PRELIMINARY DRAFT

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

FROM: **NYSBA Class Action Committee**

RE: **Proposal to Amend the Donnelly Act to Provide for Treble Damages Class Actions**

DATE: **October 5, 2018**

I. Introduction

New York has one of the most robust state antitrust statutes in the country: the Donnelly Act. But the Court of Appeals ruling in *Sperry v. Crompton Corp.*[1] effectively denies consumers a New York forum to hear their claims under the Act. The Legislature can remedy the problem by amending the Act to explicitly provide plaintiffs with a private right of action to pursue class actions for treble damages.

In *Sperry*, the Court of Appeals held that C.P.L.R. § 901(b) prohibits an injured party from pursuing a class action for treble damages under the Donnelly Act in state court. As discussed below, the practical effect of *Sperry* has been to create an absolute bar on class actions enforcing the Donnelly Act in state court. Given the exorbitant expenses associated with pursuing private antitrust litigation, actions filed by individual plaintiffs challenging unlawful anticompetitive conduct are often negative-value cases, *i.e.*, cases in which each class member's interest in the litigation is less than the cost to maintain an individual action.[2] Put simply, without resort to the

[1] 8 N.Y.3d 204 (2007).

[2] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 130 (2d Cir. 2013) ("[C]lass actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the

class action device, most antitrust violations will go unprosecuted and most victims will be devoid of any remedy for their loss.

The inability to proceed on a class basis has particular significance for New York consumers who typically suffer relatively small individual damages from price-fixing or other anticompetitive misconduct. In many instances, consumers do not purchase directly from the price-fixer, and are therefore barred from seeking damages under federal antitrust law.[3] By contrast, New York has enacted an *Illinois Brick* repealer provision which enables consumers to sue under the Donnelly Act (and recover treble damages) even if the consumer did not purchase directly from the antitrust violator.[4] In enacting this statute, the New York legislature made a policy decision to expand the remedies of the Donnelly Act to consumers.[5] For the reasons discussed below, the *Sperry* decision threatens to both gut private plaintiffs' statutory right to enforce the Donnelly Act and fundamentally undermine the intent and purpose of New York's *Illinois Brick* repealer provision. To address these concerns, we recommend amending the Donnelly Act to explicitly

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expected recovery.") (citing *Amchem*, 521 U.S. at 617); *In re Namenda Direct Purchaser Antitrust Litig.*, 2018 U.S. Dist. LEXIS 140768, at *143–44 (S.D.N.Y. Aug. 2, 2018) (citing *Royal Park Invs. SA/NV v. Wells Fargo Bank, N.A.*, 2018 U.S. Dist. LEXIS 9087 (S.D.N.Y. Jan. 10, 2018)). *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); 1 NEWBERG ON CLASS ACTIONS § 1.7 (quoting same) (5th ed. 2011).

[3] *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[4] N.Y. G.B.L. § 340(6).

[5] *See* Bill Jacket, L.1998, c. 653, Memo. by Assemblyman Richard L. Brodsky ("One of the ironies of the business law is that although a consumer is the individual most directly affected by unwarranted restraints of trade or monopolies, the consumer is without recourse against these activities in cases where she/he has purchased goods through a retail establishment. . . . This legislation would allow the ordinary consumer to sue and collect damages from parties whose trade practices have injured them.") (on file with the NYAG Law Library).

provide victims of unlawful antitrust violations with the right to obtain recovery for treble damages on a class-wide basis.

II. Background

A. Under *Sperry,* New York Plaintiffs May Not Bring Antitrust Class Actions for Treble Damages in State Court

In 1899, New York passed the Donnelly Act—the state's "little Sherman Act."[6] The Committee of the Legislature that drafted the Act announced that it did so to protect New Yorkers' "property," "pursuit of happiness" and "opportunities" from "combinations" that "[have] for [their] purpose the repression of competition or the control of product or market."[7]

Under current law, however, New York consumers may not bring a class action for treble damages to vindicate their rights under the Donnelly Act in state court. In 1975, the Legislature passed CPLR Section 901, which has two parts. The first, Section 901(a), provides the elements of a class action much like those in Federal Rule of Civil Procedure 23. When New York's Legislature passed the rule, the Governor praised the Legislature for sending him a "strong class action statute."[8] But the second part, Section 901(b), curtails New Yorkers' right to bring a class action, providing that, "[u]nless a statute creating or imposing a penalty . . . *specifically authorizes the recovery thereof in a class action*, an action to recover a penalty . . . created or imposed by statute may not be maintained as a class action."[9]

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[6] *See Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988).

