MEMORANDUM

TO: Wes Powell, Bob Hubbard and Michael Weiner

FROM: Unilateral Conduct Committee[1]

DATE: October 9, 2018

RE: DARC - Donnelly Act and Unilateral Conduct

Executive Summary

This memo analyzes the scope of New York's Donnelly Act, N.Y. GEN. BUS. L. §§ 340, et seq., with respect to redressing violations based on unilateral anticompetitive conduct. We conclude that while the Donnelly Act, as presently drafted, is capable of reaching certain forms of unilateral conduct, its language has sometimes been viewed as too vague and ambiguous to reach all forms of anticompetitive unilateral conduct. Accordingly, one solution would be to introduce new legislation to make clear that the Donnelly Act addresses unilateral conduct.

Introduction

Enacted in 1893, and last amended in 1999, the Donnelly Act provides, in relevant part:

1. Every 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

[1] The views expressed in this memo are solely those of the authors and do not reflect the views of the authors' employers or clients. The Unilateral Committee is grateful to the contributions of practitioners Matthew Perez, Justin Batten, Martin Kafafian and Nathaniel Ament-Stone, as well as law students Brian Morganelli and Candice Ellis.

> 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.

N.Y. GEN. BUS. L. § 340(1).

The Donnelly Act language is similar to Section 1 of the Sherman Act, which proscribes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. Indeed, the New York Court of Appeals has noted the similarity between the two statutes, finding that "the language of the [Donnelly Act] is almost a copy of section 1 of the Sherman Act." *Amicee Wholesale Corp. v. Tomar Prods. Inc.*, 21 N.Y.2d 621, 626 (1968).

The Donnelly Act clearly proscribes coordinated conduct between two or more parties that is designed to either (1) restrain trade or (2) create or maintain a monopoly. *See, e.g., State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 464 (1976) (Donnelly Act proscribes a "reciprocal relationship of commitment between two or more legal or economic entities"); *Benjamin of Forest Hills Realty Inc. v. Austin Sheppard Realty Inc.*, 34 A.D.3d 91, 94 (N.Y. App. Div. 2006) (same); *Anand v. Soni*, 215 A.D.2d 420, (N.Y. App. Div. 1995) (same); *Rochester Drug Co-op Inc. v. Biogen Idec U.S. Corp.*, 130 F. Supp. 3d 764 (W.D.N.Y. 2015) (same).

Courts have also held that the Donnelly Act proscribes attempts to monopolize. *See Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc.*, 92 A.D.3d 570, 574 & n.4 (N.Y. App. Div. 2012) ("In *Two Queens, Inc. v. Scoza* (296 A.D.2d 302 [2002]), this Court reinstated the defendant's counterclaims, which included an allegation of attempted monopolization. It is a fair inference that the *Two Queens* Court found that the Donnelly Act provided for a private right of action for attempted monopolization.").

The legislative intent behind the Donnelly Act appears aimed at curtailing the power of the large monopolistic trusts active at the turn of the century, but any intent to reach unilateral conduct specifically is ambiguous. Subsequent amendments to the Donnelly Act have not resolved the debate over the Donnelly Act's reach. Indeed, New York courts have resorted to canons of construction because of the Act's lack of guidance. Thus, New York and its courts would benefit from amending the Donnelly Act to clarify its scope.

Courts have struggled with the question of whether the Donnelly Act reaches single firm, unilateral anticompetitive conduct. Below, we present the way the courts, the New York Attorney General, and others have addressed this issue.

Unilateral Conduct under the Donnelly Act

Unlike Section 2 of the Sherman Act, which specifically proscribes single-firm conduct that creates or maintains a monopoly—"*Every person who shall monopolize*, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize…," 15 U.S.C. § 2—the Donnelly Act does not, on its face, cover such conduct. As noted above, the Donnelly Act's language proscribes "Every contract, agreement, arrangement or combination whereby [a] monopoly . . . is or may be established or maintained . . . ." N.Y. GEN. BUS. L. § 340.

Courts have readily held that the words "contract," "agreement," and "combination" refer to coordinated conduct between two or more parties. *See, e.g., Mobil Oil*, 38 N.Y.2d at 464; *Commonwealth Elec. Inspection Services, Inc. v. Town of Clarence*, 776 N.Y.S.2d 687, 688 (N.Y. App. Div. 2004). Courts have reasoned that because these words were "strikingly similar" to language found in Sherman Act Section 1, which proscribes coordinated conduct that restrains trade, they should be given similar meaning when interpreting the Donnelly Act. *See, e.g., Mobil Oil*, 38 N.Y.2d at 463.

The word "arrangement," however, has drawn considerable disagreement among jurists, the New York Attorney General, and commentators.

1. Legislative History behind the Donnelly Act

When a statute's reach is unclear on its face, reviewing its legislative history sometimes brings clarity.[2] A reading of the relevant history, however, uncovered little concrete evidence on the issue of whether the Legislature intended the Donnelly Act to reach unilateral conduct. But enough ambiguity exists that a plausible argument can be made that the Donnelly Act was intended to reach unilateral conduct.

