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Perspective

NY's Legislature Should Fix Runaway Consumer Class Action Damages—Not Make Them Worse

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The New York Legislature is now considering a bill, A.679/S.2407, that would make major changes to the state's chief consumer-protection statute, General Business Law §349. One change in particular should terrify all companies that do business in the state. It would raise the guaranteed minimum recovery forty-fold, to $2,000, and it would expressly make this minimum award recoverable thousands or even millions of times over in class actions. True, §349's damages scheme is badly broken and in dire need of a legislative fix—but this bill would make the problem exponentially worse. Instead of passing it, the Legislature should eliminate statutory damages altogether in consumer-protection suits—or, at minimum, clarify that they are available only in *non*-class actions.

Massively Multiplied Statutory Damages: A Long-Recognized Problem. Often, damages for individual consumer-protection violations are too modest to justify an attorney's time and effort. The Legislature recognized this and provided two mechanisms to incentivize private suits. First, in drafting Gen. Bus. Law §349 and its companion statute, §350, it provided for minimum "statutory damages" of $50 and $500, respectively. Second, it made suits under these statutes eligible for class-action status, so that consumers with modest damages could band together. Crucially, however, the Legislature never intended for these two incentive mechanisms to be *combined*. In other words, it did not intend for class actions in which potentially millions of consumers were *each* awarded the $500 statutory minimum, even though their actual losses might have amounted to a few dollars or even pennies apiece—resulting in a gargantuan class-wide award vastly out of proportion to any actual harm that the defendant caused.

How do we know the Legislature opposed this? In 1975, it enacted New York's modern class-action rule, CPLR §901. Subsection (b) of that rule provided that "an action to recover … a minimum measure of recovery created or imposed by statute may not be maintained as a class action" unless the statute specifically so authorizes. This language came from a report of the New York State Bar Association, which explained its rationale thusly:

> New York statutory law contains many "penalty" and similar provisions establishing arbitrary measures of liability for noncompliance which, although appropriate for individual actions, would lead to excessively harsh results in large class actions. The amounts of those

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penalties were established at levels sufficient to provide incentives for individual suits and it would be a gross distortion of their purpose to permit their recovery in class suits.

The Court of Appeals has agreed that CPLR §901(b) expresses the Legislature's judgment "that recoveries beyond actual damages [in class actions] could lead to excessively harsh results" and "that there was no need to permit class actions in order to encourage litigation … when statutory penalties and minimum measures of recovery [already] provided an aggrieved party with sufficient economic incentive to pursue a claim." *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1015 (N.Y. 2007).

The Legislature expressed these same concerns five years later, when Gen. Bus. Law §§349-50 were amended to add a private right of action for the first time. The original draft bill would have overridden CPLR §901(b) by expressly authorizing class actions to recover actual *or statutory* damages. The Senate refused to pass that bill, noting "adamant … opposition" to "class action[s] for statutory damages." A compromise bill was then enacted, which authorized private enforcement without overriding CPLR §901(b)'s application to such suits. The upshot, as both chambers recognized, was that "class actions … would still lie" under the amended §§349-50, but only "for actual damages" and "not statutory damages." Thus, the prohibition of statutory-damage class actions was part and parcel of the Legislature's decision to permit private enforcement of the consumer-protection laws in the first place.

'Shady Grove': SCOTUS Undermines the Legislature's Compromise. For three decades, state and federal courts applied CPLR §901(b) as the Legislature intended, forbidding class-wide recovery of statutory damages in consumer-protection suits. Then, in 2010, the United States Supreme Court blew up the Legislature's compromise. In *Shady Grove Orthopedic v. Allstate Insurance Co.*, 559 U.S. 393, the Court held by a 5-4 vote that CPLR §901(b)'s bar on statutory-damage class actions does not apply in federal court, where most large class actions are now litigated. The Justices in the plurality (Scalia, Roberts, Thomas, and Sotomayor) would have held that state statutes limiting the conditions under which class actions may be "maintained" are *always* preempted in federal proceedings. The Justices in the dissent (Ginsburg, Kennedy, Breyer, and Alito) rejected the plurality's reasoning, observing that it "override[s]" New York's "substantive" policy of "keeping … monetary awards reasonably bounded" and avoiding "annihilating punishment of … defendant[s]."

> The Legislature should indeed amend Gen. Bus. Law §§349-50—not to increase the statutory minimum damages, as the Niou/Comrie bill would do, but to eliminate them.

Justice Stevens sided with the plurality, but on narrower grounds—so his opinion likely constitutes *Shady Grove*'s "holding." He agreed that CPLR §901(b) is preempted in federal proceedings, but suggested that some state statutes forbidding class actions under certain circumstances would not be. Specifically, Stevens relied on the fact that §901(b) appears in New York's general code of civil procedure, rather than in the text of any particular substantive statute. Since *Shady Grove*, lower courts have repeatedly cited the Stevens concurrence in upholding the applicability in federal court of class-action limitations folded into the text of substantive state laws. The irony is that, in authorizing private enforcement of Gen. Bus. Law §§349-50, the Legislature was *expressly depending* on the pre-existing limiting language found in CPLR §901(b). At the time, it had no reason to place redundant limiting language in the text of §§349-50. If the Legislature had any inkling of *Shady Grove*'s holding, however, it surely would have taken that apparently redundant step.

