Sperry v. Crompton Corp.

Court of Appeals of New York

January 10, 2007, Argued; February 22, 2007, Decided

No. 4

Reporter
8 N.Y.3d 204 *; 863 N.E.2d 1012 **; 831 N.Y.S.2d 760 ***; 2007 N.Y. LEXIS 189 ****; 2007 NY Slip Op 1425; 2007-1 Trade Cas. (CCH) P75,618

[1] Paul Sperry, on Behalf of Himself and All Others Similarly Situated, Appellant, v Crompton Corporation, et al., Respondents, et al., Defendants.

Subsequent History: [**1]** Reported at *Sperry v Crompton Corp.*, 2007 NY LEXIS 211 (N.Y., Feb. 22, 2007)

Prior History: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 28, 2006. The Appellate Division affirmed, insofar as appealed from, so much of an order of the Supreme Court, Nassau County (Anthony L. Parga, J.), as had granted the motion of defendants Crompton Corporation, Uniroyal Chemical Company, Inc., Uniroyal Chemical Company Limited, Flexsys NV, Flexsys America, LP, Bayer Corporation and Rhein Chemie Corporation pursuant to CPLR 3211 (a) (7) to dismiss plaintiff's causes of action alleging violation of General Business Law § 340 and unjust enrichment.

Sperry v Crompton Corp., 26 AD3d 488, 810 NYS2d 498, 2006 NY App Div LEXIS 2364 (N.Y. App. Div. 2d Dep't, 2006), affirmed.

Disposition: Order affirmed, with costs.

Core Terms

class action, treble damages, antitrust, damages, actual damage, penalties, Chemical, punishable, purposes, costs, fine, measure of recovery, unjust enrichment, cause of action, authorization, recoverable

Case Summary

Procedural Posture
Plaintiff commenced a purported class action against defendants, seeking damages on behalf of himself and all other consumers who purchased tires, other than for resale, that were manufactured using rubber-processing chemicals sold by defendants since 1994. The supreme court dismissed the complaint in its entirety, and the appellate division affirmed. The instant court granted plaintiff leave to appeal.

Overview

Plaintiff alleged, inter alia, a claim under the Donnelly Act, General Business Law § 340 et seq., and unjust enrichment. Plaintiff alleged that defendants entered into a price-fixing agreement, and the overcharges trickled down the distribution chain to consumers. The main issue was whether treble damages relief was barred by the application of CPLR 901(b). The instant court concluded that the treble damages provision in General Business Law § 340 served as a penalty for purposes of CPLR 901(b), so such damages were not recoverable in a class action. Although one third of the award unquestionably compensated a plaintiff for actual damages, the remainder necessarily punished antitrust violations, deterred such behavior (the traditional purposes of penalties) or encouraged plaintiffs to commence litigation--or some combination of the three. Where a statute was already designed to foster litigation through an enhanced award, CPLR 901(b) acted to restrict recoveries in class actions absent statutory authorization. The unjust enrichment claim failed, as the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process was too attenuated.

Outcome
The order was affirmed, with costs.

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN1[] **Private Actions, State Regulation**

General Business Law § 340(5) provides that a successful antitrust plaintiff shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees. The Donnelly Act, however, does not address private class actions.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN2[] **Class Actions, Prerequisites for Class Action**

See CPLR 901(b).

Civil Procedure > Remedies > Damages > General Overview

Governments > Legislation > Interpretation

HN3[] **Remedies, Damages**

The determination of whether a certain provision constitutes a penalty may vary depending on the context. The same provision may be penal as to the offender and remedial as to the sufferer. The nature of the problem will determine whether a court is to take one viewpoint or the other.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN4[] **Class Actions, Prerequisites for Class Action**

By including a penalty exception in CPLR 901(b), the Legislature declined to make class actions available where individual plaintiffs are afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5[] **Private Actions, State Regulation**

Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN6[] **Class Actions, Prerequisites for Class Action**

Where a statute is already designed to foster litigation through an enhanced award, CPLR 901(b) acts to restrict recoveries in class actions absent statutory authorization.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7[] **Private Actions, State Regulation**

It lies with the Legislature to decide whether class action suits are an appropriate vehicle for the award of antitrust treble damages.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Interpretation

HN8[] Regulated Practices, Private Actions

Although a court of appeals generally construes the Donnelly Act in light of federal antitrust case law, it is also well settled that the court will interpret the statute differently where State policy, differences in the statutory language or the legislative history justify such a result.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN9[] Types of Contracts, Quasi Contracts

The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff need not be in privity with the defendant to state a claim for unjust enrichment.

