Experiments in the Lab:

Donnelly Act Diversions From Federal Antitrust Law

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Table of Contents

I. Introduction 1

II. Concerted Action 4

III. Group Boycotts 12

IV. Professional And Nonprofit Organizations 18

A. The Professional Exemption from the Donnelly Act 19

B. Treatment of Non-Professional Non-Profit Entities 27

C. The Differences Summarized 29

V. Antitrust and the State 30

A. Antitrust and State Action 31

B. Private Efforts to Influence State Action 38

VI. Merger Enforcement Under the Donnelly Act 44

VII. The Prohibition of Class Action "Penalty" Cases 52

A. CPLR 901(b)'s Application to the Donnelly Act 52

1. Exporting the Prohibition to Federal Cases 54

2. The *Shady Grove* Case 57

Justice Scalia' Opinion 59

Justice Ginsberg's Dissenting Opinion 60

Justice Stevens' Concurring Opinion 62

The Ruling's Impact on the Donnelly Act 64

B. Waiver of Treble Damages 65

1. Penalty Waivers Under the Donnelly Act and Other Statutes 66

2. Adequacy of a Class Representative Willing to Forego Penalties 69

VIII. Conclusion 71

Section Report
Experiments in the Lab: Donnelly Act Diversions From Federal Antitrust Law

Prepared by The Antitrust Committee

I. Introduction

Antitrust began in the States. In New York itself, protecting the competitive process, under the common law and through statutes, goes back at least two hundred years.[1] Bid-rigging was held to be "against public policy" as early as 1810.[2] In 1828 – more than 60 years before the Sherman Act – the New York legislature made conspiracy "to commit any act injurious to . . . trade or commerce" a misdemeanor.[3] A few years later, conspiracy to restrain trade in salt was also made criminal by statute.[4] During this same time period, at common law, price-fixing agreements by shippers on upstate canals were held to be void,[5] and thereafter restrictions on steamboat competition were invalidated.[6]

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1 *See generally* Jack Greenberg, *New York Antitrust Law and Its Role in the Federal System* ia, 1a – 5a, *reprinted in* Robert L. Hubbard & Pamela Jones Harbour, *Antitrust Law in New York State* 77 (2d ed. 2002) ("Greenberg, *New York Antitrust*," with book page in brackets).

2 *Doolin v. Ward*, 6 Johns. 194, 195 (Sup. Ct. N.Y. County 1810); *See also Wilbur v. How*, 8 Johns. 444 (Sup. Ct. N.Y. County 1811); *Atcheson v. Mallon*, 43 N.Y. 147 (1870).

3 2 R.S. 691, § 8(6) (enacted Dec. 10, 1828).

4 L. 1841, ch. 183, § 16; *See also Clancey v. Onondaga Fine Salt Mfg. Co*., 62 Barb. 395, 1862 WL 4637 (Sup. Ct. N.Y. County 1862) (agreement to increase the price of salt was illegal).

5 *Stanton v. Allen*, 5 Denio 434, 1848 WL 4511 (Sup. Ct. N.Y. County 1848). *See also Hooker & Woodward v. Vandewater*, 4 Denio 349, 1847 WL 4279 (Sup. Ct. N.Y. County 1847) (holding the price-fixing agreement illegal by statute).

6 *Watson v. Harlem & N.Y. Navigation Co*., 52 How. Prac. 348 (Sup. Ct. N.Y. County 1877).

Nationally, the first general purpose antitrust law was passed in Kansas in 1889, before the Sherman Act.[7] National legislation directed to preserving the competitive process was the by-product of agitation at the state level, where western and southern states took the lead.[8] By the time Congress passed the Sherman Act, some 20 states had antitrust statutes or constitutional provisions prohibiting or invalidating restraints of trade.[9] As Professor Hovenkamp has written, "the legislative history of the Sherman Act is replete with statements that the Act was designated to supplement rather than to abrogate existing state antitrust enforcement…."[10]

Flash forward 100-plus years. Today, federal antitrust law is regularly held out, either by virtue of statute or judicial decision, as the competition standard that state antitrust law should emulate. So, for example, in neighboring Connecticut, we find a statute directing that, "in construing" the state's antitrust provisions, "the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes."[11] In New York, the approach is a bit different, as the Court of Appeals has instructed that the state's antitrust statute, the Donnelly Act,[12] "should generally be construed in light of federal precedent and given a

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7 *See generally* Testimony of Lloyd C. Constantine before the Antitrust Modernization Commission at 2 (Washington, D.C. July 28, 2005), at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Constantine.pdf; Richard Franklin Bensel, *The Political Economy of American Industrialization* 1877-1900, at 338-39 (2000).

8 Hans B. Thorelli, *The Federal Antitrust Policy: Origination Of An American Tradition* 155 (1955) ("*Federal Antitrust Policy*"); Greenberg, *New York Antitrust* at 6a, n.42 [85].

9 Thorelli, *Federal Antitrust Policy* at 155; Greenberg, *New York Antitrust* at 6a; American Bar Association, Section of Antitrust Law, *Antitrust Federalism: The Role of State Law* 2-3 (1988).

10 Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 378 (1983). *See generally id.* at 379-84. *See also* 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman: the proposed legislation was intended to "supplement the enforcement of the established rules of the common law and statute law by the court of the several States").

11 Conn. Gen. Stat. § 35-44b.

12 N.Y. Gen. Bus. Law §§ 340 *et seq.*

different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result."[13]

In this paper, we examine several of these differences between New York state and federal antitrust law. Specifically, we discuss the following subjects, comparing treatment under New York's Donnelly Act to that under the federal Sherman or Clayton Acts: (1) the requirement of "concerted" action as an element of a restraint on trade violation; (2) treatment of group boycotts as an obstacle to free and open competition; (3) restraints by professionals and non-profit entities; (4) restraints arising from action by the State itself; (5) restrictions on mergers and acquisitions; and (6) the availability of class actions as a means to pursue antitrust claims.

We do not attempt here to detail every difference between state and federal antitrust law. For example, another significant difference concerns "vertical" price-fixing between a supplier and its customers, often referred to as retail price maintenance, or "RPM." The Supreme Court's 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[14] holds that RPM is subject to a rule of reason, rather than a *per se*, analysis.[15] *Leegin* reversed nearly 100 years of federal *per se* treatment,[16] and pre-*Leegin* Donnelly Act rulings in recent years have likewise applied the *per se* rule.[17] New York State's treatment of RPM in view of *Leegin* is the subject of a recent article, thus obviating a need to revisit the subject here.[18]

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[13] *People v. Rattenni*, 81 N.Y.2d 166, 171 (1993) (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988)).

[14] 551 U.S. 877 (2007).

[15] *Id.* at 878.

[16] *See Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[17] *See, e.g., George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 2 A.D.3d 1341, 1343 (4th Dep't 2003), *on remand*, 9 Misc. 3d at 155, 167-70 (declining to apply the rule of reason); *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 05-cv-3297, 2007 WL 963206, at *4 (E.D.N.Y. Mar. 28, 2007); *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762

(continued . . .)

Similarly, like many other states, New York has rejected the Supreme Court's *Illinois Brick*[19] "direct purchaser" rule, which holds that as a matter of federal law, only those who buy directly from (or sell directly to) an antitrust violator are entitled to sue for treble damages.[20] Countless papers have discussed this fundamental policy dispute during the 30 plus years since the Supreme Court's ruling.[21] Any contribution that we could make would be, at most, marginal. We explore, instead, differences less notorious, which may well go unappreciated.

II. Concerted Action

Section 1 of the Sherman Act states that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[22] This language requires (1) concerted actions, not unilateral activity – that is conduct in which two or more economically distinct persons participate, which (2) produce an *unreasonable* restraint on trade.[23] For a *single* firm to violate the Sherman Act, it must engage in acts that constitute or threaten

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(. . . continued)

(S.D.N.Y. 1980); *Uniroyal, Inc. v. Jetco Auto Serv., Inc.*, 461 F. Supp. 350, 357 & n.7 (S.D.N.Y. 1978).

18 *See* Jay L. Himes, *New York's Prohibition of Vertical Price-Fixing*, N.Y.L.J., Jan. 29, 2008, at 4.

19 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

20 *See* N.Y. Gen. Bus. Law § 340(6) (providing, in pertinent part, that in any Donnelly Act treble damages action, the fact that the plaintiff "has not dealt directly with the defendant shall not bar or otherwise limit recovery").

21 *See generally* ANTITRUST MODERNIZATION COMMISSION, *REPORT AND RECOMMENDATIONS* 265 (Apr. 2, 2007) (Chapter III.B – Indirect Purchaser Litigation); *See also* Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, 15 Antitrust 34 (Summer 2001).

22 15 U.S.C. § 1.

23 *See, e.g.*, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 766- 767 (1984); *Board of Trade of Chicago v. United States*, 246 U.S. 231, 237-38 (1918); *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 59-62 (1911).

monopolization, thus giving rise to a violation of Section 2.[24] Absent monopolization or attempted monopolization, single firm conduct is unobjectionable, regardless of the restraint that results.[25]

The Donnelly Act was patterned after Section 1 of the Sherman Act and likewise reaches only unreasonable restraints on trade.[26] However, the Donnelly Act contains different concerted action language. Specifically, the Act describes as "illegal":

> [e]very contract, agreement, *arrangement* or combination whereby a monopoly in the conduct of any business . . . may be established or maintained, or whereby competition or the free exercise of any activity in the conduct of any business . . . may be restrained or whereby for the purpose of establishing or maintaining any such monopoly . . . trade or commerce . . . may be restrained.[27]

There apparently is no relevant legislative history explaining inclusion of the term "arrangement," as part of the Sherman Act.[28] New York courts generally agree that the term

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[24] 15 U.S.C. § 2 ("Every person who shall monopolize or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony").

[25] *See, e.g.*, *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell").

[26] *See, e.g.*, *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 333 (1988) ("as construed by State and Federal courts, the antitrust laws prohibit only 'unreasonable' restraints on trade") (authorities omitted).

[27] N.Y. Gen. Bus. Law § 340(1) (emphasis added).

[28] In the leading historical study, Jack Greenberg wrote regarding the Donnelly Act's predecessor-statute, from which the Act's substantive provision was taken, that:

> The new statute did not merely condemn 'conspiracies' (under which contracts, agreements and combinations probably could be subsumed) as did 2 R.S. § 691, but also proscribed 'arrangements.' It also forbade . . . attempts to restrain trade; this, too, the conspiracy statute might not be able to reach. Substantive changes were, therefore, not very material.

(continued . . .)

renders the Donnelly Act broader in scope than its federal counterpart. Yet, it is unclear what conduct amounts to an "arrangement" that the Donnelly Act declares illegal, but that the Sherman Act does not reach.

The first decision to wrestle with the term "arrangement" was *People v. American Ice Co.*,[29] decided shortly after the Donnelly Act's enactment in 1899. There, the defendant was criminally charged with attempting to monopolize the ice industry by acquiring ice producers and distributors and obtaining non-compete agreements from them.[30] Explaining the term "arrangement" in a jury charge, the trial court wrote:

> In our judgment it has a broader meaning than either the word "contract," "agreement," or "combination." It may include each and all of these things, and more. . . . It is []defined 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." I think these definitions of the word "arrangement" are sufficient to convey to your minds what was meant and intended by the Legislature when it passed this act.
>
> It is the theory of the people in this case (and the indictment is drawn accordingly) that all the various contracts, agreements, acquisition of property and rights, by purchase or merger of other corporations, and the various acts set forth in the indictment and proven on this trial, constituted an "arrangement" within the meaning of the statute whereby a monopoly was created, or attempted, and competition restrained or attempted to be restrained.[31]

Similarly, in *Eagle Spring Water Co. v. Webb & Knapp, Inc.*,[32] the trial court granted an injunction against the defendant landlord, who sought to exclude the plaintiff's water delivery and installation personnel from entering its buildings because the landlord had an exclusive

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New York Antitrust at 12a [91]. No specific legislative history is cited, however. The "conspiracy statute" referred to, 2 R.S. § 691, prohibited conspiracies "injurious to . . . trade or commerce . . . ." n. 3. *See id.* at 2a [81]; text at n.3, above.

[29] 120 N.Y.S. 443, 450 (Sup. Ct. N.Y. County 1909).

[30] *See id.* at 447, 451.

[31] *Id.* at 449.

[32] 236 N.Y.S.2d 266 (Sup. Ct. N.Y. County 1962).

agreement with a rival water provider. The court said that "arrangement" "has a broader meaning than the words 'contract,' 'agreement' or 'combination,' and it may include each and all of these things and more – that is, all of the various acts, devices and agreements under which the participants are operating for the accomplishment of their purpose."[33]

Notably, in both *American Ice* and *Eagle Spring Water*, the defendant seemingly had actually made one or more agreements, which likely could have satisfied the Donnelly Act's "concert of action" element. Nevertheless, each court invoked the term "arrangement" to reach the restraint, and explicitly construed that term to cover conduct beyond "agreement."[34] In *Alexander's Department Stores v. Ohrbachs, Inc.*,[35] the court similarly concluded that "[a]n arrangement condemned by these statutes is unlawful even if it does not rise to the dignity of a contractual obligation." In short, the term expresses "extreme broadness of content."[36]

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[33] *Id.* at 275. *See also People v. Schwartz*, No. 1557/86, 1986 WL 55321, at *2 (Sup. Ct. Queens County Oct. 17, 1986) (citing *State v. Mobil Oil Corp.* 38 NY2D 460, 464 (N.Y. 1976) ("the sweep of the Donnelly Act is broader than the Sherman Act"); *H.L. Hayden Co. of NY, Inc. v. Siemens Medical Sys. Inc.*, 672 F. Supp. 724, 745 n.28 (S.D.N.Y. 1987), *aff'd*, 879 F.2d 1005 (2d Cir. 1989) ("the word "arrangement" in section 340 may include relationships beyond the "contract[s], combination[s], or conspirac[ies]" proscribed by section 1 of the Sherman Act, and, to that extent, the Donnelly Act may be slightly broader in scope."); *Harlem River Consumers Co-op., Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1283 (S.D.N.Y. 1976) ("The term 'arrangement' has been interpreted in a way which gives the Donnelly Act a scope somewhat broader than that of § 1 of the Sherman Act.") (citing *American Ice*, 120 N.Y.S. 443); *But see Nichols v. Mahoney*, 608 F. Supp. 2d 526, 545 (S.D.N.Y. 2009) (the Donnelly Act's use of the term "arrangement" does not broaden standing to sue beyond that recognized under federal law).

[34] *See People v. American Ice Co.*, 120 N.Y.S. 443, 449 (Sup. Ct. N.Y. County 1909); *See also Eagle Spring Water Co. v. Webb & Knapp, Inc.*, 236 N.Y.S.2d 266, 275 (Sup. Ct. N.Y. County 1962).

[35] 180 Misc. 18, 26 (Sup. Ct. N.Y. County 1943), *rev'd on other grounds*, 266 A.D. 535 (1st Dep't 1943), *appeal dismissed*, 291 N.Y. 707 (1943).

[36] Greenberg, *New York Antitrust* at 21a [100] (footnote omitted).

The New York Court of Appeals itself has addressed this aspect of the Donnelly Act only once. In *State v. Mobil Oil Corp.*,[37] the Court stated that:

> Although undoubtedly the sweep of Donnelly may be broader than that of Sherman, we conclude that under the familiar canon of statutory construction, *noscitur a sociis*, the term, 'arrangement', takes on a connotation similar to that of the other terms with which it is found in company, and thus must be interpreted as contemplating 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".[38]

By comparison, under federal antitrust law, the *Monsanto* standard for concerted action, at least where supplier-customer restraints are involved, requires "a conscious commitment to a common scheme designed to achieve an unlawful objective."[39]

While the Donnelly Act seems to be broader than Section 1 of the Sherman Act, applying the difference in specific cases is challenging. For example, in *U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers Local Union No. 3, AFL-CIO*,[40] the plaintiff contractors accused the defendants of excluding them from the low-voltage telecommunications and data wiring market. The Southern District of New York dismissed the Section 1 claim with prejudice on summary judgment because plaintiffs failed to meet the Supreme Court's "heightened standard" for proving a conspiracy under *Matsushita*.[41] There, the Supreme Court ruled that the plaintiff must present evidence that "tends to exclude the possibility that the

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[37] 38 N.Y.2d 460 (1976).

