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Revitalizing Indirect Purchaser Claims: Antitrust Enforcement Under New York Law

Robert F. Roach*

[The decade of the 1980s was marked by substantial changes in the nature of antitrust enforcement. The decade had been ushered in by the United States Supreme Court's decision in *Illinois Brick v. Illinois*, which held that only persons who dealt directly with those who violated federal antitrust law were afforded a damage remedy under the Clayton Act. Indirect purchasers, who purchased down the distribution chain, were denied a remedy, even where monopoly overcharges were passed on to them. *Illinois Brick* resulted in a significant decline in federal antitrust damages litigation. The 1980s also saw a decline in antitrust enforcement activity by federal agencies. State legisla-

* Assistant Attorney General, Section Chief, Antitrust Bureau, New York Attorney General's Office. The opinions expressed in this article are the author's own and do not necessarily reflect the opinions of the New York Attorney General's Office. The article benefitted greatly from the comments of Jane Azia, Timothy Cone, Antonia Hill, William Lanning, Lisa Napolitano and George Sampson.

tures and attorneys general moved to fill the void in federal law and law enforcement and provided an alternative avenue of needed relief. In this article, through an analysis of New York statutes, legislative history and case law, the author argues that New York antitrust and consumer protection laws provide an effective remedy for indirect purchasers who are harmed by anticompetitive activities but who are barred from seeking relief under federal law].

I. Introduction

In recent years, new or revised state antitrust statutes,¹ active state attorneys general² and supportive United States Supreme Court decisions³ have created a renaissance in the enforcement and development of state antitrust laws. State antitrust laws now provide renewed avenues of relief for persons who have been injured by anticompetitive business practices, but who have been denied protection by restrictive interpretations of the federal antitrust laws or by inaction of federal agencies charged with enforcing them.⁴

1. Since 1970, twelve states have adopted new antitrust laws: ALASKA STAT. § 45.50.562-596 (1986 & Supp. 1992); COLO. REV. STAT. § 6-4 (1992); CONN. GEN. STAT. § 35-24-45 (1987 & Supp. 1992); DEL. CODE ANN. tit. 6, §§ 2101-14 (Supp. 1992); KY. REV. STAT. ANN. §§ 365.020-365.070 (Michie/Bobbs-Merrill 1987); MD. CODE ANN. COM. LAW II § 11-201-213 (1990); NEV. REV. STAT. § 598A.010-280 (1991); N.J. REV. STAT. § 56:9-1 to 56:9-19 (1989); OR. REV. STAT. §§ 646.705-646.836 (1991); R.I. GEN. LAWS § 6-36 (1992); VA. CODE ANN. § 59.1-9.1 to 59.1-9.17 (Michie 1992); W.VA. CODE § 47-18-1 to 47-18-23 (1992). The only states lacking a general antitrust statute are Georgia, Pennsylvania, Vermont and Wyoming.

2. In addition to individual state action, the states' attorneys general coordinate activities through the National Association of Attorneys General (NAAG). NATIONAL ASS'N OF ATTORNEYS GENERAL, THE OFFICE OF ATTORNEYS GENERAL: POWERS & DUTIES 233-37 (Lynne M. Ross ed., 1990). NAAG's standing Antitrust Committee is comprised of seven attorneys general. NATIONAL ASS'N OF ATTORNEYS GENERAL, STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT i-ii (1989). NAAG's Antitrust Task Force is comprised of the chief antitrust attorney for each of the state attorneys general. *Id.* The Task Force coordinates multistate antitrust investigations, litigation and amicus curiae briefs. *Id.* The Task Force also develops proposed legislation, legislative commentary and policy positions for the Antitrust Committee and NAAG as a whole. *Id.*

3. See, e.g., *California v. American Stores Co.*, 495 U.S. 271 (1990) (state authority to seek divestiture as a form of injunctive relief under the Clayton Act, 15 U.S.C. § 16 (1988), upheld as a remedy for violations involving anticompetitive mergers); *California v. ARC America Corp.*, 490 U.S. 93 (1989) (holding that state statutes which allow damage remedies for indirect purchasers are not preempted by federal antitrust law).

4. See, e.g., Lloyd Constantine, *Antitrust Federalism*, 29 WASHBURN L.J. 163 (1990); Symposium, *Current Trends In State Antitrust Enforcement*, 56 ANTITRUST L.J. 99

In particular, states have actively sought to protect the rights of so called "indirect purchasers."⁵ Indirect purchasers do not deal directly with price fixers or others who engage in anticompetitive activity, but are injured when the costs of illegal activities are passed down the distribution chain.⁶ As a result of the United States Supreme Court decision in *Illinois Brick Co. v. Illinois*,⁷ indirect purchasers are barred from collecting damages under the federal Clayton Act.⁸

Many state antitrust statutes rectify the inequity caused by *Illinois Brick* by allowing damage remedies for indirect purchasers.⁹ Initially, some courts and commentators claimed that *Ill-*

(1987); Stanley M. Lipnick & Janis M. Gibbs, *An Overview Of The Last Decade Of State Antitrust Law*, 16 U. TOL. L. REV. 929 (1985).

5. See *infra* note 9 and accompanying text.

6. See *infra* notes 116-26 and accompanying text.

7. 431 U.S. 720 (1977).

8. *Id.* at 744-48. Section 4 of the Clayton Act, a federal law dealing with antitrust regulations and unfair trade practices, provides a damage remedy for persons injured by violations of federal antitrust laws. Clayton Act § 4, 15 U.S.C. § 15 (1988). It states in pertinent part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. § 15(a).

9. In the wake of *Illinois Brick*, twelve states and the District of Columbia passed statutes expressly providing for recovery by indirect purchasers. CAL. BUS. & PROF. CODE § 16750(a) (West Supp. 1989); D.C. CODE ANN. § 28-4509(a) (1981); HAWAII REV. STAT. § 480-14(c) (Supp. 1991); ILL. ANN. STAT. ch. 38, para. 60-7(2) (Smith-Hurd Supp. 1992); KAN. STAT. ANN. § 50-801(b) (Supp. 1991); ME. REV. STAT. ANN. tit. 10, § 1104(1) (West Supp. 1991); MD. CODE ANN. COM. LAW II § 11-209 (1990); MICH. COMP. LAWS ANN. § 445.778 (West Supp. 1989); MINN. STAT. ANN. § 325 D. 57 (West Supp. 1992); N.M. STAT. ANN. § 57-1-3(A) (Michie 1987); R.I. GEN. LAWS § 6-36-12(g) (1985); S.D. CODIFIED LAWS ANN. § 37-1-33 (1992); WIS. STAT. ANN. § 133.18(1) (West 1989). While these amendments may have created new remedies in some states, California made clear that its amendment simply codified an existing remedy under California law. 1978 Cal. Stat. 1696. The California statute enacting the amendment declared that it "does not constitute a change in, but is declaratory of, the existing law." *Id.* Other states, such as Arizona, did not amend their statute after *Illinois Brick*, but claim that an implied right of recovery for indirect purchasers exists under state law. See *California v. ARC America Corp.*, 490 U.S. 93, 98 n.3 (1989) ("[t]he Arizona statute, ARIZ. REV. STAT. ANN. § 44-1408(A) (1987), generally follows the language of the Clayton Act, but it might be interpreted as a matter of state law as authorizing indirect purchasers to recover.").

Two states enacted antitrust statutes prior to *Illinois Brick* which explicitly permit indirect purchasers to collect damages. ALA. CODE § 6-5-60(a) (1975) (statute, enacted in

nois Brick barred state as well as federal indirect purchaser claims.¹⁰ However, the United States Supreme Court rejected these arguments in *California v. ARC America Corp.*,¹¹ holding that indirect purchasers may seek damages for antitrust violations under appropriate state law.¹²

The revitalization of state antitrust enforcement and the *ARC America* decision require plaintiffs and potential defendants alike to recognize the rights of indirect purchasers under state antitrust law.¹³ This article sets forth and explains three propositions concerning remedies available to injured indirect purchasers under New York law. First, the general rule of damages allows a remedy to any person proximately harmed by unlawful conduct. *Illinois Brick*, which bars recovery by injured indirect purchasers,¹⁴ is an exception to this rule and should be strictly limited to cases arising under section 4 of the Clayton Act. This limiting construction is supported by *ARC America* and related Supreme Court decisions regarding indirect purchasers.¹⁵

Second, New York's antitrust statute, the Donnelly Act,¹⁶ allows indirect purchasers to recover damages.¹⁷ Although the Donnelly Act does not state in explicit language that indirect purchasers may collect damages, the legislative history of the Donnelly Act, its proper statutory construction, and New York State public policy require a damage remedy to be implied.¹⁸

1907, granting damage remedy to parties for "direct or indirect" injury); Miss. CODE ANN. § 75-21-9 (1972) (statute, enacted in 1942, granting damage remedy to parties for "direct or indirect" injury).

10. See, e.g., *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1447 (9th Cir. 1987) ("state law claims . . . based on indirect purchases . . . that do not fall within any exception to the rule of *Illinois Brick* are preempted because they stand 'as an obstacle to the accomplishment of the full purposes and objectives' of federal antitrust law."), *rev'd sub nom.* *California v. ARC America Corp.*, 490 U.S. 93 (1989); Howard B. Green, Note, *State Indirect Purchaser Statutes, The Preemptive Power of Illinois Brick*, 62 B.U. L. REV. 1241 (1982).

11. 490 U.S. 93 (1989).

12. *Id.* at 100, 105-06.

13. See *infra* notes 45-51 and accompanying text.

14. *Illinois Brick*, 431 U.S. at 744-48.

15. See *infra* notes 49-51 and accompanying text.

16. N.Y. GEN. BUS. LAW §§ 340-347 (McKinney 1988).

17. See *infra* note 72 and accompanying text.

18. See *infra* Part III.

Third, New York's "Little FTC Act"¹⁹ and the Attorney General's *parens patriae* authority under both New York's "Little FTC Act"²⁰ and the New York Executive Law,²¹ also provide monetary relief to indirect purchasers.²²

II. Indirect Purchaser Claims Under Federal Law: *ARC America Corp.* and Its Predecessors

In a multi-level distribution chain, monopoly overcharges are typically passed on by intermediaries to ultimate purchasers.²³ This economic fact raises two questions: (1) who is entitled to recover damages from monopolists; and (2) how, if at all, are damages to be apportioned among purchasers at various levels in the distribution chain? These questions were addressed by the United States Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,²⁴ *Illinois Brick v. Illinois*²⁵ and *California v. ARC America Corp.*²⁶

Hanover Shoe involved a treble-damages action brought under section 4 of the Clayton Act against a manufacturer of shoe machinery by one of its customers, a manufacturer of shoes.²⁷ The shoe machinery manufacturer argued in its defense that the plaintiff's business had not been injured as required by section 4 because it had passed on the claimed illegal overcharge to its customers who were the persons actually injured by the antitrust violation.²⁸

The Supreme Court rejected this defense, holding that a direct purchaser suing for treble damages under section 4 of the Clayton Act is injured within the meaning of the section by the full amount of the overcharge it paid, and that the defendant is not permitted to introduce evidence that indirect purchasers

19. N.Y. GEN. BUS. LAW §§ 349 to 350-e (McKinney 1988).

20. *Id.* § 349(b).