[7] Report of Joint Committee to Investigate Trusts (Mar. 9, 1897), at 5, 9.

[8] Memo. of Governor Carey, McKinney's Session Laws of New York 1748 (1975) (on file with New York State Office of the Attorney ("NYAG") General Law Library) ("This bill provides the people of New York with the type of strong class action statute which I have repeatedly requested").

[9] N.Y. C.P.L.R. §901(b) (emphasis added).

The Donnelly Act does not "specifically authorize" a class action recovery. But the same legislative session that enacted Section 901 amended the Donnelly Act to add a treble damages remedy.[10] The Donnelly Act now provides that "any person" harmed by a violation "shall recover three-fold the actual damages sustained thereby."[11] The history of the amendment reflects the Legislature's understanding that "[i]ncreasing the civil and criminal penalties for monopolistic practices should provide a more effective deterrent to such unlawful activities."[12] Upon signing the bill into law, Governor Carey issued a statement that "[t]he purpose of this bill is to increase the deterrent effect of the State's anti-trust laws by increasing the criminal penalties for violations of their provisions and by providing for the recovery of treble damages and increased costs in civil actions. . . . It will provide an effective and meaningful deterrent to anti-trust violations under State law."[13]

Just two years later, the Supreme Court issued the decision in *Illinois Brick*, declaring that only plaintiffs who purchased products or services directly from the defendant may seek antitrust damages under the federal antitrust laws.[14] Although the Supreme Court ruled in 1989 that federal antitrust laws do not preempt state laws and that states are free to permit antitrust suits by indirect purchasers,[15] it was another decade before New York took up the invitation to do so. In 1998, New

[10] McKinney's Session Laws of New York 498 (1975).

[11] N.Y. G.B.L. § 340(5).

[12] Budget Report on Bills, Assembly Bill 3546 (June 17, 1975) (on file with NYAG Law Library).

[13] Approval of Governor Carey, McKinney's Session Laws of New York 1751 (1975) (on file with NYAG Law Library).

[14] 431 U.S. 720, 744–47 (1977).

[15] *California v. ARC Am. Corp*, 490 U.S. 93 (1989).

York passed an *Illinois Brick* repealer provision, allowing indirect purchasers to sue under the Donnelly Act.[16] The Legislature's express intent was to provide a damages remedy to consumers.[17]

The New York Court of Appeals decision in *Sperry* eliminates that right and undermines that purpose. In *Sperry*, the court considered whether the Donnelly Act's treble damages provision is "punitive" for purposes of Section 901(b) such that a class action seeking treble damages under the Donnelly Act is prohibited.[18] The court found that though one-third of treble damages might be compensatory, the other two-thirds punish or deter defendants, or encourage plaintiffs to initiate suit.[19] Thus, the Donnelly Act claim was "an action to recovery a penalty," Section 901(b)'s bar on class actions applied, and the court required the plaintiff to proceed on an individual basis.[20] If New York prefers a different outcome, the court said, then "it lies with the Legislature to decide whether class action suits are an appropriate vehicle for the award of antitrust treble damages."[21]

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[16] N.Y. Gen. Bus. Law § 340(6) ("In any action pursuant to this section, the fact that the state, or any political subdivision or public authority of the state, or any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery; provided, however, that in any action in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions. In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.")

[17] *See* Bill Jacket, L.1998, c. 653, Brodsky memo, *supra* n.5.

[18] 8 N.Y.3d at 209.

[19] *Id.* at 214.

[20] The court held that because the Donnelly Act is "already designed to foster litigation through an enhanced award"—*i.e.*, treble damages—there is no need to allow a class action, which similarly "incentivize[s] plaintiffs to sue." *Id.* at 214.

[21] *Id.* at 213.

In sum, New York plaintiffs are prohibited from bringing a class action for treble damages under the Donnelly Act. Notably, the *Sperry* court "decline[d] to reach the issue of whether a plaintiff may maintain a class action under the Donnelly Act by forgoing treble damages in favor of actual damages."[22] The court found that the issue was not properly before it because the plaintiff "sought treble damages throughout this litigation" and had "not previously attempted to waive them to pursue only actual damages." *Sperry* at 215. Other appellate courts in New York, however, had already held that plaintiffs may *not* waive Donnelly Act treble damages.[23]

B. Under *Shady Grove*, Class Actions That Are Barred in NY State Court Under C.P.L.R. § 901(b) May be Permitted to Proceed in Federal Court Pursuant to Fed. R. Civ. P. 23

In certain instances, New York plaintiffs may prosecute claims under the Donnelly Act in federal court.[24] Multiple courts have found that, under the Supreme Court's decision in *Shady*

[22] *Id.* at 215.

