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A Call to Albany: It's Time to Amend the Donnelly Act

Let's face it. The Donnelly Act—New York's antitrust statute; the state's "little Sherman Act"—is not worth very much these days. For all practical purposes, it can only be used by the attorney general or by a business that has been harmed by the challenged anticompetitive conduct.

For everyone else, namely individual consumers—the very constituency the antitrust laws were designed to protect—the statute is pretty much off-limits.

The reason for the Donnelly Act's limited application is the state Legislature's ostensible ban on bringing class actions under the act. While there is great debate among many as to whether the Legislature really intended such a ban, according to New York's highest court, the issue is crystal clear. It will not allow class actions under the Donnelly Act unless Albany gives the definite go-ahead.

Until that happens, if it ever does, consumers will remain essentially excluded from New York's antitrust enforcement regime. Taking on the risk, expense and resource demand of an antitrust challenge will be too much for any individual or group of consumers to bear alone. This can not be what the Legislature envisioned when it first enacted the Donnelly Act more than a century ago. And, it certainly can not be what it contemplated when it amended the act several years ago for the explicit purpose of expanding the ability of New York consumers to seek redress under the antitrust laws.

The Current Ban on Class Actions

If there were any lingering question on the right of individuals or businesses to bring class actions under the Donnelly Act, the New York Court of Appeals settled the issue last year with a resounding No![1] According to the Court, neither the statutory construction nor the legislative intent supports such a right. In fact, from the Court's perspective, it is not even a close call.

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Under New York's class-action rule (CPLR §901(b)), a class-action cannot be brought under any law that imposes a penalty on offenders. The one exception to this statutory bar is if the particular statute explicitly authorizes a class action. The Donnelly Act does not.

So, the question has always been whether the act's treble damages provision should be considered a penalty. The Court of Appeals held that it should be, thus capturing the Donnelly Act within the class action proscription.

In reaching its decision, the Court looked to a plain reading of the Donnelly Act. The Court found no language suggesting that treble damages was intended to serve a compensatory purpose. The Court also looked to the statute's legislative history where it again found no suggestion of any compensatory design with treble damages. What the Court found instead was a damage award intended to reach beyond actual damages to punish and deter antitrust violations, and encourage those harmed to bring suit. The Court concluded that this was precisely the type of enhanced damage award the Legislature wanted to exclude from New York's class action system.

The Court also seemed particularly swayed by the New York Legislature's failure to explicitly provide for antitrust class actions despite numerous opportunities to do so. It could have authorized them at the time the treble damages award was first created, which occurred (perhaps not coincidentally) within weeks of the enactment of the current class action bar. The Legislature also could have authorized them on any one of the many occasions where it specifically entertained the question.

Legislation to allow antitrust class actions died only last year (as it has for the past several years). While the legislation was reintroduced at the beginning of this year, the bill remains languishing in the Assembly, collecting dust.

Legislative Ambivalence?

Despite the Court's straightforward read on the subject, it is far from clear that the current ban on antitrust class actions is what the New York Legislature really intended. That is because only 10 years ago, New York joined roughly two dozen states in breaking ranks with the federal government to allow indirect purchasers to bring antitrust actions. The Supreme Court has barred indirect purchaser actions under the Sherman Act because of the perceived difficulty of apportioning damages and causation over multiple levels of the distribution chain.[2]

In rejecting the Supreme Court's reasoning and approach, the New York Legislature was clear that its overriding concern was providing New York consumers full and proper redress under the antitrust laws. The Legislature was also clear that the only realistic way for consumers to seek this redress was through their ability to participate in class actions. Indeed, it was the exclusion of New York consumers from several prominent class actions that was one of the key driving forces behind New York's move to allow indirect purchaser actions.

The debate surrounding this (supposed) expansion of the Donnelly Act also makes clear the legislative recognition and expectation that indirect purchaser actions would be brought as class actions. Supporters of the bill repeatedly

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pointed to the accessibility of consumer class actions as a necessary and desired outcome of the legislation. Opponents of the bill pointed to the same eventuality as a reason to maintain the ban on indirect purchaser actions. There can be little dispute that all sides viewed as hand in hand the right of consumers to bring indirect purchaser actions and their right to bring class actions.

Somewhere along the way this once clear vision became muddled. Maybe a function of compromise. Maybe ambivalence. Or, maybe the result of sheer gridlock for which Albany is at times notorious. Whatever the case, the class-action ban that currently exists can not be reconciled with New York's unmistakable drive to expand consumers' rights under the antitrust laws. Notably, the Court of Appeals did not even try to square these incongruous legislative exertions. In fact, it ignored the indirect purchaser legislation altogether.

