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THE "DE-ICING" OF TICKET PRICES: A PROPOSAL ADDRESSING THE PROBLEM OF COMMERCIAL BRIBERY IN THE NEW YORK TICKET INDUSTRY*

*Andrew Kandel** and Elizabeth Block****

INTRODUCTION

"Ice" is money paid, in the form of a gratuity, premium or bribe, in excess of the printed box office price of a ticket, to an operator of any "place of entertainment"¹ or their agent,

* Any opinions and/or observations expressed herein as furnished by the authors are theirs alone, and are not to be construed in any fashion—either directly or indirectly—as the formal or informal opinions of the New York State Department of Law or the New York State Attorney General, who will not be bound thereby.

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¹ "Place of entertainment" is defined as "any privately or publicly owned and operated entertainment facility such as a theatre, stadium, arena, racetrack, museum, amusement park, or other place where performances, concerts, exhibits, athletic games or contests are held for which an entry fee is charged." N.Y. ARTS

representative or employee.² Box office employees and their supervisors who control the original sale and distribution of tickets are such agents. It is the premise of this Article that there can be no meaningful discussion or analysis, on the subject of price regulation of ticket resales³ without considering the impact that the phenomenon of "ice" has on the ticket resale business. Any legislative debate and proposal on this subject must focus on how widespread commercial bribery has prevented the general public from unfettered access to certain tickets.

The issue of the proper role of the law in regulating ticket resales has been a source of much debate and rhetoric. In each of the past three years, the legislature has taken up the issue of ticket resale regulation, only to postpone action when resolution proved too difficult. During its current legislative session, the New York legislature will again revisit the New York ticket resale law, Arts and Cultural Affairs Law ("ACAL"), Article 25. The current version of Article 25 is due to expire on June 1, 1997.⁴ At that

& CULT. AFF. LAW § 25.03(7) (McKinney 1984 & Supp. 1997).

² Noted Broadway producer David Merrick stated during his testimony [Inquiry by Hon. Louis J. Lefkowitz, Attorney General of N.Y., into Financing and Ticket Distribution Practices in the N.Y. Legitimate Theatre, Dec. 10, 1963] that the derivation of the word "ice" in this connection was based on two possible sources: (1) that the accounts for such payments were made on ice that "melted away", or (2) a turn of the century political expression for items listed as "incidental campaign expenses" (i.c.e.).

Orestes J. Mihaly & David J. Kaufman, Practice Commentary, N.Y. ARTS & CULT. AFF. LAW tit. F, Art. 23 n.2 (McKinney 1984 & Supp. 1997).

³ "Resale" is defined as "any sale of a ticket other than a sale by the operator or the operator's agent who is expressly authorized to make first sales of such tickets." N.Y. ARTS & CULT. AFF. LAW § 25.03(9). Computerized ticket services such as Ticketmaster are considered agents of the operator or original sellers of tickets under this definition. While the increasingly steep "service fees" charged by such companies have been the subject of several inquiries by governmental agencies and of private litigation, this Article does not address that topic. For a discussion of such service fees, see Kevin E. Stern, *The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry*, 16 HASTINGS COMM. & ENT. L.J. 349, 352-54 (1994).

⁴ L. 1996 c. 28, § 1; N.Y. ARTS & CULT. AFF. LAW § 25.01 (McKinney 1984 & Supp. 1997) (historical and statutory notes).

time, if there is no new law in place, the pre-1991 provisions of Article 25 will be reinstated.⁵ Extensions of the current law were enacted in 1994,⁶ 1995⁷ and 1996.⁸

Legislative hearings at which concerned parties (including, among others, the attorney general, representatives of ticket brokers and theater owners) presented facts and opinions were held by the New York State Assembly Committee on Tourism, Arts and Sports Development on August 16, 1994, May 19, 1995 and October 5, 1995. The primary issue in the mounting debate on ticket legislation, and also the major obstacle to achieving needed statutory reform, is whether New York should continue to regulate the price at which tickets may be resold.⁹

Opponents to the regulation of ticket resale prices rely on the philosophy of "free market" economics. Representatives of a certain part of the ticket resale industry argue that a free market for the resale of tickets would lead to increased competition among brokers and accessibility for consumers of tickets.¹⁰ Commentators have argued that tickets should be treated as a commodity and that the laws of the market should set their final price.¹¹

The market analogy, however, is flawed. An auction market such as the ones in the securities and commodities field must be

⁵ *Id.*

⁶ L. 1994 c. 319, § 1; N.Y. ARTS & CULT. AFF. LAW § 25.01 (historical and statutory notes).

⁷ L. 1995 c. 114, § 1; N.Y. ARTS & CULT. AFF. LAW § 25.01 (historical and statutory notes).

⁸ L. 1996 c. 28, § 1; N.Y. ARTS & CULT. AFF. LAW § 25.01 (historical and statutory notes).

⁹ The resale of a ticket to any place of entertainment for more than the "maximum premium price" is prohibited by law. N.Y. ARTS & CULT. AFF. LAW § 25.07(2) (McKinney 1984 & Supp. 1997). "Maximum premium price" is currently defined as "the sum of the established price plus five dollars or ten percent of the established price, whichever is greater, plus lawful taxes." *Id.* § 25.03(4).