Since *Shady Grove*, companies that do business in New York face the threat of "annihilating punishment" for even the most minor and dubious violations of the state's consumer-protection laws. For example, the Second Circuit is now considering two cases involving hygienic wipes marketed as "flushable": *Kurtz v. Kimberly-Clark Corp.* (No. 17-1856) and *Belfiore v. Procter & Gamble Co.* (No. 17-1861). The plaintiffs allege that the "flushable" claim is misleading because the wipes can cause clogs—though apparently just 0.00007% of the time. After initial hesitation, Judge Weinstein certified classes of all purchasers of the wipes, on the theory that each purchaser could be entitled to statutory damages at $500 a purchase—even though their *actual* damages could not possibly exceed the cost of the wipes themselves (as little as $3), and even though the wipes were indeed "flushable" for the vast majority of consumers. Judge Weinstein correctly observed that such "[a]ggregation of statutory damages through the class action mechanism can … [be] ruinous to small businesses, and in some cases, [even] large corporations, and grossly disproportionate to [the] actual harm … ." *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 73 (E.D.N.Y. 2015). But despite these concerns, he believed that *Shady Grove* left him no choice but to certify.

Aside from threatening defendants with unintended and potentially ruinous

judgments, *Shady Grove* may be exerting other untoward effects. In recent years, New York's federal courts have seen a major influx of consumer class actions of questionable merit—such as so-called "slack-fill" cases complaining of too much empty space in food packages or pill bottles. A 2017 study by the U.S. Chamber Institute for Legal Reform found that 22% of all food class actions in U.S. federal courts were filed in New York—even though the state comprises less than 6% of the nation's population. While it is difficult to pinpoint a single cause, some cite the post-*Shady Grove* "misuse" of Gen. Bus. Law §§349-50's statutory-damage provisions as "[o]ne reason New York is an increasingly attractive place to file" these lawsuits. Cary Silverman & Mark Behrens, *State of Liability: New York's Costly Tort Laws and How to Fix Them* 7, Empire Center for Public Policy (2017).

The Legislature Should Fix the Problem, Not Make It Worse. The present state of affairs is unintended, unfair, and untenable. Fortunately, the solution is straightforward. The simplest fix would be for the Legislature to delete the statutory-damages provisions of Gen. Bus. Law §§349-50 altogether. The notion that lawyers are incentivized to bring individual (non-class) lawsuits by the prospect of recovering one-third of a $50 or $500 statutory-damage award is questionable at best. Even increasing these minimum awards substantially would not meaningfully incentivize individual consumer-protection suits. The fact is that, nowadays—with very few exceptions—private enforcement of §§349-50 occurs in class actions, where the aggregation of many small actual-damage claims already provides a strong incentive to sue. As such, eliminating statutory damages would fix the *Shady Grove* problem without meaningfully affecting private enforcement. (It would also bring New York's consumer-protection statutes in line with most other states', which lack minimum damage awards.)

But if this is too heavy a lift, Justice Stevens's *Shady Grove* concurrence suggests another path: the Legislature can add language to Gen. Bus. Law §§349-350 stating that statutory damages under those provisions are an available remedy only in *non*-class suits. If such language were folded into §§349-50, rather than merely appearing in the CPLR, it would presumably pass muster under the Stevens approach and so would apply in both federal and state court. Importantly, this would in no way reduce the courts' ability to make deceived consumers whole for their *actual* injuries on a class-wide basis. It would merely restore the remedial system that the Legislature always intended. Thus, there should be nothing partisan or ideological about such a fix. Indeed, no less a liberal icon than Justice Ginsburg—a vocal advocate of consumer rights—authored the *Shady Grove* dissent, which decried the unfair and "ruinous liability" that statutory-damage class actions can inflict. At least 22 other states have already placed similar class-action-limiting language directly in the text of their consumer statutes, so New York would hardly be alone in taking this step.

Unfortunately, the only current bill touching on this subject goes in a diametrically opposite direction. That bill, A.679/S.2407, is sponsored in the Assembly by Rep. Yuh-Line Niou of Lower Manhattan and in the Senate by Sen. Leroy Comrie of Queens. Among other plaintiff-friendly changes to Gen. Bus. Law §349, the bill would *raise* the minimum damages under that section from $50 to $2000—a forty-fold increase. And here's the kicker: for the first time, it would *expressly authorize* class actions under §349 "to recover actual, *statutory* and/or punitive damages." Thus, far from fixing the *Shady Grove* problem, the Niou/Comrie bill would make it exponentially worse. Even small businesses could easily be hit with multi-billion-dollar judgments for inadvertent errors in their labeling and advertising. And with statutory-damages class actions authorized in the text of §349 itself, defendants would face this massively inflated liability not just in federal court, as they do now under *Shady Grove*, but in New York's own courts as well. In short, the Niou/Comrie bill would take the Legislature's original plan in authorizing private enforcement of the consumer laws and flip it on its head. It is hard to see how anyone could think this is a good idea.

The Legislature should indeed amend Gen. Bus. Law §§349-50—not to increase the statutory minimum damages, as the Niou/Comrie bill would do, but to eliminate them. At an absolute minimum, however, the Legislature should tweak the text of §§349-50 to fix the *Shady Grove* problem and clarify that statutory damages are available only in non-class suits, as was intended from the very outset of private enforcement. And it should act without delay. There is no reason to wait until a small business—or a major global corporation—is wiped out in one stroke for a minor and essentially harmless inaccuracy in its labeling or advertising.

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