The Donnelly Act reflects the New York legislature's desire to fill the perceived gaps in the Sherman Act in the 1890s. *See* Jack Greenberg, *New York Antitrust Law and Its Role in the Federal System*, in ANTITRUST LAW IN NEW YORK STATE (Robert L. Hubbard and Pamela Jones Harbour eds., 2d ed. 2002). The Donnelly Act introduces some textual difference against the Sherman Act. Whereas the Sherman Act prohibits "Every contract, combination . . . or conspiracy, in restraint of trade," 15 U.S.C.S. § 1, the Donnelly Act prohibits every "contract, agreement, *arrangement* or combination." N.Y. GEN. BUS. L. § 340(1) (emphasis added).

Yet, the legislative history does not reveal the Legislature's intent behind the inclusion of the term "arrangement." Nor does the legislative history reveal a clear directive on whether the Legislature intended the Donnelly Act to reach unilateral conduct through the term "arrangement." *See* Antitrust Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *Experiments in the Lab: Donnelly Act Diversions From Federal Antitrust Law*, 15 NY LITIGATOR at 62 (May 2010) ("There apparently is no relevant legislative history explaining inclusion of the term 'arrangement,' as part of the Sherman Act.") (citing Greenberg, *New York Antitrust Law*).

Notably, the Donnelly Act also omits a section similar to Section 2 of the Sherman Act, which proscribes monopolization arising from single-firm conduct. The Donnelly Act's omission of single-firm monopolization within the text of the act could signal the Legislature's lack of intent to reach unilateral conduct. The Lexow Committee, the committee appointed by the Legislature to research trusts and recommend a legislative response prior to passage of the Donnelly Act, identified anticompetitive trusts as only those aggregations of capital "brought about for the purpose of operating against the natural law of supply and demand;" the Committee did not find aggregations arising out of "the concentration of resources and the employment of the best skill, the highest intellect, the most approved machinery and the most qualified labor . . . against public policy."

[2] Notably, the Court of Appeals will consider an examination of a statute's legislative history where the language of the statute is ambiguous. *See In re Shannon*, 25 N.Y.3d 345, 351 (2015).

Clarence Lexow, Chairman, Report of the Joint Committee of the Senate and Assembly Appointed to Investigate Trusts, 8, 10 (1897).

The minority report of the Lexow Committee, however, favored applying the report's recommendations "as far as practicable in restricting *all monopolies* of any character or nature whatsoever." Thomas J. Barry, Minority Report of the Joint Committee of the Senate and Assembly appointed to Investigate Trusts, 51 (1897) (emphasis added). Thus, the Legislature should have been aware of the difference between monopolistic trusts and single-firm monopolies. Its decision to not address single-firm monopolies specifically could reflect either indifference to unilateral action from single-firm monopolies, in line with the main Lexow Committee report, or a belief that the proposed language of the Act would reach all monopolies, in line with the minority report of the Lexow Committee.

There are certain aspects of the Donnelly Act's legislative history from which one could argue the Legislature intended to reach unilateral conduct. *First*, is the Donnelly Act's title itself: it is "An Act to Prevent Monopolies . . . ." Chapter 690, Laws of New York (1899).

Second, the Legislature modeled the Donnelly Act after the Sherman Act, which reached both concerted and unilateral conduct when the Donnelly Act was enacted. The apparent impetus for state action on national monopolies came from a Supreme Court decision limiting the federal government's ability to proscribe national monopolies under the Sherman Act by narrowly defining "interstate commerce." Greenberg, *New York Antitrust Law* at 10a. ("The State's problem, as the [Lexow] Committee saw it, was to reach those acts which the Sherman Act would embrace if it were not for the *Knight* case [*U.S. v. E.C. Knight*, 156 U.S. 1 (1895)]."); *see also In re Davies*, 168 N.Y. 89, 101 (1901) (stating the "object [of the Donnelly Act] is to destroy monopolies . . ."). Because the Donnelly Act largely parallels the Sherman Act in form and structure, courts have used these similarities to limit the bounds of the Donnelly Act to match those of the Sherman Act—for example, refusing to expand the Donnelly Act to bar price discrimination because the Sherman Act did not reach it. *See Mobil Oil*, 38 N.Y.2d at 463 ("[I]f our Donnelly Act is to be considered a counterpart of the Sherman Act it does not extend to price discrimination"). This would suggest the Legislature's intent to capture everything in the Sherman Act but not necessarily anything outside the Sherman Act.

