

**TO: New York State Bar Association Antitrust Section.**

**FROM: NYSBA Class Action Committee**

**RE: *Parens Patriae* Amendment to New York General  
Business Law Section 340, the Donnelly Act**

**DATE: October 5, 2018**

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This memo addresses whether the Donnelly Act, New York General Business Law Section 340, should be amended to provide explicit authorization for the New York State Attorney General to bring *parens patriae* actions for damages on behalf of the people of New York. This memo recommends amending the Donnelly Act to expressly allow for *parens patriae* treble damages actions due to (1) the split among courts regarding whether the New York State Attorney General possesses such authority, and (2) the current limitations on New York consumers' ability to otherwise collectively recover damages for antitrust violations. Amending the Donnelly Act to expressly allow for *parens patriae* damages actions would resolve the split among courts in a manner that provides important protections for New York consumers and is consistent with the *parens patriae* authority possessed by Attorneys General in most other states.

**I. Courts Are Divided As to Whether the New York State Attorney General Has Authority to Bring *Parens Patriae* Damages Actions under the Donnelly Act.**

The Donnelly Act expressly authorizes the New York State Attorney General to seek injunctive relief and civil penalties on behalf of the people of the state of New York. N.Y. Gen. Bus. Law § 342–a. However, the Donnelly Act only expressly authorizes the Attorney General to seek monetary damages on behalf of the State and other public authorities. N.Y. Gen. Bus. Law § 342–b. There is therefore no express language in the Donnelly Act permitting the New York State Attorney General to bring a *parens patriae* action for damages on behalf of the public.

The lack of such express authority has led to a split among courts regarding the scope of the New York State Attorney General's *parens patriae* authority under the Donnelly Act. At least three federal district courts, all outside New York, have held that the New York State Attorney General does not possess *parens patriae* authority to bring claims for damages under the Donnelly Act. *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2007 WL 2517851, at \*6 (N.D. Cal., Aug. 31, 2007) (acknowledging that “the availability of *parens patriae* damages claims under the Donnelly Act is somewhat unclear,” and finding the arguments against the existence of such authority “more persuasive”); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 5573930 \* 1 (N.D. Cal., November 16, 2011) (holding that “the New York legislature has ‘unambiguously’ restricted the State’s ability to seek [treble] damages” on behalf of the public); *New York v. Intel Corp.*, 2011-2 Trade Cas. P 77, 711 (D. Del. 2011) (finding no statutory or common law authority for *parens patriae* damages actions under the Donnelly Act).

However, at least two New York state courts have come to the opposite conclusion, finding that the New York State Attorney General *does* have common law authority to bring *parens patriae* damages actions under the Donnelly Act. *See New York v. Liberty Mutual Ins. Co.*, 861 N.Y. S.2d 294 (1st Dept.2009) (upholding on appeal the Attorney General’s *parens patriae* authority in a case seeking treble damages under the Donnelly Act, finding that the “State has inherent authority to act in a *parens patriae* capacity when it suffers an injury to a quasi-sovereign interest”); *People v. Coventry First LLC*, slip op., C.A. No. 0404620/2006, 2007 WL 2905486 (N.Y. Sup. Ct. Sept. 25, 2007) (upholding Donnelly Act damages claim in bid-rigging case, holding that “[t]he *parens patriae* doctrine enables the State to seek damages, restitution, and civil penalties on behalf of New York residents that are harmed by wrongful acts”). At least one federal district court has also permitted the New York State Attorney General to assert and

settle damages claims in a *parens patriae* capacity under the Donnelly Act. See *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 520-21 (E.D. Mich. 2003) (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 386-87 (E.D. Mich. 2003)).

These divergent rulings illustrate the lack of clarity among courts regarding whether the New York State Attorney General has authority to bring *parens patriae* damages actions under the Donnelly Act. As reflected above, the split largely stems from the lack of express textual authorization in the Donnelly Act, as well as disagreements regarding the scope of the New York State Attorney General's common law *parens patriae* authority.

## **II. New York's Broader *Parens Patriae* Statute, Executive Law 63, Limits the Attorney General to Seeking Compensatory Damages.**

New York's broader *parens patriae* statute, Section 63 (12) of the Executive Law of New York, permits the New York State Attorney General to bring *parens patriae* damages actions for "repeated" fraudulent or illegal acts, which courts have held include antitrust violations. However, multiple courts have limited the Attorney General's *parens patriae* authority under the Executive Law to compensatory damages and disallowed the types of treble damages claims that would otherwise be available under the Donnelly Act. See *New York v. Intel Corp.*, 2011-2 Trade Cas. P 77, 711 (D. Del. 2011) ("[T]he Executive Law permits New York to recover *compensatory* damages for harms to individuals arising from repeated violations of the Donnelly Act . . . [but] does not permit *treble* damages claims on behalf of consumers."); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2007 WL 2517851, at \*6 (N.D. Cal., Aug. 31, 2007) (holding that the Attorney General may sue for "restitution and damages" but not treble damages under Executive Law § 63). Accordingly, while Executive Law § 63(12) provides the New York State Attorney General with some baseline *parens patriae* authority to

recover damages for antitrust violations, the Executive Law does not fully make up for the lack of clear *parens patriae* authority under the Donnelly Act.