The failure of New York's high court to even consider this legislation is all the more telling given the central role it played in so many of the arguments raised in support of allowing antitrust class actions. Even the state of New York (through the attorney general) pointed to this legislation as a clear indication of the Legislature's intent to allow antitrust class actions. The Court of Appeals had no response to these arguments.

Clearly, the Court did not want to go there. And, maybe for good reason. Given the Legislature's incompatible positioning on the issue, perhaps the Court thought it best to kick it back to Albany to make the call. There is no other explanation for the Court's deliberate sidestep. Nor is there one for the Court's refusal to heed (or even acknowledge) the attorney general's urging that consumers, through class actions, be permitted to play a greater role in supplementing the state's antitrust enforcement efforts.

Time to Get It Right

With this judicial abstention, the class-action question remains firmly in the hands of the New York Legislature. It is time to work through whatever log jam has prevented Albany from coming clean on this issue. It is time to follow the U.S. Congress and the legislatures of virtually every other state in openly recognizing the critical role that individual consumers play in enforcing the antitrust laws.

The competition laws are not just like any other laws that govern business behavior. They are designed to prevent conduct that strikes at the very heart of the U.S. economy—the free-enterprise system.[3] Unlike a typical business transgression, an antitrust violation has ramifications that extend well beyond the immediate target of the misconduct. It affects entire industries with widescale consumer consequences. That is why the antitrust laws are considered as important to protecting individual rights as the Magna Carta and the Bill of Rights.[4]

Congress recognized early on that the government would not have the resources to adequately enforce the antitrust laws alone. So, it enlisted the support of the public to serve as "private attorneys general" to assist in the enforcement.[5] Congress did so through the bounty of treble damages, attorney's fees and costs awarded to successful plaintiffs, and through facilitating a vibrant class action system.

There are numerous benefits to the private attorney general model. Perhaps the strongest is that it provides a much-needed supplement to the significant resource constraints of the government. Whether state or federal, the government has only so many attorneys and so much money it can devote to antitrust enforcement. These constraints often delay government action, or more importantly, cause the government to choose very carefully the cases it brings. There is a definite resistance to difficult cases. The government usually chooses to pour its limited resources only into those cases it views as clear winners.

Government enforcement is also constrained by politics. Under the current Bush administration, for example, it is no coincidence that U.S. civil antitrust enforcement has been at an all-time low. With its recently published paper essentially calling for weakened §2 Sherman Act enforcement, the DOJ apparently wants to keep it that way.[6] Private enforcement serves as an important counterbalance to this kind of government laxity. Private actions also provide antitrust victims with a vehicle for obtaining compensation for their harm, and serve as an additional level of deterrence by exposing violators to significantly increased monetary risk.

Private antitrust plaintiffs have heeded Congress' original call to service and, as Congress hoped, have become an indispensable part of U.S. antitrust enforcement. The number of private antitrust actions for any given year dwarfs the number of government actions, in some years by as much as a factor of 20. However, few of these cases are brought under the Donnelly Act. So, for those actions that fall outside of the Sherman Act (like indirect purchaser actions and those subject to federal exemptions like McCarran Ferguson), New York consumers remain disproportionately underrepresented.

In other words, without class actions, the private attorney general model has been largely a nullity in New York. Antitrust cases are just too risky, too expensive, and typically offer too little reward for any individual consumer to bring alone. In exhorting the Court of Appeals to allow class actions, the New York attorney general made this very point. He further warned that effective antitrust enforcement in New York could not be maintained without consumer class actions. The Court took a pass on the issue, leaving it to the Legislature to reconcile its conflicting visions and decide whether it is time for New York to fully embrace the private attorney general model.

Conclusion

Amending the Donnelly Act to allow for treble damages was supposed to be about encouraging private enforcement of the antitrust laws. Amending it a second time to allow for indirect purchaser actions was supposed to be about enlarging the rights of New York consumers to engage in this private enforcement. If the New York Legislature still believes in these worthy pursuits, it is time to stop the equivocation and join the rest of the country in explicitly authorizing private class actions. Otherwise, as one lower court judge so aptly put it, the antitrust right of action supposedly afforded all New Yorkers will remain "hollow in effect."[7] And, New York consumers will remain largely alone on the sidelines of private antitrust enforcement.

1. *Sperry v. Crompton Corp.*, 8 NY3d 204 (2007).
2. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
3. *Hawaii v. Standard Oil*, 405 U.S. 251, 262 (1972).
4. *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972).
5. *Cargill v. Monfort of Colorado*, 479 U.S. 104, 129 (1986).
6. U.S. Dep't of Justice, "Competition and Monopoly: Single Firm Conduct Under §2 of the Sherman Act" (2008)
7. *Lennon v. Philip Morris Co.*, 734 NYS2d 374, 381 (N.Y. Sup. Ct. 2001).