Appellate Division – Second Department Case No. 2004-06517
Nassau County Clerk's Index No. 17872/02

Court of Appeals

STATE OF NEW YORK

PAUL SPERRY, Individually and
Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

against

CROMPTON CORPORATION, UNIROYAL CHEMICAL COMPANY, INC., UNIROYAL CHEMICAL COMPANY LIMITED, FLEXSYS NV, FLEXSYS AMERICA, LP, BAYER AG, BAYER CORPORATION, RHEIN CHEMIE RHEINAU GBMH and RHEIN CHEMIE CORPORATION,

Defendants-Respondents.

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-RESPONDENTS CROMPTON CORPORATION, UNIROYAL CHEMICAL COMPANY, INC., UNIROYAL CHEMICAL COMPANY LIMITED, FLEXSYS NV, FLEXSYS AMERICA, LP, BAYER AG, BAYER CORPORATION, RHEIN CHEMIE RHEINAU GBMH AND RHEIN CHEMIE CORPORATION

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Date Completed: November 30, 2006

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y. Comp. Codes R. & Regs. § 500.1(c), *Amicus Curiae* Chamber of Commerce of the United States of America makes the following disclosure:

The Chamber of Commerce of the United States of America is a not-for-profit business federation with no parents, subsidiaries, or affiliates.

THE INTEREST OF THE *AMICUS*

Representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries, the Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber advocates the interests of its members in matters before the courts, Congress, and the executive branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber's members are frequently the target of antitrust litigation in state and federal courts. Although such litigation can benefit both the business community and consumers nationwide when it generates enhanced competition and leads to more efficient markets, it is prone to abuses that burden the nation's economy. Class actions by indirect purchasers, which are not permissible under federal antitrust law but are allowed by some states, pose particular risks of abuse. The structure of these class actions greatly increases the risks and burdens of litigation – in particular, the costs associated with litigating the class certification issue and the risk of an enormous verdict, if a class is erroneously certified. As a result, defendants often are forced to settle even claims that are meritless. Such "blackmail settlements" distort the legal system and generate substantial economic costs (which are often passed on to consumers); they deter innovation; and they

lead to inefficiency in the capital markets. *Amicus* has extensive experience with these issues and is well-situated to brief this Court on their importance, which extends well beyond the immediate concerns of the parties.

Amicus focuses on the wisdom of disallowing class actions in private indirect-purchaser cases, because that is the context of this suit. The present statutory scheme in New York disallows class actions in *all* private antitrust cases, because treble-damages claims constitute "penalty actions" within the meaning of CPLR § 901(b). The Legislature could decide to authorize private class actions under the Donnelly Act only in the context of suits by *direct* purchasers, without applying such a new approach to indirect-purchaser suits. Indeed, there could be compelling practical reasons to draw the line there. This distinction reinforces the conclusion that this is a matter best left to the Legislature. For purposes of this brief, however, *amicus* need not, and does not, take any position on the desirability of such a change, other than to point out that, under CPLR § 901(b), it is up to the Legislature to make such policy choices and to do so "specifically."

ARGUMENT

I. THE LEGISLATURE'S DECISION NOT TO AUTHORIZE INDIVIDUAL CLASS ACTIONS UNDER THE DONNELLY ACT WAS A SOUND POLICY CHOICE THAT IS ENTITLED TO DEFERENCE.

Under New York CPLR § 901(b), "an action to recover a penalty * * * may not be maintained as a class action," unless the statute creating or imposing the penalty "specifically authorizes" such an action. For nearly three decades, the New York courts have consistently held that the Donnelly Act's treble-damages provision, N.Y. Gen. Bus. Law § 340(5), constitutes a penalty for purposes of CPLR § 901(b), and that class actions are, therefore, not allowed in the absence of an express statutory provision.[1]

The decision of the Second Department in this case should be affirmed: a direct application of the relevant statutes and case law makes clear that, given the absence of a "clear statement" of legislative intent, private class actions under the

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[1] See, *e.g.*, *Sperry v. Crompton Corp.*, 26 A.D.3d 488, 810 N.Y.S.2d 498 (2nd Dep't 2006); *Paltre v. Gen. Motors Corp.*, 26 A.D.3d 481, 810 N.Y.S.2d 496 (2nd Dep't 2006); *Cox v. Microsoft Corp*, 290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't 2002); *Asher v. Abbott Labs.*, 290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dep't 2002); *Lennon v. Philip Morris Cos., Inc.*, 189 Misc. 2d 577, 734 N.Y.S.2d 374 (N.Y. Sup. Ct. 2001); *Rubin v. Nine West Group*, No. 0763/99, 1999 WL 1425364 (N.Y. Sup. Ct. 1999); *Russo & Dubin v. Allied Maint. Corp*, 95 Misc. 2d 344, 407 N.Y.S.2d 617 (N.Y. Sup. Ct. 1978); *Blumenthal v. Am. Soc'y of Travel Agents, Inc.*, No. 16812/76, 1977 WL 18392 (N.Y. Sup. Ct.); *Leider v. Ralfe*, 387 F.Supp.2d 283 (S.D.N.Y 2005).