Headnotes/Summary

Headnotes

Damages -- Treble Damages -- Class Actions Alleging Antitrust Violations -- Treble Damages Not Recoverable

1. Inasmuch as the treble damages provision in General Business Law § 340 (5) serves as a penalty for purposes of CPLR 901 (b), such damages are not recoverable in a class action. Accordingly, in a purported class action brought on behalf of purchasers of tires manufactured using rubber-processing chemicals produced and sold by defendants, plaintiff's Donnelly Act (General Business Law § 340 *et seq.*) claim was properly dismissed. By including the penalty exception in CPLR 901 (b), the Legislature declined to make class actions available where, as here, individual plaintiffs were afforded sufficient economic encouragement to institute actions through statutory provisions awarding something beyond or unrelated to actual damages. Because the antitrust treble damages statute does not state that such damages are compensatory, nor does its legislative history clearly indicate a compensatory purpose, the Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned. Where a statute is designed to foster litigation through an enhanced award, CPLR 901 (b) acts to restrict recoveries in class actions absent statutory authorization.

Appeal -- Court of Appeals

2. In a purported class action in which it was held that plaintiff's Donnelly Act (General Business Law § 340 *et seq.*) claim was barred by CPLR 901 (b), which precludes a class action to collect a penalty unless specifically authorized by statute, the issue of whether plaintiff could maintain a class action under the Donnelly Act by forgoing treble damages in favor of actual damages was not properly before the Court of Appeals, because plaintiff had consistently sought treble damages throughout the litigation and had not previously attempted to waive them to pursue only actual damages.

Equity -- Unjust Enrichment

3. In a purported class action brought on behalf of purchasers of tires manufactured using rubber-processing chemicals produced and sold by defendants, plaintiff's unjust enrichment claim was properly dismissed. Although a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process was too attenuated to support such a claim. Additionally, it was not appropriate to substitute unjust enrichment to avoid the statutory bar (CPLR 901 [b]) on plaintiff's Donnelly Act (General Business Law § 340 *et seq.*) cause of action.

Counsel: *Milberg Weiss Bershad & Schulman LLP*, New York City (J. Douglas Richards and *Michael M. Buchman* of counsel), *Carey & Danis LLP*, St. Louis, Missouri (*Michael J. Flannery* and *James J. Rosemergy* of counsel), *Lerach Coughlin Stoia Geller Rudman & Robbins LLP*, San Diego, California (*Bonney E. Sweeney* of counsel), *Robbins Umeda & Fink, LLP* (*Brian J. Robbins* of counsel), and *Maricic & Goldstein LLP*, Rancho Cucamongo, California (*David M. Goldstein* of counsel), for appellant. I. The dismissal below of plaintiff's Donnelly Act claim was incorrect and should be reversed. (*Cox v Microsoft Corp.*, 290 AD2d 206, 737 NYS2d 1; *Paltre v General Motors Corp.*, 26 AD3d 481, 810 NYS2d 496; *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 520 NE2d 535, 525 NYS2d 816; *Bogartz v Astor*, 293 NY 563, 59 NE2d 246; *Sicolo v Prudential Sav. Bank of Brooklyn, N.Y.*, 5 NY2d 254, 157 NE2d 284, 184 NYS2d 100; *Bertha Bldg. Corp. v National Theatres Corp.*, 269 F2d 785; *Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 686 N.E.2d 1343, 664 N.Y.S.2d 249; *Gunther v Abrams*, 189 AD2d 607, 592 NYS2d 308; *Feder v Caliguira*, 8 NY2d 400, 171 NE2d 316, 208 NYS2d 970; *Ethicon, Inc. v Aetna Cas. & Sur. Co.*, 737 F Supp 1320.) II. The dismissal below of plaintiff's unjust enrichment claims also was incorrect and should be reversed. (*Cox v Microsoft Corp.*, 8 AD3d 39, 778 NYS2d 147; *Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd.*, 41 NY2d 84, 359 NE2d 393, 390 NYS2d 884; *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 559 NYS2d 704; *In re*

K-Dur Antitrust Litig., 338 F Supp 2d 517; *Dubai Islamic Bank v Citibank, N.A.*, 126 F Supp 2d 659; *In re Cardizem CD Antitrust Litig.*, 105 F Supp 2d 618; *Muehlbauer v General Motors Corp.*, 431 F Supp 2d 847; *Kagan v K-Tel Entertainment*, 172 AD2d 375, 568 NYS2d 756; *Heller v Kurz*, 228 AD2d 263, 643 NYS2d 580; *Outrigger Constr. Co. v Bank Leumi Trust Co. of N.Y.*, 240 AD2d 382, 658 NYS2d 394.)