21. N.Y. EXEC. LAW § 63(12) (McKinney 1992).

22. See *infra* notes 140-42 and accompanying text.

23. See *infra* notes 116-26 and accompanying text.

24. 392 U.S. 481 (1968).

25. 431 U.S. 720 (1977).

26. 490 U.S. 93 (1990).

27. *Hanover Shoe*, 392 U.S. at 483-84.

28. *Id.* at 487-88.

were in fact injured by the illegal overcharge.²⁹

The Court gave two reasons for the decision: first, proving "pass on" of antitrust overcharges would be overly complicated; and second, antitrust violators would retain the "fruits of their illegality" because indirect purchasers "would have only a tiny stake in the lawsuit" and, hence, little incentive to sue.³⁰

While *Hanover Shoe* barred "defensive pass-on,"³¹ the vast majority of federal courts nevertheless continued to permit "offensive pass-on" after *Hanover Shoe*.³² That is, indirect purchasers were permitted by federal courts to recover damages from monopolists by claiming that the excessive costs associated with monopoly profits were passed on to them by wholesalers and other middlemen.³³ However, in *Illinois Brick v. Illinois*,³⁴ the

29. *Id.* at 494.

30. *Id.* at 492-94.

31. *Id.* at 494.

32. See, e.g., *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 200 (9th Cir. 1971), cert. denied, 415 U.S. 919 (1974); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1088 (2d Cir. 1971); *Armco Steel Corp. v. Adams County*, 376 F.2d 212, 214 (8th Cir. 1967); *Armco Steel Corp. v. North Dakota*, 376 F.2d 206, 210-11 (8th Cir. 1967); *Lefrak v. Arabian American Oil Co.*, 405 F. Supp. 597, 598 (E.D.N.Y. 1975); *Carnwale Bag v. Slide Rite Mfg. Corp.*, 395 F. Supp. 287, 291 (S.D.N.Y. 1975); *Midway Enter., Inc. v. Petroleum Mktg. Corp.*, 375 F. Supp. 1339, 1347 (D. Md. 1974); *In re Master Key Litigation*, 1973 Trade Cas. (CCH) ¶ 74,680 (D. Conn. 1973); *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 597 (N.D. Ill. 1973). Many actions by indirect purchasers have also been permitted to proceed by courts without discussion. See, e.g., *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851 (N.D. Cal. 1975); *In re Gypsum Cases*, 386 F. Supp. 959 (M.D. Cal. 1974); *Southern General Builders, Inc. v. Maule Indus., Inc.*, 1973-1 Trade Cas. (CCH) ¶ 74,484 (S.D. Fla. 1973); *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972); *California v. Frito Lay, Inc.*, 333 F. Supp. 977 (C.D. Cal. 1971); *Utah v. American Pipe & Constr. Co.*, 316 F. Supp. 837 (C.D. Cal. 1969); "East of the Rockies" Concrete Pipe Litigation, 302 F. Supp. 214 (J.P.M.L. 1969); *Iowa v. Union Asphalt & Road oils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968).

The only circuit court decision arguably to the contrary was *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) (per curiam). This one page decision upheld the district court's dismissal as a sanction for failure to answer interrogatories. *Id.* Plaintiffs did not show how overcharges became part of their purchase price. *Id.* The Third Circuit cited this as the "insuperable difficulty" discussed in *Hanover Shoe*. *Id.* at 1188. Nevertheless, the principle announced in *Mangano* was criticized and strictly limited to its facts by district courts in the Third Circuit. See, e.g., *In re Sugar Antitrust Litigation*, 73 F.R.D. 322, 350-55 (E.D. Pa. 1976) (allowing damages to indirect purchasers); *Midway Enter., Inc. v. Petroleum Mktg. Corp.*, 375 F. Supp. 1339, 1344-45 (D. Md. 1974) (allowing damages to indirect purchasers).

33. See *supra* note 32.

34. 431 U.S. 720 (1977).

United States Supreme Court overruled the lower court consensus.³⁵

In *Illinois Brick*, the State of Illinois brought suit on its own behalf and on behalf of a number of local governmental agencies seeking treble damages under section 4 of the Clayton Act for a conspiracy to fix the price of concrete block in violation of section 1 of the Sherman Act.³⁶ The state and local governments were all indirect purchasers of concrete block.³⁷ They did not purchase concrete block directly from the price-fixing defendants, but absorbed the higher costs of concrete block passed on to them by contractors performing construction projects for state agencies.³⁸

The Seventh Circuit Court of Appeals, consistent with the uniform interpretation of the lower courts, held that the state of Illinois may well have been injured in fact as an indirect purchaser.³⁹ According to the circuit court, any difficulty the state might have had in proving injury should not have prevented it from pursuing its treble damage claims under the Clayton Act.⁴⁰ The Seventh Circuit concluded that privity was not a requirement for recovery under the Clayton Act, and that allowing use of "offensive pass-on" by plaintiffs, while denying "defensive pass-on" under *Hanover Shoe*, was consistent with the purposes of the Clayton Act.⁴¹

On review, the Supreme Court agreed that indirect purchasers can be injured in fact, and may well have standing to sue under section 4 of the Clayton Act.⁴² However, the Supreme Court still chose to deny a damage remedy under section 4 of

35. *Id.* at 748.

36. *Id.* at 726-27.

37. *Id.* at 726.

38. *Id.*

39. *Illinois Brick v. Ampress Brick Co.*, 536 F.2d 1163, 1165-67 (7th Cir. 1976).

40. *Id.* at 1166-67.

41. *Id.* at 1165-67.

42. *Illinois Brick*, 431 U.S. at 728 n.7, 746. The Court explained that, "in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Id.* at 746. Accordingly, subsequent to the *Illinois Brick* decision, lower courts have permitted indirect purchasers to sue for injunctive relief. See, e.g., *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *Mid-West Paper Prod. Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979).

the Clayton Act to "indirect purchasers who may have been actually injured by antitrust violations"⁴³ for three reasons: (1) to avoid multiple liability of defendants; (2) to provide plaintiffs with incentive to sue; and (3) to avoid unnecessarily complicated litigation.⁴⁴

In *California v. ARC America Corp.*,⁴⁵ a unanimous Supreme Court decided to strictly limit its decision in *Illinois Brick* to claims under section 4 of the Clayton Act.⁴⁶ In *ARC America*, Alabama, Arizona, California and Minnesota sued various defendants for fixing prices of cement.⁴⁷ Along with their claims under section 1 of the Sherman Act and section 4 of the Clayton Act, plaintiffs sued under their state antitrust laws for damages sustained by them as indirect purchasers of cement.⁴⁸

At the outset, the Court stated that the issue in both *Hanover Shoe* and *Illinois Brick* "was strictly a question of statutory interpretation — what was proper construction of § 4 of the Clayton Act."⁴⁹ To the extent that the Court discerned policy reasons to deny recovery under section 4 of the Clayton Act to indirect purchasers, such policy was irrelevant to state antitrust laws.⁵⁰ The Court held:

It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law. . . . [N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect pur-

43. *Illinois Brick*, 431 U.S. at 731-36, 744-47.

44. *Id.* The majority in *Illinois Brick* stated that this conclusion better serves the legislative purpose of the Clayton Act. *Id.* at 746. However, as the dissent clearly establishes, the legislative history supports a contrary conclusion. *See id.* at 733-34 n.14, 754-58, 761-62, 764-65 (Brennan, J., dissenting).

45. 490 U.S. 93 (1990).

46. *Id.* at 105.

47. *Id.* at 97.

48. *Id.* at 98. Alabama's antitrust statute had allowed indirect purchasers an explicit damage remedy since 1907. *See supra* note 9. California and Minnesota amended their statutes after *Illinois Brick* to allow an indirect purchaser remedy. *See supra* note 9. Arizona argued that an indirect purchaser remedy was implied in its state statute. *See supra* note 9.

49. *ARC America*, 490 U.S. at 103.

50. *Id.*

chasers to recover under their own antitrust laws.⁵¹

Moreover, the Court went on to hold that allowing indirect purchasers to collect damages under state antitrust laws, even when brought as pendent claims in federal court, would not necessarily complicate federal proceedings, would not deter plaintiffs from bringing antitrust claims, and would not result in multiple liability for defendants.⁵²

The conclusion that must be drawn from the above decisions is clear. *Hanover Shoe* and *Illinois Brick* are applicable only to cases under section 4 of the Clayton Act and are irrelevant to any other statutes, including state antitrust laws.⁵³

51. *Id.*

52. *Id.* at 103-04.

53. Other Supreme Court decisions confirm this conclusion, since the principles and reasoning of *Illinois Brick* have not been applied, even in other areas of federal antitrust law. See *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). For example, one fundamental reason the Supreme Court decided that injured indirect purchasers should be denied a damage remedy under section 4 of the Clayton Act was that proof of cost pass-on from one level of the product distribution chain to the next would be overly complex. See *supra* notes 42-44 and accompanying text. However, pass-on issues are not considered overly complex under section 2(e) of the Robinson-Patman Act (codified as 15 U.S.C. § 13(a) (1970)). The Robinson-Patman Act deals with price discrimination where "a person engaged in commerce . . . discriminate[s] in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or . . . create a monopoly . . . or to injure, destroy, or prevent competition with any person . . ." 15 U.S.C. § 13(a) (1970). The Act does not prevent price "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . ." *Id.*

In *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), a Robinson-Patman action, the Supreme Court held that a jury could award damages to a retail service station operator who sued because the defendant had granted an illegal discount to a distributor who passed on the discount to a competitor, thereby permitting the competitor to undersell the plaintiff. *Id.* at 648-49. The Court required only a casual connection between the discount and plaintiff's injury be shown. *Id.* In reaching this conclusion, the Court stated that any limitation of recovery to a particular level in the chain of distribution would be "wholly an artificial one." *Id.* at 647. According to the Court, any other result would be unconscionable, permitting violators "to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." *Id.*

The principles of *Perkins* were reaffirmed by the Supreme Court in *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). In that case, Texaco was found liable for damages caused to Hasbrouck by an illegal discount which was passed on to Hasbrouck's competitors. *Id.* at 570. Stating that the fact pattern was essentially the same as in *Perkins*, the Supreme Court held that "[t]he additional link in the distribution chain does not insulate Texaco from liability . . ." *Id.* at 566. Indeed, in addressing the issue of damages,

III. Remedies For Indirect Purchasers Under New York Antitrust Law

While the Donnelly Act was modeled, in part, after the federal Sherman Act,⁵⁴ interpretations of the Donnelly Act do not follow federal law where differences in statutory language, legislative history or state policy occur.⁵⁵ Therefore, in order to determine whether indirect purchasers may recover damages for violation of New York's antitrust law, New York courts must refer to the Donnelly Act, its legislative history and case law. As discussed below, New York case law and proper statutory construction of the Donnelly Act permit indirect purchasers to collect damages for antitrust violations.⁵⁶ This conclusion is reinforced by New York State policy considerations.⁵⁷

A. Common Law Principles

The Sherman Act, a federal antitrust law prohibiting unreasonable interference with free market pricing and distribution in interstate trade,⁵⁸ was passed on July 2, 1890.⁵⁹ Activities prohibited by the Sherman Act were set forth in section 1.⁶⁰ As originally passed, section 7 of the Sherman Act provided a damage remedy for persons injured by violations of section 1.⁶¹ Sec-

the Supreme Court reaffirmed their "traditional rule," excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury. *Id.* at 572. According to the Court, plaintiffs need not submit "concrete, detailed proof of injury," thus solving the overly complex problem of proving pass-on. *Id.* at 573 (citing *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-66 (1981)).