¹⁰ See *Issues Pertaining to Ticket Scalping: Hearing Before New York State Assembly Standing Comm. on Tourism, Arts & Sports Development* (Oct. 5, 1995) [hereinafter *Hearing* (Oct. 5, 1995)] (testimony and submissions of Barry E. Lefkowitz, Executive Director, East Coast Ticket Brokers Association).

¹¹ See John Tierney, *The Big City: Scalping, Fair and Square*, N.Y. TIMES, June 26, 1994, § 6 (Magazine), at 16.

free of manipulation in order to be effective. This is the premise of federal and state securities laws, as well as of antitrust laws. It is the very fact of anti-fraud and anti-manipulation laws which permit the securities and commodities markets to operate efficiently.¹² Indeed, "regulation often facilitates commerce . . . where perfect competition is structurally unattainable."¹³

The theory that the competition resulting from a "free market" would drive ticket prices down does not address the hidden cost of "ice," nor does it differentiate between the markets for highly desirable front row tickets available on short notice and the rest of the market. The thrust of this Article is to convey the authors' conviction that the concept of a "free market" (i.e., a market based on supply and demand, *without* any government control)¹⁴ in connection with the resale of tickets is an illusion, and that the removal of statutory limits on the resale price of tickets, standing alone, would merely lead to unbridled price-gouging.¹⁵ Free markets, in order to function effectively and competitively, cannot

¹² Scalpers claim that they should be able to provide a service to individuals willing to pay more. They claim regulations interfere with the free market, which will otherwise police itself. This would be a valid argument if the market was truly free. If everyone had equal access to tickets of similar quality, regulation would not be necessary. However, regulation is necessary when one group controls access to the best seats. . . . Scalpers extort the public and frustrate the goals of the artist and promoter even if they control only two to three percent of the market; they can nonetheless withhold tickets to drive up the demand and price. Regulation is needed to prevent this type of manipulation.

Sheree Rabe, Note, *Ticket Scalping: Free Market Mirage*, 19 AM. J. CRIM. L. 57, 67-68 (1991).

¹³ ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 225 (1997).

¹⁴ See generally PAUL A. SAMUELSON, ECONOMICS 52-74 (11th ed. 1980) (discussing the bare elements of supply and demand).

¹⁵ This nation's system of federal and state securities and commodities regulation is built on the premise that manipulation interferes with the free market forces of supply and demand: "It attacks the very foundation and integrity of the free market system." *In re Pagel, Inc.*, 48 S.E.C. 223, 232 (1985), *aff'd sub nom. Pagel, Inc. v. Securities Exch. Comm'n*, 803 F.2d 942 (8th Cir. 1986).

be built on the basis of fraud, deception and manipulation.¹⁶ When "private-market actors" engage in abuses of market power, "drive out competitors, or use monopoly power, the usual market forms of discipline cease to operate."¹⁷

There cannot be a free market when the price of a product is controlled at the original point of distribution by a conspiracy based on bribe-giving and bribe-taking (i.e., payments of and receipt of "ice").¹⁸ This results in access to the product (tickets) for only a limited number of people who are known to each other and who determine the price that has to be paid for a ticket in excess of the printed price (the amount of the "ice"). The ticket brokers or resellers who are willing to pay the "ice" are paying for access to the best seats to the most desirable events on short notice.

The cost of tickets on the resale market must cover the established price of the ticket,¹⁹ the cost of the "ice,"²⁰ as well

¹⁶ It is the very purpose of securities (and commodities) regulation "to purge the securities exchanges of those practices which have prevented . . . open markets for securities where supply and demand may fully meet at prices uninfluenced by manipulation or *control*." *Id.* (quoting S. Rep. No. 1455, 73d Cong., 2d Sess. 81 (1934)) (emphasis added).

Several commentators have addressed the issue of maintaining a free market when access to tickets is limited. For example, Professor Thomas A. Diamond states:

Resistance to anti-scalping controls, for the most part, results from a failure to recognize that such controls are imposed not to thwart the market process but to prevent unfair manipulation of that process. Limiting opportunities to manipulate prices is an integral part of the free enterprise system.

Thomas A. Diamond, *Ticket Scalping: A New Look at an Old Problem*, 37 U. MIAMI L. REV. 71, 79 (1982).

¹⁷ KUTTNER, *supra* note 13, at 275.

¹⁸ "Any haphazard interference with competitive supply and demand is likely—save in some exceptional circumstances—to be a bad rather than a good thing." PAUL A. SAMUELSON, *ECONOMICS* 388 (6th ed. 1964).

¹⁹ "Established price" is defined as "the price fixed by the operator of any place of entertainment for admission thereto, which must be printed or endorsed on each ticket of admission." N.Y. ARTS & CULT. AFF. LAW § 25.03(3).

²⁰ The payment of a commission, gratuity or bonus in connection with the sale of a ticket to an officer or employee of a place of entertainment is prohibited. *Id.* § 25.27 (McKinney 1984 & Supp. 1997).

as additional payments to "middlemen" and other brokers if the ticket cannot be obtained directly by the ticket reseller from the original source. Added to all of this, of course, is a profit for the reseller.