[23] *See, e.g.*, *Rubin v. Nine W. Grp.*, No. 0763/99, 1999 N.Y. Misc. LEXIS 655, at *8 (Sup. Ct. Aug. 24, 1999) (finding treble damages mandatory because the statute provides that plaintiff "shall" recover treble damages"); *Asher v. Abbott Labs.*, 290 A.D.2d 208, 208 (1st Dep't 2002) (Donnelly Act treble damages "cannot be waived"); *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 206 (1st Dep't 2002) (Donnelly Act treble damages are "mandatory"); *accord Cunningham v. Bayer AG*, 2005 NY Slip Op 9449, ¶ 1, 24 A.D.3d 216, 216 (1st Dep't 2005). The case law recognizes that the Donnelly Act also fails to satisfy Rule 901(b)'s carve out because it "does not specifically authorize the recovery of this penalty in a class action." *Paltre v. Gen. Motors Corp.*, 2006 NY Slip Op. 1474, ¶ 2, 26 A.D.3d 481, 483 (2d Dep't 2006). A plaintiff's willingness to waive treble damages may also call into question his adequacy as a class representative. *Russo & Dubin v. Allied Maint. Corp.*, 407 N.Y.S.2d 617, 621 (Sup. Ct. NY Cty. 1978).

[24] Plaintiffs may litigate state-law antitrust and consumer protection claims in federal court either via the federal supplemental-jurisdiction statute, 28 U.S.C. § 1367, or the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711–1715. However, absent supplemental jurisdiction, federal jurisdiction does not extend to an entirely intrastate injury—that is, where the defendant's violation does not implicate interstate commerce. Accordingly, an amendment to the Donnelly Act is needed in order to provide injured plaintiffs with a mechanism to redress anticompetitive conduct perpetrated by a New York resident and affecting only New York residents.

Grove, Donnelly Act claims may proceed as class actions in federal court.[25] But for the reasons discussed below, *Shady Grove* does not provide New York consumers with a reliable remedy.

The question in *Shady Grove* was whether a federal class action under Rule 23 seeking statutory damages pursuant to a New York insurance statute would be barred by C.P.L.R. § 901(b). In a plurality decision, the Supreme Court concluded that Rule 23 trumped, and that § 901(b) did not bar a class action in federal court seeking statutory damages pursuant to New York's insurance statute.

The concurrence by Justice Stevens, which many view as the controlling opinion in the case,[26] acknowledged the difficulty of the question before the Court. New York's Section 901(b), Stevens observed:

> expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State. . . . It is therefore hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies.[27]

Justice Stevens concluded that the legislative history confirmed that the New York Legislature had made "a policy judgment about which lawsuits should proceed in New York courts

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[25] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). *See, e.g., In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 661 (E.D. Mich. 2011) (finding that Defendants' argument—that Plaintiffs' Donnelly Act claims must be dismissed because they could not waive treble damages—"was well taken when their brief was filed," but "has since been undermined by the Supreme Court's decision in *Shady Grove*" and "is no longer barred by § 901(b)"); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2010 U.S. Dist. LEXIS 97398, at *30 (N.D. Cal. Aug. 4, 2010) (same).

[26] *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (citation and internal quotation marks omitted).

[27] *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring).

in a class form and which should not," rather than attempting to impose an effective limitation on recoverable statutory damages.[28] Critically, Justice Stevens opined that, where the state rule at issue was "'procedural' in the ordinary sense of the term, but sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way."[29] But, Justice Stevens saw it, § 901(b) was not sufficiently "intertwined" with a New York right or remedy and, therefore plaintiffs were permitted to pursue their New York claim as a class action in federal court as permitted by Rule 23.

Post-*Shady Grove*, several federal courts have held that class plaintiffs can pursue Donnelly Act claims in federal court, and some have even suggested that *Shady Grove* constitutes "a general preemption of § 901(b)."[30] We are not aware of a single case post-*Shady Grove* that has held that § 901(b) precludes plaintiffs from bringing a class action under the Donnelly Act in federal court. But there are reasons to believe that these decisions do not reliably ensure New York consumers a federal forum. Despite the holding of several district courts, the Supreme Court has not applied Justice Stevens's test for "interwoven" statutes to the relationship between § 901(b) and the Donnelly Act; no opinion in *Shady Grove* garnered a clear majority of the Court; and in the eight

[28] *Id.* at 433–34 (Stevens, J., concurring).

[29] *Id.* at 429 (Stevens, J., concurring).