[38] *Id.* at 464 (emphasis added); *See also Harlem River Consumers Co-op*, 408 F. Supp. at 1283 ("[S]ome showing of concerted action is still an essential element of proof under this section."); *Otis Elevator Co. v. John J. Reynolds, Inc.*, 81 Misc. 2d 314, 315 (Sup. Ct. N.Y. County 1975) (because the Donnelly Act "prohibits only bilateral activity in restraint of trade," a "threat" by a supplier to cut-off a customer from supplies was not actionable).

[39] *Monsanto*, 465 U.S. at 764 (derived from *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (CA3 1980), *cert. denied*, 451 U.S. 911 (1981)).

[40] No. 00-civ-4763, 2007 WL 2219513 (S.D.N.Y. Aug. 3, 2007).

[41] *Id.* at *15; *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

alleged conspirators acted independently."[42] The Southern District then considered whether to dismiss the Donnelly Act claim as well:

> [I]t is not clear that the heightened standard for demonstrating an antitrust conspiracy that governs claims under § 1 of the Sherman Act also applies to the Donnelly Act. The parties have not identified a case from the New York state courts that establishes such a principle, and I have found none. It is therefore prudent to dismiss the Donnelly claims without prejudice.[43]

Thus, although the Sherman Act dismissal was with prejudice, the Donnelly Act dismissal was not – an implicit recognition that the State's antitrust law may impose liability where federal law does not.

One area in which the Donnelly Act may be more encompassing than the Sherman Act concerns dealings of affiliated business entities – typically between parent and subsidiary corporations, or between other entities under common ownership. The Supreme Court's *Copperweld*[44] decision held that a parent and its wholly-owned subsidiaries constitute a single economic entity, and, while separate legal "persons," nevertheless are incapable of satisfying the concerted action element of Section 1 of the Sherman Act. The courts apply this same principle under the Donnelly Act.[45] Where the ownership level is less than 100%, however, the concurrence of federal and state law is less pronounced.[46]

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42 *Matsushita*, 475 U.S. at 588.

43 *U.S. Info. Sys., Inc.*, 2007 WL 2219513, at *15.

44 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 762 (1984).

45 *See, e.g., N. Atl. Utils., Inc. v. Keyspan Corp.*, 307 A.D.2d 342 (2d Dep't 2003) (conspiracy may not be established between a parent and its wholly-owned subsidiaries), *leave to appeal denied*, 1 N.Y.3d 503, 775 N.Y.S.2d 780 (2003); *Barnem Circular Distribs., Inc. v. Distribution Sys. of Am., Inc.*, 281 A.D.2d 576, 577 (2d Dep't 2001) ("[a] parent corporation and its wholly-owned subsidiary are incapable of conspiring with each other").

46 *See Copperweld Corp.*, 467 U.S. 762, 765 (1984).

In *People v. Schwartz*,[47] the individual defendant, Schwartz, and three corporations of which he owned up to 75%, were charged under the Donnelly Act with conspiring to submit collusive bids to nursing homes, thereby subverting competitive bidding requirements. The trial court upheld the indictment despite a *Copperweld* argument. The court relied on the *Mobil Oil* court's discussion of "arrangement," quoted above, in holding that "even if corporations are wholly-owned, they will still fall under the Donnelly Act as individual economic entities."[48] As an alternative holding, however, the court noted that the indictment alleged a conspiracy involving a "second person" who had "no relationship with the defendant or his corporation. Such person is a legal entity independent of the defendants and this fact removes the case from the parent-subsidiary theory since there is no unity of purpose."[49]

Affirming the defendants' conviction, the Appellate Division wrote that Schwartz and his companies "entered into an arrangement with the administrator of the nursing home . . . whereby the bids of independent competitors were summarily rejected by the administrator in favor of the defendants' bids."[50] By this "arrangement with the administrator," the defendants "committed per se anticompetitive acts of bid rigging."[51] While the Donnelly Act's "arrangement" language appears to have formed a basis for the Appellate Division's ruling, the court seemingly could just as easily have described the relationship with the nursing home administrator as one of "agreement." This individual, a co-conspirator who testified under immunity, undoubtedly received money for participating in the scheme.

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[47] 1986 WL 55321, at *3, *conviction upheld*, 160 A.D. 2d 964 (2d Dep't 1990).

[48] *Id.* at *3.

[49] *Id.*

[50] 160 A.D.2d at 965.

[51] *Id.* (authorities omitted).

Bevilacque v. Ford Motor Co.[52] is another decision rejecting *Copperweld* where the subsidiary was less than wholly-owned, but nonetheless parent-controlled. Ford, the 78% owner, allegedly conspired with the subsidiary to prevent the minority owner from selling his interest, and then terminated him. By contrast, federal courts have applied *Copperweld's* "single entity" exclusion despite significantly lower ownership levels.[53] However, the federal cases clearly are not uniform on this point.[54]

One can debate the point at which less-than-100% ownership sufficiently dilutes both control-in-fact and economic unity-of-interest so as to make applying antitrust principles appropriate. The Donnelly Act's term "arrangement" could, arguably, provide a basis for choosing a higher, rather than lower, demarcation level. However, as one court has noted, "the *Copperweld* inquiry is more substantively about determining whether there existed control and a so-called 'unity of purpose' rather than the establishment of any magic number percentage of

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52 125 A.D.2d 516, 518-519 (2d Dep't 1986).

53 *See, e.g.*, *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997) (parent and its 51% owned subsidiary were incapable of conspiring); *Gucci v. Gucci Shops, Inc*., 651 F. Supp. 194 (S.D.N.Y. 1986) (where all the shareholders in one corporation were beneficial owners of the other, and a 50% owner of both corporations effectively controlled the business of both corporations, the entities were incapable of conspiring with each other; employees of the corporations were also incapable of conspiring with each other); *Novatel Commc'ns v. Cellular Tel. Supply*, No. Civ.A.C85-2674A, 1986 WL 798475, at *9 (N.D. Ga. Dec. 23, 1986) (a parent and its 51% owned subsidiary were legally incapable of conspiring; the subsidiary also was incapable of conspiring with a wholly-owned subsidiary of the same parent). *See also Leaco Enter., Inc. v. Gen. Elec. Co.*, 737 F. Supp. 605, 608-09 (D.Or. 1990) (*Copperweld* applies so long as the parent could effect the subsidiary's merger under applicable corporate law).

54 *See, e.g.*, *Rosen v. Hyundai Group (Korea)*, 829 F. Supp. 41, 45 n.6 (E.D.N.Y. 1993) (*Copperweld* did not apply where the parent owned 80% of subsidiary, and one of the parent's managing directors owned the remaining 20%); *Am. Vision Ctrs, Inc. v. Cohen*, 711 F. Supp. 721 (E.D.N.Y. 1989) (*Copperweld* did not apply where the defendants, who owned 54% of one publicly-traded company and 100% of another, allegedly prohibited the first company from competing with the second).

ownership."[55] By emphasizing a fact inquiry, such an approach suggests a reduced likelihood of dismissal at the motion to dismiss, rather than summary judgment stage. Moreover, were this analysis to take hold, it is not self-evident that the Donnelly Act's "arrangement" could identify those fact settings in which *Copperweld* does not apply better than the Sherman Act's "contract" or "combination" language. *Schwartz* aside, the case law to date does not generally invoke the Donnelly Act's unique terminology as the basis for whether to apply *Copperweld*.

Thus, while the Donnelly Act's concerted action element is broader than Section 1 of the Sherman Act, the circumstances in which a legally sufficient state antitrust claim can be proven, while a federal claim cannot, are elusive. This difference between state and federal antitrust law, although recognized, remains to be developed.

III. Group Boycotts

New York law differs from federal antitrust law in the standard applied to group boycotts, or concerted refusals to deal. New York law has consistently applied the rule of reason to group boycotts. Federal law, however, has evolved from the *per se* rule to an analysis of each alleged boycott on a case-by-case basis to determine whether *per se* or rule of reason treatment is warranted.

Under federal law, the United States Supreme Court held group boycotts illegal in such early cases as *Eastern States Retail Lumber Dealers' Ass'n v. United States*,[56] and *Fashion*

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55 *Yankees Entm't and Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 678 (S.D.N.Y. 2002).

56 234 U.S. , 611-12 (1914) (holding an agreement or combination by retailers to refuse to buy from boycott wholesalers who sell directly to consumers interferes with the free and normal flow of trade and therefore violates the Anti-trust Act).

Originators' Guild of Am. Inc. v. Federal Trade Commission.[57] These rulings set the stage for the Court's *per se* condemnation of group boycotts in *Klor's Inc. v. Broadway-Hale Stores, Inc*.[58]

Klor's arose after a group of suppliers to a leading San Francisco department store refused to sell to the department store's competitor. Applying the *per se* rule, the Court noted:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in specific circumstances, nor by a failure to show that they "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality."[59]

These kinds of justifications – unavailing under federal law – are ones that the New York courts have expressed a willingness to consider in applying a rule of reason.

Early New York state decisions analyzing group boycotts tended to assess the reasonableness of the defendant's motives. For example, in *Heim v. The New York Stock Exchange*,[60] the court summarized the existing precedents:

> [I]f the combination not to do business with the plaintiff is for the purpose of injuring and destroying him, it is illegal; but, if injury to him follows as an incident from action sought to protect, increase and strengthen the business of the associates, then it is as legitimate as other forms of competition which the law leaves parties and combinations free to indulge in.[61]

Applying this distinction, the court held that the refusal of all members of the New York Stock Exchange to trade bonds with any active member of the rival Consolidated Exchange was not illegal.[62] The court reasoned that the concerted refusal to deal was not guided by "any bad

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[57] 312 U.S. 668 (1941).

[58] 359 U.S. 207 (1959).

[59] *Id.* at 212 (quoting *Fashion Originators' Guild*; citations omitted).

[60] 64 Misc. 529 (Sup. Ct. N.Y. County 1909).

[61] *Id.* at 531-32.

[62] *Id.* at 532.

motives or for the purpose of injuring the plaintiff," but rather arose because "the plaintiff belongs to and is actually engaged in building up and strengthening a rival to their detriment."[63]

Similarly, in *Wolfenstein v. Fashion Originators Guild of America, Inc.*,[64] the court upheld a group boycott as a reasonable restraint intended to protect industry participants. Plaintiff was a member of an association of retailers of women's dresses. The association expelled plaintiff for selling dresses from her apartment instead of at a retail outlet, a violation of the association's rules. For the same conduct, the Fashion Originators Guild, an association of dress manufacturers, also refused to allow its members to sell their dresses to the plaintiff.[65] Rejecting the plaintiff's Donnelly Act group boycott claim, the court noted that there was "no intent or power to regulate prices nor even to control production."[66] Rather, the two organizations had merely "united in denouncing as inimical to the trade," the practice of selling garments out of one's apartment.[67] "In this," the court concluded, "we perceive nothing arbitrary, unreasonable or unduly in restraint of trade."[68]

By contrast, where the defendants' motives were to drive competitors out of business, rather than to protect the business of a trade association's membership, early New York State decisions condemned group boycotts as unlawful. For instance, in *Peekskill Theatre, Inc. v. Advance Theatrical Co. of New York*,[69] the court granted an injunction against Loew's movie theaters prohibiting the company from inducing film producers not to supply their films to the

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63 *Id.* at 531, 532.

64 244 A.D. 656 (1st Dep't 1935).

65 *Id.* at 658.

66 *Id.* at 659.

67 *Id.*

68 *Id.*

69 206 A.D. 138 (1st Dep't 1923).

plaintiff, Peekskill Theater. Ruling the boycott illegal, the court emphasized that the defendants' motives were to "ruin the plaintiff's business and not allow the plaintiff to procure films for exhibition."[70]

While the *Klor's per se* rule was the federal law standard, federal courts presented with Donnelly Act claims recognized that the state standard was different. For example, in *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*,[71] the plaintiff, a co-op buyer, alleged that various players in the food industry boycotted it in an effort to put it out of business. In analyzing the Donnelly Act claims, the Southern District of New York explained:

> The New York law under § 340 of the General Business Law is substantially similar to the federal law under § 1 of the Sherman Act. Certain decisions suggest, however, that under New York law, a "rule of reason" analysis must be applied to Donnelly Act claims rather than the per se approach applied . . . as to § 1 of the Sherman Act.[72]

The court then concluded that the plaintiff's evidence was sufficient to survive dismissal of the Donnelly Act claim, based on the "alleged combination of business and union power which allegedly induced the plaintiff's suppliers not to deal with the Co-op."[73]

In another Southern District of New York case, *International Television Productions Ltd. v. Twentieth Century-Fox Television*,[74] the court similarly construed New York State law as

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70 *Id.* at 140. *See also Alexander's Dept. Stores v. Ohrbach's Inc*., 266 A.D. 535, 539 (1st Dep't 1943) (applying the rule of reason to hold unlawful conduct by a retailer with "superior buying power," who endeavored "to eliminate one by one smaller competitors by seeking arrangements with manufacturers . . . to refuse to sell to competitors and cut off their supply").

71 408 F. Supp. 1251 (S.D.N.Y. 1976).

72 *Id.* at 1286 (citations omitted).

73 *Id.*

74 622 F. Supp. 1532 (S.D.N.Y. 1985).

calling for rule of reason analysis for a group boycott. The court dismissed the plaintiff's claim for failure to allege an anticompetitive effect in the market in which the plaintiff competed.[75]

More recent New York state Donnelly Act cases tend to analyze all non-price restraints uniformly, often making it difficult to discern from the brief opinions and sparse facts whether a group boycott is, indeed, alleged. These decisions consistently recite the rule of reason standard, stating that:

> A party asserting a violation of the Donnelly Act must identify the relevant market, describe the nature and effects of the purported conspiracy, allege how the economic impact of that conspiracy does or could restrain trade in the market, and set forth a conspiracy or reciprocal relationship between two or more legal or economic entities.[76]

In issuing these brief rulings, the courts do not acknowledge that different standards may apply to different types of Donnelly Act claims. Nor do they refer to the federal standard for group boycotts.

In applying the rule of reason during a period in which the federal standard was *per se*, New York law departed from the practice of construing the Donnelly Act in light of Sherman Act standards.[77] For this reason, the relatively recent shift in the federal analysis, which began with *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*,[78] has not affected state law treatment of group boycott claims.

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[75] *See id.* at 1540.

[76] *Watts v. Clark Assocs. Funeral Home, Inc.*, 234 A.D.2d 538, 538 (2d Dep't 1996) (citing *Anand v. Soni*, 215 A.D.2d 420, 421 (2d Dep't 1995) (citing *Creative Trading Co., Inc. v. Larkin-Pluznick-Larkin, Inc.*, 136 A.D.2d 461, 462(1st Dep't 1988), *reh'g* 148 A.D.2d 352, *rev'd on other grounds*, 75 N.Y.2d 830 (1990))).

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

[78] 472 U.S. 284 (1985).