Donnelly Act are impermissible. See Brief for Defendants-Respondents ("DB") at 14-37.

Section 901(b) arose out of the Legislature's "fear[] that class judgment awarding statutory penalty-type damages to each member of the class could result in 'annihilating punishment' of the defendant." See Vincent C. Alexander, *Practice Commentaries*, MCKINNEY'S CONSOL. LAWS OF N.Y. (2005), CPLR C901:11. This is precisely the effect of aggregating the treble-damages penalty available under the Donnelly Act. CPLR § 901(b) does not prevent the New York Legislature from authorizing a class action, and *amicus* does not question the prerogative of the Legislature to amend the Donnelly Act to authorize private class actions. However, CPLR § 901(b) does require the Legislature to make a considered and explicit decision whether to allow class actions whenever damages may be greater than what is necessary to compensate. Since 1973, the Legislature has considered, and rejected, at least five proposals to amend the Donnelly Act to authorize private class actions.[2] The Legislature also passed up the opportunity to allow private class actions when it amended the Donnelly Act to authorize a treble-damages remedy in 1975, as well as when it amended the Act to permit indirect-purchaser suits in 1998. The Legislature made these decisions against the

[2] As noted in the Brief for Defendants-Respondents before this Court ("DB"), those five proposals were made in 1973, 2002, 2003, 2004, and 2005. DB 33-36.

backdrop of cases holding that treble-damages actions are covered by CPLR § 901(b) and thus may not be maintained on behalf of a class. It would be difficult to discern a clearer expression of legislative will on this subject than the repeated decision to leave the law where the courts have construed it.

Those rejections of antitrust class actions represent a sound public policy, particularly in the context of indirect-purchaser suits. In 1998, the Legislature amended the Donnelly Act to allow individual indirect-purchaser suits. CPLR § 340(6). But it wisely stopped short of authorizing *class actions* brought by individuals in this or other Donnelly Act contexts. Instead, it authorized only the Attorney General of New York to bring a class action to recover damages on behalf of local governments. See N.Y. GEN. BUS. LAW § 342-b. An examination of the problems inherent in indirect-purchaser class actions, coupled with an appreciation of the tremendous settlement leverage that class certification generally confers on plaintiffs, underscores the good sense exhibited by the Legislature in making that decision.

The dispositive argument that CPLR § 901(b) precludes the certification of private indirect-purchaser class actions under the Donnelly Act is amply set forth in the Brief for Defendants-Respondents, and the Chamber shall not undertake to address that issue here. This brief instead sets forth three basic policy reasons for deferring to the Legislature's decision. First, such class actions are largely

unworkable. Common issues will rarely, if ever, prevail over individual questions. If a class is certified, the court will be required to conduct a long series of individual trials in which plaintiffs will have to present proof of highly particularized damages flowing from pricing decisions by intermediate distributors who somehow, to some degree, charged the class member a definable amount more for the product than would have been charged in the absence of the alleged antitrust violation. Second, where a court grants certification of a class, the plaintiffs immediately gain enormous leverage in settlement negotiations. If the Legislature makes the decision to bestow such leverage, it has the ability to determine its contours and limitations. Where, as here, the Legislature affirmatively has chosen *not* to do so, the courts should not intrude to create a one-sided process. Third, both New York law and federal law provide adequate alternative means of curbing anticompetitive behavior.

A. Indirect-Purchaser Class Actions Are Unworkable.

More than twenty years before the New York Legislature amended the Donnelly Act to authorize suits by indirect purchasers, the U.S. Supreme Court described the many problems inherent in such suits. The Court explained that allowing recovery on the basis of a "pass-on" theory "would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the

defendant." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 740 (1977). The Court found the harm to indirect purchasers to be so speculative and fraught with the danger of duplicative recovery as to render their claims invalid under federal antitrust law, even when the suits are brought on an individual basis. *Id.* at 736-46. These problems are gravely exacerbated by the class action mechanism, as demonstrated by the experience of other states that have allowed indirect-purchaser class actions brought by individuals. Courts in other states, faced with a proposed class of indirect purchasers, have generally found these workability problems insurmountable, leading to the rejection of class certification or the ultimate de-certification of a class. These numerous states operating as laboratories have demonstrated the accuracy of the Supreme Court's predictions in *Illinois Brick*, especially when indirect-purchaser suits are magnified and complicated by being fed through the class action mechanism. Although the New York Legislature was willing to allow *some* indirect-purchaser suits, it did so in the context of a settled public policy, reflected in CPLR § 901(b), not to allow *class actions* in private antitrust cases. The experience in other states has validated the New York Legislature's wisdom in avoiding the costs and risks of granting (or even litigating) class certification in this context.