[30] *See In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 679 (E.D. Pa. 2010) (holding that Rule 23, not Section 901(b), applies to Donnelly Act class actions in federal court) (citing *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 2010 U.S. Dist. LEXIS 97398, at *30–33 (N.D. Cal. Aug. 4, 2010)). *See also In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 661 (E.D. Mich. 2011) (making the same holding and citing *Wellbutrin*, *SRAM*, and *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380 (E.D. Pa. 2010)).

years since the *Shady Grove* decision, the composition of the Supreme Court has changed dramatically.[31]

III. Argument

The Donnelly Act should be amended to expressly provide for a private right of action for class action damages for at least three reasons. First, by prohibiting class actions for treble damages under the Donnelly Act, *Sperry* effectively prohibits any class action filed in state court that asserts a claim under the Donnelly Act, irrespective of whether plaintiffs seek treble damages. Because most antitrust claims are too small to cover the costs of suit if pursued individually, Sperry's bar of private class actions enforcing the Donnelly Act effectively eliminates all enforcement of New York's antitrust laws in state court. Second, the unavailability of class actions under the Donnelly Act renders New York's *Illinois Brick* repealer provision a dead letter at least insofar as Donnelly Act claims are pursued in state court. In other words, *Sperry* not only undermines the broad purposes of the Act as a whole, but it effectively nullifies the *Illinios Brick* repealer provision that the Legislature passed specifically to protect and compensate New York consumers. Third, the potential availability of a federal forum to prosecute Donnelly Act claims on a class-basis does not suffice. New Yorkers should be empowered to protect their rights in a New York court.

A. Amending the Donnelly Act to Explicitly Provide for the Right of Private Plaintiffs to Bring a Class Action for Treble Damages is Necessary to Give Force and Effect to the Act

By prohibiting class actions for treble damages under the Donnelly Act, *Sperry*'s construction of Section 901(b) effectively prohibits private enforcement of the Donnelly Act in state court because most antitrust claims are "negative value": without aggregating claims, the amounts at issue, even if trebled, are frequently too small to provide plaintiffs with the means and

[31] *See infra*, § III.C.

incentive to file a lawsuit. Even though *Sperry* kept open the possibility that a party can bring a class action for single damages, the majority of decisions that have confronted this issue have held that treble damages under the Donnelly Act cannot be waived. Although the Court of Appeals in *Sperry* reserved the question of whether Donnelly Act treble damages are waivable, no state court since *Sperry* has permitted a class action asserting Donnelly Act claims to proceed.[32] Regardless, neither a single damages class action nor an individual action for treble damages provides sufficient incentives for private plaintiffs to vindicate their rights under the Act to seek redress for injury caused by anticompetitive conduct. Absent amendment, many Donnelly Act claims will go unprosecuted, harms will go unremedied, and future anticompetitive conduct will go undeterred.

Sperry thus defeats the statutory purpose of the Donnelly Act—namely, to protect New Yorkers from harm. As the 1897 Report of New York's Joint Committee to Investigate Trusts explained:

> [I]t is [the State's] obvious duty . . . to protect every citizen in the pursuit of happiness, which means the protection of property on the one hand, and of work, that is, the ability to acquire property, on the other. . . . [W]hile the State should not impose any undue restraints upon its people or their opportunities, it should not permit others to impose any undue restraints upon its citizens.[33]

The Legislature also made it clear that the Act was intended to punish and deter wrongdoers:

> [T]he class of combinations herein criticised [sic] acts as a barrier to the free employment of capital in individual control or in moderate

[32] *See, e.g., Nine West*, 1999 N.Y. Misc. LEXIS 655, at *8; *Asher*, 290 A.D.2d at 208; Cox, 290 A.D.2d at 206; *Cunningham*, 24 A.D.3d at 216. As Justice Ginsburg noted in her dissent in *Shady Grove*, however, the Legislature likely did not intend this result, as the legislative history for Section 901(b) indicates that a "statutory class action for actual damages would still be permissible." 559 U.S. at 449 n.9 (quoting S. Fink, [Sponsor's] Memorandum, p. 2, Bill Jacket, L. 1975, Ch. 207).

[33] Report of Joint Committee to Investigate Trusts (Mar. 9, 1897), at 9.

