Perspectives in Consumer Advocacy: Antitrust Parens Patriae Suits Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act- A Solution for Wrongs Without Redress

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INTRODUCTION

The recently enacted Hart-Scott-Rodino Antitrust Improvements Act\(^1\) has expanded the scope of antitrust protections dramatically to encompass an oft sought but ever elusive remedy for the small consumer victimized by price-fixing conspiracies\(^2\) on either the manufacturing or retailing level.\(^3\) The Act reintroduced a familiar form of sovereign guardianship, the

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\(^2\) "Price-fixing" envisages any interference with the setting of prices by free market forces. Prices are fixed when they are agreed upon; once accomplished the price-fixing is per se illegal without regard to subsidiary issues of motive, result, express or implied acquiescence. See U.S. v. Socomy-Vacuum Oil Co., 310 U.S. 150 (1940). See also 15 U.S.C.S. §§ 1-7 (1964); § 1 restricting "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ."

\(^3\) See Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975). This case established the 'standing' of remote purchasers to challenge price-fixing. The court held remote purchasers of zippers had standing as a class thereby placing the burden of assuming "an active role in a suit by remote purchasers" on the defense. This would effectively ensure that all parties to whom the defendant may be liable were present and bound by the adjudication of the passing-on issue, since the responsibility for their notification rested with the defendant.

parens patriae suit, in a quasi-novel setting—antitrust litigation for damages. The legislation is designed to authorize State's attorneys general to instigate suits in parens patriae on behalf of their beleaguered local consumers thereby providing the procedural means of circumventing setbacks encountered by minimally injured consumers when they advance the same suits privately through existing antitrust remedies or as a class action. Though judicial adaptations of historical parens patriae precepts have been discarded upon their transition into the field of antitrust damages suits, this statutory parens patriae formula has been submitted as a possible solution to the scrupulously observed prerequisites which to date constituted insurmountable barriers to most consumer advocacy: e.g. standing, notice, managability, and certainty of damages standards. In determining whether the Hart-Scott-Rodino Act posits the means for curing these debilitating procedural requirements, one must examine each, distinguishing those amenable to statutory diminution from imperatives of constitutional import.

One example illustrating the magnitude of the consumer fraud this legislation seeks to relieve occurred in the Seattle-Tacoma area during the late fifties and early sixties. There, over a ten year period, bakers illegally conspired to maintain higher prices in violation of the Sherman Antitrust Act. Bread prices were increased by 20% over the national average. Though this amounted to only a four cent overcharge to any single purchaser, realistically, damage to the consuming public en masse accounted for a loss totaling thirty-five million dollars! Put on a national scale such a minimal discrepancy may never have been perceived, or, if discovered, may never have been proven later.

4. BLACK'S LAW DICTIONARY 1269 (4th Ed. 1968). Referring to the power of sovereign guardianship over persons with legal disabilities, parens patriae literally means "father of his country" or "parent of the country". In England this meant the king, while in the United States the right devolved to the state. For an extensive analysis of the origins of parens patriae actions see Malina & Blechman, Parens Patriae Suits For Treble Damages Under the Antitrust Laws, 65 NW. U.L. REV. 193 (1970). See text accompanying note 23 et seq., infra.

5. The language of the amendment, "on behalf of natural persons," being easily distinguishable from the former requirement that plaintiffs be damaged in their business interests, logically can refer only to consumers residing within the state. CLAYTON ACT, § 4C, as amended, 15 U.S.C.S. § 15 (1976).


due to the speculative nature of damages so broadly based, yet the cost to the public would have been two billion dollars.\textsuperscript{9}

It has been proposed that conspiratorial business practices relieve the American public annually of sixty billion dollars and this, at 6\% of our GNP, is declared a conservative estimate.\textsuperscript{10} These impressive figures are rather depressing when one realizes that prior law has entirely failed to offer a viable civil alternative to those purchasers who have been bilked in such small increments. Primarily this failure is attributable to the nature of the violation and its resultant damages: injury to any individual plaintiff is negligible, considered \textit{de minimus} by the courts,\textsuperscript{11} while the aggregate harm is tremendous. Such injury is so broadly founded that courts have been prone to hold private attempts at antitrust enforcement in these cases inappropriately represent the myriad differing interests and thereby fail to satisfy procedural standards established to safeguard each potential claimant's cause of action.\textsuperscript{12} Despite such omnipresent difficulties, there is no justification for the continuing failure of the judiciary to respond to such an obvious need with even a semblance of reform in the area,\textsuperscript{13} so now congress has moved to resolve this deficiency.