2. Courts Ruling Against Applying Donnelly Act to Unilateral Conduct

The absence of clear legislative history has forced courts to rely on canons of statutory interpretation to determine the reach of the Donnelly Act and the meaning of "arrangement." For example, in *People v. American Ice Co.,* a New York trial court turned to the definition of "arrangement" to determine the Donnelly Act applied to an attempted monopoly case. 120 N.Y.S. 443, 450 (N.Y. Sup. Ct. 1909) (defining arrangement as "the disposition of measures for the accomplishment of a purpose; preparation for successful performance"; or "a structure or combination of things in a particular way for any purpose"). The Court of Appeals in the context of determining whether the Donnelly Act prohibited price discrimination to customers, applied the canon of *noscitur a sociis* and held that the word "arrangement" "takes on a connotation similar to that of the other terms with which it is found in company." *Mobil Oil*, 38 N.Y.2d at 464. Accordingly, the majority of the Court held that "arrangements" "contemplate[ed] a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms,

'contract', 'combination' or 'conspiracy'." *Id.* And because arrangements required two or more parties, unilateral price discrimination could not be reached by the Donnelly Act.

Judge Gabrielli in dissent, however, stated that majority erred in failing to apply the canon against surplusage. He wrote that "each word in a statute must be presumed to have meaning and to have been inserted for a purpose." *Id.* at 468 (Gabrielli, J., dissenting). Under his interpretation, the "arrangement" is not read to be in harmony with the other three prohibited actions, but in distinction to them. Therefore, the term "arrangement" "permit[s] the prosecution of a wider variety of wrongs." *Id.*

Other New York state courts have similarly followed the majority's ruling in *Mobil Oil*. For example, the Appellate Division, Fourth Department similarly denied plaintiffs' allegations of price discrimination as beyond the purview of the Donnelly Act because it involved unilateral conduct. *See, e.g., Pharmacists' Ass'n of Western N.Y., Inc. v. Blue Cross of Western N.Y., Inc.*, 112 A.D.2d 728, 729 (N.Y. App. Div. 1985) ("Plaintiffs' second cause of action purports to allege a violation of the Donnelly Act . . . . It fails to do so, however, because its averment that agreement B will unreasonably restrain competition alleges at most unilateral reimbursement discrimination, which is indistinguishable from unilateral price discrimination."); *Abe's Rooms, Inc. v. Space Hunters, Inc.*, 833 N.Y.S.2d 138 (N.Y. App. Div 2007) (because there were no allegations of a "conspiracy or reciprocal relationship between two or more legal entities", court affirmed dismissal).[3]

Federal courts weighing in on the issue have similarly rejected the application of the Donnelly Act to unilateral conduct. For example, in *Rochester Drug Co-Op.*, 130 F. Supp. 3d at 770, the Western District of New York rejected plaintiffs' contention that "'a unilateral exertion of power' is sufficient to fall within the scope of the Donnelly Act." Relying on *Mobil Oil*, the court dismissed plaintiff's Donnelly Act claim because "jilted distributor may not rely only upon a manufacturer's unilateral exertion of power to terminate a distributorship." *Id.* at 771. Other federal courts have similarly rejected Donnelly Act claims that allege little more than unilateral conduct. *See In re Effexor XR Antitrust Litig.*, No. 3:11-cv-5661, ECF 177, slip op. at 35–37 (D.N.J. Sep. 18, 2018) (dismissing unilateral claim of monopolization brought under the Donnelly Act against defendant Wyeth for alleged fraud on the Patent and Trademark Office and sham litigation); *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 399 (E.D. Pa. 2010) (dismissing Donnelly Act claim where plaintiffs alleged a brand manufacturer monopolized Wellbutrin SR market by filing sham patent litigation); *Great Atl. & Pacific Tea Co., Inc. v. Town of E. Hampton*, 997 F. Supp. 340, 352 (E.D.N.Y. 1998) (dismissing Donnelly Act claim where "plaintiff allege[d] no fact to

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[3] *See also Bevilacque v. Ford Motor Co.*, 509 N.Y.S.2d 595 (N.Y. App. Div. 1986) (affirming dismissal of complaint based on plaintiff's failed attempt to buy a minority stake in franchise due to a first right of refusal owed to defendant); *Hall Heating Co., Inc. v. New York State Elec. and Gas Corp.*, 580 N.Y.S.2d 528, 529 (N.Y. App. Div. 1992) (affirming dismissal of Donnelly Act claim based on "unilateral action by NYSE & G [which] could have the effect of giving one contractor an advantage over another"); *Creative Trading Co., Inc. v. Larkin-Pluznick-Larkin, Inc.*, 523 N.Y.S.2d 102, 103 (N.Y. App. Div. 1988) (dismissing Donnelly Act claims that defendants disadvantaged the plaintiffs by only selling them the least desirable booth space at conventions); *Bello v. Cablevision Sys. Corp.*, 587 N.Y.S.2d 1, 2 (N.Y. App. Div. 1992) (affirming dismissal of complaint that Cablevision failed to reduce its subscriber fees despite the network's loss of popular sports channel MSG).

suggest that the Superstore Law was the product of a conspiracy or reciprocal arrangement, as opposed to a unilateral act by the Town that may have inured to the benefit of existing retailers").