I. AN OVERVIEW OF THE TICKET RESALE BUSINESS

The term "ticket scalping" has been embodied in the popular culture as an activity which generally takes place on the street, frequently in front of or near the venue for which tickets are being sold. Because of public safety concerns resulting from many people milling around event sites attempting to buy and sell tickets, the legislature attempted to restrict such activity by prohibiting ticket resales within 1000 feet of the property line of places of entertainment having a permanent seating capacity in excess of 5000 seats, unless the operator has designated an area for resale of tickets that are not usable by the purchaser.²¹ Street scalpers are, however, the smallest part of the immense ticket resale industry.²²

The ticket resale industry in New York is generally divided between those who operate and obtain licenses in New York and those who do business in New York²³ but have created the fiction that they do not do business in New York because they are located on the immediate outskirts of New York's borders.²⁴

²¹ *Id.* § 25.11 (McKinney 1984 & Supp. 1997).

²² "Scalping is no longer merely the province of individuals who . . . sell [tickets] for a huge profit on the sidewalk" but also of "[t]icket wholesalers [who] buy up huge blocks of tickets and resell them at illegally high prices." Editorial, *Broadway Robbery*, N.Y. TIMES, Mar. 25, 1995, § 1, at 22.

²³ For example, those who advertise in the New York media, have New York telephone numbers, sell tickets to New York events to New York consumers for delivery in New York, and the like, "do business" in New York.

²⁴ By defining "resale" as including sales "where either buyer or seller is located in this state," the 1991 amendment of Article 25 clearly affirmed New York's jurisdiction over resellers who do business in New York or who sell tickets to New York customers, but attempt to evade the law by locating their offices on New York's borders. See N.Y. ARTS & CULT. AFF. LAW § 25.03(9).

In *People v. Concert Connection, Ltd.*, the appellate division reaffirmed the legislative intent of section 25.03(9), as well as the intent of the law set forth in the legislative findings section 25.01 of the New York Arts and Cultural Affairs

The former group of brokers (who deal primarily in Broadway theater tickets and whose clients are frequently tourists to New York) perceive themselves as the "legitimate" part of the industry.²⁵ These brokers are also referred to as "non-premium" brokers²⁶ because they generally do not obtain desirable seats.²⁷ Colloquially, they are referred to as "dump houses." These brokers charge between ten and sixty-three percent over the face price for a Broadway theater ticket. Many of these brokers have concession desks in New York City hotels. Their mark-ups seem to vary in part as a function of the location from which a ticket is sold. "The same \$65.00 ticket, for example, cost[s] \$83.00 when purchased at the [concession desk at the] Milford Plaza and \$105.00 when purchased at the Plaza [Hotel concession desk]."²⁸

These "non-premium" brokers justify their mark-ups—a violation of the law on its face—as "service" charges (which Article 25 does not expressly address) and as a necessary cost of doing business.²⁹ There is no support for this argument under the

Law ("ACAL"). 211 A.D.2d 310, 318, 629 N.Y.S.2d 254, 259 (2d Dep't 1995). The court wrote that Concert Connection, a Connecticut corporation:

[P]urposefully availed itself of business opportunities in New York by advertising in New York newspapers, maintaining two New York telephone numbers, reselling tickets for New York events to New York residents, and actually shipping those tickets to New York. These acts are clearly sufficient to establish the minimum contacts with this State necessary to satisfy the constitutional due process requirements as well as to place The Concert Connection squarely within the reach of this State's long-arm statute. [citations omitted]

Id. at 315-16, 629 N.Y.S.2d at 257.

²⁵ See *Public Hearing on Ticket Scalping: Hearing Before Assembly Comm. on Tourism, Arts & Sports Development* 65, 322 (Aug. 16, 1994) [hereinafter *Hearing* (Aug. 16, 1994)] (testimony of Allan Zelnick, Esq., on behalf of Theater Service Americana and Arthur Golden of Golden, Penn and Le Blang Theater Ticket Service).

²⁶ See REPORT OF ATTORNEY GENERAL G. OLIVER KOPPELL ON HIS INVESTIGATION INTO TICKET DISTRIBUTION PRACTICES 5 (1994) [hereinafter 1994 ATTORNEY GENERAL REPORT].

²⁷ See *Hearing* (Aug. 16, 1994), *supra* note 25, at 73, 334 (statements of Allan Zelnick and Arthur Golden).

²⁸ 1994 ATTORNEY GENERAL REPORT, *supra* note 26, at 6.

²⁹ *Hearing* (Aug. 16, 1994), *supra* note 25, at 322-26.

current law, although it has been accepted by the New York City Department of Consumer Affairs.³⁰

In contrast to licensed brokers, unlicensed and out-of-state brokers (also known as "premium" brokers) generally obtain the most desirable seats, or "hot" tickets, on short notice. Their mark-ups range from approximately 131% to 470%.³¹ For example, on average, a \$65.00 orchestra seat to a Broadway show in New York City will be sold for \$85.00 or \$90.00 by a licensed broker and for \$165.00 to \$175.00 by an unlicensed or out-of-state broker. Tickets with a face price of \$350.00 for the 1994 Barbara Streisand concerts at Madison Square Garden in New York City were being sold by premium brokers for prices as high as \$2000.00.³² In the summer of 1995, \$50.00 tickets for the Melissa Etheridge concert at Jones Beach, on Long Island, were selling for \$450.00, and \$50.00 tickets for R.E.M. at Madison Square Garden were selling for \$350.00.³³ Part of the reasons for such inflated prices is that, among other things, they have to cover the cost of payments of "ice."³⁴