The chief practical problem associated with an indirect-purchaser suit is the difficulty of establishing the fact and amount of the plaintiff's damages. Private

antitrust suits are based on a theory of overcharge: the plaintiff claims that, as a result of the defendant's anticompetitive behavior, he paid more for a product than he otherwise would have. An indirect purchaser is one who did not purchase the product directly from the defendant; he contends that the defendant's overcharge was "passed on" to him by a middleman. In theory, this might seem relatively simple. A manufacturer sells a product to a retailer. Because of anticompetitive behavior on the part of manufacturer, the retailer pays more for that product than the retailer otherwise would have paid. This increase in price is then "passed on" to the party who purchases the product from the retailer.

The *Illinois Brick* Court immediately understood that the problem was far more complex. Except in rare cases of "cost-plus" contracts, the typical overcharge is not simply "passed on," in whole, down a distribution chain. The conduct of each innocent party along that distribution chain affects the ultimate price paid by the consumer. By hypothesis, the competitive market is working at the intermediate levels. Thus, the amount that the intermediate purchasers can charge to their customers will be determined by a whole raft of factors, only one of which is the allegedly unlawful increment initially charged by the antitrust violator. Thus, the middlemen will often absorb much, if not all, of the initial overcharge. See *Illinois Brick*, 431 U.S. at 737 ("[P]otential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims * * * by

contending that the entire overcharge was absorbed at that particular level in the chain."). In order to compensate the indirect purchaser appropriately without allowing for duplicative damages, the finder of fact would need to apportion the aggregate overcharge "among the relevant wholesalers, retailers, and other middlemen." *Illinois Brick*, 431 U.S. at 740. This is no easy task, even if the market functioned in a purely hypothetical way that does not accord with reality:

> "If the market for the passer's product is perfectly competitive; if the overcharge is imposed equally on all of the passer's competitors; and if the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product. Even if these assumptions are accepted, there remains a serious problem of measuring the relevant elasticities, the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price." *Id.* at 741-42.

After considering these challenges and the possible "statistical techniques" that could be used to address them, the Court determined that such techniques are insufficient to yield reliable results: "[I]t is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue." *Id.* at 742.

The problems identified in *Illinois Brick* increase exponentially in the class-action context. As the Court's analysis explains, the complexity of calculating the damages of passed-on overcharges is exacerbated by each additional link in a distribution chain. *Illinois Brick*, 431 U.S. at 739-42. See William H. Page, *The*

Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick, 67 ANTITRUST L. J. 1, 30 (1999) ("Manifestly, the longer the chain of distribution, the more difficult it will be to show impact by generalized proof, because a damage model will have to account for the actions of more independent intermediaries."). Tracing the impact of an overcharge at one level down through the distribution chain is virtually impossible to do on a class-wide basis. In most instances there will be great variance among the ultimate prices paid by individual consumers, each of whom is at the end of a different distribution chain. Proof of the fact and amount of damages must account for the varying and complicated roles of innocent intermediaries, so that proof issues particular to individual members of the proposed class quickly overwhelm common issues. *Id.* at 12-13. Economic models are insufficient to resolve these issues. *Illinois Brick*, 431 U.S. at 742. As a Wisconsin court has explained, "Constructing economic models in order to reach generalized conclusions about economic behavior is one thing; using such theories to prove that *every* class member has suffered a loss *and the amount of that loss* is quite another." *Derzon v. Appleton Papers, Inc.*, No. 96-CV-3678, 1998 WL 1031504, at *8 (Wis. Cir. 1998) (emphasis in original). This problem is common to all indirect-purchaser suits.

> "It is hard to imagine that any common product is sold and resold in a manner which is so clean and clear as to allow for common evidence which establishes that a

> price increase was passed on to every indirect purchaser and establishes the amount to the overcharge." *Id*.[3]

These obstacles are far from speculative: they are borne out by the experience of the states that allow indirect-purchaser class actions. In *California v. ARC America Corp.*, 490 U.S. 93 (1989), the Supreme Court held that *Illinois Brick* did not prevent states from authorizing indirect purchasers to recover under state antitrust laws. In response, many states passed *Illinois Brick* "repealer" statutes (like the 1998 amendment to the Donnelly Act), often authorizing such suits as class actions. Faced with the prospect of actually certifying a class in the indirect-purchaser context, however, most state courts have balked. In 2000, the Antitrust Law Journal published a comprehensive survey on this topic. It concluded that indirect-purchaser classes were both impossible to certify and counterproductive to the objectives of the antitrust laws:

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[3] Even courts that have allowed certification of indirect-purchaser class actions generally do not deny the existence of these enormous proof challenges. In one jurisdiction, the District of Columbia, the court openly acknowledged the challenges but allowed certification because of a peculiar provision in the District's antitrust law declaring that "'the fact of injury and the amount of damages sustained by members of the class may be proven on a class-wide basis, without requiring proof of such matters by each individual member of the class.'" *Goda v. Abbott Labs.*, No. Civ. A. 01445-96, 1997 WL 156541, at *5 (D.C. Super. Ct.) (quoting D.C. CODE § 28-4508(c)). In other jurisdictions, courts that certify indirect-purchaser classes simply push the enormous challenges of individualized proof off until after the certification process. See, *e.g.*, *Howe v. Microsoft Corp.*, 656 N.W.2d 285 (N.D. 2003) (discussed at pages 17-18 *infra*).

> "The vast majority of trial courts that have rigorously applied the requirements for class treatment in actual indirect purchaser suits have refused to certify a class. * * * [T]he results in these cases confirm, in a new context, the magnitude of the problems of proof the Court sought to avoid in *Illinois Brick*. Because of these problems, it appears that only a small subset of all indirect purchasers of price-fixed products would satisfy the requirements for class certification. Consequently, despite the enormous burdens indirect purchaser suits impose on state court systems, they fail to achieve any meaningful compensation for those actually injured by price-fixing conspiracies. Moreover, any efforts to relax the standards for class certification are likely to be futile or counterproductive because they can only make class actions workable by undermining the goal of compensating those who actually bear the overcharge." Page, *supra*, 1 ANTITRUST L.J. at 5-6.

See also Gary L. Sasso et al., *Defense Against Class Certification*, 744 PLI/LIT. 389, 465-66 (July 2006) (stating that courts generally have declined to certify indirect-purchaser classes and collecting cases from several states); Edward D. Cavanaugh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 40-41 (2004) ("The fact that a significant number of state courts in states where legislatures have authorized indirect purchaser suits have denied class action treatment may, in the end, simply point out the wisdom of *Illinois Brick*.").

Many state courts are willing to accept that there might theoretically be *some* way in which common issues can be shown to predominate in *some* indirect-purchaser class actions – but then find that requirement unmet in the case before them. Again and again, these courts get stuck on the complexity of the

individualized proof issues peculiar to indirect-purchaser claims. As the Maine Superior Court noted, in the course of refusing to certify a class of indirect purchasers:

> "Because indirect purchasers must demonstrate that any overcharges resulting from the illegal action of the defendants have been passed on to them, an entirely separate level of evidence and proof is injected into litigation of indirect purchaser claims. Proof of antitrust conspiracy may logically lead to a conclusion that the subject of the conspiracy, the retailers, have each been harmed. No such conclusion logically follows without specific proof tracing that overcharge on to consumers. It is this additional level of proof, added to the already extraordinary level of complexity of market issues, that has been the focus of all courts asked to certify classes similar to the one pending before the court." *Melnick v. Microsoft Corp.*, No. CV-99-709, 2001 WL 1012261, at *7 (Me. Super. 2001) (citation omitted).

See also *Melnick*, 2001 WL 1012261, at *4 n.5 (collecting numerous cases from other states where indirect purchasers were denied class certification because plaintiffs could not show that issues of common proof would predominate); Sasso, *supra*, 744 PLI/LIT. at 465-66 (same); Page, *supra*, 67 ANTITRUST L.J. at 23-27 & nn.102-26 (same).

These problems generally prove insurmountable in even the simplest indirect-purchaser cases. In *McCarter v. Abbott Labs., Inc.*, No. Civ. A. 91-050, 1993 WL 13011463 (Ala. Cir. Ct.), for example, an Alabama court declined to certify a price-fixing class action brought by consumers who had bought infant

formula manufactured by various defendants. The consumers were indirect purchasers: they had bought the formula from retailers, which had purchased it from the defendants. Although the structure of this claim was relatively straightforward, with only one intermediate link in the distribution chain separating the indirect-purchaser plaintiffs from the defendants, the individual issues involved in proving damages presented an insurmountable obstacle to certification:

> "The record reveals that at the retail level, where plaintiffs and the prospective class members purchased formula, prices vary considerably with respect to most of the defendants' formula products. Retail prices paid by consumers vary considerably even with respect to the same brand, form and size of product depending on when, where, from whom and in what quantity the product is purchased." *Id.* at *2.