3. **Courts Ruling In Favor of Applying Donnelly Act to Unilateral Conduct**

Despite the substantial amount of adverse authority on the applicability of the Donnelly Act to unilateral conduct, some courts have seemingly applied it to instances involving single-firm conduct. A few years prior to the *Mobil Oil* decision, the Court of Appeals seemed to have permitted a Donnelly Act claim to reach single -firm conduct. In *Columbia Gas of New York, Inc. v. New York State Elec. & Gas Corp.*, 320 N.Y.S.2d 57 (1971), the plaintiff alleged that the defendant—a competitor in energy services—was "abusing its monopolistic position in the lighting market to restrict the freedom of municipalities to choose among competing energy sources in the space heating market." *Id.* at 65. Without specifically characterizing the nature of the claim, the court allowed the Donnelly Act claim to proceed, giving the plaintiff "an opportunity of factually demonstrating illegality in a comprehensive rule of reason inquiry." *Id.* at 66.

One year after *Columbia Gas*, the New York Supreme Court in *American Cyanamid Co. v. Power Conversion*, *Inc.*, 336 N.Y.S.2d 6 (N.Y. Sup. Ct. 1972), upheld a Donnelly Act claim based on unilateral conduct. The defendant counterclaimed that the plaintiff had obtained its patent by misrepresentations made to the U.S. Patent Office, and told customers of defendant that that the defendant's patents were infringing. Although the court agreed that the allegations were purely unilateral acts, it nonetheless held that "there is authority for a liberal approach to the issue on a motion to dismiss, *Columbia Gas v. N.Y. Electric & Gas Corp.*, 28 N.Y.2d 117, which would sanction a denial of the motion in this instance." *Id.* at 12.

A decade later, the court in *Forest Laboratories, Inc. v. Lowey*, No. 7657/81, 1982 WL 52211, at *23 (N.Y. Sup. Ct. Oct. 25, 1982), stated that "In certain situations, such as those involving tying or similar arrangements, an activity of one party may violate the Donnelly Act if it is shown that such activity actually restrained competition." Although the court ultimately dismissed the claims for failing to state a claim, the court's dismissal was not based on the fact that the conduct was unilateral in nature.

In addition to these state court decisions, there are at least two federal courts that have upheld Donnelly Act claims for monopolization—essentially piggybacking on the successful Sherman Act Section 2 claims asserted in each.[4] For example, In *A&E Products Group L.P. v. Accessory Corp.*, 00

[4] In addition, in the landmark case of *United States v. Microsoft Corp.*, the court in the final judgment held that Microsoft's conduct (which were largely Section 2 violations) also violated the Donnelly Act. 97 F.Supp.2d 59, 63 (D.D.C. 2000); *aff'd in part and rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001). Little weight, however, should be given to this holding because there is no reasoned analysis behind this holding; the court does not examine the Donnelly Act or any of the relevant case law. Elai Katz, *New York Antitrust Law–The Donnelly Act*, in NEW YORK ANTITRUST AND CONSUMER PROTECTION LAW 12, n.45 (Barbara Hart et al., eds., 3d ed. 2011).

Civ. 7271 (LMM), 2001 WL 1568238 (S.D.N.Y. Dec. 7, 2001), the court upheld claims for monopolization and attempted monopolization where the plaintiff alleged that the defendant made disparaging statements about the plaintiff's products (clothes hangers). The Plaintiff also alleged that customers were incentivized to buy defendant's hangers because defendant's subsidiary would purchase defendant's own used hangers at a higher than market price and would refuse to purchase any of plaintiff's competing hangers. *Id.* at *2. After finding that these claims were sufficiently pled under Section 2, the court went on to uphold them under the Donnelly Act as well, on the basis that "[t]he Donnelly Act [] is generally construed in accordance with the Sherman Act." *Id.* at *6.

Years later, the Eastern District of Pennsylvania in *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC*, No. 1:CV-09-1685, 2011 WL 1883815 (M.D. Pa. May 17, 2011), refused to dismiss various monopolization claims under the Donnelly Act after reviewing the Section 2 and Donnelly Act claims together and reasoning that "New York's Donnelly Act is a parallel antitrust statute to the Sherman Act." *Id.* at *2, n.1. In *Kimberly-Clark*, the defendant alleged a host of antitrust counterclaims, including fraudulent procurement of a patent, product disparagement through false claims, and sham litigation—all of which were unilateral in nature. *Id.* at *1, 3. The court upheld the antitrust counterclaims under a "monopoly broth" theory, stating that the acts in the "aggregate … represent[] anticompetitive activity tied to the relevant markets that raise a plausible claim for relief." *Id.* at *3.