There are established remedies available to consumers and even to the states acting in their individual proprietary capacities,\textsuperscript{14} however, the insufficiency of these remedies, due to the procedural handicaps, cannot be refuted. Nor can it be denied that it is necessary to establish new modes under which recovery could be achieved by those whose injuries are too small to withstand the burden of complex litigation.\textsuperscript{15} \textit{Parens pro filiis} and statutory consumer protection statutes are being enacted to fill the vacuums left by the courts.

\begin{thebibliography}{15}
\bibitem{9} Id. at 87.
\bibitem{10} Mann, \textit{Antitrust and the Consumer: The Policy and Its Constituency}, 5 \textit{Antitrust L & Econ. Rev.} 39 (1972).
\bibitem{12} \textit{See generally infra} text accompanying note 51.
\bibitem{13} M. Forkosch, \textit{Antitrust and the Consumer} (1956). Note generally that the discussion of \textit{parens patriae} as a potential remedy for consumer despoilation hasn't matured in twenty years of consideration.
\end{thebibliography}
patriae suits by the States' attorneys general have extended the first statutory promise for such redress at a propitious moment: when all the procedural innovations in the area have been tested and foreclosed by the courts.\textsuperscript{18} The question to be resolved is whether consumers' reliance on this promise is justifiable.

**The Inadequacy of Private Antitrust Enforcement in Suits by Independent Plaintiffs**

Antitrust violations are seldom pursued civilly by individual plaintiffs for a variety of reasons—basically 1) the difficulty in detecting transgressors\textsuperscript{17} 2) the difficulty in establishing a violation based, as it must be, chiefly on circumstantial evidence\textsuperscript{18} 3) the expense of prosecuting antitrust cases with the concomitant knowledge that such suits are lengthy and uncertain.\textsuperscript{19} As an adjunct to this, most upcharges by the manufacturer are included in the price passed on to the ultimate consumer which contributes to the apathy of retailers when it comes to pressing antitrust actions. Seen in that light, any recovery by the retailer is a windfall with the final consumer of the goods never being recompensed. All these factors led to the unfortunate circumstance where the majority of private litigations (85\%) followed closely on the heels of successful government cases.\textsuperscript{20}

Federal authorities, because of the lack of funds, the extreme expense and complexity of trying antitrust actions and finally the desire inherent to all civil servants to prosecute only successful suits, have limited such actions to between twenty and thirty a year over the past decades with only a recent upsurge.\textsuperscript{21} 80\% of all suits begun, end in consent judgments or nolo contendre pleas by the defendants.\textsuperscript{22} Criminal sanctions being so rare, a great deal of the responsibility for deterring antitrust villainy lies in the civil action: the conflict is self-evident.

\begin{itemize}
  \item 16. *Infra*, text accompanying note 23 et seq.
  \item 22. *Supra* note 20.
\end{itemize}
PARENS PATRIAES IN HISTORICAL PERSPECTIVE

The search for methods to provide relief for the broadly damaged consuming public has progressed through two separately identifiable lineages of authority. Both procedures, investigated concurrently, have been interrelated problematically and both have finally been deemed inoperable by the courts. The two avenues of approach were first, parens patriae and, second, class actions by consumers. Primarily to support a comparative analysis with the statute, a cursory examination of each follows.

Historically, parens patriae was the theory of law established to allow states to exercise power affording guardianless infants, mental incompetents, or charities a degree of representation they were legally judged incapable of providing in their own behalf. The sovereign authority to represent such incapacitated litigants derived from the royal prerogative of the English King and at common law was strictly limited to that function. Courts have utilized this original common law concept to create a modified suit, in order to challenge alleged violations of antitrust precepts. This modification has slowly evolved to the point where it became recognized as a potent vehicle for reforms in antitrust consumer advocacy. However, it is significant that prior to passage of this “Improvements” Act, the antitrust aspects of parens patriae had been extended only so far as equitable relief for injunction or declaratory judgment. Never had the courts permitted a State in its parens patriae capacity to recover trebled damages in rectification of its injured citizens’ harm, though such relief had been sought in a number of cases.

In former suits, damages were included in the prayer for relief on the basis of two claims. First, damages were asserted on behalf of the individual consumers within the state; this

23. Supra note 4.
25. Despite the preponderance of critical commentary on the subject of consumer advocacy, reviewers have been imbued with the certain knowledge that a remedy was forthcoming in the area; parens patriae theory has commanded most of their attention in recent times.
26. infra text accompanying notes 29-33.
intervention was rationalized as part and parcel of the basic *parens patriae* power to intercede where public interest mandated the guardianship of legally disabled citizens. Second, damages were claimed under the theory that the state’s economy as a whole had incurred injury due to the antitrust violation.²⁸

The lead case in this field was the 1945 Supreme Court decision in *Georgia v. Pennsylvania R. Co.*²⁹ This case was the first to advance the notion of quasi-sovereign/*parens patriae* civil suits for trebled damages pursuant to federal antitrust statutes. The state sought vindication for damages inuring both to the state in its own proprietary capacity and, under *parens patriae*, as “agent and protector of her people against a continuing wrong done to them” due to discriminatory pricing practices by the railway system.³⁰ The court held Georgia could obtain an injunction both in its proprietary and *parens patriae* capacities;³¹ however, damages where denied due to a technicality.³²

In the aftermath of this holding *Georgia* has been cited as authority for the proposition that a State may sue in *parens patriae* and recover damages for injury to its consumers. The pleading quoted above was deceptive, but subsequent case law demonstrates concession that generally the *Georgia* case stands for nothing more than the premise that a state may enjoin alleged antitrust violations which do either injury to a proprietary interest or harm to the general prosperity of the state.³³ The court sidestepped the issue of damages by asserting the technicality.³⁴ It also enunciated the opinion that a state would have no