The court went on to identify numerous other evidentiary problems. While some of the retailers had passed along the allegedly inflated prices to consumers, others had sold formula below wholesale prices as a loss leader, and still others offered discount coupons. *Id.* at *3. In each of those categories, moreover, prices had fluctuated over the relevant time period. *Id.* To resolve this case as a class action, the court would have had to hold "thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment." *Id.* at *5.[4]

[4] Comparing *McCarter* to the present case is instructive. In *McCarter*, the product reached the plaintiffs in exactly the same condition in which it left the defendants; the only middleman was the retailer. The court nevertheless found that individual issues predominated. Here, by contrast, the indirect purchasers bought

Of course, the fact that courts generally do not certify, or ultimately de-certify, individual-purchaser classes does not mean that the *availability* of such a cause of action is harmless. Quite the contrary: courts and defendants are forced to waste enormous resources on the litigation of the class-certification issue. See, *e.g.*, *Melnick*, 2001 WL 1012261 at *16 ("After months of discovery on the certification issue, the plaintiffs have not shown that they have the means to prove impact or damages on a classwide basis."). See also Section I.B, *infra.* Thus, the unworkability of indirect-purchaser class actions actually underscores the wisdom of the New York Legislature's decision not to allow such actions. As numerous states struggle with unworkable indirect-purchaser class actions, generally denying certification in such suits after the expenditure of tremendous litigation resources, New York law allows individual or properly joined indirect-purchaser claims with genuine value to proceed, striking a careful policy balance that should not be disturbed. Even if the absence of class actions results in few suits under the indirect-purchaser provision of the Donnelly Act, it is certainly the prerogative of the New York Legislature, in light of the particular dangers of indirect-purchaser class actions, to choose not to authorize such class actions, even while authorizing

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an end product – tires – that bears little relation to the chemicals sold by the defendants. DB 2, 6-7, 46-48. As noted, each additional link in the distribution chain adds to the complexity of proving damages.

indirect-purchaser suits by individual plaintiffs who have a substantial enough interest to justify filing a lawsuit.

B. The Threat Of A Class Action Can Cause Extensive Harm To The Defendant, Even If Underlying Claims Are Without Merit.

By creating the specter of a large aggregate damages award, the certification of a class imposes tremendous settlement pressure and radically shifts the balance of power in favor of the plaintiffs, regardless of the underlying merits of their claims. "[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized." Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000). Judge Friendly memorably characterized the resolution of a class action after certification as a "blackmail settlement." See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).[5]

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[5] As one New York Supreme Court judge recently observed, "class certification may place hydraulic pressure on defendants to settle, even when the probability of an adverse judgment is low." *In re Coordinated Title Ins. Cases*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 919, 2004 WL 690380, at *4 (N.Y. Sup. Ct. 2004) (internal quotation marks omitted).

See also *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the

It is not merely the size of a potential jury verdict that makes class actions such a powerful engine of settlement. Because of their sheer mass, class actions are likely to be tried in a manner that is ultimately prejudicial to the defendant and that increases the *likelihood* of an adverse result. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Aggregation of claims makes it more likely that a defendant will be found liable and results in significantly higher damage awards."); see also Irwin A. Horowitz & Kenneth S. Bordens, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24-25 (1989) (empirical studies show that, as the number of plaintiffs in a case increases, juries become more likely to find fault and to impose greater damages).

Where the plaintiffs may recover a penalty beyond actual damages, of course, the specter of a massive judgment – and hence the pressure to settle – is magnified dramatically. Even if plaintiffs prove not to have a valid claim, and even if certification is granted only on a provisional basis, the risks faced by the defendant are considerable. In *Howe v. Microsoft*, 656 N.W.2d 285, 291 (N.D. 2003), the Supreme Court of North Dakota upheld the certification of a class of

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defendant to settle independent of the merits of the plaintiffs' claims."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." (citation omitted)).

consumers bringing indirect-purchase antitrust claims against Microsoft, even though Microsoft raised substantial questions regarding the need for individualized proof. The court held that those questions could be addressed later in the litigation:

> "Whether further proceedings will support the plaintiff's economic suppositions remains to be seen, but a sufficient basis has been laid by the plaintiffs for the finding by the court that certification of the case as a class action is appropriate at this time. The court always has the ability to decertify the class, or establish other classes or subclasses." *Id.*

Despite the court's suggestion that the certification was provisional and did not represent a resolution of the "battle of the experts," Microsoft settled the *Howe* suit shortly after the certification was affirmed.[6]

As noted *supra*, these were precisely the concerns that drove the enactment of CPLR § 901(b). In certain extreme circumstances, where the interest of the public is very substantial and the Legislature is concerned that there are inadequate alternative means for curbing certain kinds of misconduct, the Legislature can make the determination "specifically" (as § 901(b) requires) that it is appropriate to multiply a penalty across a class, and thereby to confer a significant litigation advantage on the plaintiffs.[7] Section 901(b) does not prevent the Legislature from

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[6] See https://www.microsoftproductssettlement.com/northdakota/home.htm (last visited Nov. 28, 2006).