O'Melveny & Myers LLP, Washington, D.C. and New York City (*Ian Simmons, Jonathan D. Hacker, Benjamin G. Bradshaw, Mark Davies, Matthew Cosgrove* and *Nilam A. Sanghvi* of counsel), *Gibson, Dunn & Crutcher LLP*, Los Angeles, California and Washington, D.C. (*Daniel G. Swanson, D. Jarrett Arp* and Cynthia E. Richman of counsel), *Covington & Burling LLP*, Washington, D.C. (*William D. Iverson* and *Michael J. Fanelli* of counsel), and *Jones Day*, New York City and Washington, D.C. (*J. Andrew Read* and *Catherine M. Ferrara-Depp* of counsel), for respondents. I. Plaintiff cannot bring a class action suit under the Donnelly Act. (*Sega v State of New York*, 60 NY2d 183, 456 NE2d 1174, 469 NYS2d 51; *Cunningham v Bayer AG*, 24 AD3d 216, 804 NYS2d 924; *Cox v Microsoft Corp.*, 290 AD2d 206, 737 NYS2d 1; *Asher v Abbott Labs.*, 290 AD2d 208, 737 NYS2d 4; *Lennon v Philip Morris Cos.*, 189 Misc 2d 577, 734 NYS2d 374; *Russo & Dubin v Allied Maintenance Corp.*, 95 Misc 2d 344, 407 N.Y.S.2d 617; *Leider v Ralfe*, 387 F Supp 2d 283; *Fults v Munro*, 202 NY 34, 95 NE 23; *Lyke v Anderson*, 147 AD2d 18, 541 NYS2d 817; *Leh v General Petroleum Corp.*, 330 F2d 288.) II. Plaintiff cannot bring a class action suit based on New York unjust enrichment law. (*Bradkin v Leverton*, 26 NY2d 192, 257 NE2d 643, 309 NYS2d 192; *Miller v Schloss*, 218 NY 400, 113 NE 337; *Southern Pacific Co. v Darnell-Taenzer Lumber Co.*, 245 US 531, 38 S Ct 186, 62 L Ed 451; *Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 162 NE 99; *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 818 N.E.2d 1140, 785 N.Y.S.2d 399; *Van Dussen-Storto Motor Inn v Rochester Tel. Corp.*, 63 AD2d 244, 407 NYS2d 287; *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 744 NYS2d 384; *Shortcuts Editorial Servs. v Kaleidoscope Sports & Entertainment*, 183 Misc 2d 334, 706 NYS2d 572; *Cox v Microsoft Corp.*, 8 AD3d 39, 778 NYS2d 147; *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 559 NYS2d 704.)

Andrew Cuomo, Attorney General, New York City (*Caitlin J. Halligan, Michelle Aronowitz, Jay L. Himes, Daniel Chepaitis* and *Sarah Hubbard* of counsel), for State of New York, amicus curiae. I. An action brought pursuant to General Business Law § 340, which the Legislature explicitly denominated an "action to recover damages," is not an "action to recover a penalty" within the meaning of CPLR 901 (b). (*Cox v Microsoft Corp.*, 290 AD2d 206, 737 NYS2d 1; *Asher v Abbott Labs.*, 290 AD2d 208, 737 NYS2d 4; *Paltre v General Motors Corp.*, 26 AD3d 481, 810 NYS2d 496; *Cunningham v Bayer AG*, 24 AD3d 216, 804 NYS2d 924; *Matter of Sackolwitz v Hamburg & Co.*, 295 NY 264, 67 NE2d 152; *Bogartz v Astor*, 293 NY 563, 59 NE2d 246; *Cox v Lykes Bros.*, 237 NY 376, 143 NE 226; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 574 NYS2d 672; *Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 848 N.E.2d 460, 815 N.Y.S.2d 13; *Illinois v Harper & Row Publs., Inc.*, 301 F Supp 484.) II. It is well established that unjust enrichment may exist without privity between defendant and plaintiff. (*Farash v Sykes Datatronics*, 59 NY2d 500, 452 NE2d 1245, 465 NYS2d 917; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 841 NE2d 742, 807 NYS2d 583; *Cox v Microsoft Corp.*, 8 AD3d 39, 778 NYS2d 147; *Parsa v State of New York*, 64 NY2d 143, 474 NE2d 235, 485 NYS2d 27; *Bradkin v Leverton*, 26 NY2d 192, 257 NE2d 643, 309 NYS2d 192; *State of New York v Barclays Bank of N.Y.*, 76 NY2d 533, 563 N.E.2d 11, 561 N.Y.S.2d 697; *3105 Grand Corp. v City of New York*, 288 NY 178, 42 NE2d 475; *Whiting v Hudson Trust Co.*, 234 NY 394, 138 NE 33; *Simonds v Simonds*, 45 NY2d 233, 380 NE2d 189, 408 NYS2d 359; *Kagan v K-Tel Entertainment*, 172 AD2d 375, 568 N.Y.S.2d 756.)