On the demand side of the supply-demand equation stand the hotel concierges, private clubs, large New York businesses and other members of the public who need a ready supply of desirable, well-located tickets and are willing to pay for them. These purchasers have accounts with the so-called "premium" brokers. Because different brokers have different contacts in various places of entertainment, certain brokers have come to be known as specializing in certain events, such as particular sports events or Broadway shows. Premium brokers must therefore deal with each other to provide tickets to a client for an event to which they do

³⁰ See Elizabeth Block, Practice Commentary, N.Y. ARTS & CULT. AFF. LAW tit. G, Art. 25 (McKinney Supp. 1997); Opinion of the Law Department of the City of New York, No. 100271 (Apr. 22, 1947) (on file with *Journal of Law and Policy*).

³¹ 1994 ATTORNEY GENERAL REPORT, *supra* note 26, at 12.

³² 1994 ATTORNEY GENERAL REPORT, *supra* note 26, at 2.

³³ NEW YORK PUBLIC INTEREST RESEARCH GROUP, TICKET SCALPING AND TICKET SALES IN NEW YORK STATE, A CONSUMER SURVEY & REPORT BY THE NEW YORK PUBLIC INTEREST RESEARCH GROUP (NYPIRG) 2 (1995) [hereinafter 1995 NYPIRG REPORT].

³⁴ See *Hearing* (Aug. 16, 1994), *supra* note 25, at 89, 336.

not have direct access. This has the additional result of increasing the ultimate price of the ticket. In view of the constant supply of tickets necessitated by the continuing relationships between premium ticket brokers and their business clients, it is clear that the source of this supply is not individuals standing on line for brokers directly or individuals who subsequently resell to brokers, commonly referred to as "diggers." Although such "diggers" may account for some portion of the supply of tickets in the hands of brokers, they cannot possibly account for the extent of the supply and the *quality* of tickets underpinning the business.³⁵

Ultimately, close scrutiny of industry practices will lead to the conclusion that ticket prices, such as the mark-ups cited above, and the phenomenon of "ice" are related events. When tickets to major events are acquired by a ticket reseller by means of "ice," the ultimate cost to the consumer must cover the increased cost of the ticket at its source or from a secondary source.³⁶

³⁵ See *Hearing* (Aug. 16, 1994), *supra* note 25, at 21-26 (testimony of Assistant Attorney General Elizabeth Block concerning diversion of tickets from a Ticketmaster outlet).

³⁶ According to the 1990 Memorandum of the New York State Consumer Protection Board:

[F]ans are often unable to purchase tickets for choice seats at other than exorbitant prices due to the diversion of tickets to illegal tickets scalpers by unscrupulous promoters and others who stand to make enormous profits from illegal scalping.

Memorandum of State Consumer Protection Board, State of New York 2102 (1990).

In addition, press reports concerning the Hootie and the Blowfish concerts at the Jones Beach Theater stated that the band had revealed that on August 3 and 4, 1996, 534 tickets in the first 10 rows, with a face value of \$25.00 had been sold by "scalpers" for as much \$150.00. According to a promoter, an undisclosed person in the main Jones Beach box office had withheld the first 10 rows of seats from sale and after the show had sold out, that person released and purchased all of the tickets. See Jennifer Ackerman et al., *Flash! The Latest Entertainment News and More*, NEWSDAY, July 2, 1996, at A12; Associated Press, *In Move to Discourage Scalping, Rock Band Won't Honor Tickets*, N.Y. TIMES, July 2, 1996, at B5; David J. Morrow, *Scalping: Gritty Hand of a Not-So-Free Market*, N.Y. TIMES, Aug. 4, 1996, § 3, at 7; David Saltonstall, *Tix Buyers Scalped*, DAILY NEWS, July 14, 1996, at 13.

II. A LEGISLATIVE PROPOSAL

Although New York has legislatively regulated both the resale of tickets and the resellers of tickets since the enactment of the predecessor statute of ACAL, Article 25 in 1922,³⁷ it has not, in seventy-five years, succeeded in eliminating the "undoubted abuse" in the theater ticket resale area.³⁸ Historically, ticket brokers may have played a role in "underwriting" performances and "speculating" on the success of the event.³⁹ Such business practices,

³⁷ N.Y. GEN. BUS. LAW §§ 167-174 (L. 1922 c. 590).

³⁸ Memorandum of Governor Miller, State of New York 134 (1922) (on file with *Journal of Law and Policy*) [hereinafter Memorandum, Governor Miller].

³⁹ David Marks testified in a 1923 trial "that he was in the business of selling tickets for thirty years . . ." He stated:

We are compelled to buy merchandise months in advance and if the show is a poor show the loss is ours.

Question: You look upon these tickets as merchandise?

Answer: Yes, sir.

Question: Whom do you get these tickets from?

Answer: Theatre managers. . . . We buy them in blocks, each office is allowed so many seats. . . . The theatrical managers put on a production. . . . They say to the ticket brokers that they will allow them to have a certain number of tickets for that production. . . .

Question: When is that part of the arrangement made?

Answer: Before the show is cast and before we know anything about who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy.

Question: Who sends for you?