In *Northwest Wholesale Stationers*, the Supreme Court declined to apply the *per se* rule to all group boycotts.[79] Northwest, the defendant, was "a purchasing cooperative made up of approximately 100 office supply retailers," which permitted its members "to achieve economies of scale in purchasing and warehousing that would otherwise be unavailable to them."[80] The plaintiff was a retailer that Northwest expelled from the cooperative without providing a reason.[81] Rejecting *per se* treatment, the Supreme Court held that, "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted."[82] The Court further explained that "[a] plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects."[83]

Shortly after *Northwest Wholesale Stationers*, the Supreme Court declined to apply the *per se* rule in *FTC v. Indiana Federation of Dentists*.[84] There, a group of dentists refused to send x-rays to health insurance companies. The Court noted the limited scope of the *per se* rule, stating that "the category of restraints classed as group boycotts is not to be expanded indiscriminately, and [that] the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . .."[85] In requiring an analysis of market power and anticompetitive

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79 *Id.* at 298.
80 *Id.* at 286-87.
81 *Id.* at 284.
82 *Id.* at 296.
83 *Id.* at 298.
84 476 U.S. 447 (1986).
85 *Id.* at 458.

effects, the federal standard has moved toward the rule of reason standard consistently applied to Donnelly Act claims.

Although *Northwest Wholesale Stationers* and *Indiana Federation of Dentists* limited the application of the *per se* rule to group boycotts under federal law, these rulings did not eliminate it entirely. In *FTC v. Superior Court Trial Lawyers Association*,[86] the Supreme Court applied the *per se* rule to an agreement by bar association members to refuse to represent criminal defendants until the District of Columbia raised their pay. Emphasizing that the group boycott was intended to raise prices, and that horizontal price fixing is *per se* illegal, the Court concluded that it need not consider pro-competitive justifications or market power to hold the association's activity unlawful.[87]

The Supreme Court's 1999 decision in *Nynex Corp. v. Discon, Inc.*[88] made clear that *Klor's* is still good law, even as the Court declined to apply the *per se* rule to the case at hand.[89] In *Nynex*, a single buyer of removal services for obsolete telephone equipment began buying the services from a company that competed with the plaintiff. Although the plaintiff alleged that the buyer's shift was motivated by anticompetitive reasons, the Court held that this agreement – by a single buyer to purchase services from a single supplier – could not be condemned as unlawful *per se*, even if the buyer lacked a legitimate business justification for its decision. The Court noted that "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors."[90]

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[86] 493 U.S. 411 (1990).
[87] *Id.* at 424.
[88] 525 U.S. 128 (1999).
[89] *Id.* at 135.
[90] *Id.*

In sum, although federal and state antitrust treatment of group boycotts differed for much of the twentieth century, the two bodies of law are currently converging. Absent a boycott with horizontal elements, federal analysis has come to adopt the rule of reason, historically the test under the Donnelly Act.

Thus far, we have considered two areas of conduct where the Donnelly Act differs from federal law. There are differences, too, in judicially-created exemptions from coverage for various restraints, which we consider next.[91]

IV. Professional And Nonprofit Organizations

In discussing the Donnelly Act's application to professionals and nonprofit organizations, beginning against the background of federal antitrust law is helpful. Simply put, neither professionals nor nonprofits are exempt from federal antitrust liability.[92] At most, some federal courts have been receptive to arguments that, under particular circumstances, the professional or nonprofit character of an organization can be relevant to antitrust liability.[93]

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[91] Both the Donnelly Act and federal antitrust law also have many statutory exemptions. We do not undertake here to discuss similarities or differences among these carve-outs.

[92] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) (holding that the "nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions"); *Nat'l Soc'y of Prof'l Eng'rs v. United States.*, 435 U.S. 679, 696 (1978) (noting that there is no "broad exemption under the Rule of Reason for learned professions" in affirming the Sherman Act liability of a professional society of engineers); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101, n.22 (1984) (stating that "There is no doubt that the sweeping language of § 1 applies to nonprofit entities.").

[93] *See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (holding that a dental association's ban on price-based advertisements should have been subjected to a full-blown rule of reason analysis, rather than a "quick-look" analysis, because, in view of the vast informational asymmetry between dentists and patients, such a ban could promote competition); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (per curiam) (refusing to enjoin a merger between two nonprofit hospitals under § 7 of the Clayton Act despite finding that the proposed merger would result in a significant

(continued . . .)

By contrast, the professional character of an individual or organization is determinative in assessing its liability under New York's Donnelly Act. The general characteristics said to distinguish professions from businesses give rise to an exemption for professionals from state antitrust scrutiny, while federal antitrust law remains applicable.

A. The Professional Exemption from the Donnelly Act

In re Freeman's Estate[94] is the leading New York case. There, the Monroe County Bar Association's minimum fee schedule was challenged as amounting to fixing fees for legal services in Monroe County, thus violating the Donnelly Act. The New York Court of Appeals upheld the minimum fee schedule, holding that "the law is a profession and not a business and therefore not subject to the Donnelly Act which prohibits business arrangements restraining competition."[95]

In reaching this conclusion, the Court of Appeals construed a 1933 statutory amendment which added "service" to the Donnelly Act's coverage.[96] The Court rejected the argument that

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(. . . continued)

increase in market power in the relevant market, in view of evidence that a nonprofit hospital—unlike a for-profit counterpart under similar circumstances—would tend to decrease rather than increase the price of its services).

94 34 N.Y.2d 1 (1974).

95 *Id.* at 6.

96 With the amendment, the Donnelly Act, in pertinent part, declares illegal:

> Every contract, agreement, arrangement or combination whereby
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> 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 the furnishing of any *service* in

(continued . . .)

the amendment was intended to encompass all manner of services. Rather, it found that in light of contemporary statements by the amendment's drafters, the "use of the word 'service' was confined to a commercial or business setting."[97]

The Court framed the key question as "whether the legal profession is a business or trade as that term is used in section 340."[98] To answer it, the Court enumerated factors that "distinguish professionals from others whose limitations on conduct are largely prescribed only by general legal standards and sanctions, whether civil or criminal:"[99]

> [1] the requirements of extensive formal training and learning, [2] admission to practice by a qualifying licensure, [3] a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, [4] a system for discipline of its members for violation of the code of ethics, [5] a duty to subordinate financial reward to social responsibility, and, notably, [6] an obligation on its members, even in non professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.[100]

"Interwoven with professional standards," the Court also wrote, "is pursuit of the ideal and that the profession not be debased by lesser commercial standards."[101] Professional organizations, in turn, "justify their existence to the extent that they further the standards and the ideal."[102]

(. . . continued)

> this state any business, trade or commerce or the furnishing of any *service* is or may be restrained . . ..

N.Y. Gen. Bus. Law § 340(1) (emphasis added).

97 *Matter of Freeman*, 34 N.Y.2d at 7.

98 *Id.*

99 *Id.* at 7-8.

100 *Id.* at 7 (numbers in brackets added).

101 *Id.* at 8.

102 *Id.* at 8.

Applying these factors, the Court of Appeals held that the practice of law qualifies as a profession, not as a "business or trade," and that the Donnelly Act was inapplicable.[103] Bar associations—in view of their role in controlling lawyers' conduct, promulgating and enforcing canons of ethics, maintaining a "professional disciplinary machinery," and fostering public service without financial reward—were held to be within the professional exemption.[104]

The facts in *Freeman* were similar to those in *Goldfarb v. Virginia State Bar*,[105] decided by the United States Supreme Court one year later. At issue was a fee schedule, published by the Fairfax County Bar Association and enforced by the Virginia State Bar, with recommended minimum prices to be charged by lawyers for performing common legal services.[106] The Fourth Circuit held that the existence of state regulation of lawyers, as well as the public service aspect of the practice of law, rendered the practice of law a "learned profession," rather than "trade or commerce" within the meaning of Sherman Act § 1.[107] However, the Supreme Court held otherwise and reversed.

The Supreme Court found that any "learned profession" exemption for lawyers was "at odds" with Congress' intent "to strike as broadly as it could in § 1 of the Sherman Act."[108] The Court held that the exchange of a lawyer's services for money qualifies as "commerce," and that the Sherman Act therefore applies to such an exchange.[109] The Court further held that the "nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . .

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[103] *Id.* at 8-9.
[104] *Id.*
[105] 421 U.S. 773 (1975).
[106] *Id.* at 773.
[107] *Id.* at 779, 780.
[108] *Id.* at 787.
[109] *Id.* at 787-88.

nor is the public service aspect of professional practice controlling in determining whether § 1 includes professions."[110]

In light of *Goldfarb*, *Freeman*'s viability was tested. In *People v. Roth*,[111] two doctors were indicted under the Donnelly Act for organizing a concerted refusal to furnish professional services to non-emergency workers' compensation and no-fault insurance patients as a protest against the low fee schedules established by law for these plans. The Court of Appeals affirmed dismissal of the indictment because there was "no principled basis for distinguishing between the legal profession and the medical profession."[112] Thus, Freeman was "dispositive of the issue."[113]

The *Roth* court declined to reexamine *Freeman*'s professional exemption. The Court of Appeals reasoned that *Goldfarb* had no bearing on New York's professional exemption because the exemption established in *Freeman* rested on a "specific analysis of the legislative history underlying the Donnelly Act and the intent of our own State Legislature in enacting that statute."[114] *Roth* thus affirmed a professional exemption from the Donnelly Act and extended that exemption to the medical profession.[115]

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110 *Id.* at 787. *See also supra* nn. 82-83, and accompanying text (citing Supreme Court cases establishing that the professional or nonprofit nature of an organization does not entitle it to an exemption from the Sherman Act).

111 52 N.Y.2d 440 (1981).

112 *Id.* at 447.

113 *Id.*

114 *Id.* at 448.

115 *See also Glen Cove Assocs., L.P. v. North Shore Univ. Hosp.*, 240 A.D.2d 701, 701 (2d Dep't 1997) ("the medical profession is exempt from the proscriptions of the Donnelly Act"). *Compare People v. D.H. Blair & Co., Inc.*, No. 3282/2000, 2002 WL 766119, at *30 (Sup. Ct. N.Y. Co. 2002) (analyzing the *Freeman* factors in concluding that a securities broker-dealer was not exempt from the Donnelly Act).

Pharmaceutical Society of the State of N.Y. v. Abrams[116] extended the professional exemption to pharmacists. The case involved a prescription drug plan for state employees and retirees, proposed by the Pharmaceutical Society of the State of New York. The proposed plan had incentives to use generic drugs, including a provision to reimburse pharmacies for the drugs at a percentage discount from their average wholesale price. Many pharmacists and pharmacies declined to participate and lobbied to register their disapproval. In response, the Pharmaceutical Society increased the reimbursement rate, thereby increasing the state's program cost by approximately $6 million. The New York State Attorney General served a Donnelly Act subpoena on the Pharmaceutical Society to investigate the proposed plan.[117] The Society moved to quash the subpoena, arguing that pharmacy was a profession and that the Society was, therefore, exempt from the Donnelly Act.[118]

Denying the motion to quash, the trial court held that pharmacy was not an exempt profession.[119] The Third Department, however, disagreed.[120] Although a pharmacist's services included dispensing medicines, the Appellate Division held that "the dispensing and advising of patients with respect to prescription drugs is professional rather than commercial in nature."[121] The court rested this holding on the fact that pharmacists are "highly regulated" and their licenses can be revoked or suspended by the State Board of Pharmacy.[122] Further, the court found it significant that medicine and pharmacy are grouped together for regulation under a

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[116] 132 A.D.2d 129 (3d Dep't 1987).
[117] *See* N.Y. Gen. Bus. Law § 343.
[118] *Pharm. Soc'y of the State of N.Y. v. Abrams*, 132 A.D.2d 129, 130 (3d Dep't 1987).
[119] *Id.* at 131.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 132.

single scheme, 8 NYCRR Part 29, entitled "Unprofessional Conduct," that the provisions for the two callings are "almost identical," and that the statutory guidelines for pharmacy are more extensive than for medicine.[123] In view of these considerations, and giving "great weight" to the factors enumerated in *Freeman*, the Third Department held that pharmacists are exempt from the Donnelly Act.[124]

This holding did not lead to quashing the subpoena issued to the Pharmaceutical Society, however. Although pharmacists are exempt from the Donnelly Act as professionals, the Pharmaceutical Society was not. The Society could not avail itself of the distinction between a profession and a business, wrote the court, because "[f]rom the point of view of the employer for whom a pharmacist works, the sale of drugs is trade or commerce."[125] The Third Department distinguished *Freeman* on the ground that, there, only members of the legal profession belonged to the County Bar Association; similarly in *Roth*, the only defendants were licensed physicians.[126] By contrast, the Pharmaceutical Society was "composed of both members and nonmembers of the pharmaceutical profession," and hence could not be held exempt from the Donnelly Act.[127] As the court explained, "[p]ersons and business organizations subject to the Donnelly Act cannot escape liability by cloaking their actions with participation of exempt individuals."[128]

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 133.

[128] *Id.* at 132. *See also Westchester County Pharm. Soc'y, Inc. v. Abrams*, 138 A.D.2d 721 (2d Dep't 1988) (affirming the denial of a motion to quash a Donnelly Act subpoena served on an organization comprising both pharmacists and pharmacies, while recognizing that pharmacists as professionals are exempt from the Donnelly Act).

Jaffee v. Horton Memorial Hosp.[129] offers additional guidance on whether there is a Donnelly Act exemption for an organization not composed entirely of professionals. The Donnelly Act claim there arose from Arden Hill Hospital's denial of staff privileges to a licensed physician.[130] Relying on *Pharmaceutical Society*, the physician argued that the hospital was not exempt from the Donnelly Act because it included both members and nonmembers of the medical profession. The Orange County Supreme Court interpreted *Pharmaceutical Society* as requiring an inquiry into: (1) the nature of the activity in question; and (2) the composition of the organization whose activities are challenged.[131]

The *Jaffee* court characterized the activity in *Pharmaceutical Society*—the control of reimbursement rates from the sale of drugs—as "decidedly commercial."[132] Accordingly, the holding of that case "was not directed at pharmacists as professionals, but at pharmacies engaged in a profit-oriented business."[133] On the other hand, the physician's claim in *Jaffee* concerned a hospital, defined in the relevant statute as "a facility or institution engaged principally in providing services by or under the supervision of a physician . . . for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition."[134] These were "services traditionally supplied by the medical profession."[135]

Therefore, in alleging an improper denial of staff privileges, the physician was not "alleging claims against the hospital as a commercial enterprise, but as an integral part of the

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[129] *Jaffee v. Horton Mem'l Hosp.*, No. 2843/88, 1988 WL 247973 (Sup. Ct. Orange Co. 1988).

[130] *Id.* at *1.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* (internal citations and quotation marks omitted).

[135] *Jaffee v. Horton Mem'l Hosp.*, No. 2843/88, 1988 WL 247973, at *1 (Sup. Ct. Orange Co. 1988) (citing People v. *Roth*, 52 N.Y.2d 440 (1981)).

medical profession."[136] Given this core of "traditionally exempt" activity, the court found it "incidental" that certain hospital staff members were not licensed physicians, and that a physician's nonparticipation in the staff could have economic repercussions.[137] Just as the professional exemption of some of an organization's members should not operate as a shield to protect nonprofessional members engaging in commercial activity, "neither should the Donnelly Act be transformed into a sword against those professionals, traditionally exempt from liability, due to mere participation with nonexempt individuals."[138] Considering the nature of the activity involved, the court held the hospital exempt from the Donnelly Act and dismissed the claim.

In summary, the New York Court of Appeals' antitrust treatment of professionals—in marked contrast with that of the United States Supreme Court—has been categorical rather than policy-based. In deciding whether an individual or organization should be exempt, the Court of Appeals did *not* ask what competition-related policies would be served or disserved by applying the antitrust laws to the particular activity at issue. Rather, it asked whether as a matter of language and common sense the individual or organization's practices are best characterized as a "business" or a "profession," and came up with six factors to assist in answering this question.

