



The misuse and abuse of the Donnelly Act

For tactical purposes, more and more litigants now turn to the Donnelly Act—New York's anti-trust law—in routine commercial disputes. And, the reason for this is clear: the act authorizes treble damages and attorney's fees. This article analyzes the purpose of the Donnelly Act, its prerequisites, and arguments to consider when confronted with this claim.

Because of the enormous pressure that treble damages and attorney's fees place on a litigant, it is important that courts take a hard look at whether a Donnelly Act claim is viable. It is encouraging to note that the Nassau County Commercial Division does indeed hold litigants to their burden before allowing them to proceed with a Donnelly Act claim.¹

The Donnelly Act is codified under General Business Law § 340 *et seq.* Section 340 provides in pertinent part that, "[e]very contract, agreement, arrangement or combination whereby a monopoly . . . is or may be established or maintained, or whereby competition . . . may be restrained . . . is . . . illegal."² It is well-settled that, "[a]nti-trust laws are concerned with acts that harm 'competition, not competitors.'"³ And, thus, "behavior which hurts or even destroys an individual competitor is not illegal under anti-trust laws unless it also adversely affects competition."⁴

To establish a *prima facie* case under the Donnelly Act, a litigant must satisfy the following elements: (1) identify the relevant product and geographic market; (2) describe the nature and effects of the purported conspiracy; (3) allege how the economic impact of the conspiracy restrains trade in the market in question; and (4) show a conspiracy or reciprocal relationship between two or more entities who are named.⁵ Failure to allege any one of these prerequisites is fatal.⁶

As to the first element, not any product or market satisfies this requirement. Rather, it must be a

product and market of sufficient magnitude. A single product or narrow market is insufficient.⁷ And, as noted above, the reason for this is that the Donnelly Act is concerned with harm to competition, not competitors.⁸ As to the second element, it is incumbent upon the pleader to set forth details that describe the nature and effects of the purported conspiracy. It is insufficient to simply allege in conclusory fashion that a conspiracy took place.⁹

As to the third element, the pleader must set forth the economic impact of the conspiracy. In most cases involving routine commercial disputes, a litigant can not satisfy this prerequisite because the harm alleged is only to the litigant, not to competition.¹⁰ As to the fourth element, the pleader must allege specific facts that a conspiracy took place—bare bones' allegations are insufficient.¹¹

Analysis of the above authority demonstrates that the Donnelly Act is not designed for the routine commercial disputes. Rather, it is there to punish companies that engage in harmful conduct towards competition—not competitors.

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1. *G.T. Acquisition I Corp. v. Bridgestone/Firestone North American Tire LLC*, 2006 WL 1887516, at *1-2 (Sup. Ct. Nassau County June 5, 2006) (dismissing Donnelly Act claims); *Hamlet on Olde Oyster Bay Home Owners Assoc., Inc. v. Holiday Organization, Inc.*, 2006 WL 1982603, at *17-18 (Sup. Ct. Nassau County July 7, 2006) (same).

2. See General Business Law § 340.

3. *See Simon & Son Upholstery, Inc. v. 601 West Assocs. LLC*, 2003 WL 22231540, at *4 (Sup. Ct. New York County Aug. 27, 2003) (citing *Apex Oil Co. v. DiMauro*, 713 F. Supp. 587 (S.D.N.Y. 1989) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977))).

4. *See id.*

5. *Watts v. Clark Assocs. Funeral Home, Inc.*, 234 A.D.2d 538, 538 (2d Dep't 1996); *Simon*, 2003 WL 22231540, at *1.

6. *See Watts*, 234 A.D.2d at 538; *Lopresti v.*

Mass. Mutual Life Ins. Co., 2004 WL 2364916, at *2 (Sup. Ct. Kings County Oct. 19, 2004) ("The failure to allege any one of these elements is fatal to the claim"), *aff'd* 2006 WL 1644109, at *1 (2d Dep't June 13, 2006) (affirming dismissal of Donnelly Act claim on the grounds that "the complaint contained only vague, conclusory allegations insufficient to adequately plead a conspiracy or reciprocal agreement between two or more entities . . . [and] failed to identify a relevant market, or an injury to competition cognizable under the statute.").

7. *See Watts*, 234 A.D.2d at 538 (holding allegations that plaintiff "was precluded from purchasing an interest in one of the few existing funeral parlor businesses within Northern Westchester County does not adequately allege impairment of competition within a relevant market."); *Lopresti*, 2004 WL 2364916, at *3 ("[T]he annuity product sold by plaintiff to Wyckoff's employees cannot be characterized as a product market in and of itself given the other substitute investment options available, such as stocks, bonds, or mutual funds, that may also be available to Wyckoff's employees."), *aff'd* 2006 WL 1644109, at *1 (Second Department expressly affirmed dismissal on this ground and others)).

8. *See Simon*, 2003 WL 22231540, at *4.

9. *See Watts*, 234 A.D.2d at 538.

10. *See Lopresti*, 2004 WL 2364916, at *3 (quoting *Hsing Chow v. Union Cen. Life Inc. Co.*, 457 F. Supp. 1303, 1306 (E.D.N.Y. 1978) (stating that a company has the right "to select a person with whom it does business and to refuse to deal or continue to deal with anyone for reasons sufficient to itself.")); *see Watts*, 234 A.D.2d at 538 (holding allegations that plaintiff "was precluded from purchasing an interest in one of the few existing funeral parlor businesses within Northern Westchester County does not adequately . . . show how the economic impact of the alleged conspiracy restrains trade in the market."). And, anti-trust laws are not concerned with acts that harm a competitor—only acts that harm competition. *See Simon*, 2003 WL 22231540, at *4.

11. "In order to properly plead a conspiracy, the plaintiff must do more than make a 'bare bones' allegation that such a conspiracy exists." *See Lopresti*, 2004 WL 2364916, at *2 (quoting *Beyer Farms v. Elmhurst Dairy*, 142 F. Supp. 2d 296, 300-301 (E.D.N.Y. 2001), *aff'd* 2002 WL 1059087 (2d Cir. 2002)). "Conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act." *See id.* (citing *Yankees Entertainment & Sports Network, LLC v. Cablevision Systems Corp.*, 224 F. Supp. 2d 657, 678 (S.D.N.Y. 2002)). Rather, "[t]he complaint must allege facts to support the existence of a conspiracy." *See id.* (citing *Great Atlantic & Pacific Tea Co. v. Town of East Hampton*, 997 F. Supp. 340, 352 (E.D.N.Y. 1998)).