Answer: The managers of the various productions . . . and the theatre owners," who say "We are going to produce a show four weeks from next Monday night and it is going to open at a certain theatre," and they say, 'how many seats do you want for that show for eight weeks in advance.' We have asked for time to see how many we can use for that production at that particular theatre. . . . [W]e are compelled to buy them at four and five dollars apiece, plus the war tax, and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty

however, no longer exist.⁴⁰ Today, “non-premium” brokers still receive their “allocations” from the theaters on a weekly basis for the less desirable seats,⁴¹ whereas the “premium” brokers pay “ice” to employees of the theater, and in return, receive those desirable tickets that would otherwise be available to the general public. Even the “non-premium” brokers, however, do not pay in advance of the production.

Although there has been repeated “tinkering at the edges” of the law since 1922,⁴² the goal of creating a fairer ticket distribution system that provides access to New York entertainment and sports events to average consumers at reasonable prices remains a wish, rather than a reality. To the contrary, what has evolved is a massive, complex network of persons actively deriving huge profits from the resale of tickets [and] . . . a dual system of distribution—one for persons with wealth or

thousand dollars.

Question: In other words you finance the theatrical performance?

Answer: Yes, sir.

Question: And you have to pay in advance?

Answer: Yes, sir, and it takes hundreds of thousands of dollars.

Question: Suppose the play is not a success?

Answer: They [the tickets] are left on our hands. We have a return privilege of twenty-five, sometimes fifteen and sometimes ten.

People v. Weller, 207 A.D. 337, 347-48, 202 N.Y.S. 149, 157 (1st Dep’t 1923).

⁴⁰ *Cf. Hearing* (Oct. 5, 1995), *supra* note 10, at 217 (testimony of Barry E. Lefkowitz, Executive Director, East Coast Ticket Brokers Association, stating: “[I]n some cases if a broker should, in fact, buy tickets in advance for a particular show thinking that it may be a hit, and it ends up not being, they in fact will have to sell the tickets for below face value.”).

⁴¹ *See Hearing* (Aug. 16, 1994), *supra* note 25, at 334 (testimony of Arthur Golden of Golden, Penn, Le Blang Ticket Agency and Allan Zelnick, Esq., on behalf of Theater Service Americana).

⁴² The “maximum premium price” has been incrementally increased from 50 cents in 1922 to five dollars or 10% above the established price today. In 1965, section 169-k of the New York General Business Law (now ACAL section 25.29) was added to regulate box office employees and other agents of places of entertainment with respect to the receipt of a premium or any price in excess of the established price of a ticket plus lawful taxes (“ice”), and makes such exaction or receiving of “ice” a misdemeanor.

access; the other for the rest of the population who camp out in front of the box office all night only to find out that the best seats to an event are gone before they get to the window or who buy tickets to "hit" shows six to twelve months in advance.⁴³

It is time, therefore, to take a different approach. The current "maximum premium price" and the prohibition against the payment and receipt of "ice" are being almost universally disregarded.⁴⁴ A 1995 survey of "tickets available through ticket scalping agencies" advertising in New York newspapers indicated that "ticket scalping is a thriving business" and that "large numbers of the best seats are diverted from sale to the general public"⁴⁵ While some ticket industry representatives view this as an opportune time to argue for the elimination of all regulation on the resale price of tickets, any "free market" proposal fails to address, or even acknowledge, the massive diversion of the supply of tickets and the corruption at the original point of distribution.⁴⁶ Even some ticket brokers

⁴³ 1994 ATTORNEY GENERAL REPORT, *supra* note 26, at 14-15.

⁴⁴ See *supra* Part I (providing an overview of the ticket resale business).

⁴⁵ 1995 NYPIRG REPORT, *supra* note 33, at 1.

⁴⁶ See, e.g., New York State Assembly Bill No. 7480, 219th Gen. Assembly, 2d Sess. (1995) (introduced by Assemblyman Pillitere before the New York State Assembly Committee on Tourism, Arts and Sports Development, May 19, 1995, which eliminates the "maximum premium price" and "ticket speculation" provisions of ACAL sections 25.07 and 25.09). This bill purported to be a consumer protection bill because it imposed some seeming consumer protection regulations on ticket resellers who would presumably "come back" to New York to obtain licenses. Many of these regulations merely codified current business practices of ticket brokers (e.g., disclosing to the purchaser the cancellation policy of that broker). Because complaints with respect to the sales practices of ticket brokers have not, in fact, been a problem (customers generally get what their high prices are paying for), these provisions appear to be "window-dressing" to cover up the real consumer issue—the unavailability of tickets at reasonable prices to persons who cannot afford to deal with a "premium" broker.

On March 25, 1997, State Senator Skelos, at the request of the Consumer Protection Board, introduced Senate Bill 3968 to amend ACAL, Article 25, which also removes, *inter alia*, the "maximum premium price" provision. New York Senate Bill No. 3968, 220th Legis. Sess. (1997).

New Jersey adopted a similar law in 1995 pursuant to Governor Christine Todd Whitman's recommendation that the statutory price cap on all

acknowledge their payments of "ice." In complaining about the recent expiration of the "free market" experiment in New Jersey, ticket brokers state "that they cannot work under [the previous law's] strict limitations."⁴⁷ They said that they "have hundreds of tickets that they bought at a premium price, and would lose money if they had to comply with the old law."⁴⁸

Not unsympathetic to the blandishments of free market philosophy in an environment free of bribery and corruption, this Article proposes a course which partially adopts the arguments of the free market advocates, with limits based on the concerns about a manipulated market expressed above, or a modified "free market" system.⁴⁹ In any event, a consensus appears to be emerging that a major departure from current ineffective regulation is necessary.