B. Treatment of Non-Professional Non-Profit Entities

The extent to which the Donnelly Act applies to *non-professional* nonprofit organizations is less clear. The only case to consider the issue, *International Service Agencies v. United Way of New York State*,[139] does not offer any substantial analysis.

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[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] 108 Misc.2d 305 (Sup. Ct. Albany County 1981).

International Service Agencies (ISA), an association of charitable organizations, brought action against other charitable organizations and officials of the State of New York, alleging that they had violated the Donnelly Act by monopolizing the solicitation of charitable donations among New York state employees. ISA's antitrust violation claim arose from state requirements prescribing an organization's eligibility to participate in charitable fundraising from New York state employees through payroll deductions – requirements that precluded ISA from participating.

Defendants moved for summary judgment, arguing that the Donnelly Act does not extend to nonprofit charitable corporations. ISA countered that charitable fundraising, which generates millions of dollars to buy supplies and services, is "big business," and that charitable organizations are, accordingly, entitled to compete for contributions on an equal footing.[140] The court characterized the determinative inquiry as "whether ISA's view of charitable fund raising is sufficient to convert the work of charitable corporations and associations into commercial enterprise."[141] It rejected ISA's argument that the Donnelly Act could apply to charitable fundraising, and concluded instead that "regulation of business activity through the Donnelly Act was never intended to extend to the fund raising of charitable corporations and associations."[142] In offering this conclusion, the court did not engage in any textual, legislative-history, doctrinal, or policy analysis.

The *International Service Agencies* opinion is shallow. A New York court deciding whether the Donnelly Act applies to activities such as fundraising by charitable organizations is bound by the Court of Appeals' analysis in *Freeman*. As we have seen, that case held that that

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[140] *Id.* at 307.
[141] *Id.* at 308.
[142] *Id.*

the Donnelly Act's "use of the word 'service' was confined to a commercial or business setting" and focused on whether the activity at issue constitutes "business, trade or commerce" under § 340(1) of the Act.[143] To this extent, *International Service Agencies* may have it right. From here on, though, it is not as easy as the court makes it seem.

Given *Freeman's* approach of categorizing activity as either a "business" or a "profession," nonprofit organizations, like professionals, probably will tend to be held exempt from the Donnelly Act on the ground that they do not generally engage in "business, trade or commerce." On the other hand, the lesson from the cases applying the professional exemption to the pharmaceutical industry—*Pharmaceutical Society*, *Westchester County*, and *Jaffee*—is that what matters is not merely the composition and general character of the organization, but also the particular activity at issue. In consequence, although the Donnelly Act treats professionals and nonprofits more leniently than the Sherman Act, a nonprofit organization that would generally be exempt could conceivably engage in activities sufficiently related to profit-making to extinguish that exemption. Fund-raising to the tune of millions of dollars may well be such an activity. So, though it is by no means clear that *International Service Agencies* should have been decided the other way, deciding whether the Donnelly Act applies calls for more analysis than the court offered.

C. The Differences Summarized

By way of summary, the most significant difference between federal and New York antitrust law as applied to professionals is that, unlike federal law, New York law recognizes a categorical antitrust exemption for professionals. New York law asks the following two questions:

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[143] *Freeman*, 34 N.Y.2d at 7

(1) Is the *practice* in question a profession and therefore exempt?

(2) Even if a profession is involved, are the *particular activities* at issue professional activities and are the particular *members* engaging in them as professionals?

The answer to the first question is determined largely by the six *Freeman* factors. The second question involves a more context-specific analysis. However, it is directed more at examining the membership composition of an organization, and whether an act is professional or commercial, than it is at examining competition policy.

The jurisprudence on the application of the Donnelly Act to *non*-professional nonprofits is not as developed as the jurisprudence on professional organizations. But there is reason to believe, in light of *Freeman*, that the same inquiries into the extent to which an activity and an organization are motivated by profit and commercial considerations will control.

V. Antitrust and the State

This section examines two related questions of antitrust and the state under New York law: (1) the extent to which the Donnelly Act applies to activity taken by the government or pursuant to government conduct; and (2) the extent to which the Donnelly Act applies to the efforts of private actors to influence government action. We discuss these questions against the backdrop of federal law.

Under federal law, the state-action doctrine – first expressed in *Parker v. Brown*[144] – generally immunizes state government action from antitrust challenge. New York law lacks an equivalent doctrine. Instead, the Donnelly Act's applicability to state action is analyzed in a framework that considers the proper extent of the State's police power. Under this approach, in

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[144] 317 U.S. 341 (1943).

various circumstances, New York courts have held that the actions of state and local governments violate the Donnelly Act.

Where antitrust scrutiny of private efforts to influence government action is sought, under federal law the question is governed by the *Noerr-Pennington* doctrine, which, broadly speaking, exempts such efforts from antitrust liability.[145] New York does has not have an equivalent state law doctrine, and the New York courts have not decided whether the *Noerr-Pennington* doctrine applies as a defense to a Donnelly Act claim. However, case law indicates that New York courts will probably import the *Noerr-Pennington* doctrine to Donnelly Act claims.

A. Antitrust and State Action

Under federal law, the *Parker* doctrine can preclude antitrust challenges to conduct undertaken pursuant to state law. *Parker* involved a challenge under the Sherman Act to a California statute governing the marketing of raisins. The Supreme Court assumed that the State's marketing program would violate the Sherman Act if adopted by private persons, but upheld the program nonetheless because it was mandated and enforced by California itself. Mindful of a "a dual system of government in which, under the Constitution, the states are sovereign," the Court held that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[146] Rather, "in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action."[147]

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[145] *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

[146] *Parker*, 317 U.S. at 350-51.

[147] *Id.* at 352.

The Supreme Court subsequently clarified that the reference to the state "legislature" in *Parker* was not limiting, and that the state-action doctrine also immunizes other branches of state government when acting in a legislative capacity.[148] Moreover, although *Parker* involved a suit against a state official, the Supreme Court subsequently clarified that *Parker* immunity could also attach to private parties when acting pursuant to state regulation.[149] Briefly, when a private party seeks to defend a restraint, based on state action, the private party must show that the challenged restraint is: (1) "one clearly articulated and affirmatively expressed as state policy," and (2) "the policy must be 'actively supervised' by the State itself."[150]

New York does not recognize a doctrine exempting state action from antitrust liability. As the Second Department has said, "the state action immunity doctrine . . . deals with application of the Sherman Act to state and municipal conduct and not to the application of the Donnelly Act to municipal conduct."[151] The absence of a state-action doctrine does not mean, however, that New York courts resolve challenges to government conduct, or to activity

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[148] *Hoover v. Ronwin*, 466 U.S. 558, 558-59 (1984) (characterizing *Bates* as holding that "[a] state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature for purposes of the state-action doctrine"); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977) (holding that the Arizona Supreme Court's enactment and enforcement of a disciplinary rule restricting attorney advertising was "compelled by direction of the State acting as a sovereign" (citation omitted) and thus exempt from the Sherman Act).

[149] *See, e.g., Patrick v. Burget*, 486 U.S. 94, 99-100 (1988).

[150] C*alifornia Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

[151] *Elec. Inspectors, Inc. v. Village of Lynbrook*, 293 A.D.2d 537, 538 (2d Dep't 2002); *see also Capital Tel. Co. Inc. v. New York Tel. Co.*, 146 A.D.2d 312, 315 (3d Dep't 1989) (citing without disapproval a federal district court's recognition, in dismissing a Sherman Act claim on state-action grounds, that "no comparable immunity doctrine exists under New York law as to Donnelly Act claims"). *But see Cohen v. Metro. Life Ins. Co.*, 143 Misc. 2d 641, 644 (Sup. Ct. N.Y. County 1988) (holding, in an action under the Donnelly Act, that the "State's licensing limitations applicable to optometrists constitute direct state action which, as a matter of law, is exempt from the antitrust laws").

undertaken pursuant to government conduct, using the same antitrust analysis as that applied to private conduct. Rather, to determine whether such activity violates the Donnelly Act, the courts inquire whether the challenged conduct represents a proper exercise of the police power.

For example, in *American Consumer Industries, Inc. v. New York*,[152] plaintiff challenged the grant of an exclusive franchise as violative of the state and federal constitutions and the Donnelly Act.[153] The First Department noted that "if the granting of the exclusive franchise was a proper exercise of the police power of the City of New York it is not subject to successful attack."[154] Further, the court stated "a monopoly or agreement in restraint of trade may, upon occasion, be warranted in the exercise of the police power."[155] The court defined the proper boundaries of the police power as follows:

> Generally, the privilege or franchise granted in the exercise of the police power must not be in conflict with any general statute or with the constitution, and it should be reasonable, necessary and appropriate for the protection of the public health and comfort. It must not violate fundamental law, interfere with the enjoyment of fundamental rights beyond the necessities of the case, and must bear a real, substantial relation to the object to be achieved.[156]

Applying this standard, the *American Consumer* court struck down a grant by the New York City Commissioner of Markets for an exclusive franchise to sell and deliver ice to the occupants of the Hunts Point market.[157] The court found it significant that the applicable law, the Agriculture and Markets Law, did not empower the Commissioner to grant an exclusive

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[152] 28 A.D.2d 38 (1st Dep't 1967).
[153] *Id*. at 39.
[154] *Id*. at 40.
[155] *Id*. at 41.
[156] *Id.* at 41 (citing *California Reduction Co. v. Sanitary Works*, 199 U.S. 306, 318 (1905)).
[157] *Id.* at 40.

franchise.[158] Furthermore, there was no notice that a franchise would be granted or that it was granted, nor was there an investigation of the successful bidder's ability to perform the contract.[159] Moreover, there was no evidence that the market tenants' private selection of ice suppliers had led to confusion, health hazards, or inefficiencies, or that the grant of a franchise was necessary to prevent such conditions from developing.[160] Thus, the court concluded that "[t]he letting of the franchise was solely a revenue-producing device," not a proper exercise of the police power, and was hence invalid.[161]

Atlantic-Inland, Inc. v. Union[162] also analyzed a Donnelly Act claim under the rubric of police power. The town of Union's ordinances required municipal electrical code inspections and compliance services be performed solely by the New York Board of Fire Underwriters.[163] Atlantic-Inland, a competitor of the Board, brought action asserting that the town ordinance violated the Donnelly Act. The court found that the ordinance: (1) designated the Board to inspect electrical installations; (2) deputized Board inspectors, whose selection the Board controlled, to act as agents of the Town; and (3) surrendered to the Board the discretion to approve or disapprove electrical installations.[164] Furthermore, the Board was authorized, in its sole discretion, to establish and retain fees for the inspection services.[165]

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158 *Id.*

159 *Id.* at 41 (The plaintiff, an ice supplier who was not granted the franchise, allegedly did not have notice of a bid opening and, accordingly, did not submit a bid); *See id.* at 40.

160 *Id.* at 40-42.

161 *Id.* at 41-43. *See also AFA Protective Sys., Inc. v. Crouchley*, 63 Misc. 2d 695 (Sup. Ct. Nassau Co. 1970).

162 126 Misc. 2d 509 (Sup. Ct. Broome Co. 1984).

163 *Id.* at 509.

164 *Id.* at 509-11, 514-5.

165 *See id.* at 515.

In view of these facts, the court held that the Town had improperly delegated its "inalienable" police power to a private entity and, in so doing, had run afoul of the Town Law's command that all fees received shall belong to the Town.[166] Further, because Atlantic-Inland was as qualified as the Board, the Town's designation of the Board as its exclusive agent was "arbitrary and confiscatory" as to Atlantic-Inland.[167] The court also found that competition between Atlantic-Inland and the Board would be workable.[168] At the same time, the court found no merit to the Town's contention that the Board's monopoly was justified by administrative ease, or by the danger that non-qualified firms would be permitted to perform inspections.[169] The ordinance was thus "constitutionally infirm and *ultra vires*," and violative of the Donnelly Act.[170]

Professional Ambulance Service, Inc. v. Abramowitz,[171] another state-action case, involved the Niagara Falls Police Department's refusal to place an ambulance company on the Department's list of ambulance service providers. The refusal was detrimental to the plaintiff's business because, when individuals called the police for ambulance services, most were referred to a company on the Department's list.[172] While noting that an exclusive franchise may be legal if it is an appropriate exercise of state police power, the court found a Donnelly Act violation because no reason was proffered for excluding the plaintiff from the list.[173]

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166 See *id.* at 515-16.
167 *Id.* at 516.
168 *See id.* at 516- 517.
169 *Id.* at 516-17.
170 *Id.* at 516-17.
171 68 Misc. 2d 941 (Sup. Ct. Niagara Co. 1972), *aff'd*, 39 A.D.2d 1018 (4th Dep't 1972).
172 *Id.* at 942.
173 *Id.* at 943.

Similarly, in *S-P Drug Co., Inc. v. Smith*,[174] the New York County Supreme Court enjoined an exclusive contract between the State Department of Social Services and RX Data Corp. Under the contract, RX furnished the State with drug acquisition cost and other information. In exchange, the State granted RX the right to obtain statutory copyright for a list of prices calculated based on this information and to refrain from disclosing the documentation underlying its calculation.[175] These price lists were required by law for pharmaceutical retailers to obtain Medicaid reimbursements. As a result of RX's exclusivity agreement with the State, no RX competitor had access to the price lists, and RX was able to profit by selling them.[176] The contract was also executed without any public announcement or bidding.[177]

The court held that the contract violated the Public Officers Law by granting a private company exclusive access to information that the law required to be in the public domain.[178] Such an award – granted in the absence of competitive bidding and without a showing that only RX was capable of providing the requested information to the State – constituted "a bargaining away of public property without proper consideration."[179] The court did not independently analyze the Donnelly Act claim, but stated that "[i]t is this very same grant of exclusivity which vitiates the contract on other grounds," citing the Donnelly Act.[180] The court found it "anomalous indeed to have the State itself creating such a monopoly and restricting effective

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[174] 96 Misc. 2d 305 (Sup. Ct. N.Y. Co. 1978).
[175] *Id.* at 309.
[176] *Id.*
[177] *Id.*
[178] *Id.* at 310-12.
[179] *S-P Drug Co., Inc. v. Smith*, 96 Misc. 2d 305, 312-313 (Sup. Ct. N.Y. Co. 1978).
[180] *Id.* at 311.

competition in a private business." [181] While *S-P Drug* does not include an explicit police power analysis, it is in accordance with other New York state-action cases. Rather than invoking the state-action immunity, the court analyzed the claim by determining whether the contractually-derived restraint was a legal exercise of state power.[182]

In *Harvey & Corky Corp. v. Erie County*,[183] another exclusive dealing case, a promoter of pop concerts asserted that the Buffalo Bills' denial of its request to sublease Erie County's Rich Stadium violated the Donnelly Act and deprived it of equal protection of the laws in violation of the federal and state constitutions. The promoter sued the County of Erie, the stadium's owner, which had leased the facility exclusively to the Buffalo Bills. The court held that the "mere fact that the Bills are the lessees of public property is insufficient, standing alone, to show state action."[184] Nevertheless, the court evaluated the claims against the County on the merits, and found no violation of the Donnelly Act. Because the grant of an exclusive lease was a proper exercise of the State's police power, no Donnelly Act claim was stated by alleging only an exclusive lease, without further allegation of an "overt act or other non-conclusory allegation from which a conspiracy to violate the antitrust laws could be inferred."[185]

In sum, New York does not exempt state action from its antitrust laws. Many New York cases have dealt with antitrust challenges to activity pursuant to government conduct, particularly grants of exclusive franchises, contracts, or concessions. These cases recognize that such grants may be valid if they are a proper exercise of the police power. In determining their

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[181] *Id.* at 311-12.

[182] *Id.* at 311.

[183] 56 A.D.2d 136 (4th Dep't 1977).

