall recovery. For example in 2018, the Attorney General announced criminal convictions and a civil settlement, including

[8] 15 U.S.C. §1.
[9] N.Y. Gen. Bus. Law § 341.
[10] *See generally* N.Y. Organized Crime Control Act Penal Law §§ 460, 470 (McKinney 2009).
[11] *See* PLI at 13.
[12] *See* NEW YORK STATE ATTORNEY GENERAL, ANTITRUST ENFORCEMENT, https://ag.ny.gov/antitrust/antitrust-enforcement (last visited Oct. 11, 2018).
[13] Kyle W. Mach, Bradley E. Markano, Antitrust & Unfair Competition Law Section, State Bar of Cal., *The Problem of Duplicative Recovery Under Federal and State Antitrust Law*, Competition J., 1 (2014) ("[O]verlapping regulatory schemes allow concurrent enforcement by federal prosecutors, state attorneys general, and a long list of private plaintiffs, which can simultaneously hit defendants with enormous overlapping liabilities for the same conduct.").
[14] *See* NEW YORK STATE ATTORNEY GENERAL, ANTITRUST ENFORCEMENT, https://ag.ny.gov/antitrust/antitrust-enforcement (last visited Oct. 11, 2018).

over $1 million in criminal and civil penalties, against a cartel that conspired to rig bids, allocate customers, and fix prices for waste management services.[15] Thus, there is no need to increase the criminal cap, as the Attorney General does not frequently pursue criminal sanctions, and has developed other ways to increase recoveries and deter behavior.

As an aside, many other states have a similar cap on criminal penalties. For example, Colorado has a $1 million cap on criminal penalties.[16] Given that state and federal penalties are cumulative, and that the Attorney General has the option to bring a civil action for damages and seek treble damages, we do not believe raising the penalty is necessary at this point in time.

III. **Criminal Enforcement**. We were asked to consider whether New York should have a leniency policy, or perhaps statutory protection against prosecution of a federal immunity recipient.

There are many challenges with drafting a state leniency policy. The primary challenge is that the state cannot grant federal immunity, so there is no compelling incentive for potential amnesty applicants to come forward to the state authorities. Putting in place a New York antitrust leniency policy resembling the federal policy would certainly give the Attorney General more ammunition in pursuing cartel activity in New York, but it is unlikely that antitrust violators would consider it more important to get immunity from the State of New York and to take their chances with the federal agencies, rather than the other way around, given the potential for harsher penalties under federal law.

Another challenge is the potential for inconsistencies across federal and state leniency policies. The European Union's ("EU") experience with national leniency policies is instructive on this point. In the EU, both the European Commission ("EC" or "Commission") and individual member states have their own separate leniency programs.[17] This has led to increasing inconsistencies across policies in Europe,[18] which prompted the Commission to draft a proposed directive calling for more coordination among member states. According to the proposed directive, there are "[d]ivergences between leniency programmes in terms of summary applications, core principles, protection of self-incriminating material and interplay with individual sanctions."[19] The proposed directive affirms that inconsistencies across leniency policies leads to legal uncertainty for potential leniency applicants and thereby weakens their

[15] NEW YORK ATTORNEY GENERAL, *A.G. Schneiderman Announces Bust of Broome County Waste Management Cartel for Colluding to Rig Bids and Fix Prices* (press release, April 9, 2018), https://ag.ny.gov/press-release/ag-schneiderman-announces-bust-broome-county-waste-management-cartel-colluding-rig (last visited Oct. 11, 2018).
[16] *See* Kathleen T. Alt & Mary Sue Greenleaf, COLORADO BAR ASS'N., *Criminal Enforcement of State and Federal Antitrust Laws*, 43 THE COLORADO LAWYER 10, 59-60 (2014), http://www.bhgrlaw.com/media/1287/10-2014_criminalenforcement_alt_greenleaf.pdf (last visited Oct. 11, 2018).
[17] *See* EUROPEAN COMMISSION, Proposal for a Directive of the European Parliament and the Council to empower the completion authorities of Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Impact Assessment, 23 (Mar. 22, 2017), http://ec.europa.eu/competition/antitrust/impact_assessment_annexes_en.pdf (last visited Oct. 11, 2018) ("Currently the commission and all Member States except Malta have leniency programs in place.").
[18] *Id*. at 23 ("[L]eniency applications [vary] widely across NCA's. . . [The varied level of] success of the leniency programmes in member states can be attributed "to problems related to the single leniency programmes or to their interplay, which undermine their (single and collective) effectiveness.").
[19] *Id*.

incentives to apply for leniency.[20] In addition, the gaps and limitations in individual state leniency programmes can hinder effective enforcement. Therefore, the proposed directive calls for deference to leniency applications compliant with the EC's leniency programme in order to encourage consistency and cooperation. While it is currently unclear when the proposed directive will be passed, according to a report published by the UK House of Commons European Scrutiny Committee, "the Commission is hopeful that the Directive will be passed 'before [the] European Parliament elections in spring 2019.'"[21]

For both of the aforementioned reasons, we do not think it would be useful to develop a state leniency policy. The truth of the matter is that states rarely bring cases after federal immunity has been granted, and that states tend to defer to federal leniency decisions, thus making a state statute obsolete. However, in order to promote transparency, we would recommend codifying this practice of deference. To the extent federal immunity has already been granted, rather than continuing to leave this up to prosecutorial discretion, we would recommend granting statutory protection against prosecution to federal immunity recipients who provide cooperation to the Attorney General. This approach would incentivize more parties to seek leniency at the federal level and would have the additional benefit of letting the State reap cooperation benefits.