[7] For example, N.Y. PUB. HEALTH LAW § 2801-d authorizes both a minimum recovery and punitive damages in private litigation against nursing homes for

allowing class actions for claims as to which a penalty is available, but the statute recognizes the huge risks involved in multiplying a penalty, and it forces the New York Legislature to decide "specifically" whether it wants to skew the system by authorizing class actions for particular types of claims.

The Chamber does not contend that the risks inherent in *all* class actions militate in favor of abandoning this often useful mechanism. Rather, the point here is that the New York Legislature has taken care to enact a provision that requires *explicit* authorization of class actions when the risks inherent in the class action mechanism are particularly severe — that is, when the threatened damages might be greater than the scope of the actual, compensatory harm. The Legislature has thus specifically made it the province of the Legislature, not of the courts, to make the decision to grant such immense leverage to antitrust plaintiffs — leverage that can spur settlement even of claims with questionable merit. Unless and until the Legislature decides to impose the expense of litigating class certification under the Donnelly Act, and the risks inherent in the power shift of class certification, this Court should respect the clear statutory text, which the Legislature repeatedly has chosen to retain.

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inadequate provision of services, and explicitly allows private class actions in these circumstances. N.Y. PUB. HEALTH LAW § 2801-d(4).

C. There Are Adequate Alternative Means Of Curbing Anticompetitive Behavior.

Plaintiff does not – because he cannot – argue that indirect-purchaser class actions under the Donnelly Act are necessary to deter and punish anticompetitive behavior like the price-fixing alleged in this case. Direct and indirect purchasers can and do sue individually under the Donnelly Act, under federal law, and under the laws of other states. New York and federal authorities can and do bring criminal prosecutions. This broad array of alternative remedies militates against forcing an unnatural construction of CPLR § 901(b) to allow indirect purchasers to bring class actions. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983) ("The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party * * * to perform the office of a private attorney general.").

The conduct that gave rise to this case illustrates the point. In 2004, several of these defendants pled guilty to federal criminal charges alleging a conspiracy to fix prices of rubber processing chemicals. DB 6. Afterwards, several *direct* purchasers of these chemicals brought an antitrust suit in federal court seeking treble damages; Flexsys, Chemtura, and Bayer settled those actions by paying the claimants. DB 6-7. Thus, the unavailability of a class-action remedy for indirect

purchasers will not result in under-punishment or under-deterrence of the conduct at issue here.

II. ALLOWING PLAINTIFF TO MAINTAIN HIS UNJUST ENRICHMENT CLAIM WOULD PERMIT AN END-RUN AROUND THE DONNELLY ACT'S LIMITATIONS AND DISTORT GENERAL PRINCIPLES OF STANDING.

This Court should reject plaintiff's attempt to recast his indirect-purchaser claim as an "unjust enrichment" claim in order to seek certification of this case as a class action. Neither plaintiff nor the *amici* supporting this result can identify any boundary limiting the universe of people who would, pursuant to his theory of liability, be able to bring an "unjust enrichment" claim. It appears they believe that this quasi-contract claim can be stretched to the edges of the earth, allowing recovery by any party who can establish a chain of connection, no matter how remote, to an allegedly unjustly-enriched defendant. Such an understanding of the unjust enrichment doctrine contradicts longstanding common-law principles and New York case law. It also would represent an end-run around the statutory limitations on the indirect-purchaser cause of action in antitrust cases.

For good reason, the law does not try to trace the remote effects of either a tort or a contract to allow a third party to sue for conduct that breached legal obligations to a more directly affected person. The common-law concept that there must be a direct relationship between the party injured and the party that allegedly caused the injury takes many doctrinal forms. As the U.S. Supreme Court has

explained, at common law "a number of judge-made rules circumscribe[] the availability of damages recoveries in both tort and contract litigation – doctrines such as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract." *Associated Gen. Contractors,* 459 U.S. at 532-33. Many of these principles were famously articulated in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928). The animating principle underlying each of these doctrines is the limiting principle of "remoteness," the idea that, while "*any* wrongful act * * * can reach beyond the person who is directly hurt * * * [a]t some point, imposition of liability becomes too tenuous, too remote." Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J. L. & PUB. POL'Y 421, 421 (1999) (emphasis in original).

The remoteness principle is, fundamentally, one of standing: it allows the court to identify the appropriate plaintiff to sue for a breach of duty or other harm. Allowing a plaintiff to use an expansive concept of "unjust enrichment" to evade this principle would result in a cause of action with no logical stopping point. In plaintiff's vision, any chain of connection between a plaintiff's alleged harm and a defendant's alleged benefit is sufficient to establish an unjust enrichment claim. Such a conception is simply anathema to the common law.