4. New York Attorney General Amicus Position

The New York Attorney General ("NY AG") submitted an amicus brief in 1996 in a case alleging a violation of the Donnelly Act by attempted monopolization. Brief for the State of New York as Amicus Curiae, *Bartholdi Cable Company, Inc. v. Time Warner, Inc.*, (E.D.N.Y. Nov. 8, 1996) (No. 1:96-cv-02687) ("*New York Amicus*"). The amicus brief addressed an argument in the defendant's motion to dismiss, which asserted that attempted monopolization is not a violation of the Donnelly Act.

The NY AG argued that, contrary to defendants' argument, the word attempt in the statute was not a prerequisite to an attempted monopolization claim under the Donnelly Act. The NY AG noted the Donnelly Act repeatedly used the word "may" and the phrase "for the purpose of" to "create civil liability for acts falling short of actual monopolization." *Id.* at 3–4. For instance, the Donnelly Act outlaws enumerated conduct "whereby [a] monopoly … is or *may* be established or maintained." N.Y. Gen. Bus. Law § 340 (emphasis added).

The NY AG also argued that defendants had not carried their burden of establishing that the Donnelly Act differed from federal antitrust law. The NY AG pointed to a line of cases holding that the Donnelly Act "should generally be construed in light of federal precedent" unless "the party urging the divergence" justifies the difference grounded in "statutory language, legislative history or policy. *See New York Amicus* at 4-5 (citing *X.L.O. Concrete Corp. v. Rivergate Corp.*, 83 N.Y.2d 513, 518 (1994), and *People v. Rattenni*, 81 N.Y.2d 166 (1993)). Because federal law prohibits attempted monopolization, so too, should the Donnelly Act. *New York Amicus* at 5. On monopolization generally, the NY AG pointed to *Columbia Gas, Inc. v. New York State Electric & Gas Corp.*, 28 N.Y.2d 117, 127 (1971), which considered and upheld a claim that the defendant "[was] abusing its monopolistic position" by citing U.S. Supreme Court cases construing section 2 of the Sherman Act. *New York Amicus* at 5.

The *Bartholdi Cable* trial court was "convinced by the submission of the state" that the attempted monopolization claim under the Donnelly Act should go forward. *See* Transcript of Civil Cause for Motion at 33, *Bartholdi Cable v. Time Warner, Inc., et al.*, CV-96-2687 (JBW) (E.D.N.Y. Nov. 27, 1996).

5. New York Attorney General Enforcement Actions

A review of recent antitrust investigations, settlements, and prosecutions by the NY AG did not uncover a clear example of the NY AG Antitrust Bureau prosecuting purely unilateral anticompetitive conduct under the Donnelly Act. Instead, it appears that the NY AG has most often pursued Donnelly Act claims when unlawful concerted conduct was alleged in additional to unlawful single-firm conduct.

For example, the NY AG pursued both Donnelly Act and Sherman Act claims in its investigations of UnitedHealth Group, for restraining the market for elder and long-term care insurance products, and of Casella Waste Systems, a waste-management company, for unlawful monopolization practices in upstate New York.[5] In *New York v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015), the NY AG similarly invoked both the Sherman Act and Donnelly Act in a case alleging that Actavis (now Allergan) had attempted unlawfully to extend its patent on the Alzheimer's drug Namenda by forcing patients to switch from one version of the drug to another, and had conspired with a pharmacy to accomplish this scheme.[6] The NY AG also reached a multistate settlement with the National Football League for its league-wide mandatory price floor policy.[7] Even the NY AG's investigation of Simon Property Group, an alleged monopolist in the outlet mall market in New York City, cited both Sections 1 and 2 of the Sherman Act and the Donnelly Act—perhaps because the company's exclusivity arrangements with retailers constituted both attempts to monopolize and anticompetitive agreements.[8] Thus, while each of these cases alleged unlawful single-firm conduct, each case also presented facts involving agreements.

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[5] *See* "A.G. Schneiderman Announces Settlement with United Health Group Protecting Competition in Elder Care" (Jan. 7, 2016), https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-united-health-group-protecting-competition-elder; Assurance of Discontinuance, *Investigation of the Business Practices of UnitedHealth Group, Inc.*, http://www.ag.ny.gov/pdfs/NYAG_AOD_United.pdf; "A.G. Schneiderman Announces Settlement Protecting Competition for Waste Hauling Services in Upstate New York" (July 14, 2014), https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-protecting-competition-waste-hauling-services; Assurance of Discontinuance, *Investigation of Casella Waste Systems, Inc.*, http://www.ag.ny.gov/pdfs/2014.07.10%20AOD%20Fully%20Executed.pdf.

[6] *See also* "A.G. Schneiderman Announces Resolution of Lawsuit That Protected Alzheimer's Patients from Anticompetitive Tactic Aimed at Maintaining Higher Drug Prices" (Nov. 25, 2015), https://ag.ny.gov/press-release/ag-schneiderman-announces-resolution-lawsuit-protected-alzheimer%E2%80%99s-patients.