IV. **Criminal jurisdiction and venue**. We were asked to explore to what extent the jurisdictional rules should be amended to ensure that the Donnelly Act covers all conduct related to an Attorney General investigation.

Given the broad scope of the existing jurisdictional rules, we concluded that strengthening the tools already at the Attorney General's disposal would be more beneficial than amending the Donnelly Act.

Under Section 343 of the General Business Law, the Attorney General is empowered to secure documents, witness testimony and "any other data and information as he may deem relevant" in connection with any person or corporation engaged in deceptive acts or practices as defined by the General Business Law. This provision expressly authorizes the Attorney General to secure a court order enabling it to serve an investigatory subpoena on any persons or corporations within or outside the state, as long as the corporation is subject to personal jurisdiction.[22] This permits the Attorney General to accomplish service even where a corporation is engaged in conspiratorial conduct outside the state, where the conduct has had a sufficient impact in New York.

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[20] *Id*. at 24 ("If the core principles of the different programs are too divergent, companies do not have legal certainty about their immunity status under the leniency programme(s) of the authority/ies that will eventually deal with their case.").

[21] *See* Matthew Levitt, Christopher Thomas, Falk Schöning, Hogan Lovells, C*artel Leniency in EU: overview, Proposals for Reform*, ASS'N. OF CORPORATE COUNSEL (2017), https://uk.practicallaw.thomsonreuters.com/0-517-4976?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 (last visited Oct. 11, 2018).

[22] *See Parke-Bernet Galleries, Inc. v. Franklin*, 256 N.E. 2d 506, 508 (N.Y. 1970) ("It is important to emphasize that one need not be physically present in order to be subject to the jurisdiction of our courts under CPLR 302 for . . . one can engage in extensive purposeful activity here without ever actually setting foot in the State.").

Moreover, Section 63 of New York's Executive Law, grants the Attorney General power to issue investigative subpoenas for documents and witness testimony in connection with its authority to prosecute fraudulent or illegal business practices. The Attorney General has consistently invoked the extensive investigative powers granted under both General Business Law Section 343 and Section 63 of New York's Executive Law to initiate actions against companies accused of repeated antitrust violations.[23] Under these broad powers, the Attorney General has the ability to obtain and inspect any information related to conduct that appears to violate state or federal antitrust laws.[24] Further, case law supports the view that the Attorney General has authority to investigate so long as there is a reasonable basis for believing that the party sought to be subpoenaed violated federal or New York State law, regardless of whether that person would be subject to jurisdiction in New York in a civil action by a private party.[25]

Apart from these statutory tools, the Attorney General can also coordinate with other state Attorneys General through more informal avenues like the National Association of Attorneys General Task Force. The Task Force is not itself a governmental body with the power to issue subpoenas or file charges; it does, however, allow the states to more efficiently allocate their own resources.[26] The New York Attorney General's office has been an active member of NAAG in antitrust matters in both federal and New York State courts. For example in 2018, the New York Attorney General sent a letter to eight national fast food franchisers regarding "no poach" agreements in franchise contracts as part of a coalition of eleven attorneys general working in tandem.[27] These cooperative undertakings also allow Attorneys General to tackle major cases that might otherwise swamp the limited resources of an individual state office.

Given the various statutory and cooperative tools available to the Attorney General, we do not believe there is a specific need to amend the jurisdictional rules at this time.

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[23] *See*, e.g., *New York v. Feldman*, 210 F. Supp. 2d 294 (S.D.N.Y. 2002).

[24] *See* NEW YORK STATE ATTORNEY GENERAL, ANTITRUST BUREAU, https://ag.ny.gov/bureau/antitrust-bureau ("The Antitrust Bureau's responsibilities include: Using the Attorney General's extensive investigative powers to probe into any arrangement or activity that appears to violate the antitrust laws.") (last visited Oct. 11, 2018).

[25] *Matter of La Belle Creole International, S.A. v. Attorney General*, 10 N.Y.2d 192, 198 (N.Y. 1961) ("A foreign corporation's immunity from civil suit in New York, on the ground that it is not doing business there, does not mean that is it immune from investigation by the Attorney-General in an inquiry to determine whether it is violating the laws of this State. As long as that official has a reasonable basis to believe that the corporation violated a New York statute, he is not prevented . . . from exercising power of subpoena . . . ."); *see also In re Grand Jury Subpoena Directed to Marc Rich & Co, A.G.*, 707 F.2d 663 (2nd Cir. 1983), *cert. denied sub nom. Marc Rich & Co., A.G. v. United States* 463 U.S. 1215 (1983) (finding district court had jurisdiction to enforce a federal grand jury subpoena against a foreign corporation where "there was a conspiracy among all parties . . . and at least some of the conspiratorial acts occurred in the United States.")

[26] *See* PLI at 7.

[27] NEW YORK STATE ATTORNEY GENERAL, *A.G. Underwood – Part of 11 AG Coalition – Investigates No-Poach Agreements at National Franchises* (press release, July 9, 2018), https://ag.ny.gov/press-release/ag-underwood-part-11-ag-coalition-investigates-no-poach-agreements-national-franchises (last visited Oct. 11, 2018).