Likewise, tracing passed-on costs was not considered "too complicated" by the Supreme Court under federal tax law. *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937). In *Anniston Mfg. Co.*, the Supreme Court upheld the constitutionality of a requirement that tax refund claimants prove that they did not pass on increased costs. *Id.* at 347-56.

54. See *infra* notes 58-72 and accompanying text.

55. *Anheuser-Busch v. Abrams*, 71 N.Y.2d 327, 334-35, 520 N.E.2d 535, 539, 525 N.Y.S.2d 816, 820 (1988). See also *People v. Roth*, 52 N.Y.2d 440, 447, 420 N.E.2d 929, 930, 438 N.Y.S.2d 737, 738 (1981) ("[a] Federal Court interpreting a Federal statute [the Sherman Act] has no direct bearing upon a State court's analysis of an analogous provision enacted by the State Legislature [the Donnelly Act].").

56. See *infra* note 72.

57. See *infra* notes 100-37 and accompanying text.

58. 15 U.S.C. §§ 1-7 (1988).

59. Sherman Act, ch. 647, 26 Stat. 209-10 (1890) (codified at 15 U.S.C. §§ 1-7 (1988)).

60. 15 U.S.C. § 1.

61. *Id.* § 7.

tion 7 of the Sherman Act was repealed in 1955,⁶² and was superseded by section 4 of the Clayton Act.⁶³

New York's antitrust statute, the Donnelly Act,⁶⁴ was originally enacted in 1897⁶⁵ in response to a decision by the United States Supreme Court⁶⁶ severely limiting the scope of the Sherman Act.⁶⁷ The Donnelly Act was modeled in part after the Sherman Act.⁶⁸ While the New York Legislature adopted language regarding prohibited activities similar to section 1 of the Sherman Act, it did not adopt the damage provisions of section 7 of the Sherman Act.⁶⁹ Nor did the Legislature adopt the language of section 4 of the Clayton Act when it was enacted in 1914.⁷⁰ Indeed, no reference to damages was made in the Donnelly Act until 1957 when a statute of limitations was added.⁷¹ It was not until 1975 that an explicit damage remedy was provided

62. Act of July 7, 1955, ch. 283, §§ 3, 7, 69 Stat. 283.

63. Act of October 15, 1914, ch. 323, §§ 4, 15, 38 Stat. 731 (codified at 15 U.S.C. § 15 (1988)).

64. N.Y. GEN. BUS. LAW §§ 340-347 (McKinney 1988).

65. Act of May 7, 1897, ch. 383, 1897 N.Y. Laws 310 (codified as amended at N.Y. GEN. BUS. LAW § 340(1) (McKinney 1988)). It provided:

Section 1. Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

Id.

66. *United States v. E.C. Knight*, 156 U.S. 1, 17 (1894) (holding that manufacturing was not commerce).

67. *See* REP. OF THE JOINT COMM. OF THE NEW YORK STATE SENATE AND ASSEMBLY, APPOINTED TO INVESTIGATE TRUSTS 28-30 (1897); REP. OF THE SPECIAL COMM. TO STUDY THE NEW YORK STATE ANTITRUST LAWS OF THE NEW YORK STATE BAR ASS'N 9a-10a (1957).

68. *New York v. Mobil Oil Corp.*, 38 N.Y.2d 460, 463, 344 N.E.2d 357, 359, 381 N.Y.S.2d 426, 428 (1976).

69. Act of May 7, 1897, ch. 383, 1897 N.Y. Laws 310 (codified as amended at N.Y. GEN. BUS. LAW §§ 340-347 (McKinney 1988)).

70. Clayton Act, ch. 323, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 15 (1988)).

71. Act of Apr. 24, 1957, ch. 893, 1957 N.Y. Laws 1931 (codified at N.Y. GEN. BUS. LAW § 340(5) (McKinney 1988)). The new section provided: "An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued." *Id.*

in the Act.⁷²

While the Donnelly Act as originally passed did not expressly provide for damages to those injured by its violation, New York courts applied common law principles⁷³ and implied a right to damages under the Donnelly Act,⁷⁴ including punitive damages to provide relief for plaintiffs.⁷⁵ Under common law principles, there is no limitation barring indirect purchasers from collecting damages under the Donnelly Act.⁷⁶ Recoverable damages under the Donnelly Act are those damages "proximately caused by the violation."⁷⁷ Proximate cause only requires a plaintiff to be "within the reasonable foreseeable area to be affected by the antitrust violations,"⁷⁸ and does not require privity of contract.

To the contrary, there is a strong policy under New York

72. Act of July 1, 1975, ch. 333, 1975 N.Y. Laws 498 (codified at N.Y. GEN. BUS. LAW § 340(5) (McKinney 1988)). It provides in part: "The state, or any political subdivision or public authority of the state, or any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees." *Id.*

73. The Donnelly Act was based on and did not alter common law. *In re Davies*, 168 N.Y. 89, 101, 61 N.E. 118, 120 (1901). See REP. OF THE SPECIAL COMM. TO STUDY THE NEW YORK STATE ANTITRUST LAWS OF THE NEW YORK STATE BAR ASS'N (1957). New York common law, predating the Donnelly Act, gives the injured party fair compensation for the wrong which has been done him. *United States Trust Co. of N.Y. v. O'Brien*, 143 N.Y. 284, 287-88, 38 N.E. 266, 267 (1894). Where there is an alleged violation of a New York statute, an action is maintainable by any person injured thereby, so long as the person injured is one of the class designed to be protected by the statute. *Pauley v. Steam Gauge & Lantern Co.*, 131 N.Y. 90, 95-96, 29 N.E. 999, 1000 (1892).

74. See *Straus v. American Publishers Ass'n*, 231 U.S. 222, 230 (1913). See also *Alexander's Dep't Stores, Inc. v. Ohrbach's, Inc.*, 266 A.D. 535, 539-40, 42 N.Y.S.2d 703, 707-08 (1st Dep't 1943); *Dunkel v. McDonald*, 57 N.Y.S.2d 211, 212 (N.Y. Sup. Ct. 1945), *aff'd*, 270 A.D. 757, 59 N.Y.S.2d 921 (1st Dep't 1946).

75. See *Ambruster v. Anglo-South American Trust Co.*, 260 A.D. 598, 599, 23 N.Y.S.2d 458, 459 (1st Dep't 1940).

76. Indeed, one New York court held that in fashioning damage remedies, New York courts will follow common law principles and federal antitrust cases such as *Hanover Shoe* are irrelevant. *Orange & Rockland Utilities, Inc. v. New England Petroleum Corp.*, 60 A.D.2d 233, 236-37, 400 N.Y.S.2d 79, 82 (1st Dep't 1977).

77. *Mobil Corp. v. Rubinfeld*, 48 A.D.2d 428, 433, 370 N.Y.S.2d 943, 948 (2d Dep't 1975), *aff'd*, 40 N.Y.2d 936, 358 N.E.2d 882, 390 N.Y.S.2d 57 (1976).

78. *Lerner Stores Corp. v. Parklane Hosiery Co.*, 86 Misc. 2d 215, 218, 381 N.Y.S.2d 968, 970 (Sup. Ct. 1976) (citing *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971)), *aff'd*, 54 A.D.2d 1072, 388 N.Y.S.2d 760 (4th Dep't 1976).

common law against requiring privity of contract as a prerequisite for recovering damages for wrongful conduct.⁷⁹ In fact, New York has led the country in removing privity of contract as a prerequisite for recovering damages for wrongful conduct.⁸⁰ New York courts have apparently never required privity of contract as a prerequisite to recovery of damages by those injured by violations of the Donnelly Act.⁸¹ For example, in *Straus v. American Publishers Ass'n*,⁸² a book retailer was boycotted by book wholesalers and publishers because it discounted the selling price of books.⁸³ Although there was no privity of contract, Straus collected damages from the Association because the Association's violation of the Donnelly Act injured Straus.⁸⁴

In *Peekskill Theatre v. Advance Theatrical Co. of New York*, Peekskill Theatre was the victim of an illegal boycott instigated by a competitor, Loew's, Inc.⁸⁵ The court found Peekskill Theatre was injured by Loew's violation of the Donnelly Act, entered an injunction, and stated that Peekskill Theatre was entitled to damages, although there was no privity of contract between them.⁸⁶ Thus, New York case law supports the award of damages to any person whose injuries were proximately caused by violations of the Donnelly Act, including indirect purchasers.⁸⁷

79. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916). Since the decision of *MacPherson* in 1916, privity as a prerequisite for recovery has been consistently rejected by New York courts. See *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 12-16, 181 N.E.2d 399, 402-04, 226 N.Y.S.2d 363, 367-70 (1962) (finding that where a defendant engages in false advertising and false promises, no privity of contract is required); *Inman v. Binghampton Hous. Auth.*, 3 N.Y.2d 137, 144-45, 143 N.E.2d 895, 898-99, 164 N.Y.S.2d 699, 703-04 (1957) (finding that lack of privity will not bar a plaintiff from holding architects or builders liable for their handiwork).

80. See *supra* note 79.

81. N.Y. GEN. BUS. LAW § 340 (McKinney 1988).

82. 231 U.S. 222 (1913).

83. *Id.* at 229.

84. *Id.* at 230.

85. 206 A.D. 138, 139, 200 N.Y.S. 726, 727 (1st Dep't 1923).

86. *Id.* at 140, 142-43, 200 N.Y.S. at 728, 730.