[184] *Id.* at 139-40.

[185] *Id.* at 140 (citing *Murphy v. Erie County*, 28 N.Y.2d 80 (1971), for the proposition that the grant of an exclusive lease is a proper exercise of state police power).

validity, courts have examined the government's authority under the New York constitution and the relevant authorizing statute to engage in the conduct, as well as the public interest arguments proffered by the government to justify its conduct.

B. Private Efforts to Influence State Action

Under federal law, the *Noerr-Pennington* doctrine—derived from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[186] *United Mine Workers of America v. Pennington*,[187] and their progeny—generally immunizes from antitrust liability private attempts to influence state action. Whether the *Noerr-Pennington* doctrine or a corollary of it applies to Donnelly Act actions depends on the doctrine's underpinning. If *Noerr-Pennington* immunity is derivative of *Parker* immunity, it should not apply to Donnelly Act claims because New York does not recognize *Parker* immunity or an equivalent state-action exemption. But if *Noerr-Pennington* immunity derives from the First Amendment, it should apply to actions under the Donnelly Act because the Fourteenth Amendment extends First Amendment guarantees of free speech, free assembly, and the freedom to petition the government action by the states.[188]

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[186] 365 U.S. 127.

[187] 381 U.S. 657.

[188] *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). *See also* U.S. Const. art. VI, cl. 2 (the "Supremacy Clause"). Of course, even if it were held that the *Noerr-Pennington* doctrine is not constitutionally required, the First Amendment would still apply in deciding whether a private effort to bring about anticompetitive action by a New York state or local government is lawful. However, that inquiry would not be controlled by the *Noerr-Pennington* doctrine. By contrast, if the *Noerr-Pennington* doctrine applied, it would seem in most cases to settle both the question of the applicability of antitrust laws and the application of the First Amendment. This is so because if the *Noerr-Pennington* doctrine is rooted in the First Amendment, it would not allow the antitrust laws to condemn as a violation conduct that the First Amendment protects.

In *Noerr*, the Supreme Court based its decision on a construction of the Sherman Act, and did not directly apply the First Amendment.[189] But the decision mentions both the reasons underlying the *Parker* doctrine and constitutional considerations as grounds for its ruling that the Sherman Act did not apply to private efforts to influence government action.[190] Supreme Court opinions since *Noerr* have repeated both rationales.[191]

What do New York courts say? The Second Circuit wrestled with *Noerr-Pennington*'s constitutional character and consequent applicability to state law claims in *Suburban Restoration Co. v. ACMAT Corp.*[192] The court recognized that whether the *Noerr-Pennington* doctrine applied to statutory and common law claims under Connecticut law depended on whether it "is mandated by the United States Constitution," and held that "[i]f indeed the *Noerr-Pennington* doctrine is mandated by the first amendment, then the doctrine must also apply to Connecticut's statute and common law."[193] The court noted that it had previously described the doctrine as "an application of the first amendment," and that federal courts in other jurisdictions treated the doctrine as First Amendment-mandated.[194] But it ultimately found it "unnecessary to decide this constitutional question."[195] Rather, the Second Circuit reasoned that in construing the

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189 *Noerr*, 365 U.S. at 132 n.6 (finding it "unnecessary" to consider the First Amendment "[b]ecause of the view we take of the proper construction of the Sherman Act").

190 *See generally id.* at 135-38.

191 *See, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (restating both *Noerr* rationales); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503-04 (1988) (emphasizing the *Parker* rationale that the antitrust laws are not aimed at regulating political activity); *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 379-80, 383 (1991) (emphasizing the *Parker* rationale, but also alluding to the First Amendment).

192 700 F.2d 98 (2d Cir. 1983).

193 *Id.* at 100, 101.

194 *Id.* at 101 (citing authorities from the Second Circuit and other jurisdictions).

195 *Id.* at 101.

Connecticut statute, Connecticut courts would probably look to federal interpretations of the Federal Trade Commission Act and the Sherman Act, and in so doing "would carve out a similar exception [*i.e.*, *Noerr-Pennington*] to [the Connecticut statute] and the common law, whether or not they believed that they were required to do so by the Constitution."[196]

The Southern District of New York similarly dodged the applicability of *Noerr-Pennington* to state law claims in *Bio-Technology General Corp. v. Genentech, Inc.*[197] While addressing a Sherman Act claim, the court described the *Noerr-Pennington* doctrine as having "its roots in the First Amendment."[198] However, the court did not decide whether the doctrine applied to the New York Donnelly Act and common law claims, and dismissed the claims on unrelated grounds.[199]

Like the federal courts, New York State courts have not explicitly decided whether *Noerr-Pennington* applies to Donnelly Act claims. But their decisions applying *Noerr-Pennington* to other state law claims strongly suggest that it does. For instance, in *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*,[200] the Second Department held that *Noerr-Pennington* can shield against liability under the New York common law of tortious interference and prima facie tort, and under the State's deceptive trade practices statute. There, the defendant, Big V Supermarkets, enlisted neighborhood associations and a retained firm to oppose Weisman's application to the Yonkers City Council to rezone land so that he could lease

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196 *Id.* at 101-02.

197 886 F. Supp. 377 (S.D.N.Y. 1995), *aff'd*, 267 F.3d 1325 (Fed. Cir. 2001).

198 *Id.* at 380.

199 *Id.* at 382 n.3, 383.

200 268 A.D.2d 101 (2d Dep't 2000).

it to a competing supermarket.[201] Deciding whether *Noerr-Pennington* applied to the state law claims, the court presented the doctrine as one that "arose" in antitrust, but that the courts had "expanded" to protect First Amendment petitioning of the government from claims brought under both federal and state law.[202] This framing suggests that *Noerr-Pennington* began as a statutory construction of the Sherman Act, but because of its constitutional moorings, evolved to apply to claims under other laws as a matter of constitutional supremacy.[203] The Second Department concluded that the plaintiff's state law claims went "to the very heart of the *Noerr-Pennington* doctrine" and held that the doctrine shielded the defendants from liability.[204]

Likewise, *Concourse Nursing Home v. Engelstein*[205] applied *Noerr-Pennington* to state business tort claims based on defendants' meetings with Department of Health officials to discuss a settlement process involving the Department.[206] The court characterized *Noerr* as holding that certain conduct was "immune from antitrust scrutiny under the First Amendment"[207] and *Pennington* as holding that certain conduct "was protected by the First Amendment and immune from the antitrust laws."[208] Without directly citing the supremacy of federal law, the court reasoned that "the right to petition [the] government is privileged and is superior to [the]

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201 *Id.* at 103-06.

202 *Id.* at 106-07.

203 *Id*.

204 *Id.* at 107-08; *see also Singh v. Sukhram*, 56 A.D.3d 187, 191 (2d Dep't 2008) (making the same point about the origins and growth of *Noerr-Pennington*).

205 181 Misc. 2d 85 (Sup. Ct. N.Y. Co. 1999), *aff'd*, 278 A.D.2d 35 (1st Dep't 2000).

206 *See id.* 85.

207 *Id*. at 89.

208 *Id.* at 90. (making this characterization is wrong because regardless of whether the *Noerr-Pennington* doctrine is constitutionally mandated, *Noerr* and *Pennington* clearly construed the Sherman Act and did not apply the First Amendment. The *Noerr* Court explicitly stated that it was not applying the First Amendment. *See supra* at n.166 (citing *Noerr*, 365 U.S. at 132 n.6)).

right to maintain an action for interference,"[209] and held that the defendants were "entitled to First Amendment immunity."[210]

The *Concourse* opinion—discussing *Noerr-Pennington* in detail and then basing its holding on "First Amendment immunity"—leaves unclear whether the court was applying *Noerr-Pennington*, a doctrine it thought was derived from the First Amendment, or was directly applying the First Amendment. The First Department's short affirmance does not resolve the ambiguity.[211] Still, *Concourse Nursing* is safely placed alongside other New York cases, following *Alfred Weissman*, which suggest, if not hold, that the *Noerr-Pennington* doctrine is mandated by the First Amendment and applies to New York state law claims.[212]

A more recent case, *Villanova Estates, Inc. v. Fieldston Property Owners Ass'n, Inc.*,[213] also described *Noerr-Pennington* as a doctrine that "protects the First Amendment right of petitioning the government"[214] and applied it to New York state law claims. The court held that *Noerr-Pennington* barred a claim for injurious falsehood, but not claims for interference with

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209 *Id.* at 91 (internal citations and quotation marks omitted).

210 *Id.* at 92.

211 The opinion reads, in pertinent part:

> The action was properly dismissed on the ground that the tortious conduct alleged involved the petitioning of a governmental agency that is immune from suit under the First Amendment of the U.S. Constitution. Although the *Noerr Pennington* doctrine initially arose in the antitrust field, the courts have expanded it to protect First Amendment petitioning of the government from claims brought under Federal and State law. *Concourse Nursing Home v. Engelstein*, 278 A.D.2d 35 (1st Dep't 2000)(citing *Alfred Weissman Real Estate Inc. v. Big V Supermarkets, Inc.*, 268 A.D.2d 101, 107 (2d Dep't 2000).

212 See e.g. *Alfred Weissman Real Estate Inc. v. Big V Supermarkets, Inc,* 268 A.D.2d 101, 107 (2d Dep't 2000).

213 23 A.D.3d 160, 161 (1st Dep't 2005).

214 *Id.* at 161 (citing *Alfred Weissman Real Estate Inc. v. Big V Supermarkets, Inc,* 268 A.D.2d 101, 106-107 (2d Dep't 2000)..

property rights and prima facie tort.[215] Discussing the injurious falsehood claim, the First Department held that *Noerr-Pennington* immunized the defendants from suit because the plaintiffs made the alleged false statements to public officials in a uniform land use application proceeding.[216] By contrast, the court rejected *Noerr-Pennington* immunity for the interference and prima facie tort claims because the complained-of conduct was directed at the plaintiff, did not involve speech, and was not addressed to any public official during the application process.[217]

Finally, the Second Department, in *Singh v. Sukhram*, has described *Noerr-Pennington* as a doctrine "which provides First Amendment protections for persons petitioning the government for redress."[218] The court held that *Noerr-Pennington* did not apply to libel claims because another doctrine, derived from *McDonald v. Smith*[219] and grounded in the First Amendment, applied "in lieu of the *Noerr-Pennington* doctrine."[220] This analysis shows that the Second Department thought of *Noerr-Pennington* as a doctrine mandated by the First Amendment, but displaced, in a particular First Amendment area, by another doctrine.

As this case law demonstrates, in applying *Noerr-Pennington* to non-antitrust state statutory and common law claims, New York courts appear to consider *Noerr-Pennington* to be

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215 *See generally, id.* at 161-62.

216 *See id.* at 161.

217 *See id.* at 161-62.

218 *Singh v. Sukhram*, 56 A.D.3d 187, 188 (2d Dep't 2008).

219 472 U.S. 479 (1985). *McDonald* held that the First Amendment provides qualified, not absolute, immunity to defendants charged with libel in petitions to government officials, and further held that North Carolina state law requiring proof of malice for recovery of damages in such a libel action need not be expanded to comply with the First Amendment. *See McDonald*, 472 U.S. at 483-85; *Singh*, 56 A.D.3d at 193.

220 *Singh v. Sukhram*, 56 A.D.3d 187, 188, 193 (2d Dep't 2008).

mandated by the First Amendment. Under this analysis, *Noerr-Pennington* should apply to all state law claims, including those pleaded under the Donnelly Act.

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We shift focus now, from Donnelly Act conduct prohibitions and exemptions to the area of mergers and acquisitions. In the next section, we discuss the Act's application to anticompetitive mergers and acquisitions.

VI. Merger Enforcement Under the Donnelly Act

Section 7 of the Clayton Act is the primary federal statute under which mergers may be challenged as anticompetitive.[221] Section 7, in pertinent part, provides as follows:

> No person . . . shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person . . . shall acquire the whole or any part of the assets of another person . . . , where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[222]

Although the Donnelly Act has been amended many times since passage of Section 7 in 1914, New York has not added language that parallels the federal statute. Nor have the courts imported into the Donnelly Act prohibitions such as those reached by the Clayton Act. Although in *State v. Mobil Oil Corp.*,[223] the Court of Appeals said that "undoubtedly the sweep of the Donnelly Act may be broader than that of Sherman,"[224] no judicial authority to date has invoked this dicta in the merger context to import Section 7 law into Donnelly Act analysis.

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[221] For simplicity's sake, we use the term "merger" here to include acquisitions and other forms of business combinations as well.

[222] 15 U.S.C. §18.

[223] 38 N.Y.2d 460 (1976) (holding that the Donnelly Act does not contain price discrimination prohibitions such as those in the Clayton Act).

[224] *Id.* at 463-64.

Sections 1 and 2 of the Sherman Act, however, also afford means to challenge mergers under federal antitrust law. Section 1, it may be recalled, declares illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . .."[225] Section 2 prohibits monopolization, attempted monopolization and conspiracy to monopolize "any part of the trade or commerce among the several States, or with foreign nations . . .."[226]

As noted earlier, the Donnelly Act was modeled after the Sherman Act, having been enacted shortly thereafter and containing language proscribing similar anticompetitive or monopolistic practices.[227] To reiterate, the Donnelly Act declares illegal:

> 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
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> For the purpose of establishing or maintaining any such monopoly . . . in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained . . ..[228]

Accordingly, as the New York Court of Appeals has written:

> Although we do not move in lockstep with the Federal Courts in our interpretation of antitrust law, the Donnelly Act – often called a 'Little Sherman Act' – should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or the legislative history justify such a result.[229]

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[225] 15 U.S.C. §1.

[226] 15 U.S.C. §2.

[227] *See, e.g., People v. Rattenni*, 81 N.Y.2d 166, 171 (1993).

[228] N.Y. Gen. Bus. Law §340(1).

[229] *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d at 334-35 (1988) (internal citations omitted).

Despite the Donnelly Act's established Sherman Act lineage and the absence of Donnelly Act language comparable to the Clayton Act's merger prohibitions, at least one federal court has entertained the possibility that the Donnelly Act may contain merger enforcement authority similar to that available under Section 7. In *Reading International, Inc. v. Oaktree Capital Management LLC*,[230] Judge Lynch noted that the Donnelly Act had been used "though rarely, to prohibit mergers and acquisitions having anticompetitive effect, covered under section 7 of the Clayton Act."[231] The *Reading* court also acknowledged that "[t]he Donnelly Act was modeled on the Sherman Act, not the Clayton Act, and the court [was] unaware of any case that has specifically held that such Donnelly Act claims are to be interpreted in light of section 7 of the Clayton Act."[232] Judge Lynch did not reach the issue, however. Recognizing that "state courts interpret the Donnelly Act in light of federal antitrust law," Judge Lynch held that because the plaintiffs' Section 7 claim was dismissed, "the state law claim cannot survive where the federal one has failed."[233]

Reading holds out only a slim hope, at best, of importing Section 7 merger authority into the Donnelly Act. However, the Sherman Act provides a sturdier foundation for state law merger enforcement authority. Both prior to and after the Clayton Act's passage in 1914, the

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[230] 317 F. Supp. 2d 301 (S.D.N.Y. 2003).

[231] *Id*. at 333 (citing *State v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995); *Big Apple Concrete Corp. v. Abrams*, 103 A.D.2d 609 (1st Dep't 1984)).

[232] 317 F. Supp. 2d at 333 n.22. *See also Kasada, Inc. v. Access Capital, Inc.*, No. 01 civ 8893, 2004 WL 2903776 at *13 (S.D.N.Y. Dec. 10, 2004) ("The Donnelly Act . . . has been narrowly construed to encompass only those causes of action falling within the Sherman Act," citing *State v. Mobil Oil Corp, 3*8 N.Y.2d 460 (1976)).