> and normal association . . . [and thus] imposes upon the State the duty of exercising *any prohibitive and punitive authority* it may possess to check the former.[34]

Since its passage, the Legislature has repeatedly amended the Act to reaffirm these statutory purposes. In 1975, it provided for treble damages, with the intent to "increase the deterrent effect of the State's anti-trust laws."[35] In 1998, it added the *Illinois Brick* repealer provision with the intent of providing a mechanism to compensate consumers. As one of the sponsors of the amendment stated, its purpose was to correct "[o]ne of the ironies of the business law": that "a consumer is the individual most directly affected by unwarranted restraints of trade or monopolies" but is "without recourse" if he is an indirect purchaser.[36]

Class actions for treble damages are necessary to achieve each of the Legislature's objectives: protecting and compensating victims, deterring future wrongdoers, and punishing violators. *Sperry* defeats these objectives. Absent amendment, the Donnelly Act as interpreted by *Sperry* allows for only one method for private enforcement in state court: an individual action for treble damages.

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[34] *Id.* at 35-36 (emphasis added).

[35] Approval of Governor Carey, McKinney's Session Laws of New York 1751 (1975) (on file with NYAG Law Library); *see also* Budget Report on Bills, Assembly Bill 3546 (June 17, 1975) (on file with NYAG Law Library) ("Increasing the civil and criminal penalties for monopolistic practices should provide a more effective deterrent to such unlawful activities."). *See also Sperry*, 8 N.Y.3d at 214 (describing three purposes of treble damages as punishment, deterrence, and encouraging suit). Of course, the Legislature declined to add a class action mechanism in 1975—despite having passed 901(b), which requires that a statute "specifically authorize" a class action, in the same legislative term—a fact the *Sperry* court found to be a compelling reason not to imply one. *See* 8 N.Y.3d at 212 ("Within weeks of passage of the class action statute, the Legislature undertook to amend the Donnelly Act. . . .").

[36] *See* Bill Jacket, L.1998, c. 653, Memo. by Assemblyman Richard L. Brodsky (on file with the NYAG Law Library).

1. Eliminating Class Action Enforcement of the Donnelly Act Has Impeded Injured Parties from Seeking to Redress their Claims in State Court and Runs Contrary to the Legislature's Stated Goals of Deterring and Punishing Anticompetitive Conduct.

Limiting private enforcement of the Donnelly Act to individual actions, even with treble damages, dramatically reduces the incentives and more importantly the ability of plaintiffs to vindicate their statutory rights. This is because even after trebling, antitrust damages are frequently too small to incentivize counsel to bring suit. Individuals harmed by antitrust violations frequently suffer damages to the tune of $1, $10, or $100. Yet antitrust cases often take many years to litigate[37] and cost millions of dollars – expert costs alone can outstrip the possible recovery.[38] Even a significant claim of $1 million – more than many individuals make in a lifetime – will often not provide sufficient incentive to sue. Competent counsel will only take on a case if the potential

[37] *See* Daniel Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 675, 692 (2010) ("[T]he average private antitrust lawsuit today takes over six years to disposition" and "[t]he Georgetown study of private antitrust litigation conducted in the early 1980s found that antitrust cases take, on average, about three times longer than other federal cases from initiation of the lawsuit to disposition.").

[38] Amicus Br. for United States, *Am. Express Co. v. Italian Colors Rest.*, No. 12-133, at 4, 7, 22–26 (U.S. Jan. 2013) (discussing respondents' uncontested evidence that costs of retaining experts would exceed potential recovery by hundreds of thousands of dollars). *See also In re Packaged Ice Antitrust Litig.*, Case No. 08-md-01952, 2011 U.S. Dist. LEXIS 150427, at *76 (E.D. Mich. Dec. 13, 2011) (describing an antitrust action as "arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome.") *Rochester Drug Co-Operative, Inc. v. Warner Chilcott Co. (In re Loestrin 24 Fe Antitrust Litig.)*, 814 F.3d 538, 552 (1st Cir. 2016) ("[A]ntitrust litigation often requires an 'elaborate inquiry into the reasonableness of a challenged business practice' and, as a result, is 'extensive and complex.'") (quoting *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982)); *Atl. Textiles v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.)*, 505 F.3d 274, 288 (4th Cir. 2007) ("Antitrust is a complex area of the law, and antitrust trials (or arbitration proceedings) can be long and involved."); *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) ("[W]hether a company's action constitutes an antitrust violation is usually a complicated question of fact. The law that then applies to those facts is equally complex."); *Lake Comm., Inc. v. ICC Corp.*, 738 F.2d 1473, 1479 (9th Cir. 1984) ("Moreover, antitrust cases are usually complex and the evidence extensive and diverse . . .") (internal citation and quotation marks omitted).

recovery is large enough to warrant his or her time, but 33% of a $300 recovery will not cover the costs of suit.[39] In short, with few exceptions, limiting antitrust recovery to individual actions for treble damages does not "foster litigation through an enhanced award," as the *Sperry* court assumed.[40]