87. The only case to the contrary is *Russo & Dubin v. Allied Maintenance*, 95 Misc.2d 344, 407 N.Y.S.2d 617 (N.Y. Sup. Ct. 1978). The court in *Russo* did not attempt to analyze the Donnelly Act, its case law, legislative history or purposes. Rather, the court simply relied on the United States Supreme Court decision in *Illinois Brick*, and dismissed the indirect purchaser claims. *Id.* at 349, 407 N.Y.S.2d at 621. *Russo* is incorrect because it ignores significant decisions of the New York Court of Appeals. See, e.g.,

B. *Legislative Intent*

When the Legislature amended the Donnelly Act in 1975 to add treble damage provisions similar to section 4 of the Clayton Act,⁸⁸ it intended to maintain a damage remedy for indirect purchasers, as was permitted by state and federal law at the time.⁸⁹ The legislature's intent in enacting a New York statute is interpreted "not from the time . . . when courts are called on to interpret it, but as of the time [the statute] took effect."⁹⁰ Where a statute subject to interpretation was first enacted in another state or by the federal government, and was then adopted by the legislature in New York, the construction which was placed on the act by the other jurisdiction at the time the statute was enacted is thought to have been within the minds and intent of the legislature and adopted with the statute.⁹¹

As noted above, when the Donnelly Act was enacted there was no explicit reference to damages, and a common law remedy of damages was adopted by the New York courts.⁹² It was not until 1975 that the Donnelly Act was amended to reflect treble damage provisions similar to section 4 of the Clayton Act.⁹³

Anheuser-Busch v. Abrams, 71 N.Y.2d 327, 334-35, 520 N.E.2d 535, 539, 525 N.Y.S.2d 816, 820 (1988) (interpretations of the Donnelly Act should not follow federal law where differences in state policy, statutory language, or legislative history occur); People v. Roth, 52 N.Y.2d 440, 447, 420 N.E.2d 929, 930, 438 N.Y.S.2d 737, 738 (1981) ("a [f]ederal [c]ourt interpreting a [f]ederal statute [the Sherman Act] has no direct bearing upon a [s]tate court's analysis of an analogous provision enacted by the [s]tate [l]egislature [Donnelly Act]."). Moreover, the decision is no longer valid after *ARC America* because of its simple reliance on *Illinois Brick* as binding on New York courts without an independent analysis of the Donnelly Act. See *California v. ARC America*, 490 U.S. 93, 103 (1989).

88. See *infra* note 93 and accompanying text.

89. See *supra* notes 72-87.

90. N.Y. STAT. LAW § 93 (McKinney 1971). See also *Kelley v. Yannotti*, 4 N.Y.2d 603, 606, 152 N.E.2d 69, 71, 176 N.Y.S.2d 637, 640 (1958); *Spencer v. Bd. of Educ. of Schenectady*, 39 A.D.2d 399, 402, 334 N.Y.S.2d 783, 786 (3d Dep't), *aff'd*, 31 N.Y.2d 810, 291 N.E.2d 585, 389 N.Y.S.2d 461 (1972).

91. N.Y. STAT. LAW § 262 (McKinney 1971). See *Coane v. American Distilling Co.*, 182 Misc. 926, 931-32, 49 N.Y.S.2d 838, 844 (N.Y. Sup. Ct. 1944).

92. See *supra* note 73.

93. Act of July 1, 1975, ch. 333, 1975 McKinney's Sess. Law News 498 (codified at N.Y. GEN. BUS. LAW §§ 340(5), 341 (McKinney 1988)). See Memorandum from the Attorney General, Louis J. Lefkowitz, to the Governor (June 20, 1975) (contained in Bill Jacket to Act of July 1, 1975, ch. 333, 1975 McKinney's Sess. Law News 498) [hereinafter *Memorandum from the Attorney General*].

When the New York legislature adopted language similar to the Clayton Act in 1975,⁹⁴ "it adopted terminology that came with a history of interpretation"⁹⁵ which, under principles of statutory construction, was in the minds of the legislature. In 1975, the law under the Clayton Act, as articulated by the Second Circuit and by the vast majority of federal courts, permitted indirect purchasers a damage remedy.⁹⁶ Indeed, one study examining antitrust cases filed after 1960, but before *Illinois Brick*, found indirect purchasers were plaintiffs in almost two-thirds of all federal antitrust actions and were the only plaintiffs in twenty five percent of all cases.⁹⁷

When the legislature amended the Donnelly Act in 1975, indirect purchasers in New York were unquestionably permitted under New York and federal law to collect damages for antitrust violations.⁹⁸ Nothing in the legislative history of the Donnelly Act or the case law remotely suggests that the New York legislature, in amending the Donnelly Act, intended to remove an existing indirect damage remedy from the Act, as was done later to the Clayton Act by the Supreme Court in *Illinois Brick*.⁹⁹ Accordingly, the legislature could only have intended to increase the damage remedies available.

C. Public Policy Considerations

As noted above, requiring privity of contract as a prerequisite for recovering damages for wrongful conduct is contrary to New York's public policy.¹⁰⁰ Moreover, an indirect purchaser remedy under the Donnelly Act is supported by New York's public policy which favors: (1) damage remedies that encourage vigorous enforcement of the Donnelly Act; (2) damage remedies rationally based in antitrust economics; and (3) the fair apportionment of damages provided by an indirect purchaser damage

94. See *Lerner Stores Corp. v. Parklane Hosiery Corp.*, 86 Misc. 2d 215, 217, 381 N.Y.S.2d 968, 969 (N.Y. Sup. Ct. 1976).

95. *Id.*

96. See *supra* note 32.

97. S. REP. No. 239, 96th Cong., 1st Sess. 16 (1979).

98. See *supra* notes 72-87 and accompanying text.

99. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977).

100. See *supra* text accompanying notes 79-87.

remedy.¹⁰¹ Moreover, indirect purchaser actions will not be overly complex for New York courts.¹⁰²

1. *Ensuring Vigorous Prosecutions*

According to the New York Court of Appeals, the Donnelly Act reflects a "strong public policy in favor of free competition for New York" and represents "a public policy of the first magnitude."¹⁰³ The New York legislature has consistently reinforced this strong public policy through amendments to the Donnelly Act aimed at invigorating public and private enforcement of the Act.¹⁰⁴ For example, the Donnelly Act was amended in 1921 and in 1933 to expand its coverage to include restraints in transportation, marketing and services, as well as interferences with the "free exercise of any activity."¹⁰⁵

In 1957, a committee was appointed to study the Donnelly Act and recommend improvements.¹⁰⁶ The committee's investigation resulted in two pieces of legislation: one expanding the scope and coverage of the Donnelly Act,¹⁰⁷ and the other increasing funding for antitrust enforcement by the Attorney General.¹⁰⁸ According to Governor Harriman, the "[c]ommittee gave exhaustive consideration to the whole subject of State antitrust laws before formulating its recommendations . . . [and concluded] that there is a real need for the enforcement of our State antitrust legislation."¹⁰⁹ The Governor concurred, stating that "[t]he need for vigorous enforcement of the antitrust laws was

101. See *infra* Part III.C.1-3.

102. See *infra* Part III.C.4.

103. *Columbia Gas v. New York State Electric & Gas*, 28 N.Y.2d 117, 127, 268 N.E.2d 790, 796, 320 N.Y.S.2d 57, 65 (1971) (quoting *In re Aimcee Wholesale Corp.*, 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968)).

104. See *infra* notes 105-15 and accompanying text.

105. Act of May 13, 1921, ch. 712, 1921 N.Y. Laws 2501 (codified at N.Y. GEN. BUS. LAW § 341(1) (McKinney 1988)); Act of Aug. 26, 1933, ch. 804, 1933 N.Y. Laws 1635, 1636 (codified at N.Y. GEN. BUS. LAW § 341 (McKinney 1988)).

106. See REP. OF THE SPECIAL COMM. TO STUDY THE NEW YORK STATE ANTITRUST LAWS OF THE NEW YORK STATE BAR ASS'N (1957).

107. Act of Apr. 24, 1957, ch. 893, 1957 N.Y. Laws 1931 (codified at N.Y. GEN. BUS. LAW § 340(5) (McKinney 1988)).

108. Act of Apr. 24, 1957, ch. 895, 1957 N.Y. Laws 1934. See Governor's Memoranda on Bills Approved, reprinted in 1957 N.Y. Legis. Ann. 522.

109. Governor's Memoranda on Bills Approved, reprinted in 1957 N.Y. Legis. Ann. 522.

underlined in my annual messages of the last two years.”¹¹⁰ The 1957 amendments to the Donnelly Act, according to the Governor, were designed to accommodate this need, expand the Act and invigorate enforcement.¹¹¹ Since 1957, the legislature has continued to expand the Donnelly Act, increase damages and penalties, and invigorate enforcement.¹¹²

This clear public policy favoring strong public and private enforcement of the Donnelly Act requires that indirect purchasers retain their right to sue for damages because direct purchasers cannot be relied upon to enforce antitrust laws.¹¹³ Among

110. *Id.* at 523.

111. *Id.*

112. For example, in 1961, the Attorney General was given the power to seek civil penalties for antitrust violations. Act of Apr. 22, 1961, ch. 749, 1961 N.Y. Laws 2088 (codified as amended at N.Y. GEN. BUS. LAW § 342-a (McKinney 1988)). In 1963, the Attorney General was given power to cite a recalcitrant witness for civil contempt in Donnelly Act investigations. Act of Apr. 16, 1963, ch. 333, 1963 N.Y. Laws 1677 (codified as amended at N.Y. GEN. BUS. LAW § 343 (McKinney 1988)). In 1969, the need for corroboration of the testimony of accomplices in antitrust prosecutions was eliminated. Act of May 26, 1969, ch. 1059, 1969 N.Y. Laws 2674 (codified as amended at N.Y. GEN. BUS. LAW § 347 (McKinney 1988)). Also in 1969, the Attorney General was given power under the Donnelly Act to bring suit and receive damages on behalf of state political subdivisions and public authorities. Act of May 21, 1969, ch. 635, 1969 N.Y. Laws 1804 (codified as amended at N.Y. GEN. BUS. LAW § 342(b) (McKinney 1988)). In 1975, criminal penalties were increased, making the violation of the Donnelly Act a felony and making private treble damages in such actions available. Act of July 1, 1975, ch. 333, 1975 McKinney's Sess. Law News 498 (codified at N.Y. GEN. BUS. LAW §§ 340(5), 341 (McKinney 1988)). In 1979 and 1980, the Attorney General's investigative and enforcement powers were enhanced by allowing out-of-state subpoena service and tolling the statute of limitations during federal antitrust proceedings. Act of July 10, 1979, ch. 589, 1979 N.Y. Laws 1 (codified at N.Y. GEN. BUS. LAW § 343 (McKinney 1988)); Act of May 6, 1980, ch. 107, 1980 N.Y. Laws 1056 (codified at N.Y. GEN. BUS. LAW § 342(c) (McKinney 1988)).

113. See, e.g., *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 198 (9th Cir. 1971), cert. denied, 415 U.S. 919 (1974); *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 598 (N.D. Ill. 1973). In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court denied a pass-on defense because it was concerned, under the facts of that case, that indirect purchasers might not have sufficient incentive to sue. *Id.* at 494. In *Illinois Brick v. Illinois*, 431 U.S. 725 (1977), the Court minimized the significance of this rationale by referring to it as being secondary in importance. *Id.* at 732 n.12. In *California v. ARC America Corp.*, 490 U.S. 93 (1990), consistent with the cases and commentators, the Court seems to have completely abandoned this rationale. The Court stated:

In one respect, the Court of Appeals was overly narrow in its description of the congressional purposes identified in *Illinois Brick*, the court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws, as the Court of Appeals asserted, but rather that at least some party have sufficient incentive to bring suit.

other constraints, direct purchasers may be dependent on their suppliers and thus fearful of retaliation, while others may be unwilling to jeopardize longstanding profitable relationships.¹¹⁴ In addition, because direct purchasers typically pass on antitrust overcharges to indirect purchasers, they will generally be unwilling to sue, and if they do sue, they may settle for less.¹¹⁵ Thus, the vigorous enforcement of the Act demanded by the legislature requires that indirect purchasers maintain their right to sue for damages.