Kirby McInerney & Squire, LLP, New York City (Daniel Hume of counsel), for American Antitrust Institute, amicus curiae. I. The issue is crucial to the enforcement of the antitrust laws. (*Illinois Brick Co. v Illinois*, 431 US 720, 97 S Ct 2061, 52 L Ed 2d 707; *Rand v Monsanto Co.*, 926 F2d 596.) II. Antitrust "treble" damages actions are not a penalty. (*Reiter v Sonotone Corp.*, 442 US 330, 99 S Ct 2326, 60 L Ed 2d 931.) III. Antitrust "treble" damages, when viewed correctly, are actually only single damages, and therefore are not a penalty. IV. Permitting indirect purchaser suits would not lead to overdeterrence.

Mayer, Brown, Rowe & Maw LLP, New York City (*Philip Allen Lacovara, Lauren R. Goldman* and *Daniel B. Kirschner* of counsel), and *National Chamber Litigation Center, Inc.*, Washington, D.C. (*Robin S. Conrad* and *Amar D. Sarwal*, admitted pro hac vice, of counsel), for Chamber of Commerce of the United States of America, amicus curiae. I. The Legislature's decision not to authorize individual class actions under the Donnelly Act was a sound policy choice that is entitled to deference. (*Paltre v General Motors Corp.*, 26 AD3d 481, 810 NYS2d 496; *Cox v Microsoft Corp.*, 290 AD2d 206, 737 NYS2d 1; *Asher v Abbott Labs.*, 290 AD2d

208, 737 NYS2d 4; *Lennon v Philip Morris Cos.*, 189 Misc 2d 577, 734 NYS2d 374; *Russo & Dubin v Allied Maintenance Corp.*, 95 Misc 2d 344, 407 N.Y.S.2d 617; *Leider v Ralfe*, 387 F Supp 2d 283; *Illinois Brick Co. v Illinois*, 431 US 720, 97 S Ct 2061, 52 L Ed 2d 707; *California v ARC America Corp.*, 490 US 93, 109 S Ct 1661, 104 L Ed 2d 86; *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F3d 98, 351 US App. D.C. 223; *Castano v American Tobacco Co.*, 84 F3d 734.) II. Allowing plaintiff to maintain his unjust enrichment claim would permit an end run around the Donnelly Act's limitations and distort general principles of standing. (*Associated Gen. Contractors of Cal., Inc. v Carpenters*, 459 US 519, 103 S Ct 897, 74 L Ed 2d 723; *Holmes v Securities Investor Protection Corporation*, 503 US 258, 112 S Ct 1311, 117 L Ed 2d 532; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 841 NE2d 742, 807 NYS2d 583; *Cox v Microsoft Corp.*, 8 AD3d 39, 778 NYS2d 147; *3105 Grand Corp. v City of New York*, 288 NY 178, 42 NE2d 475; *Whiting v Hudson Trust Co.*, 234 NY 394, 138 NE 33; *Simonds v Simonds*, 45 NY2d 233, 380 NE2d 189, 408 NYS2d 359; *A.O. Fox Mem. Hosp. v American Tobacco Co.*, 302 AD2d 413, 754 NYS2d 368; *Van Dussen-Storto Motor Inn v Rochester Tel. Corp.*, 63 AD2d 244, 407 NYS2d 287.)