**III. Because Class Actions Are Currently Prohibited under the Donnelly Act, New York’s Indirect Purchasers Have Limited Ability to Recover Damages for Antitrust Violations.**

The lack of clear authority for the New York State Attorney General to seek treble damages in *parens patriae* actions under the Donnelly Act is significant because consumers and other victims of Donnelly Act violations are otherwise unable to collectively sue for damages—at least in New York state court. In 2007, the New York Court of Appeals effectively prohibited class actions under the Donnelly Act, holding that because the Donnelly Act’s treble damages provision served as a “penalty,” class actions for damages were prohibited by NY CLS CPLR § 901. *See Sperry v. Crompton Corporation*, 831 N.Y.S.2d 760 (2007). Although direct purchasers may still sue for antitrust violations under the federal antitrust laws, the Supreme Court’s holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) generally prevents indirect purchasers from suing under federal antitrust laws. *Illinois Brick* similarly prevents state Attorneys General from bringing *parens patriae* damages actions under federal law on behalf of indirect purchasers. *See Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

Accordingly, indirect purchasers in New York have limited recourse for recovering treble damages for antitrust violations insofar as they (1) are prohibited from suing under the federal antitrust laws, (2) cannot maintain class actions in New York state court under the Donnelly Act,<sup>1</sup> (3) are excluded from *parens patriae* actions brought by the New York State Attorney General under federal antitrust law, and (4) are often precluded from recovering damages as part

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<sup>1</sup> New York indirect purchasers may still seek treble damages under the Donnelly Act in federal court, as set forth in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 455 (2010).

of *parens patriae* actions brought by the New York State Attorney General under the Donnelly Act. With the exception of filing individual lawsuits, which is rarely practical for consumers, New York indirect purchasers seeking to recover damages from antitrust violations must either file a class action under the Donnelly Act in federal court, or hope the Attorney General bring a *parens patriae* action under Executive Law 63, which is limited to single damages.

#### **IV. Most Other States Allow for Either Indirect Purchaser Class Actions for Treble Damages or *Parens Patriae* Actions for Treble Damages (or Both).**

Unlike New York, most other states provide a state court mechanism for indirect purchasers to recover treble damages for antitrust violations. Most states either (1) grant their Attorney General the authority to bring *parens patriae* actions for treble damages under state law, or (2) permit indirect purchasers to bring their own class actions for treble damages in state court. Specifically, at least twenty states' antitrust laws expressly authorize the Attorney General to recover damages as *parens patriae*, and either specifically allow for or contain no limitation on the recovery of treble damages.<sup>2</sup> An additional nine states<sup>3</sup> also expressly allow for suits by indirect purchasers, without any prohibition on the maintenance of class actions. The majority of states therefore provide indirect purchasers with at least one mechanism for recovering treble damages for antitrust violations, with many states providing both.

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<sup>2</sup> See Alaska Stat. § 45.50.577(b); Cal. Bus. & Prof. Code § 16760; Colo. Rev. Stat. § 6-4-111; Del. Code Ann. tit. 6, § 2108; Fla. Stat. Ann. § 542.22; Haw. Rev. Stat. Ann. § 480-14; Idaho Code Ann. § 48-108; 740 Ill. Comp. Stat. 10/7; Mass. Gen. Laws Ann. Ch. 93, §9; Md. Code Ann., Com. Law § 11-209; Neb. Rev. Stat. § 84-212; N.H. Rev. Stat. Ann. § 356:4-a; Ohio Rev. Code Ann. § 109.81; Ohio Rev. Code Ann. § 1345.07; Okla. Stat. tit. 79, § 205; Or. Rev. Stat. § 646.775; R.I. Gen. Laws § 6-36-12; S.D. Codified Laws § 37-1-23; Utah Code Ann. § 76-10-916; Va. Code Ann. § 59.1-9.15; W. Va. Code Ann. § 47-18-17.

<sup>3</sup> D.C. Code § 28-45, : Kan. Stat. Ann. § 50-161, IB: Me. Rev. Stat. Ann. Tit. 10, § 1104(1), Mich. Comp. Laws § 445.7, : Minn. Stat. § 325D.57, : Miss. Code Ann. § 75-21-9; : N.M. Stat. Ann. § 57-1; : N.D. Cent. Code § 51-08.1; : VT. Stat. Ann. Tit. 9, § 2465(b); Wis. Stat. § 133.18(1)(a);

The majority of the remaining 21 states have similarly conferred *parens patriae* authority on their Attorneys General; however it is unclear whether such authority encompasses treble damages in antitrust lawsuits. *See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 521-522 (E.D. Mich. 2003) (identifying fifteen states for which courts have either interpreted statutes or common law to provide *parens patriae* authority). Only a small handful of states, such as New York and Connecticut, both prohibit indirect purchaser class actions and also restrict *parens patriae* actions to single damages. New York therefore finds itself among the clear minority of states that fail to provide meaningful treble damage remedies to indirect purchasers in state court.