2. *Basing Remedies on Economics and Experience*

A second public policy reason for allowing indirect purchasers to sue for damages is that such a remedy is rationally and substantially based on antitrust economics and experience. It has long been recognized that an anticompetitive overcharge may be substantially, if not completely, passed on by intermediaries to ultimate purchasers.¹¹⁶ Courts have also observed that middlemen can both pass on an anticompetitive overcharge and increase their profits.¹¹⁷

These observations of courts and commentators are based on fundamental economic theory.¹¹⁸ Middlemen will pass on an anticompetitive overcharge to indirect purchasers at a rate determined by the elasticity of supply and demand.¹¹⁹

Elasticity represents the relationship between price and the quantity either demanded or sold.¹²⁰ In the context of determin-

Id. at 102.

114. Malcolm E. Wheeler, *Antitrust Treble Damage Actions: Do They Work?*, 61 CAL. L. REV. 1319, 1331-32 & nn.56-57 (1973); Comment, *Antitrust Enforcement By Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1057 & nn.309-10 (1952). See also Panel Discussion: *Private Actions-The Purposes Sought and the Results Achieved*, 43 ANTITRUST L.J. 73, 87-95 (1973).

115. Elmer J. Schaeffer, *Passing-On Theory In Antitrust Treble Damage Actions*, 16 WM. & MARY. L. REV. 883, 914-15 n.122 (1975).

116. *Illinois Brick*, 431 U.S. at 746; *In re Western Liquid Asphalt Cases*, 487 F.2d at 191. See also Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 276 (1979); Schaeffer, *supra* note 115, at 920-25.

117. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1084 (2d Cir. 1971).

118. Harris & Sullivan, *supra* note 116, at 275-76.

119. *Illinois Brick*, 431 U.S. at 741.

120. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 379-386 (12th ed. 1985). See also Ernest Gelhorn, *An Introduction to Antitrust Economics*, 1975 DUKE L.J.

ing the rate at which a direct purchaser-middleman passes on an anticompetitive overcharge, pass on will be total when demand is inelastic or supply elastic.¹²¹ Products which have been the subject of price-fixing are typically in markets characterized by inelastic demand.¹²² Conversely, supply is likely to be relatively elastic.¹²³

In other words, because a rational price fixing conspiracy "raises the price above the noncollusive level, there must not be a relatively larger drop in sales volume; higher prices must mean higher total revenue."¹²⁴ The end result is that "in a multiple-level chain of distribution, *passing on monopoly overcharges is not the exception: it is the rule.*"¹²⁵

Thus, indirect purchasers will bear the brunt of a price fixing conspiracy in most cases. Because the Donnelly Act allows damages to "any person who shall sustain damages by reason of any violation of this section,"¹²⁶ indirect purchasers must be afforded a damage remedy.

3. Apportioning Damages Fairly

In addition to the policy reasons in favor of an indirect purchaser damage remedy, it must be noted that such a remedy will create little risk of multiple liability for defendants.¹²⁷ Rather, the remedy will allow for a fair apportionment of damages

1, 19-22 (1975).

121. Harris & Sullivan, *supra* note 116, at 283-87; Schaeffer, *supra* note 115, at 887-97.

122. Walter B. Erickson, *Economics of Price Fixing*, 2 ANTITRUST L. & ECON. REV. 83, 86-87 (1969); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1569-75, 1603-04 (1969); George A. Hay & Daniel Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & ECON. 13, 25 n.16 (1974).

123. See generally Harris & Sullivan, *supra* note 116, at 283-87, 318-19.

124. John M. Kuhlman, *Nature and Significance of Price Fixing Rings*, 2 ANTITRUST L. & ECON. REV. 69, 72-75 (1969).

125. Harris & Sullivan, *supra* note 116, at 276, 335 (general contractors treat input costs as direct costs and pass them on in full in the overwhelming majority of cases); Schaeffer, *supra* note 115, at 897-900, 920-56 (increased cost of vital component passed on in full).

126. N.Y. GEN. BUS. LAW § 340(5) (McKinney 1988).

127. As a practical matter, the asserted danger of multiple liability is more hypothetical than real. See, e.g., *Crown Oil Corp. v. Superior Court*, 223 Cal. Rptr. 164, 169, *appeal dismissed sub nom. Crown Oil Corp. v. Lapidus Popcorn, Inc.*, 479 U.S. 879 (1986); *Union Carbide Corp. v. Superior Court*, 679 P.2d 14, 19-20 (Cal. 1984).

among injured parties.

There are three reasons for this conclusion. First, as noted above, the majority, if not all, of the anticompetitive overcharge will be passed on to indirect purchasers.¹²⁸ Second, recovery under New York state law is determined by actual injury.¹²⁹ This rule has been applied as well by those states allowing indirect purchasers damages in antitrust cases.¹³⁰ Third, when the threat of double recovery occurs, courts will fashion relief to avoid such a result.¹³¹

4. *Over-Complexity Not A Problem*

Indirect purchasers should not be denied a remedy based on the allegation that such cases will be overly complex. Commentators agree that the economic analysis required to determine the scope of an indirect purchaser's injuries is straightforward and is no more difficult than the usual effort to determine damages in antitrust cases.¹³² Moreover, it must be noted that, under New York law, a plaintiff need not prove damages with certainty.¹³³ Finally, many states allow such antitrust actions¹³⁴ and numerous federal courts have successfully entertained actions for damages by indirect purchasers in the past.¹³⁵ Indeed, the Supreme Court now agrees that indirect purchaser cases need not be too complex for federal courts to adjudicate, because state indirect purchaser damages will be determined by federal

128. See *supra* text accompanying notes 116-26.

129. *Steitz v. Gifford*, 280 N.Y. 15, 19 N.E.2d 661 (1939). See also 36 N.Y. JUR. 2d *Damages* § 9 ("[t]he plaintiff cannot hold the defendant liable for more than the actual loss which the defendant has inflicted by his wrong . . .").

130. A determination of the extent of antitrust injuries actually sustained is essential to indirect purchaser's California claim. *Union Carbide*, 679 P.2d at 19. See also D.C. CODE ANN. § 28-4509(b) (1981 & Supp. 1991); HAW. REV. STAT. § 480-13 (c)(2) (Supp. 1988); ILL. ANN. STAT. ch. 38, para. 60-7(2) (Smith-Hurd 1977 & Supp. 1992); MD. CODE ANN. COM. LAW II § 11-209(b)(2)(ii) (1990); MINN. STAT. ANN. § 325D.57 (West 1981 & Supp. 1993); N.M. STAT. ANN. § 57-1-3(c) (Michie 1978); R.I. GEN. LAWS § 6-36-12(g) (1956 & Supp. 1990).

131. See, e.g., *Crown Oil Corp.*, 223 Cal. Rptr. at 169.

132. *Harris & Sullivan*, *supra* note 116, at 320-21, 337; *Schaeffer*, *supra* note 115, at 915-16.

133. See *Duane Jones Co. v. Burke*, 306 N.Y. 172, 192, 117 N.E.2d 237, 247-48 (1954). Accord, *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 124-25 (1969).

134. See *supra* note 9.

135. See *supra* note 32.

courts in adjudicating pendent state law claims.¹³⁶ It cannot be concluded, particularly in light of the strong public policy in favor of such actions, that New York State courts are less capable of handling indirect purchaser cases.¹³⁷

IV. Monetary Relief For Indirect Purchasers Under New York's "Little FTC Act" And The New York Executive Law

Fundamental honesty and fair dealing in our free market economy plainly require sellers to price and sell products and services independently, and not to collusively inflate prices or restrict supply. Some collusive business practices which are illegal under the Donnelly Act, such as price fixing¹³⁸ and customer allocation,¹³⁹ violate these concepts of fundamental honesty and fair dealing.

New York's "Little FTC Act"¹⁴⁰ and the New York Executive Law¹⁴¹ forbid fraudulent and deceptive practices, and allow monetary relief to all persons injured by such practices, including indirect purchasers.¹⁴² Thus, indirect purchasers who are injured by practices which violate concepts of fundamental honesty, such as price fixing and customer allocation, will have separate and distinct claims for fraud and deception, in addition to Donnelly Act claims.

A. Defining Fraudulent And Deceptive Business Practices

Section 63(12) of the New York Executive Law is designed to prevent fraud or illegal business conduct.¹⁴³ The statute de-

136. See *California v. ARC America Corp.*, 490 U.S. 93, 103-04 (1989).

137. Indeed, indirect purchasers have an explicit right to collect damages through New York courts under New York's "Little FTC" Act, N.Y. GEN. BUS. LAW § 349(b) (McKinney 1988). See *infra* text accompanying notes 138-217.

138. *E.g.*, *American Dental Cooperative, Inc. v. Abrams*, 127 A.D.2d 274, 276-77, 514 N.Y.S.2d 228, 230 (1st Dep't 1987); *People v. Wisch*, 58 Misc. 2d 766, 768, 296 N.Y.S.2d 882, 885 (N.Y. Sup. Ct. 1969). See also *People v. Schwartz*, 160 A.D.2d 964, 965, 554 N.Y.S.2d 686, 687 (2d Dep't 1990).

139. *E.g.*, *People v. Rattenni*, 79 A.D.2d 691, 578 N.Y.S.2d 257, 258-59 (2d Dep't 1992), *appeal granted*, 79 N.Y.2d 1053, 596 N.E.2d 418, 584 N.Y.S.2d 1020 (1992).

140. N.Y. GEN. BUS. LAW § 349(b) (McKinney 1988).

141. N.Y. EXEC. LAW § 63(12) (McKinney 1992).

142. *Id.*; N.Y. GEN. BUS. LAW § 349(b) (McKinney 1988).

143. Section 63(12) was first enacted in 1956. Act of Apr. 14, 1956, ch. 592, 1956 N.Y. Laws 1336 (codified as amended at N.Y. EXEC. LAW § 63(12) (McKinney 1982 &

finer "fraud" or "fraudulent" as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions."¹⁴⁴

New York General Business Law ("G.B.L.") Article 22-A, which is entitled "Consumer Protection From Deceptive Acts and Practices," is based on section 5 of the Federal Trade Commission Act,¹⁴⁵ and provides in pertinent part: "Deceptive acts

Supp. 1993)). As originally drafted, section 63(12) was limited to the activities of partnerships and unincorporated companies that conducted business under an assumed name. *Id.* However, the statute was broadened in 1959 to cover all fraudulent and illegal business activities, regardless of the form of the business entity. Act of Apr. 8, 1959, ch. 242, 1959 N.Y. Laws 999 (codified as amended at N.Y. EXEC. LAW § 63(12) (McKinney 1982 & Supp. 1993)).