The inability of private plaintiffs to enforce their statutory rights under the Donnelly Act severely undermines the purpose of the statute for at least two important reasons. First, the inability to bring a class action to enforce the Donnelly Act is likely to leave victims uncompensated. As it is, many antitrust violations go undetected and unprosecuted.[41] Absent an effective private enforcement mechanism, unlawful monopolists and cartelists are more likely to retain the fruits of their unlawful conduct.[42] Even where the government brings an action, such

[39] *See, e.g.*, *Eisen*, 417 U.S. at 161 ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that [such a] suit proceed as a class action or not at all."). *See also* 1 Newberg on Class Actions § 1.7 (quoting same) (5th ed. 2011); *In re Namenda*, 2018 U.S. Dist. LEXIS 140768, at *143–44; *Amchem*, 521 U.S. at 617; *In re U.S. Foodservice*, 729 F.3d at 130. Granted, the Donnelly Act provides for attorney's fees separate from the recovery. N.Y. G.B.L. §340(5). But a court may be reluctant to award fees that exceed the award to plaintiff and counsel is unlikely to take a case if his fee is capped at the size of the individual plaintiff's award.

[40] 8 N.Y.3d at 214.

[41] *See, e.g.*, Connor, John M. and Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 465 (2012) (describing a model of cartel detection in which they assume "a relatively high" 25% to 30% probability that cartels will be detected).

[42] In many instances, private enforcement is the only available means to redress an antitrust violation. Government enforcement is "inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations." Spencer Weber Waller, Symposium: Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust, 78 Chi.-Kent. L. Rev. 207, 211 (2003). Government objectives also shift over time, resulting in uneven enforcement of certain antitrust provisions. *Id*. at 230 ("For ideological reasons, budgetary constraints, and staff workloads, cases may never be brought that would have been a front-burner issue at another time.").

actions rarely provide compensation to victims, in part because courts and prosecutors assume that private litigants will supplement the work done by government enforcers.[43] If counsel are not incentivized to bring these claims, victims will not be made whole.

Second, if private plaintiffs and their counsel are not able or incentivized to bring suit, antitrust violators will not be deterred from engaging in anticompetitive conduct. As Professors Areeda and Hovenkamp have noted, if damages can be trebled but not aggregated, "a malefactor may greatly profit from its antitrust violation at the expense of numerous victims whose individual treble damage recoveries would be too small to warrant suit."[44] Antitrust violators will have little to fear from a smattering of individual plaintiffs suing for triple their $10 or $100 harm. And while the Donnelly Act does provide for criminal enforcement,[45] the government's resources are limited.

Beyond providing private plaintiffs with the means and incentive to vindicate their statutory rights, permitting private plaintiffs to pursue class action claims under the Donnelly Act

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[43] *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *see also* Antitrust Modernization Commission, Report and Recommendations 241 (2007) ("The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs."); *see, e.g.*, *New York v. Feldman*, 210 F. Supp. 294, 302 n.4 (S.D.N.Y. 2002) (noting that the Donnelly Act does not authorize the Attorney General to recover restitution); Tr. of Sentencing Hr'g at 10, ECF No. 12 (Nov. 14, 2011), *United States v. Furukawa Elec. Co.*, Case No. 11-20612 (E.D. Mich.) ("The Court: And because there are civil causes of action available to the victims of this violation, the Court would not be ordering any restitution as a part of the sentence. You understand that? The Interpreter: Yes, Your Honor."); Judgment at 3, ECF No. 11 (Nov. 14, 2011), *Furukawa*.

[44] Areeda, Phillip E. & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 331 (3rd and 4th Editions, 2018 Cum. Supp. 2010-2017).

[45] N.Y. G.B.L. § 347 ("The attorney general may prosecute every person charged with the commission of a criminal offense in violation of the laws of this state, applicable to or in respect of the practices or transactions referred to in this article.").

will result in myriad benefits. For instance, class actions allow for fair distribution of compensation among victims, thus eliminating the risk that well-funded corporate plaintiffs will receive a disproportionate share of the recovery.[46] Class actions also benefit defendants by allowing parties to achieve efficiencies, certainty and closure on what could be hundreds or thousands of separate claims.[47] Class actions also benefit defendants by limiting forum shopping: without an aggregate procedure, plaintiffs may bring test cases in multiple jurisdictions, creating the risk of inconsistent results. The state foregoes these benefits if the only remedy available is an individual action for treble damages.