[233] 317 F. Supp. 2d at 333 n.22. Interestingly, however, acceding to the what he termed the "general mandate to interpret the New York statute in light of equivalent federal antitrust precedent[,]" Judge Lynch denied the defendants' motion to dismiss other Donnelly Act claims where their federal counterpart survived a Clayton Act analysis. *Id.* at 333.

United States successfully prosecuted challenges to mergers under Sections 1 and 2 of the Sherman Act.

The first such case was *Northern Securities. Co. v. United States*,[234] where the Supreme Court's 5-4 split reflects the controversial nature of applying the Sherman Act to mergers. There, an attempt was made to combine the Northern Pacific Railway Co., controlled by J. Pierpont Morgan, and the Great Northern Railway Company, controlled by James J. Hill. The Supreme Court invalidated the effort, however, as unlawful under Minnesota law.[235] In consequence, a holding company was created to own and control the two railroads. The transaction produced a "virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."[236]

A majority of the Supreme Court held that Sections 1 and 2 of the Sherman Act reached the transaction because the statutes "declare[d] illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbid[] attempts to monopolize such commerce or any part of it."[237] Indeed, in the majority's view, such a transaction offended the rationale at the heart of the Sherman Act:

> If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at

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[234] 193 U.S. 197 (1903).

[235] *Northern Sec. Co. v. United States*, 193 U.S. 197, 320-321 (1903) (discussing *Pearsall v. Great Northern R.R. Co.*, 161 U.S. 646 (1896)).

[236] *Id.* at 322.

[237] *Id.* at 325.

> the mercy of a single holding corporation, organized in a State distant from the people of that territory.[238]

Four justices dissented, arguing that construing the Sherman Act to bar a "virtual consolidation" was neither constitutional nor a correct reading of the Sherman Act. Writing in dissent, Justice Holmes argued that the majority had expanded Sherman Act enforcement beyond Congress' intended purposes.[239] His dissent criticized the majority's reliance on the merger's effect on competition. "The act," Justice Holmes wrote, "says nothing about competition."[240]

Northern Securities validated using the Sherman Act to bar anticompetitive mergers. Thus, in *United States v. American Tobacco Co.*,[241] a challenge to the tobacco trust, the Supreme Court wrote that:

> [T]he history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible.[242]

Likewise in *United States v. Terminal Railroad Ass'n of St. Louis*,[243] the Court invalidated a combination that controlled the only bridge in St. Louis over the Mississippi River:

> [W]hen, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility

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238 *Id.* at 327-28.

239 *Id.* at 403.

240 *Northern Sec. Co. v. United States*, 193 U.S. 197, 403 (1903) (Holmes, J., dissenting). This comment by Justice Holmes, long since forgotten, should not detract from another memorable part of the dissent. It was this dissent where he said that "[g]reat cases like hard cases make bad law." *Id.* at 364.

241 221 U.S. 106 (1911).

242 *Id.* at 181-82.

243 224 U.S. 383 (1912).

> under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the [Sherman] act, in that it constitutes a contract or combination in restraint of commerce among the States and an attempt to monopolize commerce among the States which must pass through the gateway at St. Louis.[244]

Since passage of the Clayton Act and its express merger provision, the Sherman Act's role in merger enforcement has receded, but not disappeared. While a narrow 4-3 Supreme Court majority rejected the Antitrust Division's Sherman Act challenge in *United States v. United States Steel Corp.*,[245] in subsequent years, the courts applied the Sherman Act to mergers, albeit not nearly as often as they applied Section 7.[246]

More recently, a line of decisions, beginning with Judge Posner's opinion in *United States v. Rockford Memorial Corp.*,[247] recognize that Sections 1 and 7 have "converged" to provide similar merger protections. As Judge Posner put it, "[t]he defendants' argument that section 7 prevents probable restraints and section 1 actual ones is word play. Both statutes as currently understood prevent transactions likely to reduce competition substantially."[248] Similarly, the current *Horizontal Merger Guidelines*, established by the DOJ and the FTC in

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[244] *Id.* at 409.

[245] 251 U.S. 417, 461 (1920).

[246] *See, e.g.*, *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964) (bank merger invalidated under Section 1).

[247] 898 F.2d 1278 (7th Cir. 1990).

[248] *Id.* at 1281. *See also Vantico Holdings S.A. v. Apollo Mgmt.*, 247 F. Supp. 2d 437, 458 (S.D.N.Y. 2003) ("Because §1 of the Sherman Act looks to the probable effects of an agreement, there is no substantive difference between the standards underlying a violation of §7 and §1.") (citing United States v. *Rockford Memorial*, 898 F.2d 1278, 1281-1283 (7th Cir 1990)).

1992 and revised in 1997, identify the Sherman Act as a tool in merger enforcement, along with Section 7 of the Clayton Act and Section 5 of the FTC Act.[249]

Therefore, applying the New York Court of Appeals' teaching that the Donnelly Act is informed by Sherman Act precedents, there is a solid basis for state law merger enforcement. The language of the Donnelly Act itself reinforces the statute's application to mergers. Section 340(1) expressly prohibits agreements: (1) "whereby a monopoly . . . is or may be established or maintained," or (2) "whereby [f]or the purpose of establishing or maintaining any such monopoly . . . any business, trade or commerce . . . is or may be restrained."[250] Thus, like Section 2 of the Sherman Act, the statute specifically addresses activity that creates or maintains a monopoly. Further, like Clayton Act Section 7, the Donnelly Act extends as well to activity in its incipiency where the effect "may be" to create or maintain a monopoly. And, in addition, like Section 1, the Donnelly Act reaches actual or incipient "restrain[ts]" produced by activity undertaken "[f]or the purpose" of creating or maintaining a monopoly.[251]

Finally, the absence of an express merger provision in the Donnelly Act has not hindered the New York State Attorney General from engaging in merger challenges. Although the State has relied primarily on Clayton Act Section 7, it also has pleaded supplemental Donnelly Act

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[249] 15 U.S.C. §45. *See* Merger Guidelines, §0 (*Purpose, Underlying Policy Assumptions, and Overview*); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn*, 98 F. Supp. 2d 729, 731 (W.D. Va. 2000) (noting that the Merger Guidelines detail the agencies' enforcement policy "concerning horizontal acquisitions and mergers subject to Section 1 of the Sherman Act. *See* Merger Guidelines, §0."). *But see* Judge Bork's opinion in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 220 (D.C. Cir. 1986) ("the Guidelines apply to mergers tested under section 7 of the Clayton Act, a statute aimed at halting 'incipient monopolies and trade restraints *outside the scope of the Sherman Act*,' *Brown Shoe [Co. v. United States]*, 370 U.S. [294,] 318 n.32 [(1962)], and which therefore applies a much more stringent test than does rule-of-reason analysis under section 1 of the Sherman Act.") (emphasis added).

[250] N.Y. Gen. Bus. Law § 340(1).

[251] *Id.*

claims in merger cases. This approach is found in cases where New York has acted alone,[252] with other States,[253] and with federal enforcers.[254] However, in none of these cases have the courts construed the Donnelly Act's merger reach independent of the Clayton Act's merger provision.[255]

A recent lawsuit by the City of New York, challenging the merger of Group Health, Inc. (GHI) and the HIP Foundation, Inc., afforded an opportunity to shed further light on the use of the Donnelly Act to regulate mergers. In 2006, the City sued to prevent the merger, alleging that the transaction would create a monopoly in the New York metropolitan market for low cost health insurance purchased by the City, its current and retired employees, and its employee

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[252] *See Bon-Ton Stores, Inc. v. The May Dep't Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994); *State v. Kraft Gen. Foods, Inc.*, 862 F. Supp. 1030 (S.D.N.Y 1993), *aff'd*, 14 F. 3d 590 (2d Cir. 1993). The New York Attorney General merger challenges under the Clayton or Donnelly Acts have also resulted in unpublished settlements, available on the Attorney General's website (http://www.oag.state.ny.us), and consent decrees. *See, e.g.*, *New York v. The Great Atl. & Pacific Tea Co., Inc.*, (Nov. 26, 2007) (Assurance of Discontinuance); *New York v. El Paso Energy Corp.*, No. 01-cv-0059S (W.D.N.Y. Apr. 6, 2001) Consent Decree and Final Judgment and Order; *New York v. Allied Waste Indus., Inc.*, No. 00-cv-0363 (S.D.N.Y. Dec. 1, 2000) (Final Judgment); *New York v. Service Corp. Int'l*, No. 99-cv-11391 (S.D.N.Y. Nov. 18, 1999) (Final Judgment).

[253] *See, e.g.*, *New York v. Visa U.S.A.*, 1990-1 Trade Cas. (CCH) ¶ 69,016 (S.D.N.Y. 1990). Again, merger challenges by the New York Attorney General and other state attorneys general under the Clayton Act and their respective state antitrust laws have produced unpublished settlements (available at http://www.oag.state.ny.us) and consent decrees. *See, e.g.*, *New York v. Rite Aid Corp.* (June 1, 2007) (Assurance of Discontinuance); *New York v. Federated Dep't Stores* (Aug. 30, 2005) (Assurance); *New York v. Primestar Partners, L.P.*, No. 93 civ. 3868, 1993 U.S. Dist. LEXIS 21122 (Sept. 10, 1993).

[254] *See, e.g.*, *United States v. Sony Corp. of Am.*, 2000-1 Trade Cas. (CCH) ¶ 72, 787 (S.D.N.Y. 1998); *United States v. Cargill, Inc.*, 1997-2 Trade Cas. (CCH) ¶ 71,893 (W.D.N.Y. 1997). In more recent years, however, challenges with the DOJ have alleged only Section 7 claims. *See United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *United States v. Echostar Comm'ns Corp.*, No. 1:02CV02138 (D.D.C. Oct. 31, 2002).

[255] *See generally* Robert L. Hubbard & Sondra Roberto, *State Merger Enforcement*, 6 SEDONA CONF. J. 1, 1-6 (2005); Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 Geo. Mason L. Rev. 37, 45-51 (2002).

unions. The City's complaint – which alleged that the merger constituted an unreasonable restraint in the relevant market – pleaded claims under the Donnelly Act, as well as under Clayton Act Section 7, and Sherman Act Sections 1 and 2.[256] However, the district court granted summary judgment dismissing both the federal and state claims, holding that the City had failed to define a relevant market.[257]

VII. The Prohibition of Class Action "Penalty" Cases

The New York Court of Appeals decision in *Sperry v. Crompton*[258] holds that, by virtue of New York CPLR 901(b), state courts may not hear Donnelly Act class actions seeking treble damages. Although derived from the CPLR and not the Donnelly Act, the inability to pursue state law treble damages class actions distinguishes state antitrust law from its federal counterpart. However, under a recent United States Supreme Court ruling, *Shady Grove Orthopedic Associates, P.A., v. Allstate Ins. Co.*,[259] the federal district courts probably are empowered to hear Donnelly Act class actions under Rule 23 of the Federal Rules of Civil Procedure. The forum choice thus makes a real difference. An additional unresolved question, not answered by either *Sperry* or *Shady Grove*, is whether a Donnelly Act plaintiff may waive antitrust treble damages, and having done so, pursue a class action. We consider these matters below.

A. CPLR 901(b)'s Application to the Donnelly Act

CPLR 901(b) provides that:

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[256] *New York v. Group Health Inc.*, No. 1:06-cv-13122-RJS, 2008 WL 4974578 (S.D.N.Y. 2008).

[257] *See New York v. Group Health Inc.*, No. 06-cv-13122-RJS, 2010 WL 2132246 at *6 (S.D.N.Y. 2010).

[258] 8 N.Y.3d 204 (2007).

[259] 130, S. Ct. 1431 (2010), *rev'g*, 549 F.3d 137 (2d Cir. 2008).

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.[260]

The Donnelly Act's damages provision states that "any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby."[261] In *Sperry*,[262] the New York Court of Appeals held that "Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned."[263] Because nothing in the Donnelly Act provision expressly authorizes class actions, § 901(b) prohibits such actions.[264] Accordingly, New York state courts and federal courts across the country have barred Donnelly Act class action claims.

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[260] N.Y. C.P.L.R. § 901(b) (McKinney 2005).

[261] N.Y. Gen. Bus. Law § 340(5) (McKinney 2004).

[262] 8 N.Y.3d 204.

[263] 8 N.Y.3d at 214. The lower court rulings leading up to *Sperry* were to the same effect. *See, e.g.*, *Paltre v. Gen. Motors Corp.*, 26 A.D.3d 481, 483 (2d Dep't 2006) ("The treble damages provision is a penalty within the meaning of CPLR 901(b)."); *Asher v. Abbott Labs.*, 290 A.D.2d 208, 208 (1st Dep't 2002) ("the treble damages remedy provided in [Gen. Bus. Law.] § 340(5) is a 'penalty' within the meaning of CPLR 901(b), the recovery of which in a class action is not specifically authorized") (citations omitted); *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 206 (1st Dep't 2002) ("Private persons are precluded from bringing a class action under the Donnelly Act . . . because the treble damages remedy provided for in subdivision (5) constitutes a 'penalty' within the meaning of CPLR 901(b)"); *Lennon v. Philip Morris Cos., Inc.*, 189 Misc. 2d 577, 583 (Sup. Ct. N.Y. Co. 2001) ("Although federal courts have held that treble damages are remedial, not punitive, New York state courts have historically concluded that treble damages are punitive in nature") (citation omitted).

[264] The *Sperry* Court noted that although "§ 342-b contemplates that the Attorney General may bring class actions on behalf of governmental entities, General Business Law § 340, in contrast, makes no reference to class actions for private litigants." 8 N.Y.3d at 216, n.7. *See also Cox v. Microsoft*, 290 A.D.2d at 206. The Attorney General – who, as amicus curiae, consistently advocated permitting Donnelly Act class actions – has argued that § 342-b does not preclude private class actions under the Donnelly Act. *See* Notice of Motion, Affidavit, Exhibits and Brief of the Attorney General of the State of New York in Support of Motion For Amicus Curiae Relief, at 53, *filed in Cox v. Microsoft Corp.*, 749 N.Y.S.2d 478 (2002).

The inability to proceed on a class basis has particular significance for consumers, who typically pay, individually, a relatively modest overcharge from price-fixing or other anticompetitive misconduct. Consumers, however, generally do not purchase directly from a price-fixer, and, as a result, are unable to sue for damages under federal antitrust law under *Illinois Brick Co. v. Illinois*.[265] By contrast, New York has enacted an "*Illinois Brick* repealer" statute to allow consumers to sue under the Donnelly Act, despite the absence of direct dealings with any price-fixer.[266] By denying consumers the opportunity to aggregate their individual damages claims using the class action mechanism, the *Sperry* court's construction of § 901(b) weakens considerably the thrust of New York's indirect purchaser statute.

1. Exporting the Prohibition to Federal Cases

Rule 23 of the Federal Rules of Civil Procedure authorizes class actions in federal court. Because there is no federal counterpart to CPLR 901(b), the question has arisen whether the New York statute also bars Donnelly Act class actions in cases where a federal court has diversity jurisdiction over the Donnelly Act claim.

The Class Action Fairness Act of 2005 ("CAFA")[267] greatly expanded federal jurisdiction over diversity actions asserting state law claims, such as state antitrust violations. Prior to CAFA, however, there were relatively few circumstances in which a federal forum was available for a Donnelly Act class action. The state claim could be asserted as supplemental where there was federal jurisdiction under another claim – not uncommon where direct purchasers sue for

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[265] 431 U.S. 720 (1977) (holding that only those who purchase directly from a price-fixer are entitled to sue for antitrust treble damages).

[266] N.Y. Gen. Bus. Law, § 340(6) of the Donnelly Act.