144. N.Y. EXEC. LAW § 63(12) (McKinney 1992). Under the terms of the statute, the New York Attorney General may seek relief when the fraud or illegal conduct is "repeated". *Id.* The term "repeated" is defined by the statute to include conduct affecting more than one person or repetitions of any separate and distinct fraudulent or illegal act. *Id.*

Section 63(12) also protects against repeated "illegal" acts. *Id.* Repeated violations of any federal, state or local law or regulation constitutes an "illegality" within the meaning of section 63(12). *Id.* See, e.g., *State v. Ford Motor Co.*, 136 A.D.2d 154, 158, *aff'd*, 74 N.Y.2d 495, 548 N.E.2d 906, 549 N.Y.S.2d 368 (1989) (involving state law); *State v. Princess Prestige Co.*, 42 N.Y.2d 104, 106, 366 N.E.2d 61, 63, 397 N.Y.S.2d 360, 361 (1977) (involving state law); *Lefkowitz v. Scottish American Ass'n*, 52 A.D.2d 528, 528, 381 N.Y.S.2d 671, 672 (1st Dep't 1976) (involving U.S. Civil Aeronautics Board regulations); *People v. Calogero Corp.*, 78 Misc. 2d 953, 957-58, 358 N.Y.S.2d 790, 793-94 (N.Y. Sup. Ct. 1974), *aff'd*, 47 A.D.2d 741, 365 N.Y.S.2d 548 (1st Dep't 1975) (involving an antitrust violation and illegal tying arrangement, as well as Internal Revenue Service regulations); *People v. Ackerman*, 24 Misc. 2d 83, 84, 202 N.Y.S.2d 352, 354 (N.Y. Sup. Ct. 1960) (involving New York City housing laws).

145. 15 U.S.C. § 45 (1988). Therefore, General Business Law Article 22-A is given parallel construction to section five of the Federal Trade Commission Act (codified at 15 U.S.C. § 45 (1988)). See, e.g., *State v. Colorado State Christian College*, 76 Misc. 2d 50, 53-54, 346 N.Y.S.2d 482, 486-87 (Sup. Ct. 1973); *Metropolitan Retail Ass'n v. City of New York*, 60 Misc. 2d 805, 807-08, 303 N.Y.S.2d 612, 614-15 (N.Y. Sup. Ct. 1969).

Originally, General Business Law Article 22-A prohibited only false advertising. N.Y. GEN. BUS. LAW § 350 (McKinney 1988). This provision was derived from section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55(a)(1) (1988). See Governor's Memorandum on Approval of 1963 N.Y. Laws 813, *reprinted in* 1963 N.Y. Legis. Ann. 465, 466; Memorandum from the Attorney General, *supra* note 93, at 106. General Business Law Article 22-A was amended when New York's Consumer Protection Act, General Business Law section 349, was enacted in 1970 and added to General Business Law Article 22-A. Act of March 3, 1970, ch. 43, 1970 N.Y. Laws 103 (codified at N.Y. GEN. BUS. LAW § 349 (McKinney 1988)). Section 349 was based substantially on a proposed consumer protection statute drafted by the Antitrust Committee of the New York State Bar Association (hereinafter "Bar Committee"). N.Y. GEN. BUS. LAW § 349 (McKinney 1988). See REP. OF THE COMM. ON NEW YORK STATE ANTITRUST LAW OF THE ANTITRUST LAW SECTION OF THE

or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."¹⁴⁶

New York courts give a parallel construction to Executive Law section 63(12) and G.B.L. Article 22-A,¹⁴⁷ and, under both statutes, define "fraud" much more broadly than common law fraud.¹⁴⁸ *People v. Federated Radio Corp.*,¹⁴⁹ first set forth what has become the standard statutory definition of "fraud":

In a broad sense the term [fraud] includes all deceitful practices contrary to plain rules of common honesty. . . . [T]he words "fraud" or "fraudulent" in this connection should, therefore, be given a wide meaning so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law.¹⁵⁰

NEW YORK STATE BAR ASS'N: A PROPOSED NEW STATE LAW MAKING DECEPTIVE ACTS OR PRACTICES UNLAWFUL, 1968 N.Y. ST. B.A. ANTITRUST L. SYMP. 114 (CCH ed.) [hereinafter COMMITTEE REPORT]. The Committee Report arose from a 1967 study by the Bar Committee. See STUDY OF THE COMM. ON NEW YORK STATE ANTITRUST LAW OF THE ANTITRUST LAW SECTION OF THE NEW YORK STATE BAR ASS'N, 1970 N.Y. ST. B.A. ANTITRUST L. SYMP. 72 (CCH ed.) [hereinafter COMMITTEE STUDY].

The Bar Committee reviewed General Business Law section 350 and other New York State statutes which protected consumers and concluded that they were insufficient. COMMITTEE STUDY, *supra*, at 91-94. See also COMMITTEE REPORT, *supra*, at 117. According to the Bar Committee, existing state laws were complex, scattered, overlapping and inconsistent. COMMITTEE STUDY, *supra*, at 93. The Bar Committee reviewed the Federal Trade Commission Act, a model state act proposed by the Federal Trade Commission and other state statutes prohibiting fraud and deception, and modeled its proposed legislation, in large part, on these statutes. *Id.* at 94-106.

146. N.Y. GEN. BUS. LAW § 349(a) (McKinney 1988). New York General Business Law Article 22-A also prohibits false advertising. *Id.* at § 350. See *supra* note 145.

147. *State v. Colorado State Christian College*, 76 Misc. 2d at 54, 346 N.Y.S.2d at 488 (N.Y. Sup. Ct. 1973). Indeed, the New York Attorney General has always been permitted to use Executive Law section 63(12) and General Business Law Article 22-A together. See, e.g., *State v. Diamond Tours & Travel, Inc.*, N.Y. L.J. Jan. 7, 1977, at 11; *State v. Alan Business Management, Ltd.*, N.Y. L.J. Jan. 3, 1977, at 5; *State v. Police Benevolent Ass'n of the Dist. Attorney's Office of the City of N.Y., Inc.*, N.Y. L.J., Dec. 30, 1976, at 10.

148. See *Lefkowitz v. Bull Inv. Group*, 46 A.D.2d 25, 28, 360 N.Y.S.2d 488, 491 (3d Dep't 1974); *State v. Interstate Tractor Trailer Training, Inc.*, 66 Misc. 2d 678, 682, 321 N.Y.S.2d 147, 151 (N.Y. Sup. Ct. 1971); *State v. Bevis Indus., Inc.*, 63 Misc. 2d 1088, 1090, 314 N.Y.S.2d 60, 64 (N.Y. Sup. Ct. 1970).

149. 244 N.Y. 33, 154 N.E. 655 (1926).

150. *Id.* at 38-39, 154 N.E. at 658. *Federated Radio Corp.* was an action under the

By broadly defining the nature of "fraud" and "deception," the courts avoid the need to detail every prohibited practice, and make clear that Executive Law section 63(12) and G.B.L. Article 22-A are not limited to acts which are described by express statute as fraudulent.¹⁵¹

B. *Collusive Business Practices: Price-Fixing and Customer Allocation*

Because of the broad proscription against fraud and deception, reported cases brought pursuant to Executive Law section 63(12) and G.B.L. Article 22-A involve a wide panoply of issues,¹⁵² including cases involving alleged violations of the Don-

Martin Act, New York's statute prohibiting securities fraud. N.Y. GEN. BUS. LAW § 352 (McKinney 1988). The definition of "fraud" under the Martin Act, first articulated by the court in *Federated Radio Corp.*, was subsequently followed and widely quoted by New York courts interpreting the meaning of "fraud" under New York Executive Law Section 63(12). See, e.g., *Bull Inv. Group*, 46 A.D.2d at 28, 360 N.Y.S.2d at 491-92; *Interstate Tractor Trailer Training, Inc.*, 66 Misc. 2d at 682, 321 N.Y.S.2d at 151; *Bevis Indus., Inc.*, 63 Misc. 2d at 1090, 314 N.Y.S.2d at 64.

Pursuant to this definition, New York courts consistently hold that scienter is immaterial to establishing fraud or deception. *Bull Inv. Group*, 46 A.D.2d at 28, 360 N.Y.S.2d at 491; *Lefkowitz v. E.F.G. Baby Products, Inc.*, 40 A.D.2d 364, 367, 340 N.Y.S.2d 39, 42 (3d Dep't 1973); *Colorado State Christian College*, 76 Misc. 2d at 56, 346 N.Y.S.2d at 489; *Bevis Indus., Inc.*, 63 Misc. 2d at 1090, 314 N.Y.S.2d at 64; accord, *Doherty v. F.T.C.*, 317 F.2d 669, 674 (2d Cir. 1963).

Additionally, an omission of a material fact, as well as affirmative misrepresentations, can be fraudulent and deceptive. *Bull Inv. Group*, 46 A.D.2d at 28, 360 N.Y.S.2d at 492; *State v. General Motors Corp.*, 120 Misc. 2d 371, 374, 466 N.Y.S.2d 124, 127 (N.Y. Sup. Ct. 1983). See also *F.T.C. v. Pharmtech Research, Inc.*, 576 F. Supp. 294 (D.D.C. 1983) (discussing section 5 of Federal Trade Commission Act). "Material" means tending to affect consumers' purchasing decisions about a product or a service. *American Home Prod. Corp.*, 98 F.T.C. 136, 368 (1981), *aff'd as mod.*, 695 F.2d 683, 684 (3d Cir. 1982) (discussing section 5 of Federal Trade Commission Act).

Finally, the law protects the credulous and unthinking as well as the cynical and intelligent. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273, 372 N.E.2d 17, 19, 401 N.Y.S.2d 182, 184 (1977); *People v. Volkswagen of America*, 47 A.D.2d 868, 868, 366 N.Y.S.2d 157, 158 (1st Dep't 1975); *Colorado State Christian College*, 76 Misc. 2d at 56, 346 N.Y.S.2d at 489.

151. *Matter of Prudential Advertising, Inc. v. Attorney General*, 22 A.D.2d 737, 737, 253 N.Y.S.2d 491, 492-93 (3d Dep't 1964). See *supra* notes 148-50 and accompanying text. The drafters of section 349 of New York General Business Law Article 22-A argued that existing statutes were insufficient to adequately deal with the many possible forms of fraud and deception. COMMITTEE REPORT, *supra* note 145, at 117. Indeed, the drafters intended that section 349 would expand to counter new and varied forms of deceptive conduct as they evolved. COMMITTEE REPORT, *supra* note 145, at 121.

152. See, e.g., Richard A. Givens, SUPPLEMENTARY PRACTICE COMMENTARIES, 19 Mc-

nelly Act.¹⁵³ However, because a finding of fraud is not predicated on the finding of a violation of the Donnelly Act or any other law,¹⁵⁴ collusive practices such as price-fixing and customer allocation will be deceptive and fraudulent without reference to any other statute. This conclusion is supported by numerous federal cases, which hold that bid rigging schemes (which fix price and allocate customers) are fraudulent.¹⁵⁵

As in state courts, federal courts give a broad interpretation to the concept of statutory fraud.¹⁵⁶ A scheme to defraud, as used in the federal mail¹⁵⁷ and wire fraud statutes,¹⁵⁸ includes

Kinney's Consolidated Laws of New York 83, 83-100 (Supp. 1989).

153. *E.g.*, *People v. Calogero Corp.*, 78 Misc. 2d 953, 957-58, 358 N.Y.S.2d 790, 794-95 (N.Y. Sup. Ct. 1974) (court enjoined an illegal tying arrangement, under Executive Law section 63(12), where service stations tied the sale of gasoline during the "gas crisis" to the purchase of auto repair services); *People v. Asiatic Petroleum*, N.Y. L.J. April 9, 1974, at 17 (court allowed the state of New York to proceed on a claim that a conspiracy to restrict the supply of oil and to raise prices violated Executive Law § 63(12)). In neither case, however, did the courts expressly reach the issue of whether such anticompetitive practices would be considered "fraudulent" or "deceptive."