[7] *See* "A.G. Schneiderman Announces Multi-State Settlement with NFL Permanently Barring League-Wide Mandatory Ticket Price Floor" (Nov. 15, 2016), https://ag.ny.gov/press-release/ag-schneiderman-announces-multi-state-settlement-nfl-permanently-barring-league-wide; Settlement Agreement, *In the Matter of NFL Ticketing Investigation*, https://ag.ny.gov/sites/default/files/11.15.2016_-_nfl_tix_investigation_final.pdf.

[8] *See* "A.G. Schneiderman Announces Settlement with Nation's Largest Mall Operator to Stop Anticompetitive Tactics at Woodbury Common Outlet Center" (Aug. 21, 2017), https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-nations-largest-mall-operator-stop; Assurance of

6. Comparison to the Antitrust Laws in Other States

The evolution of antitrust laws in other states highlights the Donnelly Act's present inadequacies, particularly in prohibiting anticompetitive single-firm conduct.

Many states have enacted statutes that explicitly capture unilateral conduct. Those laws typically follow Section 2's proscriptions. *See, e.g.,* OKLA. STAT. 79 § 203(B) ("It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state."); MO. REV. STAT. § 416.031 ("It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state."). Predictably, courts interpreting these statutes have applied them to unilateral conduct. *See, e.g., Fine Airport Parking, Inc. v. City of Tulsa*, 71 P.3d 5, 10 n.5 (Okla. 2003) (interpreting Oklahoma antitrust law: "The state antitrust statutes expressly prohibit every unilateral 'act' of anti-competitive conduct."); *Stensto v. Sunset Memorial Park, Inc.*, 759 S.W.2d 261 (Mo. Ct. App. 1988) (applying the Missouri Antitrust Law to attempted monopolization and a tying arrangement, holding that the state statute should be "construed in harmony" with Section 2 of the Sherman Act).

Generally, these statutes have two features. First, they explicitly prohibit monopolies and attempts to monopolize. Second, they tend to couch the prohibitions on monopolization and attempted monopolization in terms of conduct committed by a single "person." *See, e.g.,* COLO. REV. STAT. § 6-4-105 (Colorado Antitrust Act of 1992) ("It is illegal for any *person* to monopolize, attempt to monopolize, or combine or conspire with any other person to monopolize any part of trade or commerce.") (emphasis added); FLA. STAT. § 542.19 (Florida Antitrust Act of 1980) ("It is unlawful for any *person* to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state.") (emphasis added); 740 ILL. COMP. STAT. 10 § 3 (Illinois Antitrust Act) ("Every *person* shall be deemed to have committed a violation of this Act who shall: . . . (3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce. . . .") (emphasis added); TEX. BUS. & COM. CODE ANN. § 15.05(b) (Texas Free Enterprise and Antitrust Act of 1983) ("It is unlawful for any *person* to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce.") (emphasis added). By comparison, the Donnelly Act, which proscribes monopolies only in terms of a "contract, agreement, arrangement or combination," suggests concerted action between two or more persons. N.Y. GEN. BUS. L. § 340.

The evolution of state-level antitrust laws provides further insight. In some instances, state antitrust legislation, pre-dates the Sherman Act and thus, does not mirror the Sherman Act's language. James A. Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEX. L. REV. 753, 760 (1961). For example, in 1889, Kansas passed the first antitrust laws in the nation, barring all "arrangements, contracts, agreements trusts, or combinations" in restraint of trade or for other improper purposes. Rush H. Limbaugh, *Historic Origins of Anti-Trust Legislation*, 18 MO. L. REV. 215, 246 (1953); *see also* 1889 KAN. SESS. LAWS 389, § 1 ("That all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view or which tend to prevent full and free competition . . . are hereby declared to be against public policy, unlawful, and void"). Shortly thereafter, Texas adopted

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Discontinuance, *Investigation of Simon Property Group, Inc.*, https://ag.ny.gov/sites/default/files/executed_aod_8.21.17.pdf.

a similar, albeit differently worded legislation, declaring "trusts"—*i.e.*, "a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons"—that restrict trade, reduce production, or raise or fix prices unlawful. John J. Hanson & Julian O. von Kalinowksi, *The Status of State Antitrust Laws with Federal Analysis*, 15 CASE W. RES. L. REV. 9, 10-11 (1963). In total, at least thirteen states enacted antitrust legislation before the Sherman Act was signed into law, following either the Kansas or Texas models. Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 657 n.22 (1974).

By mid-century, three legislative patterns had taken hold. First, a hand full of states had adopted statutes closely following the Sherman Act. Rubin, *supra*, at 658. Second, other states prohibited trusts or combinations to fix prices or limit output. *Id.* at 659. Third, still other states had laws following Texas's 1889 ban on "trusts." *Id.*

However, divergences in certain states' antitrust laws with the Sherman Act yielded enforcement gaps—particularly with respect to unilateral conduct like monopolization and attempted monopolization. To fill these gaps, some states have amended their antitrust statutes to clarify heir scope and harmonize them with the Sherman Act's prohibitions on monopolization and attempted monopolization.[9]

Illinois's experience is instructive. In 1891, Illinois enacted an antitrust statute following the Kansas format, then two years later enacted a second statute modelled after the Texas format. *See* John T. Soma, *Enforcement Under the Illinois Antitrust Act*, 5 LOY. L.J. 25, 26-27 (1974). By 1961, Illinois's antitrust law covered only agreements to fix prices or to limit production. Rahl, *supra*, at 761. It did not capture other restraints on trade or monopolization and was largely unenforced. *Id.* According to one commentator, only three enforcement actions were brought by the state between 1891 and 1960. Soma, *supra*, at 27.