Labaton Sucharow & Rudoff LLP, New York City (*Bernard Persky* and *Kellie Safar* of counsel), *Michael Schuster*, Washington, D.C., *Stacy J. Canan*, *Sarah Lenz Lock* and *Bruce Vignery* for AARP, amicus curiae. The lower court erred by dismissing the suit based on its statutory interpretation that the treble damages provision of the Donnelly Act constitutes a penalty under CPLR 901 (b). In so doing, it failed to consider the legislative history of the 1998 amendment to the Donnelly Act granting antitrust standing to indirect purchasers, reflecting the obvious intention of the Legislature to allow consumer class actions. Alternatively, assuming, arguendo, that the Donnelly Act's treble damages provision is a penalty, the lower court erred by disregarding the plain language and legislative history of CPLR 901 (b) itself, which allows a representative plaintiff to waive a penalty in order to bring a class action. (*In re Cardizem CD Antitrust Litig.*, 391 F3d 812; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 434 NYS2d 698; *Trump v Trump*, 179 AD2d 201, 582 NYS2d 1008; *Brzychnalski v Unesco, Inc.*, 35 F Supp 2d 351; *Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 673 NYS2d 659; *Ridge Meadows Homeowners' Assn. v Tara Dev. Co.*, 242 AD2d 947, 665 N.Y.S.2d 361; *Cox v Microsoft Corp.*, 8 AD3d 39, 778 NYS2d 147; *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 517 NYS2d 764; *Weinberg v Hertz Corp.*, 116 AD2d 1, 499 NYS2d 693; *Hauptman v Helena Rubinstein, Inc.*, 114 Misc 2d 935, 452 NYS2d 989.)

Judges: Opinion by Judge Graffeo. Chief Judge Kaye and Judges Ciparick, Read, Smith and Pigott concur. Judge Jones took no part.

Opinion by: GRAFFEO

Opinion

[1013] [*209] [***761]** Graffeo, J.

Because we conclude that the treble damages provision in General Business Law § 340 serves as a penalty for purposes of CPLR 901 (b), such damages are not recoverable in a class action. We therefore affirm the order of the Appellate Division so holding.

Defendants Crompton Corporation, Uniroyal Chemical Company, Inc., Uniroyal **[2]** Chemical Company, Ltd., Flexsys NV, Flexsys America LP, Bayer AG, Bayer Corporation, Rhein Chemie Rheinau GmbH and Rhein Chemie Corporation produce and sell rubber-processing chemicals that improve the durability, **[****2]** color control and heat resistance of rubber products, including tires, belts, hoses and footwear. [1] Defendants do not manufacture or sell these end products.

In 2002, plaintiff Paul Sperry commenced this purported class action against **[**1014] [***762]** defendants seeking damages on behalf of himself and all other consumers "who purchased tires, other than for resale, that were manufactured using rubber-processing chemicals sold by defendants since 1994." [2] Sperry alleged that defendants entered into a price-fixing agreement, overcharging tire manufacturers for the chemicals, and that the overcharges trickled down the distribution chain to consumers.

[**3]** The complaint set forth three causes of action. First, Sperry claimed that defendants violated New York's antitrust statute (General Business Law § 340 *et seq.*)--commonly known as the Donnelly Act--by engaging in an arrangement that restrained "[c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce" (General Business Law § 340 [1]). Relying on the indirect

[1] Uniroyal Chemical Company, Inc. and Uniroyal Chemical Company, Ltd. are wholly owned subsidiaries of Crompton Corporation, now known as Chemtura Corporation. Bayer AG and its associated companies, Bayer Corporation, Rhein Chemie Rheinau GmbH and Rhein Chemie Corporation are no longer parties to this appeal.

[2] The lawsuit has not yet been certified as a class action under CPLR article 9.

purchaser provision of the Donnelly Act (General Business Law § 340 [6]), Sperry sought "three-fold the actual damages," costs and attorneys' fees pursuant to General Business Law § 340 (5). Second, Sperry asserted that defendants' arrangement constituted a deceptive practice in violation of General Business Law § 349. Third, Sperry requested recovery on an unjust enrichment theory. Defendants moved to dismiss the complaint under CPLR 3211.