The legislation proposed by this Article has three major prongs:⁵⁰ 1) the "maximum premium price" should be increased

entertainment tickets be removed for a period of 18 months during which, "the Legislature will be able to assess whether lifting the resale price caps makes more tickets available to consumers at prices lower than those now charged by unlicensed resellers." Memorandum of Governor Christine Todd Whitman to the Senate 2 (June 19, 1995) (on file with *Journal of Law and Policy*); see N.J. STAT. ANN. § 56:8-27 to -39 (West 1989). To date, no formal assessment has been carried out. On April 3, 1997, the New Jersey law expired. The old system, prohibiting brokers from charging over three dollars or 20% (whichever is greater) above the ticket price, is thus restored. Melody Petersen, *New Jersey Ends Experiment in Free-Market Ticket Sales*, N.Y. TIMES, Apr. 4, 1997, at B4. It should be noted, however, that unlike New York State's 75-year history of legislation in this area, New Jersey started regulating ticket resales only in 1983 and then only for New Jersey events.

⁴⁷ Petersen, *supra* note 46, at B4.

⁴⁸ Petersen, *supra* note 46, at B4.

⁴⁹ See *Hearing* (Oct. 5, 1995), *supra* note 10, at 23-25 (colloquy between Attorney General Dennis C. Vacco and Assemblyman Brodsky).

⁵⁰ In addition, the legislation should also provide a requirement that venues publicize the percentage of seats that are actually available to the public. For example, during the 1994 Barbara Streisand concerts at Madison Square Garden, approximately 50% of the seats never went on public sale, i.e., they were withheld for the "house," the producer, the promoter, the record company, the performer, etc. Had this been disclosed to the public in the advertising for the event, the public would have had more realistic expectations about their chances of obtaining a ticket through general sales. All of the tickets that went on general sale were sold out in less than two hours from the time the sale commenced.

to a percentage that will encompass the prices charged by the "non-premium" brokers, but not to exceed 100%; 2) the business of ticket speculation, defined as selling more than twenty tickets for a given event for over the "maximum premium price" or selling tickets that cumulatively exceed \$1000.00 over the "maximum premium price" should be a felony; and 3) the payment or receipt of "ice" should also be a felony.

*A. A Modified "Free Market" Based on an Increased
"Maximum Premium Price"*

The setting of the "maximum premium price" at a percentage considerably higher than currently exists is derived from an analysis of the ticket resale industry, as discussed above. The "maximum premium price" should be large enough to cover the legitimate business expenses and reasonable profits of the ticket resellers, such as those who currently operate as licensed brokers in New York and who are able to operate substantial businesses by charging mark-ups of ten to sixty-three percent.⁵¹ However, it should not exceed 100% of the established price printed on the face of the ticket. That is, the "maximum premium price" should not be so large as to cover the excesses of a corrupt ticket distribution system emanating from the original source of distribution. While the "maximum premium price" should be equitable to legitimate business people operating within the law, it should be prohibitive of corrupt business practices, such as the payment of "ice" to original ticket distributors.⁵² While the American economic system

After that they were only available at huge mark-ups from resellers. See 1994 ATTORNEY GENERAL REPORT, *supra* note 26, at 7.

This proposal could also be used in conjunction with a proposal widely discussed in 1996, and in use in Phoenix, Arizona, providing for a "trading pit"—a prescribed area at a place of entertainment that would be the sole location for the sale and purchase of tickets in the secondary market for athletic games and contests, i.e., an auction pit in which the resale price would be determined by supply and demand, as long as it is no more than the "maximum premium price."

⁵¹ 1994 ATTORNEY GENERAL REPORT, *supra* note 26, at 12.

⁵² See *Hearing* (Oct. 5, 1995), *supra* note 10, at 9 (testimony of Attorney General Dennis C. Vacco stating: "While I firmly believe that . . . legitimate

generally supports free competition with a minimum of regulation, it has also been inimical to the concept of profiteering or taking advantage of a scarcity of a particular product or service by price-gouging.⁵³

Government regulation has traditionally been used to avert economic harm to the public. The lack of access to sports and entertainment events does not appear to create the kind of crisis which normally requires government intervention. However, there is a marked harm to the New York economy: average New York sports fans and theater and concert goers, as well as tourists to New York, are not able to obtain good tickets to sports and entertainment events.⁵⁴ According to market research studies cited by the League of American Theaters and Producers, "the high cost of tickets and the availability of tickets are two issues which continually inhibit increased attendance [at Broadway theaters]."⁵⁵

business people are entitled to profit from their entrepreneurial skills, I am committed to wiping out the institutionalized bribery which props up the current ticket distribution system.").

⁵³ KUTTNER, *supra* note 13, at 229 (stating that "[u]nregulated scarcity confers market power—and price gouging").

⁵⁴ While this Article does not discuss the tax implications of "ice" payments and ticket scalping, it is clear that the huge sums of income derived from these enterprises are not properly reported. On April 10, 1997, New York State Attorney General Dennis C. Vacco obtained a 19-count indictment against two New York City ticket brokers for sales tax violations and ticket speculation violations. *People v. Rosenblatt & Nahay*, Indictment No. 2490/97 (N.Y. Sup. Ct. Apr. 10, 1997).