The legal rationale for the remoteness principle turns, in large part, on the concept of proximate cause:

> "If one were merely to ask: 'Would the plaintiff have been injured if the defendant had not engaged in negligent or wrongful activity?' thousands of claims could be produced. Tort law has clearly rejected 'cause-in-fact' as the sole limitation on whether a defendant will be deemed liable for another's harm." Schwartz, *supra*, 8 CORNELL J. L. & PUB. POL'Y at 429.

The Supreme Court elaborated on the common law's clear requirement of a "direct relation between the injury asserted and the injurious conduct alleged":

> "At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient. Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) (internal quotation marks and citations omitted).

In this case, plaintiff is complaining "of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." Under common-law principles, therefore, the claim does not belong to plaintiff, who "stand[s] at too remote a distance to recover."

Unjust enrichment is not only a common law doctrine circumscribed by the prudential concerns articulated by the Supreme Court; it is also a quasi-contract claim that rests on *equitable* principles. "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any

agreement." *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572 (N.Y. 2005). This cause of action is available only in circumstances "which make it just that one should have a right, and the other should be subject to a liability[,] similar to the rights and liabilities in certain cases of express contract." *Miller v. Schloss*, 218 N.Y. 400, 407-08 (1916). But plaintiff in this case is trying to insist that the law, for equitable reasons, should create a quasi-contract between persons who had no direct dealings with each other, so that no actual contract could have existed. Such an approach is incoherent and would result in a virtually infinite number of plaintiffs with valid claims for recompense.

Despite plaintiff's claim to the contrary, the New York courts have not abandoned the remoteness principle in the context of unjust enrichment claims. New York law requires an unjust enrichment plaintiff to allege direct dealings with the defendant. DB 39-45. Though plaintiff argues that relevant New York cases are inapposite, Brief for Plaintiff-Appellant ("PB") 29-32, and points to a handful of thinly-reasoned cases from other jurisdictions, PB 26-28, all of the New York cases cited by plaintiff have in fact involved direct relationships between plaintiffs and defendants, including *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 778 N.Y.S.2d 147 (1st Dep't 2004). DB 43-44.[8]

[8] The New York Attorney General's Brief ("AGB") cites a couple of early cases dealing with utterly different situations and extrapolates that they show that New York does not require a direct relationship between plaintiff and defendant in

An examination of the indirect-purchaser claim that plaintiff is trying to squeeze into the form of an unjust enrichment action in this case makes clear that the animating concerns of the remoteness principle are particularly acute, and that the need for its application particularly urgent. There at least four circumstances that call for adhering to the remoteness doctrine: (1) when there are intervening acts between the defendant's conduct and the plaintiff's supposed injury that attenuate causation and complicate calculation of damage; (2) when there is the possibility of duplicate recovery for the same conduct; (3) when the remoteness doctrine is necessary to prevent an avalanche of claims; or (4) when the harm is indirect and purely economic. Schwartz, *supra*, 8 CORNELL J. L. & PUB. POL'Y at 426-28. Each of those circumstances is present here.

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unjust enrichment cases. AGB 35-36. However, the Attorney General never discusses the remoteness principle, and the stolen-money cases (*3105 Grand Corp. v. City of New York*, 288 N.Y. 178, 181 (1942), and *Whiting v. Hudson Trust Co.*, 234 N.Y. 394 (1923)) are really nothing more than illustrations of the principle that stolen property can be recovered from the person who holds it. These cases present none of the problems of causation of injury, calculation of damages, or duplicative recovery that bar the kind of remote claim plaintiff here characterizes as "unjust enrichment."

The same point applies to the case involving a determination of the proper recipient of life insurance proceeds. See *Simonds v. Simonds*, 45 N.Y.2d 233, 242-43 (N.Y. 1978). The question whether one person or another is entitled to contractual benefits is a far cry from plaintiff's effort to show remote injury flowing from alleged overcharges collected from purchasers far away from him in the distribution chain.

First, a series of intervening acts separates defendants' alleged conduct from plaintiff's alleged injury. Plaintiff's claim arises from his purchase of tires. Yet he never purchased tires from any of the defendants; indeed, none of the defendants even manufactures or sells tires. Plaintiff is thus several steps removed from the sale of chemicals that gave rise to this litigation. Market forces at work at each step in the manufacture and distribution chain affected the end price he paid for the tires, which incorporated small amounts of those chemicals. This attenuation complicates the task of determining the existence and extent of his injury, if any.