[267] 28 U.S.C. §§ 1332(d), 1453, and 1711-15. *See generally* Pub. L. No. 109-2, 119 Stat. 4; Jay L. Himes, *The Class Action Fairness Act: A Wolf in Wolves' Clothing*, 10 Class Action Litig. Rep. (BNA) 452 (No. 9, May 8, 2009).

federal antitrust violations. But the value of the Donnelly Act, rather than the federal antitrust claim, lies mostly for indirect-purchaser consumers who generally cannot sue under federal antitrust law to begin with.[268] Then, federal jurisdiction over the Donnelly Act claim would have to be based on diversity of citizenship, and with the current $75,000 diversity amount-in-controversy requirement, few consumer class actions could be brought in federal court.[269] By expanding federal jurisdiction in class actions, CAFA creates opportunities to bring Donnelly Act indirect purchaser claims in federal court that could not be brought pre-CAFA.

The lower federal courts consistently held that § 901(b) applied and precluded class litigation, despite Rule 23. This body of case law typically employed a "procedure versus substantive" analysis – derived from *Erie R. Co. v. Tompkins*[270] – and held that CPLR 901(b) is "substantive." Under this approach, because federal courts sitting in diversity cases apply federal procedural law, while the substantive law to be applied is "the law of the state," the federal courts were constrained to follow CPLR 901(b). Then, like the New York state courts, federal courts sitting in diversity cases could not hear Donnelly Act class actions.

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[268] *See New York v. Cedar Park Concrete Corp.*, 741 F. Supp. 494, 497 (S.D.N.Y. 1990).

[269] For a number of years, *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973), precluded aggregating individual class member injury to reach the diversity jurisdictional amount. Because, under *Zahn* each individual class member's claim had to exceed the amount-in-controversy requirement in order to satisfy diversity, most state law-based class actions had to be litigated in state court. In *Exxon-Mobil v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Supreme Court held that the supplemental jurisdiction statute, 28 U.S.C. § 1367, effectively overruled *Zahn*. Thus, so long as one named plaintiff class representative satisfied the amount in controversy, the district court could exercise supplemental jurisdiction over the other class members' claims, even though they were below the jurisdictional amount. While eliminating *Zahn*'s "non-aggregation" rule, *Exxon-Mobil* has little practical effect in most consumer antitrust cases, where individual damages are likely to be far south of $75,000.

[270] 304 U.S. 64, 78 (1938).

These decisions were based heavily on the notion that judicial outcomes should not differ whether brought in state or federal court. In *Guaranty Trust Co. v. York*,[271] the Supreme Court held that:

> [I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.[272]

This approach serves both to discourage forum shopping and to ensure equal administration of law.[273]

Leider v. Ralfe[274] is illustrative. Applying CPLR § 901(b) is necessary, the court wrote, because "to allow plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court" would "contravene both of these mandates," articulated in *Guaranty Trust*.[275] Thus, "the bulk of cases to address the applicability of N.Y. C.P.L.R. § 901(b) have decided that the statute is substantive."[276]

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[271] 326 U.S. 99 (1945).

[272] *Id.* at 109.

[273] *See, e.g.*, *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004) (Donnelly Act class actions in federal court would encourage forum-shopping and "inequitably injure plaintiffs unable to demonstrate diversity of citizenship"); *In re Auto. Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549-50 (E.D. Pa. 2007) (federal courts sitting in diversity must apply state substantive law to prevent inconsistent results).

[274] 387 F. Supp. 2d 283 (S.D.N.Y. 2005).

[275] *Id.* at 291.

[276] *Id. See also In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 580 (M.D. Pa. 2009) (Donnelly Act's penalties "cannot be advanced on behalf of a class"); *In re Onstar Contract Litig.*, 600 F. Supp. 2d 861, 875 (E.D. Mich. 2009) (because CPLR 901(b) is a substantive law, it must be applied in federal courts); *Gordon v. Kaleida Health*, No. 08-CV-378S, 2008 WL 5114217, at *10 (W.D.N.Y. Nov. 25, 2008) (same); *In re G-Fees Antitrust Litig.*, 584 F. Supp. 2d 26, 39 (D.D.C. 2008) (dismissing Donnelly Act claims because CPLR 901(b) prohibits Donnelly Act class actions in both federal and state court); *Gratt v. ETourAndTravel, Inc.*, No. 06-CV-1965, 2007 WL 2693903, at *1-2 (E.D.N.Y. Sept. 10, 2007), *aff'd*, No. 08-3511 cv, 2009 WL 3161310 (2d Cir. Oct. 2, 2009) (whether filed in

(continued . . .)

The Supreme Court's *Shady Grove* decision, which considered the applicability of § 901(b) outside of the Donnelly Act context, casts significant doubt on the soundness of these prior federal rulings.

2. The *Shady Grove* Case

Shady Grove involved a penalty provision found in the New York Insurance Law. The district court refused to permit a class action to proceed, and the Second Circuit affirmed.[277] The Court of Appeals held that Rule 23 is *procedural* -- it sets forth the prerequisites to maintain a class action in federal court – while CPLR § 901(b) is a *substantive* rule that specifically provides which remedies class plaintiffs may seek under New York law, thereby restricting the types of cases that may be brought as a class action.[278] Accordingly, failure to apply CPLR § 901(b) in federal court would "clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the 'substantial advantages' of class

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(. . . continued)

state or federal court, CPLR 901(b) bars plaintiffs from maintaining a class action because it is substantive and does not conflict with procedural Rule 23); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 415 (D. Del. 2007) ("application of CPLR § 901(b) is appropriate" because it does not conflict with Rule 23); *Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179, 185, & n.3 (E.D.N.Y. 2007) (applying CPLR 901(b) to claims for statutory penalties brought under the Telephone Consumer Protection Act because "the majority of courts have concluded that § 901(b) is a substantive law which must be applied in the federal forum"), *aff'd*, No. 07-2191-cv, 2008 U.S. App. LEXIS 23203 (2d Cir. Oct. 31, 2008) (summary order), *vacated and remanded*, ___ U.S. ___, No. 08-1307, 2010 WL 1525998 (U.S. Apr. 19, 2010); *Bonime v. Avaya, Inc.*, No. 06-CV-1630, 2006 WL 3751219, at *3 n.2 (E.D.N.Y. Dec. 20, 2006), *aff'd*, 547 F.3d 497 (2d Cir. 2008) (Rule 23 and CPLR 901(b) do not conflict); *United States v. Dentsply Int'l, Inc.*, No. Civ. A. 99-005, 2001 WL 624807, at *15-16 (D. Del. Mar. 30, 2001), *aff'd sub nom, Howard Hess Dental Labs Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363 (3d Cir. 2005) (same); *Dornberger v. Metro. Life Ins. Co.*, 182 F.R.D 72, 84 (S.D.N.Y. 1998) (applying CPLR 901(b), and thus barring a class action brought under N.Y. Ins. L. § 4226,"which provides for the recovery of a specific penalty" for insurer misrepresentation, and "does not expressly permit class actions").

[277] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (S.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008) *overruled by* 130 S.Ct. 1431 (2010).

[278] *Shady Grove Orthopedic Assocs., P.A.*, 549 F.3d. at 143.

actions."[279] The Supreme Court granted certiorari, despite the absence of any split in the courts of appeal.

Before the Supreme Court, Shady Grove argued that *Hanna v. Plumer*,[280] rather than *Erie*, governed disposition of the case.[281] *Hanna* holds that a federal court in a diversity action must apply a valid rule of civil procedure, regardless of contrary state law, so long as the federal rule does not abridge, expand or modify substantive state-created rights.[282] Shady Grove further argued that § 901(b) "governs only the mode of enforcing substantive rights, which is a matter properly considered procedural under *Erie*."[283] Moreover, according to Shady Grove, § 901(b) conflicted with Rule 23 because the New York law addressed "precisely the same issue as Rule 23: Whether claims for various forms of relief may be pursued through class actions."[284] Thus, as a valid procedural provision under *Hanna*, Rule 23 should prevail over CPLR 901(b).[285]

Allstate, on the other hand, argued that CPLR § 901(b) was "substantive" because it reflected a New York policy to limit the state statutory penalty imposed in a lawsuit. Thus, under *Erie*, the federal courts must give effect to such substantive state policy choices in cases arising under state law.[286] Allstate further argued that no conflict existed between Rule 23 and

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[279] *Id.* at 145 (quoting *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004)).

[280] 380 U.S. 460, 471 (1965).

[281] Brief for Petitioner, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, 2009 WL 2040421, at *9-10, 12-15, 31-32 (U.S. July 10, 2009) ("Shady Grove's Opening Brief").

[282] *See* the Rules Enabling Act, 28 U.S.C. § 2072(b).

[283] Shady Grove's Opening Brief, 2009 WL 2040421, at *11.

[284] Petitioner's Reply Brief, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, 2009 WL 3143700, at *2 (U.S. Sept. 28, 2009). *See also* Shady Grove's Opening Brief, 2009 WL 2040421, at *23-24.

[285] Shady Grove's Opening Brief, 2009 WL 2040421, at *25-27.

[286] Brief for Respondent, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, 2009 WL 2777648, at *43-44 (U.S. Aug. 28, 2009).

CPLR 901(b) – § 901(b) simply categorized certain claims as ineligible for class certification, regardless of whether they met Rule 23's requirements. In consequence, CPLR 901(b) must apply in federal court in order to prevent inequitable administration of the laws and forum-shopping.[287]

As thus framed for the Supreme Court, the central issue was whether § 901(b) was procedural, and thus trumped by Rule 23 in federal court, or, instead, substantive in nature such that New York's state law trumps Rule 23. A fractured Supreme Court agreed with Shady Grove and reversed the Second Circuit.

Justice Scalia' Opinion: Justice Scalia, writing for himself, Chief Justice Roberts, and Justices Thomas and Sotomayor, adopted a two-part analysis:

> "We must first determine whether Rule 23 answers the question in dispute . . . [:] whether Shady Grove's suit may proceed as a class action."[288]
>
> "If it does, it governs – New York's law notwithstanding – unless it exceeds statutory authorization or Congress's rulemaking power."[289]

Rejecting the Second Circuit's conclusion that Rule 23 and § 901(b) did not conflict, Justice Scalia wrote:

> Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because §901(b) attempts to answer the same question – i.e., it states that Shady Grove's suit "may *not* be maintained as a class action" . . . because of the relief it seeks – it cannot apply in diversity suits unless Rule 23 is ultra vires.[290]

Justice Scalia therefore considered whether Rule 23 is authorized by the Rules Enabling Act, by which Congress empowered the Supreme Court to promulgate rules of procedure,

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[287] *Id.* at *46-47.

[288] *Shady Grove*, 559 U.S. at ___, No. 08-1008, 2010 WL 1222272, at *4.

[289] *Id*.

[290] *Id*. (emphasis in original).

provided that the rules "shall not abridge, enlarge or modify any substantive right."[291] This limitation, Justice Scalia said, "means that the Rule must 'really regulat[e] procedure – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'"[292] On this score, the Federal Rules of Civil Procedure bat 1.000, as the Supreme Court has rejected every Rules Enabling Act challenge presented since the Rules were promulgated. As Justice Scalia explained, "[e]ach of these rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing these rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either."[293]

Applying this test, Justice Scalia 23 kept the batting average perfect. The class action device, recognized by Rule 23, was simply "a species" of joinder that "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties legal rights and duties intact and the rules of decision unchanged."[294] Thus, Justice Scalia reasoned that § 901(b) had to give way, even though "open[ing] the door to [federal court] class actions that cannot proceed in state court will produce forum shopping."[295] According to Justice Scalia, "a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping."[296]

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[291] 28 U.S.C. § 2072(b).

[292] *Shady Grove*, 559 U.S. at ___, 2010 WL 1222272, at *8 (*quoting Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

[293] *Id*. at *8.

[294] *Id*.

[295] *Id*. at 12.

[296] *Id*.

Justice Ginsburg's Dissenting Opinion: Justice Ginsburg dissented in an opinion that Justices Kennedy, Breyer and Alito joined. Justice Ginsburg agreed that if a federal rule controls an issue, and conflicts directly with state law, then the federal rule must be applied in diversity cases so long as it does not violate the Rules Enabling Act prohibition against "abridg[ing], enlarg[ing] or modify[ing]" a state-created substantive right. On the other hand, if no Federal Rule controls, then state law must be applied in diversity cases under the Rules of Decision Act.[297] This approach was necessary to ensure that the Federal Rules are construed "with sensitivity to important state interests."[298] Justice Ginsburg then undertook to demonstrate why, in her view, Rule 23 did not conflict with § 901(b).

As Justice Ginsburg explained, § 901(b) was designed "[t]o prevent excessive damages" by controlling "the penalty to which a defendant may be exposed in a single suit."[299] Thus, unlike Federal Rule 23, the New York provision "was not designed with the fair conduct or efficiency of litigation in mind."[300] Because § 901(b) controlled the remedy available in class actions, while Rule 23 addressed matters of procedure, there was no conflict between the two:

> Sensibly read, Rule 23 governs procedural aspects of class litigation, but allows state law to control the size of a monetary award a class plaintiff may pursue.
>
> In other words, Rule 23 describes a method of enforcing a claim for relief, while § 901(b) defines the dimensions of the claim itself.

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[297] *Shady Grove*, 559 U.S. ___, No. 08-1008, 2010 WL 1222272, at *11 (Ginsburg, J, dissenting op.).

[298] *Id*. at *16 (*quoting Gasperini v. Center for Humanities, Inc*., 518 U.S. 415, 427 n. 7 (1996)). *See also id*. at *25 (criticizing Justice Scalia's opinion as reflecting "a mechanical reading of the Federal Rules, insensitive to state interests and productive of discord").

[299] *Id*. at *26.

[300] *Id*. at *27.

> The fair and efficient *conduct* of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers.[301]

Viewed in this way, there was no inevitable conflict between Rule 23 and § 901(b). Any plaintiff seeking to proceed under Rule 23 could, according to Justice Ginsburg, "forgo statutory damages and instead seek actual damages or injunctive or declaratory relief; any putative class member who objects can opt out and pursue actual damages, if available, and the statutory penalty in an individual action."[302]

Finding no unavoidable conflict, the question became "whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court."[303] Here, there could be no genuine doubt. The relief sought by Shady Grove was estimated to be "ten thousand times greater than the individual remedy available to it in state court . . . . [F]orum shopping will undoubtedly result if a plaintiff need only file in federal court instead of state court to seek a massive monetary award explicitly barred by state law."[304] As *Erie* teaches, the fortuity of diversity jurisdiction "should not subject a defendant to such augmented liability."[305]

Justice Stevens' Concurring Opinion: Justice Stevens provided the key vote for reversal. Justice Stevens concurred in parts of Justice Scalia's opinion, and in the result because

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[301] *Id*. at *28 (emphasis in original).

[302] *Id*. *See also id*. at *28, n.9 (noting that "New York Courts routinely authorize class actions when the class waives its right to receive statutory penalties") (citing authorities). Justice Scalia, however, was less confident that waiver was available. *See id*. at *6, n. 5.

[303] *Id*. at *30 (*quoting Hanna v. Plumer*, 380 U.S. 460, 468 n. 9 (1968)).

[304] *Id*. at *32.

[305] *Id*.

he agreed that § 901(b) "is a procedural rule that is not part of New York's substantive law."[306] For Justice Stevens, however, the fact that a state rule may be characterized as "procedural" was not in itself determinative. Indeed, "the line between procedural and substantive law is hazy."[307] In his view, if a state rule denominated as "procedural" operated as "part of the State's definition of substantive rights and remedies," then the federal courts must apply it in diversity cases, regardless of the law's label.[308]

Accordingly, Justice Stevens maintained that, in each case, the nature of the state law sought to be displaced by the federal rule had to be analyzed to determine whether "the state law actually is part of a state's framework of substantive rights or remedies."[309] Under this approach, the federal rule would have to give way in any case where "the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[310] This approach was necessary to preserve the balance "that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies."[311] As Justice Stevens saw it, §901(b) was not sufficiently "intertwined" with a New York right or remedy and, therefore, did

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306 *Shady Grove*, 559 U.S. ___, No. 08-1008, 2010 WL 1222272, at *2 (Stevens, J., concurring op.).