2. The Class Action Mechanism And Treble Damages Remedy Are Not Duplicative.

The *Sperry* court refused to imply a class action remedy into the Donnelly Act in part because it found the class action mechanism and the treble damages remedy to be redundant, as each addressed the same policy end of incentivizing litigation.[48] This echoes the concern of legislators and lobbyists in support of Section 901(b) that the statute was necessary because aggregated punitive damages would provide a "windfall" to plaintiffs[49] or result in "annihilating"

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[46] *See* 1 Newberg on Class Actions § 1.7 (5th ed. 2011) ("Because class actions enable wide participation of class members in aggregate settlements or judgments, compensation is spread more broadly throughout a class of similarly situated consumers. With individual litigation alone, a few may benefit but most will not; with class actions, a far wider group will benefit, ensuring a fairer distribution of compensation.").

[47] Although, as noted, plaintiffs are unlikely to proceed individually absent a class mechanism, defendants still may find multiple small cases to be a nuisance. Plus, as noted, the Donnelly Act provides for attorneys' fees, which may be sufficient incentive for the attorney if not the client. N.Y. G.B.L. § 340(5).

[48] 8 N.Y.3d at 213.

[49] Memorandum from Sanford H. Bolz, General Counsel, Empire State Chamber of Commerce, to N.Y. State Sen. and Assembly Codes Committees at 1 (Feb. 14, 1975) (on file with NYAG Law Library).

punishments for defendants.[50] New York is not alone; nearly a dozen states prohibit class actions, either broadly or for consumer claims,[51] and a dozen more have failed to pass *Illinois Brick* repealer provisions and, thus, effectively prohibit indirect purchaser class actions.

Concerns of overenforcement of the Donnelly Act are unjustified. In fact, it is likely that antitrust laws are ***underenforced*** because violations go undetected (due to the difficulty of uncovering secret conspiracies) [52] and unremedied (due to limited enforcement resources, the cost and uncertainty of litigation, and other limitations).[53] Further, the rationales for the class action mechanism and treble damages remedy overlap in some ways but not in others. Either by itself is likely inadequate to deter violators or compensate victims.

B. Allowing for Class Action Enforcement Under the Donnelly Act is Necessary to Give Effect to New York's *Illinois Brick* Repealer Amendment.

The fact that *Sperry* denies any effective recourse under the Donnelly Act to New Yorkers is especially apparent in the context of N.Y. G.B.L. § 340(6), New York's *Illinois Brick* repealer amendment. The Legislature amended the Act to add this provision with the express intent of providing a remedy for consumers denied a federal forum by the Supreme Court's decision in

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[50] *Id.* at 2.

[51] These states include: Alabama (Ala. Code § 8-19-10(f)); Georgia (Ga. Code § 10-1-399(a)); Iowa (Iowa Code § 714.16 (providing that the statute is enforceable only by the state's attorney general); Louisiana (La. Stat. Ann. § 51:1409(a)); Mississippi (Miss. Code Ann. § 75-24-15(4)); Montana (Mont. Code Ann. § 30-14-133); South Carolina (S.C. Code Ann. § 39-5-140(a)); Tennessee (Tenn. Code § 47-18-109(g)); Virginia (*see Pearsall v. Va. Racing Comm'n*, 494 S.E.2d 879, 883 (1998)).

[52] *See, e.g.*, Connor and Lande, *supra* n.41.

[53] *See, e.g.*, Sullivan, C., *Breaking up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 Seton Hall L. Rev. 17, 62 (1983) ("[T]he class of antitrust plaintiffs is almost always less than the class of antitrust victims. Further, the recovery of antitrust damages is likely to be less than the amount of harm caused by the violation. As a result, an award to plaintiffs, even if treble their damages, will rarely exceed the defendants' wrongful gain.").

Illinois Brick. Yet without *both* the class action remedy and the availability of treble damages, most claims under the *Illinois Brick* repealer provision will go unprosecuted in state court.

This outcome is antithetical to the Act's *Illinois Brick* repealer amendment. As discussed above, the Supreme Court's decision in *Illinois Brick* prohibits indirect purchasers from recovering under the Sherman Act.[54] In response to *Illinois* Brick, New York's Legislature expressly created a private right of action for indirect purchasers to recover for damages resulting from anticompetitive conduct. The Legislature enacted this *Illinois* Brick repealer amendment in order to "allow the ordinary consumer to sue and collect damages from parties whose trade practices have injured them."[55] At least one court in New York has recognized that the *Illinois Brick* repealer provision is "hollow in effect" without a class action mechanism.[56] Yet courts have refused to imply a right to a class action under the Donnelly Act, citing the language of GBL Section 340 and CPLR Section 901(b), as well as the Legislature's failure to add a class action mechanism despite several other amendments to the Donnelly Act.[57]

Amending the Donnelly Act to expressly authorize the right of private plaintiffs to bring a class action for treble damages is the only way to give the *Illinois Brick* repealer provision full force and effect. Likewise, empowering New York consumers to bring actions under the *Illinois Brick* repealer provision ensures that the Donnelly Act will maintain the remedial and deterrent effects that its drafters intended.