[*210] Supreme Court granted the motion and dismissed the complaint in its entirety. The court held that CPLR 901 (b), which precludes a class action to collect **[****4]** a penalty unless specifically authorized by statute, barred the Donnelly Act claim. The court determined that the General Business Law § 349 cause of action failed to state a claim because the allegations in the complaint did not come within the scope of that statute. [3] It also dismissed the unjust enrichment **[3]** claim because the parties lacked a sufficient relationship. The Appellate Division affirmed and we granted Sperry leave to appeal.

Relying on our decisions in *Cox v Lykes Bros.* (237 NY 376, 143 NE 226 [1924]), *Bogartz v Astor* (293 NY 563, 59 NE2d 246 [1944]) and *Sicolo v Prudential Sav. Bank of Brooklyn, N.Y.* (5 NY2d 254, 157 NE2d 284, 184 NYS2d 100 [1959]), Sperry argues that the Donnelly Act's treble damages provision is not a penalty under CPLR 901 (b). He also cites to federal precedents indicating that federal antitrust treble damages are **[****5]** primarily remedial in nature. Defendants counter that the courts below properly concluded that state antitrust treble damages are a penalty within the meaning of CPLR 901 (b).

HN1[↑] General Business Law § 340 (5) provides that a successful antitrust plaintiff "shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees." The Donnelly Act, however, does not address private class actions. The main issue here is whether treble damages relief is available to class action plaintiffs or is barred by the application of CPLR 901 (b).

The Legislature enacted CPLR article 9 (§§ 901 to 909) in 1975 to replace CPLR 1005, the former class action statute. The prior class action provision, which remained largely unchanged through its various incarnations dating back to the Field Code of Procedure (*see* L 1849, ch 438, § 119), had been judicially restricted over the years and was subject to inconsistent results (*see generally Moore v Metropolitan Life Ins. Co.*, 33 NY2d 304, 313, 307 NE2d 554, 352 NYS2d 433 [1973] **[****6]** [noting **[**1015]** **[***763]** "the general and judicial dissatisfaction with the existing restrictions on class action"]). Consequently, in 1975, the Judicial Conference proposed a new class action statute that was designed "to set up a flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions" (13th Ann Report of Jud Conf on CPLR, reprinted in 1975 McKinney's Session Laws of NY, at 1493). To that end, the Judicial Conference recommended **[*211]** the enactment of CPLR 901 (a), which specified the five prerequisites of numerosity, predominance, typicality, adequacy of representation and superiority.

While the Legislature considered the Judicial Conference report, various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty or minimum measure of recovery, except when expressly authorized in the pertinent statute (*see* Legislation Report No. 15 of Banking Law Comm, Business Law Comm and Comm on CPLR of NY St Bar Assn, Bill Jacket, L 1975, ch 207; Legislation Report No. 1 of Banking Law Comm of NY St Bar Assn, Bill Jacket, **[****7]** L 1975, ch 207; Mem in Opposition of Empire St Chamber of Commerce, Feb. 14, 1975, Bill Jacket, L 1975, ch 207). These groups feared that recoveries beyond actual damages could lead to excessively harsh results, particularly where large numbers of plaintiffs were involved. They also argued that there was no need to permit class actions in order to encourage litigation by **[4]** aggregating damages when statutory penalties and minimum measures of recovery provided an aggrieved party with a sufficient economic incentive to pursue a claim. Responding to these concerns, the Legislature amended the legislation to include a new subdivision--CPLR 901 (b), which reads: **HN2**[↑] "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."

Assemblyman Stanley Fink, the bill's sponsor, explained the purpose of section 901 (b):

> "The bill, however, precludes a class action based on a statute creating or imposing a penalty or minimum measure of recovery **[****8]** unless the specific statute allows for a class action. These penalties or 'minimum damages' are provided as a means of encouraging suits where the amounts involved might otherwise be too small. Where a class action is brought, this additional encouragement is not necessary. A statutory class action

[3] Sperry no longer seeks recovery under General Business Law § 349.

for actual damages would still be permissible" (Sponsor's Mem, Bill Jacket, L 1975, ch 207).

Hence, the final bill, which was passed by the Legislature and approved by the Governor on June 17, 1975, was the result of a compromise among competing interests.