At least one commentator has argued that any violation of New York law should be considered *per se* deceptive under New York General Business Law Article 22-A because the illegal activity contravenes New York public policy. *See* Joseph T. Moldovan, Note, *New York Creates A Private Right Of Action To Combat Consumer Fraud: Caveat Venditor*, 48 BROOK. L. REV. 509, 559-62 (1982). The author's argument is persuasive. New York General Business Law Article 22-A is given a parallel construction with Executive Law § 63(12). *See supra* note 147 and accompanying text. New York General Business Law Article 22-A is also modeled after other state statutes forbidding fraud and deception, including the State of Washington's Consumer Protection Statute, WASH. REV. CODE ANN. § 19.86.020 (West 1989). *See* COMMITTEE STUDY, *supra* note 145, at 105. Under both Executive Law section 63(12) and state court decisions, any act or practice that violated a law specifically designed to protect the public was inimical to the public interest and therefore automatically considered to be an unfair or deceptive act or practice. *See, generally*, *Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (N.Y. Sup. Ct. 1966); *State v. Reader's Digest Ass'n*, 501 P.2d 290, 301-02 (Wash. 1972). However, there is some legislative history to the contrary. *See infra* note 171.

154. *See supra* note 151 and accompanying text.

155. *E.g.* *United States v. Dynaletric Co.*, 859 F.2d 1559, 1569-78 (11th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989); *United States v. Washita Constr. Co.*, 789 F.2d 809, 817-18 (10th Cir. 1986); *United States v. Rodgers*, 624 F.2d 1303, 1306-10 (5th Cir. 1980); *cert. denied sub nom. Anthony J. Bertucci Constr. Co. v. United States*, 450 U.S. 917 (1981); *United States v. Azzarelli Constr. Co.*, 612 F.2d 292, 298 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980); *United States v. Climatemp, Inc.*, 482 F. Supp. 376, 381 (N.D. Ill. 1979), *aff'd sub nom. United States v. Reliable Sheet Metal Works, Inc.*, 705 F.2d 461 (7th Cir.), *cert. denied sub nom. Fakter v. United States*, 462 U.S. 1134 (1983).

156. *United States v. Pearlstein*, 576 F.2d 531, 534 (3d Cir. 1978).

157. 18 U.S.C. § 1341 (1988).

158. *Id.* § 1343.

any plan or course of action intended to deceive others in order to obtain something of value from the persons to be deceived.¹⁵⁹ Thus, federal mail and wire fraud statutes, as with Executive Law section 63(12) and G.B.L. Article 22-A, are not limited to frauds that violate other federal or state statutes.¹⁶⁰

Since no violation of any other statute is required, federal courts condemn as fraudulent any attempt to collusively set prices or allocate contracts or customers, even though "attempts" do not violate the Sherman Act.¹⁶¹ The reasoning was set forth in *United States v. Critical Industries, Inc.*¹⁶² In *Critical Industries*, a federal wire fraud prosecution, defendants were charged with attempting to secretly fix the price at which defendants and their competitors would sell respirators and filters used in the abatement of asbestos containing materials.¹⁶³ The court, following an earlier decision of the Sixth Circuit in *United States v. Ames Sintering Co.*,¹⁶⁴ condemned the price fixing scheme as fraudulent.¹⁶⁵ Initially, the court described the deceptive nature of the scheme:

Although the alleged attempt here was not to rig a bid to a specific business entity as in *Ames*, the indictment charges similar fraudulent conduct, namely, an attempt to inflate prices for which goods would be offered to customers generally - customers who would be deceived into believing that the prices being quoted to them were governed by market forces, not the secret agreement of competitors.¹⁶⁶

The court denied the defendants' motion to dismiss the indict-

159. *United States v. McNally*, 483 U.S. 350, 358-59 (1987); *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987); *Pearlstein*, 576 F.2d at 535.

160. *Moore v. United States*, 865 F.2d 149 (7th Cir. 1989); *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). *See also* *United States v. Lindsey*, 736 F.2d 433, 436 (7th Cir. 1984); *United States v. Kleimer*, 609 F.2d 126, 128 (5th Cir. 1980).

161. *United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) (holding that a violation of the wirefraud statute, 18 U.S.C. § 1343 (1988), did not constitute a violation of the Sherman Act, 15 U.S.C. §§ 1-7 (1988)); *United States v. Critical Indus., Inc.*, Crim. No. 90-318 (D.N.J. Dec. 12, 1990) (Debevoise, J.).

162. *Critical Indus.*, Crim. No. 90-318 (D.N.J. Dec. 12, 1990) (Debevoise, J.).

163. *Id.* at 30-31.

164. *Id.* at 32-33 (citing *United States v. Ames Sintering Co.*, 927 F.2d 232 (2d Cir. 1990) (involving an attempted bid rigging)).

165. *Id.* at 34.

166. *Id.* at 32.

ment, stating:

The conduct charged in this case is a scheme to defraud unwitting customers by secretly fixing at inflated levels the prices charged them. "Fundamental honesty, fair play and upright dealing" in the business life in a free market economy require sellers to price products independently and not to collusively inflate such prices. Thus, to secretly fix prices at inflated levels, as charged in the indictment, is to engage in fraud without regard to the Sherman Act. Collusive bidding schemes constitute "schemes or artifices to defraud" in violation of the mail and wire fraud statutes.¹⁶⁷

While the definition of criminal fraud under federal law differs somewhat from civil fraud standards under G.B.L. Article 22-A and Executive Law section 63(12),¹⁶⁸ the reasoning set forth by the federal courts under the mail and wire fraud statutes is equally persuasive under New York law. As under federal law, New York consumers are entitled to purchase goods and services at prices resulting from fair and open competition.¹⁶⁹ When businesses circumvent the competitive process and fix prices or allocate customers or contracts, then customers are deceived.¹⁷⁰ Therefore, they are entitled to relief under G.B.L. Article 22-A and Executive Law section 63(12).¹⁷¹

167. *Id.*

168. The concept of fraud is a broader, more flexible standard under G.B.L. Article 22-A and Executive Law § 63(12) than under federal mail and wire fraud statutes. The federal statutes require proof of several elements which involve a scheme: (1) knowingly or intentionally participated in by defendant; (2) consisting of misrepresentations or omissions; (3) reasonably calculated to deceive persons of ordinary prudence and comprehension; (4) through use of mail or wire communication. *E.g.*, *Kehr Packages, Inc. v. Fidel Corp.*, 926 F.2d 1406 (3d Cir. 1991); *Pritchard v. United States*, 386 F.2d 760 (8th Cir. 1967), *cert. denied sub nom. Borchett v. United States*, 390 U.S. 1004 (1968). The concept of fraud under New York statutes substantially eliminates a number of these proof requirements. *See supra* note 150.

169. *See supra* notes 143-51 and accompanying text.

170. *See supra* notes 152-67 and accompanying text.

171. Arguably, not every agreement which is anticompetitive under the Donnelly Act is fraudulent and deceptive. For example, an argument can be made that an open, public merger which was anticompetitive and, therefore, illegal under the Donnelly Act, *see supra* Part IV.A-B, would not be deceptive or fraudulent to consumers. Indeed, the Bar Committee that proposed New York's consumer protection statute envisioned that it would not encompass every violation of state and federal antitrust law. COMMITTEE REPORT, *supra* note 145, at 127-28; COMMITTEE STUDY, *supra* note 145, at 106-10. While the Bar Committee adopted much of the language of section 5 of the Federal Trade Commis-

C. Remedies For Victims of Deceptive Business Practices

The New York Attorney General is authorized to enforce G.B.L. Article 22-A¹⁷² and Executive Law section 63(12),¹⁷³ while a private right of action is created by G.B.L. Article 22-A.¹⁷⁴ The exact remedies for violation of each statute differ and, therefore, require separate discussion.

1. Role of New York Attorney General

Under section 349(b) of G.B.L. Article 22-A, the Attorney General may investigate alleged violations of Article 22-A,¹⁷⁵ and, where appropriate, may seek injunctive relief and restitution.¹⁷⁶ Under the explicit language of section 349(b), indirect purchasers who are injured by fraudulent or deceptive practices are entitled to monetary relief.¹⁷⁷ The Article provides:

Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the State of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any

sion Act, the Committee rejected some of it, including the Federal Trade Commission Act phrase "unfair methods of competition," in its proposed statute. COMMITTEE REPORT, *supra* note 145, at 127-28; COMMITTEE STUDY, *supra* note 145, at 106-10. The Bar Committee noted that the Donnelly Act and federal antitrust law differed in a variety of respects. COMMITTEE REPORT, *supra* note 145, at 127-28; COMMITTEE STUDY, *supra* note 145, at 106-10. The Bar Committee did not wish to adopt federal antitrust law wholesale into the proposed legislation, which, in effect, would repeal the differences embodied in Donnelly Act case law. COMMITTEE REPORT, *supra* note 145, at 127-28; COMMITTEE STUDY, *supra* note 145, at 106-10. Moreover, the Bar Committee was concerned that the term "unfair methods of competition" encompassed antitrust concepts that were far outside the scope of the fraud and deception to which their proposed legislation was directed. COMMITTEE REPORT, *supra* note 145, at 127-28; COMMITTEE STUDY, *supra* note 145, at 106-10. However, it does not appear necessary to establish that every violation of the Donnelly Act is fraudulent. Clearly, collusive agreements, such as price fixing and customer allocation, have no redeeming social values and will always be fraudulent and deceptive.

172. N.Y. GEN. BUS. LAW § 349(b) (McKinney 1988).

173. See *infra* text accompanying notes 197-205.

174. N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988).

175. *Id.* § 349(f).

176. *Id.* § 349(b).

177. *Id.*

*such unlawful acts or practices.*¹⁷⁸

Where statutory language is clear and unambiguous, courts must follow the legislature's mandate.¹⁷⁹ Each word must be given its appropriate meaning.¹⁸⁰ The New York Attorney General is given explicit authority to seek restitution of any money or property obtained directly or *indirectly* by fraud or deceit.¹⁸¹ Therefore, there can be no question that the legislature intended that indirect purchasers have a remedy for deception or fraud.¹⁸²

This legislative directive is consistent with the public policy announced by the New York Court of Appeals in *Randy Knitwear, Inc. v. American Cyanamid Co.*¹⁸³ In *Randy Knitwear*, a garment manufacturer purchased fabric treated by a resin manufactured by American Cyanamid.¹⁸⁴ American advertised through trade journals, direct mail and garment tags that fabric treated with its resin would not shrink or stretch.¹⁸⁵ Randy Knitwear purchased fabric treated with the resin, but the fabric shrunk and stretched when subjected to ordinary washing.¹⁸⁶ Although Randy Knitwear did not purchase directly from American Cyanamid, they sued for breach of express warranty.¹⁸⁷ The Court of Appeals reversed a 39 year old precedent, and held that privity of contract was not necessary.¹⁸⁸ The Court reasoned that public policy and present-day commercial practices required that manufacturers be held responsible for damages caused to

178. *Id.* (Emphasis added).