⁵⁵ Statement of George Wachtel Regarding A.7480A Relating to the Resale of Tickets to Entertainment Events 2 (May 19, 1995) (on file with *Journal of Law and Policy*) (testimony of George Wachtel, Director of Research and Government Relations for the League of American Theaters and Producers). In a 1995 hearing, the attorney general stated:

The live entertainment industry, which includes both Broadway shows and one-time performances, such as sporting events and concerts . . . provides thousands of jobs and millions of dollars to our state's economy, and especially in the case of Broadway shows, this industry is a symbol of the very character of New York, and our reputation as a world center of culture, entertainment and commerce.

Hearing (Oct. 5, 1995), *supra* note 10, at 9-10 (testimony of Attorney General Dennis C. Vacco).

Even as far back as 1923, an appellate court recognized the importance of the theater industry in New York:

Although the theater may serve many useful purpose[s], its most important functions are the promotion of public welfare and education. As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement, and education to the inhabitants becomes more imperative.⁵⁶

Thus, regulation on behalf of “the public interest” has been continuously upheld by courts with respect to ticket resale practices, as well as in other areas which cause economic harm to the public.⁵⁷

B. The Business of Ticket Speculation

The current law creates two categories of ticket speculators in ACAL, sections 25.09(1) and 25.09(2) for unlicensed resellers of one to four tickets and for five or more tickets respectively. Pursuant to section 25.35, a violation of section 25.09(1) is a “violation” punishable by a fine not to exceed \$200.00, whereas a violation of section 25.09(2) is a misdemeanor punishable by up to a year’s imprisonment or by a fine not to exceed \$350.00 on the first conviction.

Nothing in Article 25 shows more clearly that this is a law written for another time and place when ticket speculation or ticket

⁵⁶ *People v. Weller*, 207 A.D. 337, 341-42, 202 N.Y.S. 149, 153 (1st Dep’t 1923). The Court also stated that:

The overwhelming evidence shows an abuse. It is the duty, therefore, of governmental agencies to meet the conditions and find a remedy. It is idle to say that the state and city are powerless to prevent fraud [sic] and extortion in the resale of theater tickets. The evils of theater ticket speculating are undisputed.

Id. at 342, 202 N.Y.S. at 153.

⁵⁷ *Id.* at 352, 202 N.Y.S. at 161; see *Nebbia v. New York*, 201 U.S. 502 (1933) (holding that a New York statute regulating the prices at which retailers may buy milk from wholesalers was not violative of the Fourteenth Amendment, and was permissible when required by the public interest).

scalping was an activity of the streets,⁵⁸ not the activity of businesses represented by prominent attorneys, lobbyists and industry associations that generate millions of dollars per year in sales. The prohibition against sales of five or more tickets for over the "maximum premium price" makes no sense in this context. It is therefore recommended that there should be a category of ticket speculation for resellers who are engaging in continuous activity or the "business" of reselling tickets for amounts over the "maximum premium price."

The New York Penal Law subjects those who commit larceny and steal property, when "the value of the property exceeds one thousand dollars," to a class E felony.⁵⁹ Such an upgrade in classification of the crime (from a misdemeanor to a felony) should similarly occur when the activity takes place in the ticket resale area. Thus, the new law should reflect the additional seriousness of activity where a reseller sells tickets that cumulatively exceed \$1000.00 over the "maximum premium price," or sells more than twenty tickets for a given event for over the "maximum premium price," violations of which should become felonies.⁶⁰

C. The Payment or Receipt of "Ice" Should Be a Felony

Whether it is called "ice," graft, commercial bribery or fraud, the activity involved is considered reprehensible and illegal.

⁵⁸ Prior to 1991, ACAL section 25.05 was specifically aimed at street activity, prohibiting solicitation by "word of mouth, crying, calling, shouting or other means" and declared such activity to be a misdemeanor. N.Y. ARTS & CULT. AFF. LAW § 25.05 (McKinney 1984 & Supp. 1997).

⁵⁹ N.Y. PENAL LAW § 155.30(1) (McKinney 1988) (grand larceny in the fourth degree). If the amount stolen is less than \$1000.00, and no other provision of the statute applies, then the crime is merely a misdemeanor. *Id.*; *see id.* § 155.25 (McKinney 1988).

⁶⁰ *See Hearing* (Oct. 5, 1995), *supra* note 10, at 15 (citing testimony of Attorney General Dennis C. Vacco) ("My office is committed to providing . . . enforcement. However, the tools that we have are currently insufficient. Major ticket reselling businesses are treated no differently under the law than street scalpers. There should be a greater penalty against unlicensed resellers who sell 20 or more tickets for a given event.").