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[54] 431 U.S. 720, 744–47.

[55] Bill Jacket, L.1998, c. 653, Brodsky Memo.

[56] *Lennon v. Philip Morris Cos.*, 734 N.Y.S.2d 374, 381 (Sup. Ct. NY Cty. 2001).

[57] *Id.*

C. Amendment is Necessary to Ensure that Injured New Yorkers can Vindicate their Statutory Rights in a New York Court

Finally, amendment is necessary to ensure that New York consumers have a forum to redress antitrust harms they suffer. While there may be a pathway for private enforcement of the Donnelly Act through the class action device in federal court as a result of the *Shady Grove* plurality decision,[58] such a pathway is uncertain at best for at least three reasons.

First, *Shady Grove* is not directly on point. If Justice Stevens' concurrence is in fact the law, it is unclear whether CPLR §901(b) is more or less "intertwined" or "interwoven"[59] with the Donnelly Act than with the insurance penalty at issue in *Shady Grove*.[60] One might argue that because Section 901(b) effectively denies a class action on behalf of indirect purchasers, it is interwoven with the Donnelly Act sufficiently to deny the availability of a Rule 23 class action in federal court. Of course, the plurality is only that—a plurality.

Second, and relatedly, a Supreme Court case is always subject to overruling, reinterpretation or reversal. That is particularly the case given that Justices Scalia, Stevens, and Kennedy are no longer on the court. If *Shady Grove* were overruled or reinterpreted, New York indirect purchasers may well be denied a federal forum to redress. Since *Sperry* denies them a state forum, they would be utterly without a remedy, thus making New York's *Illinois Brick* repealer provision a dead letter.[61]

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[58] *See supra* § II.B.

[59] *See Shady Grove*, 559 U.S. at 423, 428, 429 (Stevens, J., concurring).

[60] As noted, post-*Shady Grove*, several federal courts have held that class plaintiffs could pursue Donnelly Act claims, or have even suggested that *Shady Grove* constitutes "a general preemption of § 901(b)." *See supra* n.30.

[61] One other consideration is that even if *Shady Grove* stands, it encourages forum shopping, as the majority decision admitted. 559 U.S. at 415–16. Amending the Donnelly Act to provide for a

In any event, New Yorkers who are injured by an antitrust conspiracy should not have to rely on federal rather than state procedure in order to vindicate their rights under the Donnelly Act. A New York forum should always be available for that purpose.[62]

IV. Conclusion

For the reasons set forth herein, we propose the following amendment to New York General Business Law § 340(5):[63]

> 5. An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued. The state, or any political subdivision or public authority of the state, or any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees. **Any person may sue as a representative party on behalf of all members of a class, pursuant to article 9(a) of the Civil Practice Law and Rules, without affecting the availability of three-fold damages as described in this subpart.** At or before the commencement of any civil action by a party other than the attorney-general for a violation of this section, notice thereof shall be served upon the attorney-

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class action for treble damages will bring the state and federal antitrust regimes into closer alignment and reduce this risk.

[62] One possible counterargument is that the attorney general's *parens patriae* authority provides sufficient relief for New York consumers. N.Y. G.B.L. §§ 342, 342-a, 342-b. As we discuss in a separate memo, however, the Donnelly Act does not expressly permit the State Attorney General to seek monetary damages on behalf of consumers and the courts are split as to whether such a right exists. Regardless, it is well recognized that effective enforcement of the antitrust laws requires private plaintiffs to supplement government enforcers as "private attorneys general." *See, e.g.*, *Reiter*, 442 U.S. at 344 (1979) ("[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.")

[63] The Assembly considered a similar amendment in 2009 and 2015. *See* 4D N.Y. Prac., Comm. Litig. in N.Y. State Courts § 101:39 (4th ed.), *Antitrust damages—Private class actions under the Donnelly Act*. In February 2017, the Assembly considered a proposal to add a subsection 340(7) providing that, "7. 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." 2017 Bill Text NY A.B. 5321.

general. Where the aggrieved party is a political subdivision or public authority of the state, notice of intention to commence an action under this section must be served upon the attorney-general at least ten days prior to the commencement of such action. This section shall not apply to any action commenced prior to the effective date of this act.