Second, allowing plaintiff to recover on an "unjust enrichment" theory raises the real possibility of duplicative recovery for the same harm if – as actually occurred here – one or more of the parties closer in the distribution and manufacture chain to the original sale of the chemicals decides to bring a claim. If plaintiff's view of the law were correct, anyone who in turn buys the used tires from him also would have an equal right to bring an "unjust enrichment" claim against the chemical companies.

If overlapping or successive claims at different levels of the distribution system were allowed, the courts would have to devise new and elaborate procedures to protect the due-process rights of defendants to be spared from being mulcted several times for the same "ill-gotten gains." Safeguarding against duplicative (or multiplicative) recovery would require resolving ever more

complicated issues of proof and the expenditure of great resources by the parties and the courts. See Schwartz, 8 CORNELL J. L. & PUB. POL'Y at 426. The Legislature has had no need to create mechanisms to deal with these challenges, because the existing principle of remoteness addresses them. This is not a set of problems this Court should suddenly create by acceding to plaintiff's ambitious theory.

Third, allowing any person along a potentially long and tenuous chain of an allegedly passed-on price increase to bring a claim renders inevitable an avalanche of claims based on an unjust enrichment theory, with parties at each step permitted to bring suit.

Finally, indirect economic harms, like those alleged here, are especially vulnerable to the problems of remoteness, because they theoretically extend easily down a chain of connections with no natural stopping point. For alleged anti-competitive behavior with respect to a chemical used in manufacturing, as in this case, the theoretical spread of the economic harm is almost limitless. One could argue that the economic harm spread from chemical company to rubber producer to tire manufacturer to tire distributor to tire store to automobile dealership to automobile purchaser to the purchaser of a used car. With no requirement of any kind of direct dealings between plaintiff and defendant, the theoretical universe of persons who could bring an "unjust enrichment" claim based on price-fixing is

literally endless. See *A.O. Fox Mem'l Hosp. v. Am. Tobacco Co.*, 302 A.D.2d 413, 414, 754 N.Y.S.2d 368, 370 (2nd Dep't 2003) (affirming dismissal of hospitals' claims against tobacco companies because "plaintiffs' purported economic injury is entirely derivative of the tobacco-related harm suffered by the individual patients and therefore too remote to permit recovery").

In *Illinois Brick*, the Supreme Court explicitly invoked the prudential concept of "remoteness" in determining that indirect-purchaser suits were invalid under federal antitrust laws. If such suits were permitted, there would be a "strong possibility that indirect purchasers remote from the defendant would be parties to virtually every treble-damages action." See 431 U.S. at 740-41. In *Associated General Contractors*, the Supreme Court again invoked the common-law remoteness principle to determine that a remote party claiming consequential injury flowing from an antitrust lacked standing to sue:

> "There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. * * * The Union's allegations of consequential harm resulting from a violation of the antitrust laws * * * are insufficient as a matter of law." 459 U.S. at 535-36, 545.

All of the problems discussed at Section I, *supra*, are as applicable to plaintiff's unjust enrichment theory as they are to the indirect-purchaser claim: authorizing such a theory would create enormous evidentiary issues and other practical challenges.

Until the New York Legislature acted in 1998, these comprehensive common-law principles applied to state antitrust claims under the Donnelly Act. See *Van Dussen-Storto Motor Inn, Inc. v. Rochester Tel. Corp.*, 63 A.D.2d 244, 252, 407 N.Y.S.2d 287 (4th Dep't 1978) ("[T]o sustain an antitrust cause of action, plaintiff must allege that defendant's illegal restraint of trade proximately caused damage to plaintiff's business or property. * * * Plaintiff must allege a causal link to its injury which is direct rather than incidental or remote to have standing to sue."). When the Legislature decided to create a unique exception for indirect-purchaser claims under the Donnelly Act, it did not repeal the settled principle of remoteness for any other kind of claim. The Legislature's 1998 Amendment thus stands in sharp relief as a limited, statutory exception to the strictures of the common law.

The Legislature's power to craft exceptions to the doctrine of remoteness – when it seems appropriate to do so – demonstrates the frailty of plaintiff's arguments urging this Court to allow remote purchasers to pursue "unjust enrichment" claims against persons with whom they have had no dealings. If there

are compelling reasons to create the burdens that inevitably flow from allowing any kind of indirect or remote claim, it is the proper province of the Legislature to make the cost-benefit calculus that underlies such a judgment. The Court should remit the plaintiff to the Legislature, which is in a position to determine whether there is a compelling reason to reject centuries of settled – and wise – common-law doctrine limiting the class of persons who may charge a stranger with "unjust enrichment."

CONCLUSION

For the foregoing reasons, the order of the Second Department should be affirmed.

Dated: New York, New York
November 30, 2006

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* *Application for admission pro hac vice pending*