179. *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 565, 463 N.E.2d 604, 606, 475 N.Y.S.2d 263, 265 (1984); *Eaton v. New York City Conciliation & Appeals Board*, 56 N.Y.2d 340, 345, 437 N.E.2d 1115, 1117, 452 N.Y.S.2d 358, 360 (1982). See generally N.Y. STAT. LAW § 76 (McKinney 1971).

180. *Drelich v. Kenlyn Homes, Inc.*, 86 A.D.2d 648, 649, 446 N.Y.S.2d 408, 410 (2d Dep't 1982).

181. N.Y. GEN. BUS. LAW § 349(b) (McKinney 1988).

182. Cf. ALA. CODE § 6-5-60(a) (1975) (which grants a damage remedy to parties for "direct or indirect" injury). The United States Supreme Court, in *California v. ARC America Corp.*, 490 U.S. 93 (1990), held that, in general, state statutes can permit indirect purchasers a damage remedy. See *supra* notes 45-53 and accompanying text.

183. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

184. *Id.* at 9, 181 N.E.2d at 400, 226 N.Y.S.2d at 364.

185. *Id.* at 10, 181 N.E.2d at 400, 226 N.Y.S.2d at 365.

186. *Id.* at 9, 181 N.E.2d at 400, 226 N.Y.S.2d at 364.

187. *Id.* at 8-11, 181 N.E.2d at 400-01, 226 N.Y.S.2d at 364-66.

188. *Id.* at 10-11, 181 N.E.2d at 401, 226 N.Y.S.2d at 366.

indirect purchasers by false advertising.¹⁸⁹ The Court stated that "[t]he policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentations outweighs allegiance to an old and out-moded technical rule of law"¹⁹⁰

Following *Randy Knitwear*, one New York court has held that imposing a privity requirement in cases under G.B.L. Article 22-A was inappropriate.¹⁹¹ Likewise, courts of other states with similar consumer protection statutes have reached the same conclusion.¹⁹²

Moreover, G.B.L. Article 22-A provides that "[t]his section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other laws of this state"¹⁹³ Thus, even if we assume *arguendo* that injured indirect purchasers may not recover damages under state antitrust law because of *Illinois Brick*, and, therefore, are "not subject to any other laws of this state," they will still be permitted to recover restitution under G.B.L. Article 22-A.

While the New York Attorney General may collect restitution for indirect purchasers under G.B.L. Article 22-A, unlike the Donnelly Act, there is no provision in Article 22-A for recovery of treble damages by the Attorney General.¹⁹⁴ However, Article 22-A does provide for a civil penalty of up to five hundred dollars for each violation, which accrues to the state and may be recovered by the New York Attorney General.¹⁹⁵ While this penalty may seem small at first glance, the total penalty that a court may impose against an offender may be very substantial, because each victim, each improper act, each false statement or

189. *Id.* at 12-13, 181 N.E.2d at 401-02, 226 N.Y.S.2d at 367-68.

190. *Id.* at 13, 181 N.E.2d at 402, 226 N.Y.S.2d at 368.

191. *Hyde v. General Motors Corp.*, N.Y. L.J., October 30, 1981, at 5 (Sup. Ct.) (court denied the defendant's motion to dismiss a class action, under General Business Law Article 22-A, on the ground of lack of privity (citing *Randy Knitwear v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962))). *See also State v. General Motors Corp.*, 120 Misc. 2d 371, 466 N.Y.S.2d 124 (Sup. Ct. 1983) (finding that privity was not necessary under New York Executive Law Section 63(12)).

192. *See, e.g., Barthlow v. Metcalf*, 594 S.W.2d 143, 144 (Tex. Civ. App. 1979).

193. N.Y. GEN. BUS. LAW § 349(g) (McKinney 1988).

194. *But see infra* text accompanying notes 206-12 (allowing individual plaintiffs bringing private actions to be awarded treble damages up to \$1000 at the discretion of the court where the wrongdoing is willful or knowing). *See also* N.Y. GEN. BUS. LAW § 340(5) (McKinney 1988) (treble damages permitted).

195. N.Y. GEN. BUS. LAW § 350-c (McKinney 1988).

deceptive omission constitutes a separate violation of Article 22-A.¹⁹⁶

The New York Attorney General may also seek injunctive relief, restitution and damages¹⁹⁷ for repeated fraud or illegality under Executive Law section 63(12) alone¹⁹⁸ or in conjunction with G.B.L. Article 22-A.¹⁹⁹

Moreover, New York Courts consistently permit injured consumers to obtain monetary relief under section 63(12) without requiring privity.²⁰⁰ In *State v. Ford Motor Co.*,²⁰¹ the New York Attorney General brought a proceeding under section 63(12) alleging that the automobile manufacturer was charging a \$100 deductible to new car owners against the cost of warranty repairs in violation of New York's New Car Lemon Law.²⁰² The Court of Appeals awarded restitution even though the New Car

196. While this issue has not been decided by New York courts, the conclusion is supported by federal and state courts interpreting analogous provisions of the Federal Trade Commission Act and state statutes forbidding fraudulent and deceptive practices. See, e.g., *United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 966 (3d Cir.), cert. denied, 455 U.S. 908 (1982); *State v. United Energy Corp. of America*, 725 P.2d 752, 755-58 (Ariz. Ct. App. 1986); *Commonwealth v. Flick*, 382 A.2d 762, 765 (Pa. Commw. Ct. 1978); *Commonwealth v. Toleson*, 321 A.2d 701, 712 (Pa. Commw. Ct. 1974); *State v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 553 P.2d 423, 436 (Wash. 1976).

197. N.Y. EXEC. LAW § 63(12) (McKinney 1988). Section 63(12) was amended in 1977 to allow the Attorney General to collect damages as well as restitution. Act of Aug. 1, 1977, ch. 539, 1977 N.Y. Laws 1 (codified as amended at N.Y. EXEC. LAW § 63(12) (McKinney 1982 & Supp. 1993)). The power to obtain restitution and damages is intended "in appropriate cases, to award statutory or compensatory damages." Memorandum to the Governor from the Attorney General, reprinted in 1977 N.Y. Legis. Ann. 194.

This power to direct restitution under section 63(12) is broadly construed and has been defined to embrace the authority to order respondents to take whatever affirmative action is necessary to achieve full restitution. See, e.g., *New York v. Princess Prestige*, 42 N.Y.2d 104, 366 N.E.2d 61, 397 N.Y.S.2d 360 (1977) (court ordered respondents to notify consumers of their statutory right to cancel their contracts for housewares and electronic equipment); *New York v. Bevis Indus., Inc.*, 63 Misc. 2d 1088, 1092, 314 N.Y.S.2d 60, 66 (Sup. Ct. 1970) (court ordered a fund to be established for restitution). Pursuant to section 63(12), courts customarily order restitution to all defrauded consumers, even where the consumers are not all identified at the time of the order. See, e.g., *Princess Prestige*, 42 N.Y.2d at 108, 397 N.Y.S.2d at 362; *New York v. Scottish-American Association*, 52 A.D.2d 528, 528-29, 366 N.E.2d 63, 381 N.Y.S.2d 671, 672 (1st Dep't 1976); *Bevis Industries*, 63 Misc. 2d at 1092, 314 N.Y.S.2d at 66.

198. See *supra* note 144.

199. See *supra* note 147.

200. See *infra* text accompanying notes 201-05.

201. 74 N.Y.2d 495, 548 N.E.2d 906, 549 N.Y.S.2d 368 (1989).

202. *Id.* at 499, 548 N.E.2d at 908, 549 N.Y.S.2d at 370.

Lemon Law did not provide for such relief and the consumers lacked privity with Ford.²⁰³ Likewise, in *State v. General Motors Corp.*,²⁰⁴ the Court permitted the New York Attorney General to seek restitution on behalf of consumers under section 63(12) against General Motors for fraud, even though consumers lacked privity with the manufacturer.²⁰⁵

2. *Private Right Of Action*

G.B.L. Article 22-A did not originally provide for private enforcement, but was amended in 1980 to allow for a private right of action.²⁰⁶ The amendment, which added G.B.L. section 349(h), provides that "any person who has been injured"²⁰⁷ by a violation of the Article may sue for injunctive relief and damages, and the prevailing plaintiff may recover attorney's fees.²⁰⁸ The court may award actual damages or a minimum statutory damage of fifty dollars, whichever is greater.²⁰⁹ Where the defendant willfully or knowingly violates G.B.L. Article 22-A, the court may treble plaintiff's damages up to one thousand dollars.²¹⁰ Plaintiffs may pursue their claims under Article 22-A as a class action,²¹¹ although one court has held that the class is limited to seeking only actual damages and may not seek treble or minimum statutory damages.²¹²

G.B.L. section 349(h) differs from section 349(b) and does not explicitly state that indirect purchasers may pursue a private right of action.²¹³ However, New York courts have refused to impose a privity requirement under section 349(h).²¹⁴ More-

203. *Id.* at 499, 548 N.E.2d at 908, 549 N.Y.S.2d at 372.

204. 120 Misc. 2d 371, 466 N.Y.S.2d 124 (Sup. Ct. 1983).

205. *Id.* at 373-75, 466 N.Y.S.2d at 126-27.

206. Act of June 19, 1980, ch. 346, 1980 N.Y. Laws 1303 (codified at N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988)).

207. N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Weinburg v. Hertz Corp.*, 69 N.Y.2d 979, 981-82, 509 N.E.2d 347, 348, 516 N.Y.S.2d 652, 653 (1987); *Burns v. Volkswagen of America, Inc.*, 118 Misc. 2d 289, 292, 460 N.Y.S.2d 410, 413 (N.Y. Sup. Ct. 1982), *aff'd*, 97 A.D.2d 977, 468 N.Y.S.2d 1017, *appeal dismissed*, 61 N.Y.2d 604, 462 N.E.2d 155, 473 N.Y.S.2d 1025 (1984).

212. *Burns*, 118 Misc. 2d at 292-93, 460 N.Y.S.2d at 413.

213. *See supra* notes 174-82, 207-12 and accompanying text.

214. *See supra* notes 191, 201-05.

over, because any person who has been injured may sue for damages,²¹⁵ and because any Sherman Act or Donnelly Act limitations resulting from *Illinois Brick* do not apply,²¹⁶ an indirect purchaser proximately harmed by a violation of Article 22-A should be permitted a private right of action.²¹⁷

V. Conclusion

Federal law and law enforcement are no longer the sole source of relief for victims of antitrust offenses. State law will often provide a remedy that federal law does not.²¹⁸ In New York, indirect purchasers should look to state law for relief. The legislative history, case law and public policy behind the Donnelly Act, G.B.L. Article 22-A and Executive Law section 63(12) establish that indirect purchasers injured by anticompetitive or fraudulent conduct are entitled to monetary relief.

215. N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988).

216. See *supra* notes 53, 193 and accompanying text.

217. See *supra* Part IV.

218. See *supra* notes 1-9 and accompanying text.