[*212] Within weeks of passage of the class action statute, the Legislature undertook to amend the Donnelly Act. Before 1975, General Business Law § 340 (5) permitted only the recovery of actual damages. After a report was issued by a special grand jury investigating the anticompetitive practices of the petroleum industry in the early 1970's, the Attorney General recommended a bill increasing penalties for violations of the Donnelly Act (*see* Mem of Dept of Law, Bill Jacket, L 1975, ch 333). Specifically, the bill added the treble damages provision and provided for costs and attorneys' fees in General Business Law § 340 (5), **[****9]** while increasing the fines and criminal punishment measures contained **[**1016]** **[***764]** in General Business Law § 341 [4] According **[5]** to the Attorney General:

> "The provision for the 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)" (*id.*). [5]

The legislation amending section 340 (5) and section 341 was enacted on July 1, 1975.

Although we have never construed the term "penalty" within the meaning of CPLR 901 (b), nor have we had occasion to characterize the treble damages provision of the Donnelly Act, we have articulated various rules regarding the identification of penalties in other contexts. For example, this Court has stated that, where a statute expressly denominates an enhanced damages **[*213]** provision to be compensatory in nature, it will not be deemed a penalty (*see Bogartz v Astor*, 293 NY 563, 565, 59 NE2d 246 [1944] [double payment recoverable under Workmen's Compensation Law § 14-a not a penalty because the statute **[****11]** referred to "double compensation"]; *Cox v Lykes Bros.*, 237 NY 376, 379, 143 NE 226 [1924] [double payment available to seamen for late wages under federal statute not a penalty because the statute expressly provided that such compensation "shall be recoverable as wages"]). Furthermore, we have found that when used in a statute of limitations, "[t]he words 'penalty or forfeiture' . . . refer to something imposed in a punitive way for an infraction of a public law and do 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 **[6]** such" (*Sicolo v Prudential Sav. Bank of Brooklyn, N.Y.*, 5 NY2d 254, 258, 157 NE2d 284, 184 NYS2d 100 [1959]). [6]

We have also indicated that **HN3**[⬆] the determination of whether a certain provision constitutes a penalty may vary depending on the context. In *Cox*, then-Judge Cardozo **[****12]** wrote: "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer. The nature of the problem will determine whether we are to take one viewpoint or the other" (*Cox*, 237 NY at 380 [citations omitted]; *see also Life & Casualty Ins. Co. of Tenn. v McCray*, 291 US 566, 574, 54 S Ct 482, 78 L Ed 987 [1934, Cardozo, J.] [" 'Penalty' is a term of varying and uncertain meaning"]).

[1] [1017]** **[***765]** Judge Cardozo's observations in *Cox* are particularly relevant to this case. It is evident that **HN4**[⬆] by including the penalty exception in CPLR 901 (b), the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status. This makes sense, given that class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically **[****13]** incurred. Therefore, the

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[4] Before the 1975 amendment, General Business Law § 341 provided that an individual convicted of violating the Donnelly Act was guilty of a misdemeanor, punishable by a fine not exceeding $ 20,000 and/or imprisonment for not longer than one year. A corporation was punishable by a fine of not more than $ 50,000. Under the amendment, convicted individuals would be guilty of a class E felony and punished by a fine not exceeding $ 100,000 and/or imprisonment for up to four years. A corporation would face a fine of up to $ 1 million. While these fines are clearly penalties, they are not the types of penalties contemplated by CPLR 901 (b) because they are not recoverable in a private civil action.

[5] Federal antitrust provisions, since their inception in 1890, have always provided for the recovery of threefold damages in civil lawsuits (*see* Clayton Act § 4 [15 USC § 15]; *see also Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 486 n 10, 97 S Ct 690, 50 L Ed 2d 701 [1977]). In contrast, although the Donnelly Act dates back to 1899, treble damages were not added until much later.

[6] Former Civil Practice Act § 49 (3) provided a three-year statute of limitations for penalties or forfeitures.

term "penalty," as used for purposes of the class action scheme, has broader application than that given in *Sicolo* for statute of limitations purposes.

[*214] The antitrust treble damages statute also does not state that such damages are compensatory (*compare* Bogartz, 293 NY at 565). Nor does its legislative history clearly indicate a compensatory purpose. Read together, we conclude that **HN5**[] Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned. Although one third of the award unquestionably compensates a plaintiff for actual damages, the remainder necessarily punishes antitrust violations, deters such behavior (the traditional purposes of penalties) or encourages plaintiffs to commence litigation--or some combination of the three. But we need not break down the remaining damages into specific categories for purposes of determining whether it is a penalty under CPLR 901 (b). **HN6**[] Where a statute is already designed to foster litigation through an enhanced award, CPLR 901 (b) acts to restrict recoveries in class actions absent statutory authorization.