**V. The Donnelly Act Should be Amended to Expressly Authorize the Attorney General to Seek Treble Damages as *Parens Patriae*.**

To fill this gap, the Donnelly Act should be amended to expressly allow for *parens patriae* treble damages actions. Treble damages remedies may in fact better approximate the actual anticompetitive harm caused by a conspiracy or by monopolization than does the traditional compensatory remedy. The typical measure of damages in a price-fixing conspiracy case, for instance, will be the overcharge paid by the plaintiffs. However, overcharges do not remunerate plaintiffs for lost opportunity costs, business losses associated with the antitrust litigation, or the deadweight loss to society resulting from horizontal conspiracies; and may facilitate settlement amounts that roughly equate to actual damages.<sup>4</sup> There is also considerable empirical evidence that treble damages are in fact closer to true “single” damages when other factors, such as ongoing losses resulting from the anticompetitive conduct, litigation costs, and the time value of money, are accounted for.<sup>5</sup>

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<sup>4</sup> Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 169–70 (2005).

<sup>5</sup> Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 453 n.38 (2010) (citing three law review articles).

The current lack of any Donnelly Act *parens patriae* treble damages remedy is also contrary to Congress' intent in authorizing state attorneys general to bring *parens patriae* antitrust actions, which was in part to address perceived shortcomings of private class actions:

Congress was cognizant of the hostile reception that large consumer classes with relatively small individual claims faced in federal courts. By the early 1970s, federal courts had found a number of such class actions to be unmanageable and improper for class treatment because they were unduly complicated to litigate. The Committee was also skeptical about the likelihood of consumer antitrust class actions because consumers rarely buy enough of any consumer good to have an incentive to invest the time and money in a lawsuit. Even if a consumer decides to sue, she will have difficulty in proving damages because, in general, few consumers keep receipts for small purchases. Finally, the Committee found that the expense and difficulty of giving notice to all class members as required by Rule 23 would effectively eliminate such class actions as a remedy for consumers in antitrust cases.<sup>6</sup>

Courts have noted that *parens patriae* actions can be superior to private class actions for several reasons, including the Attorney General's lack of pecuniary interest, the slow pace of Rule 23 class action litigation, and the relative simplicity of settlement in *parens patriae* actions.<sup>7</sup> Congress's intention, both in creating the treble damages remedy and in empowering state attorneys general to pursue *parens patriae* enforcement, was to align incentives properly to effectuate its goal of ensuring a competitive marketplace.

The relative shortcomings of class action litigation, particularly from a plaintiff's perspective and as contrasted with *parens patriae* actions, are readily apparent. In some cases, the inflicted antitrust injury may not be neatly susceptible to common proof, as when an indirect purchaser class action raises too many individual questions concerning a given putative class member's overcharge, role in the relevant market, or relationship with its suppliers and/or

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<sup>6</sup> Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Class Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361, 386–87 (1999).

<sup>7</sup> *See id.* at 388–90.

competitors. Further, class actions in federal court may be especially troublesome for plaintiffs; a study of class action litigation between 1925 and 2011 found that federal courts are substantially more hostile than state courts to class members bringing state-law claims.<sup>8</sup>

Finally, the very existence of the one remedy available to indirect purchaser class plaintiffs bringing Donnelly Act claims—federal-court class action litigation—rests upon an uncertain precedent. The *Shady Grove* majority opinion by Justice Scalia, which construed New York’s limitation on class actions as a rule of procedure inapplicable to diversity suits in federal court, included sections endorsed by only four Justices and another section endorsed by only three.<sup>9</sup> Justice Stevens’s concurrence reasoned that Rule 23 did not violate the Rules Enabling Act and so could be applied, but rejected the plurality’s interpretation of case law.<sup>10</sup> With respect to these issues, the views of Scalia’s and Stevens’s successors on the Court, respectively, Justices Gorsuch and Kagan, are not known, and a reversal of *Shady Grove*’s core holding could leave prospective Donnelly Act indirect purchaser class plaintiffs without a monetary remedy.

### **3. Proposed Amendment**

The proposed amendment New York General Business Law Section 340 would add the following language:

The Attorney General may also bring an action in the name of the State, as *parens patriae*, on behalf of persons, and other entities, residing in the state of New York, to recover the damages available under this Section, including treble damages. The powers under this Section are in addition to and not in derogation of the common law powers of the Attorney General and any authority it has under

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<sup>8</sup> See Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts—A Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal and State Courts, 1925-2011*, 3 Wm. & Mary Bus. L. Rev. 419, 549–50 (2012).

<sup>9</sup> See *Shady Grove*, 559 U.S. at 406–16 (Scalia, J.) (plurality).

<sup>10</sup> See *id.* at 416–36 (Stevens, J., concurring).



federal antitrust law. New York residents, or other affected entities, may elect to exclude from adjudication the portion of the claim for monetary relief attributable to her, him or it by filing notice of such election with the court within the time period designated by the court. The final judgment in such action shall be res judicata as to any claim under this section by any person or other entity on behalf of whom/which such action was brought and who/which fails to give notice within the time period designated by the court.