To broaden the Illinois antitrust law's prohibitions to bring it in harmony with the Sherman Act, in 1965, the Illinois legislature enacted the Illinois Antitrust Act, ILL. COMP. STAT. 740 ILCS 10/1, *et seq*. *See id.*[10] In relevant part, the 1965 statute—which remains on the books today—proscribes entering into a "contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce" and "[e]stablish[ing], maintain[ing], us[ing], or attempt[ing] to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce. . . ." ILL. COMP. STAT. 740 ILCS 10/3.

Like Illinois, the history of Texas's antitrust law is similarly instructive. Prior to 1983, the antitrust law on Texas's books dated back to the Sherman Act era. It had been unclear to courts and commentators what sort of conduct was proscribed. When the Texas legislature adopted this new statute, prior ambiguities were addressed, including the addition of a section specifically proscribing

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[9] Appendix A lists 31 state statutes that have adopted statutes closely following Section 2's proscription against monopolies.

[10] To further enhance enforcement, the new legislation also provided the Illinois attorney general with investigatory powers, including the ability to issue pre-complaint subpoenas. *See* Soma, *supra*, at 33.

"(1) monopolizing; (2) attempting to monopolize; and (3) conspiring to monopolize 'any part of trade or commerce.'" *Id.* (quoting TEX. BUS. & COMM. CODE § 15.05(b)). Note the 1983 law directed that it be "construed in harmony with federal judicial interpretations of comparable federal antitrust statutes. . . ." *Id.* § 15.04. *See also Caller-Times Pub. Co., Inc. v. Triad Comm., Inc.*, 826 S.W.2d 576, 579-80 (Tex. 1992) (noting that the updated Texas antitrust laws forbid predatory pricing and attempted monopolization).

New York, which has an antitrust law similarly encumbered by linguistic shortcomings, could resolve its law's present inadequacies by following the example of its sister states, Illinois and Texas, and modernizing its antirust regime to include explicit prohibitions on monopolization and attempted monopolization.

7. The View of Commentators on Applicability of Donnelly Act to Unilateral Conduct

Additional authorities, interpreting the varied case law, have similarly come to divergent opinions. *Compare* 4D N.Y. PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 101:26 (database updated September 2017) ("The Donnelly Act reaches only concerted monopolization—two or more actors working together to establish or maintain a monopoly—not unilateral conduct."), *and* BUS. FRANCHISE GUIDE ¶ 1470.85 (2018) ("The New York Donnelly Act does not prohibit monopolization or attempted monopolization."), *with* 103 N.Y. JUR. 2D *Trade Regulation* § 14 (database updated May 2018) ("The Donnelly Act does provides for a private right of action for attempted monopolization."). Additionally, a New York State Bar Association publication observes there are arguments on both sides, stating that "the Donnelly Act does not explicitly speak of single firm action," but on the other hand, "[t]he title of the Donnelly Act refers to 'monopoly' as does the text of GBL § 340(1)." Katz, *supra* note 3, at 11–12.

<u>Conclusion and Recommendation</u>

The Donnelly Act, on its face, appears to only reach conduct engaged in by multiple actors. The terms "contract," "agreement," and "combination" all clearly refer to multiple-firm conduct. The other proscribed conduct, "arrangement," has been held to require a reciprocal relationship. Consistent with this view, some courts have held that the Donnelly Act does not reach unilateral conduct and have thus dismissed such claims. Other courts, though, have applied the Donnelly Act to single-firm, monopolization claims. And the NYAG took a similar position in the *Bartholdi* case.

We conclude that the Donnelly Act language is too vague and ambiguous on the issue of anticompetitive unilateral conduct. Many courts have latched onto the vagueness and ambiguity of the language of the Donnelly Act in reaching their decisions. One solution would be to introduce legislation that would explicitly track the Sherman Act's language and clarify that the Donnelly Act does indeed apply to anticompetitive unilateral conduct. The strongest policy reason for supporting such a solution is that there are courts that have denied a remedy to victims of anticompetitive conduct, when such a remedy might have been provided for under the Sherman Act. Providing for a cause of action under the Donnelly Act is especially important for those class of plaintiffs who would not have a claim under the Sherman Act – such as indirect purchasers who allege a passed-on overcharge, and plaintiffs who allege a violation that only affected intrastate commerce.