[**14]** It is notable that the Legislature added the treble damages provision to the Donnelly Act shortly after having adopted CPLR 901 (b). Clearly, the Legislature was aware of the requirement of making express provision for a class action when drafting penalty statutes, **[7]** and could have included such authorization in General Business Law § 340 [7] In sum, **HN7**[] it lies with the Legislature to decide whether class action suits are an appropriate vehicle for the award of antitrust treble damages. Indeed, the Legislature has contemplated adding such authorization on a number of occasions. [8]

[**15]** We are not persuaded that the outcome of this case is controlled by statements in United States Supreme Court decisions **[*215]** describing the federal antitrust treble **[**1018] [***766]** damages counterpart as being remedial in nature (*see e.g. American Soc. of Mechanical Engineers, Inc. v Hydrolevel Corp.*, 456 US 556, 575, 102 S Ct 1935, 72 L Ed 2d 330 [1982]; *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 485-486, 97 S Ct 690, 50 L Ed 2d 701 [1977]; *but see Texas Industries, Inc. v Radcliff Materials, Inc.*, 451 US 630, 639, 101 S Ct 2061, 68 L Ed 2d 500 [1981] ["The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."]). **HN8**[] Although we generally construe the Donnelly Act in light of federal antitrust case law, it is also well settled that we will interpret our statute differently "where State policy, differences in the statutory language or the legislative history justify such a result" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 335, 520 NE2d 535, 525 NYS2d 816 [1988]). To the extent there is any conflict, this case highlights such distinctions.

As an initial matter, none of these United **[****16]** States Supreme Court decisions considered whether treble damages should be considered a "penalty" for purposes of a particular statute. More importantly, Federal Rules of Civil Procedure rule 23, the federal class action **[8]** provision, does not contain a limitation similar to that found in CPLR 901 (b). Since this appeal requires us to view General Business Law § 340 (5)'s treble damages provision in light of the limitation in CPLR 901 (b), we are presented with a state law question that federal precedent is not very helpful in resolving.

[2] Finally, we decline to reach the issue of whether Sperry may maintain a class action under the Donnelly Act by forgoing treble damages in favor of actual damages. This issue is not properly before us because Sperry has consistently sought treble damages throughout this litigation and has not previously attempted to waive them to pursue only actual damages.

[3] Turning to the unjust enrichment cause of action, Sperry argues that the courts below erred in dismissing this cause of action on the basis that no privity existed between Sperry **[****17]** and defendants. It is well settled that **HN9**[] "[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, 285 NE2d 695, 334

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[7] Although General Business Law § 342-b contemplates that the Attorney General may bring class actions on behalf of governmental entities, General Business Law § 340, in contrast, makes no reference to class actions for private litigants.

[8] In 1973 and 1974, bills died in committee that would have permitted class actions for the recovery of treble damages (*see* 1973 NY Senate-Assembly Bill S 3544, A 4832; 1974 NY Senate-Assembly S 3544, A 4832). Similarly, in 1975, while the Legislature was considering the treble damages bill that was eventually enacted, a separate proposal (1975 NY Assembly Bill A 1215) would have expressly permitted class actions. More recently, bills to amend the Donnelly Act to create a class action provision in General Business Law § 340 (7) have been considered a number of times (*see* 2002 NY Assembly Bill A 11124; 2003 NY Assembly Bill A 5158; 2005 NY Assembly Bill A 663). The same proposal is currently pending (*see* 2007 NY Assembly Bill A 396). Under the proposed amendment, General Business Law § 340 (7) would provide: "Any damages recoverable pursuant to this section may be recovered in any action which a court may authorize to be brought as a class action pursuant to article nine of the civil practice law and rules."

NYS2d 388 [1972], *cert denied* 414 US 829, 94 S Ct 57, 38 L Ed 2d 64 [1973]). While we agree with Sperry that a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, we nevertheless conclude that such a claim does not lie under the circumstances of this case. **[*216]** Here, the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support such a claim. Additionally, in this situation it is not appropriate to substitute unjust enrichment to avoid the statutory limitations on the cause of action created by the Legislature.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Ciparick, Read, Smith and Pigott concur; Judge Jones taking no part.

Order **[****18]** affirmed, with costs.