307 *Id*. at *14, (*quoting Erie R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring)).

308 *Id*. at *13. *See also id*. at *10 (noting that a state procedural law "may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy").

309 *Id*. at *14.

310 *Id*. at *16.

311 *Id*. at *17.

not trigger a need for this further stage of review.[312] Justice Stevens thus provided the fifth vote for reversing the Second Circuit.

The Ruling's Impact on the Donnelly Act: The 4-4 split in the Supreme Court on the Insurance Law provision makes the application of *Shady Grove* to the Donnelly Act uncertain. A lower federal court could perhaps consider it an open question as to whether the relationship between § 901(b) and the Donnelly Act is sufficiently different from that presented by the Insurance Law provision in *Shady Grove*. If it is, then a court might inquire whether the individualized analysis that Justice Stevens envisioned leads to applying § 901(b) in Donnelly Act cases heard in federal court under diversity jurisdiction.[313]

Although this issue may, strictly speaking, be regarded as "open," the argument for treating the Donnelly Act differently seems strained. Justice Stevens was satisfied that § 901(b), which applies to penalty actions generally, was procedural. He did not see the provision as implicating rights or remedies under the state's Insurance Law. That being so, changing the penalty statute to which § 901(b) itself is applied – here, from the Insurance Law to the Donnelly Act – does not appear likely to change the assessment, in Justice Stevens' mind, that § 901(b) is

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[312] Shortly after the decision in *Shady Grove*, the Supreme Court vacated a ruling by the Second Circuit, which held that § 901(b) barred class actions brought under the private right of action provision of the Telephone Consumer Protection Act ("TCPA") of 1991, 47 U.S.C. § 227. *Holster v. Gatco, Inc.*, ___ U.S. ___, No. 08-1307, 2010 WL 1525998 (U.S. Apr. 19, 2010), *vacating and remanding*, No. 07-2191-cv, 2008 U.S. App. LEXIS 23203 (2d Cir. Oct. 31, 2008) (summary order), *aff'g*, 485 F. Supp. 2d 179 (E.D.N.Y. 2007). The TCPA is a peculiar piece of legislation, as it creates a private right of action to recover a specified penalty "if otherwise permitted by the laws or rules of court of a State . . . . " 47 U.S.C. § 227(b)(3). The Court's disposition, which included a remand to the Court of Appeals, will give the Second Circuit an opportunity to revisit its earlier ruling in light of *Shady Grove*.

[313] To be sure, this approach may seem dubious given Justice Stevens' retirement. However, with the Supreme Court otherwise equally divided in *Shady Grove*, it is hard to see how the lower federal courts could resolve subsequent § 901(b) issues other than by at least taking account of Justice Stevens' approach.

not "intertwined" with state-created rights and remedies. More likely, before Justice Stevens would reconsider his conclusion, the state law would have to be different in kind from CPLR 901(b). If this assessment is correct, then *Shady Grove* should permit Donnelly Act class actions to proceed in federal district court.

Nevertheless, one might argue that § 901(b) restricts the Donnelly Act's menu of remedies, in the sense that it tempers the impact of the State's "Illinois Brick repealer," Gen. Bus. L. § 340(6). While the repealer authorizes a damages claim that federal law itself rejects, § 901(b) limits the state antitrust claim to individual treble damages actions. In this way, § 901(b), arguably, is linked to Donnelly Act rights and remedies differently than the Insurance Law provision was considered in *Shady Grove*.

Although § 901(b) has the effect of limiting the impact of § 340(6), that clearly was not its intent. When § 901(b) was enacted in 1975, New York's Donnelly Act did not even have a treble damages provision, much less an Illinois Brick repealer, the latter of which was first adopted in 1998.[314] Accordingly, it seems unsound to argue a § 901(b) connection to § 340(6) is sufficient to satisfy Justice Stevens' particular analysis.

B. Waiver of Treble Damages

In her *Shady Grove* dissent, Justice Ginsburg wrote that "New York Courts routinely authorize" class actions where the plaintiffs waives the right to recover an available statutory penalty.[315] However, this assertion seems overstated. The case law is split on whether a waiver

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[314] Section 901(b) was added by L.1975, ch. 207. Later in that same legislative session, the Donnelly Act's treble damages provision was enacted by L.1975, ch. 333. There is no evidence in either law's legislative history of a connection between the two. The Legislature added the Illinois Brick repealer by L.1998, ch. 653, § 1.

[315] *Shady Grove*, 559 U.S. ___, No. 08-1008, 2010 WL 1222272, at *28, n.9 (Ginsburg, J, dissenting op.) (citing authorities).

of penalties will permit class claims to proceed, despite § 901(b). More specifically, with respect to the Donnelly Act, limited case law rejects approving a waiver of treble damages in order to pursue class litigation. The New York Court of Appeals has not thus far weighed in, either generally or as to the Donnelly Act.

1. Penalty Waivers Under the Donnelly Act and Other Statutes

New York law has long-recognized that a party may, if it chooses, "stipulate away statutory, and even constitutional rights."[316] This principle suggests that a Donnelly Act plaintiff should be permitted to waive part of the non-compensatory part of the recovery available under the treble damages provision. When that is done, the case would proceed only for single damages, and there would be no "penalty" for purposes of CPLR 901(b). This construction of § 901(b) comports with the legislative history of CPLR Article 9, which demonstrates that the legislature intended to increase the availability of the class action device.[317]

Some courts, however, have precluded waiver of Donnelly Act treble damages because the treble damages provision is stated in mandatory language. In *Rubin v. Nine West Group, Inc.*,[318] the court held that because the Donnelly Act expressly provides that antitrust victims "*shall* recover three-fold the actual damages," treble damages cannot be waived.[319] Similarly, in *Asher v. Abbott Labs.*,[320] the First Department cited *Nine West*, among other authorities, for the notion that the Donnelly Act treble damages remedy is not only a "penalty," by also one "the

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316 *In re New York, Lackawanna & W. R. R. Co.*, 98 N.Y. 447, 453 (1885); *Trump v. Trump*, 179 A.D.2d 201, 203 (1st Dep't 1992).

317 *See* Brief for Appellant at *10, *Sperry v. Crompton Corp.*, No. 2004-06517, 2006 WL 4389252 (1st Dep't Dec. 1, 2006) (quoting Memorandum of Governor Carey, *McKinney's Session of Laws of New York* 1748 (1975) ("This bill provides the people of New York with the type of strong class action statute which I have repeatedly requested")).

318 No. 0763/99, 1999 WL 1425364 (Sup. Ct. N.Y. County Nov. 3, 1999).

319 *Id.* at *4-5 (*citing* GBL 340(5)) (emphasis added).

320 290 A.D.2d 208.

imposition of which cannot be waived."[321] Under this view, a class representative's willingness to waive treble damages is simply immaterial.

By contrast, the *Nine West* court *allowed* the class plaintiff to waive the New York's Deceptive Acts and Practices statutory penalty. Section 349 of the New York General Business law declares deceptive acts and practices in the conduct of business unlawful.[322] A plaintiff suing under the statute may seek either actual damages or a statutory minimum for violations, which the court may then increase:

> [A]ny person who has been injured by reason of any violation of this section may bring . . . an action to recover his actual damages or fifty dollars, whichever is greater . . . . The court *may, in its discretion,* increase the award of damages to an amount not to exceed three times the actual damages.[323]

Thus, § 349's provision makes the damage multiple discretionary, whereas the Donnelly Act calls for what the *Nine West* court held were mandatory treble damages. Several other state and federal courts have relied on the language difference between § 349(h) and the Donnelly Act treble damages provision to permit waiver under § 349, thus permitting class litigation.[324]

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[321] 290 A.D.2d at 208. Justice Scalia cited *Asher* in *Shady Grove*, suggesting that Justice Ginsburg's comment should not be uncritically accepted. 559 U.S. at ___, Slip Op. at 7, n. 5.

[322] N.Y. Gen. Bus. Law § 349(a).

[323] N.Y. Gen. Bus. Law § 349(h) (emphasis added).

[324] *See Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40-41 (1st Dep't 2004) (permitting the plaintiffs to pursue a class action under § 349 after they had waived the right to minimum damages); *Ho v. Visa U.S.A. Inc.*, No. 112316/00, 2004 WL 1118534, at *3 (Sup. Ct. N.Y. County Apr. 21, 2004), *aff'd*, 16 A.D.3d 256 (1st Dep't 2005) (after dismissing Donnelly Act claims, the court permitted the plaintiffs to waive treble damages and proceed as a class asserting § 349 claims); *Leider*, 387 F. Supp. 2d at 293 (noting that §901(b) does not bar class certification where the plaintiff waives treble damages, and allowing the plaintiffs to waive the penalty and proceed as a class asserting § 349 claims). *Cf. Ridge Meadows Homeowners' Ass'n, Inc. v. Tara Dev. Co., Inc.*, 242 A.D.2d 947 (4th Dep't 1997) (while § 901(b) bars the plaintiffs from maintaining a class action for treble damages under § 349(h), the court allowed a class action to proceed if the class limited their demand to actual damages); *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D.2d 604 (2d Dep't 1987) (sustaining a class

(continued . . .)

At the same time, however, New York courts have attached no significance to mandatory "shall" language in other penalty damages provisions, and have permitted a waiver that avoided § 901(b). For example, prior to a recent amendment, New York Labor Law § 198(1-a) provided that:

> [T]he court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was wilful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.

Like the Donnelly Act, § 198(1-a) instructs that courts "*shall*" award liquidated damages if willfulness is proven. However, in *Pesantez v. Boyle Environmental Services, Inc.*,[325] the First Department permitted waiver of liquidated damages and allowed a class action to proceed – a result contrary to that reached by the Donnelly Act rulings.[326]

A 2009 amendment shifted to the employer the burden to show grounds to deny liquidated damages, whereas previously the employee had to prove the facts required to trigger the award. But the amended statute still contains mandatory language – directing that the court "shall allow . . . an additional amount as liquidated damages" – where the employer fails to discharge its burden.[327]

The case law under the Donnelly Act thus suggests that no waiver of treble damages will be permitted to avoid the class action barrier that CPLR 901(b) erects. However, the Labor Law

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(. . . continued)

action under § 349, where the plaintiffs agreed to waive treble damages); *Beckler v. Visa U.S.A. Inc.*, No. 09-04-C-00030, 2004 WL 2115144 (N.D. Dist. Aug. 23, 2004) (noting that the availability of treble damages does not preclude the plaintiffs' class claims under § 349, so long as they agree to waive treble damages and so long as class members could opt out of the class and pursue their treble damages claims individually).

[325] 251 A.D.2d 11 (1st Dep't 1998).

[326] 251 A.D.2d at 12. *See also Ansoumana v. Gristede's Operating Corp*, 201 F.R.D. 81 (S.D.N.Y. 2001) (permitting waiver of the penalty and allowing the class action to proceed).

[327] L.2009, c. 372, § 1.

rulings leave open the opportunity to argue to the New York Court of Appeals, should the issue be presented, that the Donnelly Act's mandatory language should not necessarily preclude waiving treble damages.

2. Adequacy of a Class Representative Willing to Forego Penalties

Courts also are divided on whether a class representative who is willing to waive treble damages in order to proceed as on behalf of a class adequately represents the interests of the class. In *Pesantez*, the First Department held that the class representative was adequate, despite having waived the available penalty to avoid § 901(b) because class members could opt out of the class if they objected to the waiver and preferred to independently prosecute their claims and seek punitive damages.[328] In *Ansoumana v. Gristede's Operating Corp.*,[329] the Southern District of New York similarly permitted plaintiffs to waive their right to recover liquidated damages as a condition of proceeding as a class because "any who object may opt out of the class."[330]

Where a class would have no viable means of recovery were it not for the waiver of the penalty – because proceeding on individuals claims would be cost prohibitive, even with the penalty recovery – courts have recognized a waiver of penalties in order to support the class mechanism. As the Second Department said in permitting waiver in *Super Glue*: "there can be little doubt that a class action is the only feasible mechanism of addressing the claims of the individual members of the proposed class. The small amount of damages sustained by the

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[328] 251 A.D.2d at 12.

[329] 201 F.R.D. 81.

[330] *Id.* at 95. *See also* Vincent C. Alexander, *McKinney's Statutes Practice Commentaries*, N.Y. C.P.L.R. C901.11 (McKinney 2005) ("the class representative's surrender of a penalty or minimum recovery arguably calls into question the adequacy of representation [], but courts have overcome this hurdle by giving class members the opportunity to opt out of the class").

individual class members would discourage many of them from pursuing their claims individually."[331]

However, other courts have also reached a contrary conclusion. Prior to *Pesantez*, the Supreme Court in *Hauptman v. Helena Rubinstein, Inc*.[332] held that a plaintiff willing to waive punitive damages was an inadequate representative because waiver amounted to impermissible claim-splitting. Although no New York appellate court has expressly rejected *Hauptman*, the *Ansoumana* court stated that *Pesantez* effectively did so because *Hauptman* prohibited waiver without addressing the class members' right to opt out and individually to seek punitive damages.[333] Yet, since *Ansoumana*, at least one court has deemed the plaintiffs inadequate class representatives where they were willing to waive treble damages.[334]

If these issues do percolate up to the Court of Appeals, the Donnelly Act non-waiver rulings do not seem defensible. The *Super Glue* court got it right. If the choice is between an effective single damages remedy and no remedy at all – as is typically the case in Donnelly Act consumer class actions – there is no significant interest to be served by prohibiting waiver. That would simply permit price-fixers and other antitrust miscreants to inflict widespread, but diffused, injury on victims without ever being held accountable to make the victims whole. Moreover, elementary algebra teaches that one times something is always greater than three times nothing. The waiver decision shows rationality – not representational inadequacy or

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[331] 132 A.D.2d at 607-08.

[332] 114 Misc. 2d 935 (Sup. Ct. N.Y. County 1981).

[333] *Ansoumana*, 201 F.R.D. at 95.

[334] *See Relafen*, 221 F.R.D. at 286 (a class representative's willingness to waive claims for treble damages "casts doubt on the named plaintiffs' fitness to represent class members who might prefer to pursue statutory or punitive remedies individually"). *See also Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 480 (E.D. Pa. 1997) ("named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class") (pre-*Pesantez*).

conflict with class member interests. Any individual class member who thinks him- or herself aggrieved by the treble damages waiver is protected by the right to opt out when notice of class certification is given or when a settlement notice is distributed.

VIII. Conclusion

As the topics discussed reflect, any notion that New York State antitrust law merely replicates federal antitrust law is incorrect. While there are very substantial similarities, this should not obscure – or, indeed, misdirect attention from – the differences. Businesses looking for certainty, or at least predictability, may bemoan this state of affairs. But it is part and parcel of our federal system. The dual regime for antitrust similarly is found in other areas as well – securities regulation, products liability, consumer protection, and environmental law, to name just a few.

The States are supposed to experiment. The nation as a whole is enriched when they do. The ability to experiment is strength of our federalism, not a weakness.

This report was prepared by Morissa Falk, Andrew Finch, Jay L. Himes, Sarah Hubbard, Ryan Kriger, Hollis L. Salzman, Aidan Synnott and Joseph Tusa, who are members of the Antitrust Committee of the Commercial and Federal Litigation Section. It was approved by unanimous votes of the Section's Executive Committee on March 16, 2010 and May 12, 2010.

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