In many comparable areas such activity is classified as a felony.⁶¹ It should be similarly classified as a class E felony under the ACAL. Without increased penalties for the payment and receipt of "ice," the practice seems destined to remain an integral part of the ticket industry in New York. In the past thirty years, there has been only one prosecution of a box office employee for receiving a payment of "ice."⁶²

Increasing the crime to a felony will have two immediate results: *mandatory* state imprisonment for those convicted a second time,⁶³ and thus, greater leverage in law enforcement investigations. Currently, the threat of a misdemeanor conviction for "ice" presents virtually no deterrent against violations. Most of those involved in either paying or receiving "ice" would, no doubt, merely consider a misdemeanor conviction and any corresponding fine, as a cost of doing business. While a misdemeanor conviction under ACAL section 25.29 (*receipt* of "ice") is subject to a jail term of up to one year,⁶⁴ in light of the large amount of other,

⁶¹ See, e.g., N.Y. PENAL LAW § 180.03 (McKinney 1988) (commercial bribing in the first degree); *id.* § 180.08 (McKinney 1988) (commercial bribe receiving in the first degree); *id.* § 190.65 (McKinney 1988) (scheme to defraud in the first degree).

⁶² See *People v. Smith*, 34 A.D.2d 524, 308 N.Y.S.2d 422 (1970), *aff'd*, 29 N.Y.2d 831, 327 N.Y.S.2d 849, 277 N.E.2d 783 (1971). Thomas Smith was the treasurer of the Anta Washington Square Theatre in the late 1960s and was in charge of, among other things, the sale and distribution of tickets to performances of *Man of La Mancha*. He was indicted by a New York State Grand Jury for violating numerous sections of the General Business Law, Article 26-A (the predecessor statute of ACAL, Article 23), including receiving money from a ticket broker in excess of the established ticket price. *Id.* The defendant, however, was not convicted of that charge. *Smith*, 29 N.Y.2d 831, 327 N.Y.S.2d 849, 277 N.E.2d 783.

⁶³ The sentence for a first non-violent, class E felony ranges from no mandatory jail sentence to a sentence of one and one-third to four years in prison. N.Y. PENAL LAW § 70.00 (McKinney 1987). However, if an indeterminate sentence is imposed, the lowest sentence is one to three years in prison. *Id.* § 70.00(1), (2)(e), (3)(b). The sentence for a second non-violent class E felony ranges from a minimum of one and one-half to three years in prison to a maximum of two to four years in prison. *Id.* § 70.06(1), (3)(e), (4)(b) (McKinney 1987 & Supp. 1997).

⁶⁴ See N.Y. ARTS & CULT. AFF. LAW § 25.35(1) (McKinney 1984 & Supp.

more violent crimes in New York City, it is extremely unlikely that a New York State Supreme Court Judge would impose a jail term under the current law. Moreover, there is no specific penalty set forth in the ACAL for a violation of section 25.27 (*payment of "ice"*). The threat of a felony conviction, however, and a substantial period of incarceration for a second conviction, can have a dramatic deterrent effect on those currently breaking the law.

CONCLUSION

The legislative proposal discussed above can only set the stage for an equitable ticket distribution system that provides access to New York entertainment and sporting events to average consumers at reasonable prices. Providing stricter penalties for the payment and receipt of "ice" will take a significant step toward achieving the goals set forth three-quarters of a century ago.⁶⁵ Even this step, however, is unlikely to suddenly eradicate a practice that is so embedded in the culture of the ticket business in New York. Therefore, maintaining some control over the price of tickets, while allowing reasonable profits for legitimate business, is essential.

On Broadway, the introduction of publicly held companies, such as Disney and Livent, may represent an opportunity for the beginning of the end of corrupt box office practices because it is unlikely that companies answerable to public shareholders will permit felonies to be committed in their box offices. They may also independently negotiate with the unions and, thus, exercise more control over union employees.⁶⁶ The continuation of the practices which have distorted the ticket distribution system in New York, so that desirable seats to events are available only to those with wealth

1997).

⁶⁵ See N.Y. GEN. BUS. LAW § 167-174 (L. 1922 c. 590); see also Memorandum, Governor Miller, *supra* note 38, at 134.

⁶⁶ See William Grimes, *On Stage, and Off*, N.Y. TIMES, Mar. 14, 1997, at C2. Livent does not belong to the League of American Theaters and Producers, "which negotiates a standard contract for the Broadway theaters." *Id.* Instead, Livent, like Disney, negotiates its own contracts, which has allowed it to gain historic concessions with respect to chorus contracts. *Id.*

or connections, is clearly not in the best interests of these companies.

To truly eradicate commercial bribery in the ticket industry, however, cooperation from all affected groups is required—those who own the places of entertainment, producers, promoters, unions and union members and performers.⁶⁷ Unions cannot tolerate the practice of their members taking “ice.” Box office employees who take “ice” must be expelled from their union—not merely transferred to another location where they can once again profit from their positions. Those in charge of season ticket distribution must ensure that tickets are distributed equitably to fans, not assigned to those who make extra “under-the-table” payments or those who will resell them individually at a gross mark-up. Finally, owners of places of entertainment must accept ultimate responsibility for the diversion of tickets for performances or events at their venue.

⁶⁷ The action taken by Hootie and the Blowfish in the summer of 1996 provides an example of what performers can do to assist in the fight against corruption and to provide greater availability to tickets for their fans. Once Hootie discovered that over 500 tickets for their Jones Beach concerts were withheld from public sale and then sold directly to ticket brokers, they voided those tickets and re-released them directly to the public. Hootie’s contract specifically provided that the first 10 rows of their concerts be sold on a “first come, first serve” basis. See Associated Press, *supra* note 36, at B5.