APPENDIX A

	State	Citation	Text
1.	Alaska	ALASKA STAT. § 45.50.564	It is unlawful for a person to monopolize, or attempt to monopolize, or combine or conspire with another person to monopolize any part of trade or commerce.
2.	Arizona	ARIZ. REV. STAT. ANN. § 44-1403	The establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, any part of which is within this state, by any person for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful.
3.	Colorado	COLO. REV. STAT. § 6-4-105	It is illegal for any person to monopolize, attempt to monopolize, or combine or conspire with any other person to monopolize any part of trade or commerce.
4.	Florida	FLA. STAT. § 542.19	It is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state.
5.	Hawaii	HAW. REV. STAT. § 480-9	No person shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State.
6.	Idaho	IDAHO CODE ANN. § 48-105	It is unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize any line of Idaho commerce.
7.	Illinois	740 ILL. COMP. STAT. 10 § 3	Every person shall be deemed to have committed a violation of this Act who shall: . . . (3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce. . . .
8.	Indiana	IND. CODE § 24-1-2-2	A person who monopolizes any part of the trade or commerce within this state commits a Class A misdemeanor.

9.	Iowa	IOWA CODE § 553.5	A person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing, or maintaining prices.
10.	Kentucky	KY. REV. STAT. ANN. § 367.175	(2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.
11.	Louisiana	LA. REV. STAT. ANN. § 51:123	No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state.
12.	Maine	ME. REV. STAT. TIT. 10, § 1102	Whoever shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce of this State shall be guilty of a Class C crime.
13.	Maryland	MD. CODE ANN. COM. LAW § 11-204	(a) A person may not: . . . (2) Monopolize, attempt to monopolize, or combine or conspire with one or more other persons to monopolize any part of the trade or commerce within the State, for the purpose of excluding competition or of controlling, fixing, or maintaining prices in trade or commerce[.]
14.	Massachusetts	MASS. GEN. LAWS CH. 93, § 5	It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce in the commonwealth.
15.	Michigan	MICH. COMP. LAWS §445.773	The establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices, is unlawful.
16.	Minnesota	MINN. STAT. § 325D.52	The establishment, maintenance, or use of, or any attempt to establish, maintain, or use monopoly power over any part of trade or commerce by any person or persons for the

			purpose of affecting competition or controlling, fixing, or maintaining prices is unlawful.
17.	Missouri	MO. REV. STAT. § 416.031	(2) It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state.
18.	Montana	MONT. CODE ANN. § 30-14-205	It is unlawful for a person or group of persons, directly or indirectly: (2) for the purpose of creating or carrying out any restriction in trade, to: . . . (g) create a monopoly in the manufacture, sale, or transportation of an article of commerce[.]
19.	Nebraska	NEB. REV. STAT. § 59-802	Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, within this state, shall be deemed guilty of a Class IV felony.
20.	New Hampshire	N.H. REV. STAT. ANN. § 356:3	The establishment, maintenance or use of monopoly power, or any attempt to establish, maintain or use monopoly power over trade or commerce for the purpose of affecting competition or controlling, fixing or maintaining prices is unlawful.
21.	New Jersey	N.J. STAT. ANN. § 56:9-4	a. It shall be unlawful for any person to monopolize, or attempt to monopolize, or to combine or conspire with any person or persons, to monopolize trade or commerce in any relevant market within this State.
22.	New Mexico	N.M. STAT. ANN. § 57-1-2	It is hereby declared to be unlawful for any person to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, trade or commerce, any part of which trade or commerce is within this state.
23.	North Carolina	N.C. GEN. STAT. § 75-2.1	It is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina.
24.	Oklahoma	OKLA. STAT. TIT. 79, § 203	B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a

			relevant market within this state.
25.	Oregon	OR. REV. STAT. § 646.730	Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce, shall be in violation of [this Statute].
26.	Rhode Island	R.I. GEN. LAWS § 6-36-5	The establishment, maintenance, or use of a monopoly, or an attempt to establish a monopoly, of trade or commerce by any person, for the purpose of excluding competition or controlling, fixing, or maintaining prices, is unlawful.
27.	South Dakota	S.D. CODIFIED LAWS § 37-1-3.2	The monopolization by any person, or an attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any of the trade or commerce within this state shall be unlawful.
28.	Texas	TEX. BUS. & COM. CODE ANN. § 15.05	(b) It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce.
29.	Utah	UTAH CODE ANN. § 76-10-3104	(2) It shall be unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce.
30.	Washington	WASH. REV. CODE § 19.86.040	It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce.
31.	West Virginia	W. VA. CODE § 47-18-4	The establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, any part of which is within this State, by any persons for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful.
32.	Wisconsin	WIS. STAT. § 133.03	(2) Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce is guilty of a Class H felony, except that, notwithstanding the

			maximum fine specified in s. 939.50(3)(h), the person may be fined not more than $100,000 if a corporation, or, if any other person, may be fined not more than $50,000.