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²⁹. 324 U.S. 439 (1945). Georgia alleged facts demonstrating railroads servicing the state were conspiratorily fixing rates, thereby discriminating against Georgian ports in deference to neighboring states’ ports and holding Georgia’s economy in a state of arrested development.
³⁰. 324 U.S. at 443.
³². 324 U.S. at 453, 460-63. Rates had been approved by the Interstate Commerce Comm., to grant damages was felt would provide Georgia with an unfair advantage.
standing to file in *parens patriae* if it was determined in reality the suit was for the benefit of particular individuals\(^3\) thus effectively disposing of the fourth count in Georgia's complaint alleging damages as to its individual consumers.\(^3\) This dicta, disapproving such causes of action for lack of standing, deterred further promotion of antitrust damages claims by the states until fully twenty years later, in a period of heightened consumer awareness.

Subsequently, in *Philadelphia Housing Authority v. American Radiator & Sanitary Corp.*,\(^3\) it was contended a state may sue in its *parens patriae* capacity for antitrust damages to its citizens. In clarification of the *Georgia* opinion this court pointed out that in *Georgia*, there had been no consideration of demands for treble damages on behalf of its citizens, only the request for token damages to the state's economy was taken into account.\(^3\) The *Philadelphia* holding entirely dismembered a state's line of attack in representation of its citizens; consequently a second, more innovative alternative was presented in *Hawaii v. Standard Oil Co.*\(^3\)

In *Hawaii*, the Attorney General for the state cited *Georgia* as authority for the concept that a state injured in its quasi-sovereign capacity\(^4\) could sue in *parens patriae* and obtain both damages and an injunctive remedy. The District Court accepted *Georgia* as authoritative precedent for this proposal.\(^4\) The Supreme Court in affirming the Circuit Court's reversal of this holding based its conclusion, that no cause of action was

\(^3\) 324 U.S. at 446.

\(^3\) 309 F. Supp. 1057 (D.C. Pa. 1969). Manufacturers of plumbing fixtures were allegedly conspiring to fix prices. This holding was based on a motion by California and Kansas to amend the complaint to include a *parens patriae* allegation. The court held such claim to be without legal foundation.

\(^3\) Injury to the state's "quasi-sovereign" interest refers to its damages in its function as a state; i.e. state *qua* state injuries. This is to be distinguished from *parens patriae* in representation of the state's citizens' damages.

\(^3\) 405 U.S. 251 (1972), aff'g 431 F.2d 1282 (9th Cir. 1970), rev'g 301 F. Supp. 982 (D. Haw. 1969). Defendant companies in this instance were charged with conspiratorily fixing prices of gas within the state. Also alleged were bidrigging, market monopolization, and other activities in restraint of trade in the sale of refined petroleum products to Hawaiian consumers.

\(^3\) 405 U.S. at 258.

stated, on two grounds. It held principally that the court in *Georgia* never dealt with the question of damages at all, either in relation to citizens' rights or quasi-sovereign interests, due to the aforementioned technicality.\(^4\) Secondly, it pointed out that legislative history of the Clayton Act supported the view that injury to a person's "business or property"\(^4\) referred solely to "commercial interests or enterprises"\(^4\) and didn't include that done to the general prosperity of the state.\(^4\) Having reduced the scope of the *Georgia* decision to its most finely distilled essence, the outlook for states in *parens patriae* pursuit of antitrust violators seemed bleak. Though the very substance of the envisaged action had entirely corroded, it is from these ruins California's *Frito Lay* case arose. It is this case, which is analyzed following the discussion of class actions in the next subsection, which most closely precurses modern *parens patriae* statutory relief.\(^4\)

Clearly the single most influential reason for the renewed interest and confidence in the *parens patriae* remedy was the innovative settlement procedure adopted in a consumer class action against five drug companies charged with price-fixing upcharges re the drug, tetracycline.\(^4\) In that settlement, the manufacturers of this fairly common drug paid to forty-nine states an agreed total of nearly 140 million dollars. The defendants devised the payment of this sum to the states, in their *parens patriae* capacity, to be distributed to all interested parties, thereby binding all claimants to the settlement, with the balance escheating to the states to be constructively applied to the interests of the damaged class.\(^4\) This constituted the solitary device by which consumers on all levels of the marketing chain could be reimbursed thus relieving the defendants from fear of further duplicative suits with multiple recoveries against them. Without the *parens patriae* procedure, it is unlikely that either

\(^{42}\) *Supra* note 32.  
\(^{43}\) 405 U.S. at 261.  
\(^{44}\) 405 U.S. at 264.  
\(^{45}\) 431 F.2d at 1285.  

The terms "business or property" are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damages felt by a community. Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly.\(^4\)

\(^{48}\) *Supra* note 4, at 185.
party could have attained any degree of satisfaction: the defendants would still have been subject to an untold number of treble damages actions, while the plaintiffs would never have been able to achieve the broad based relief required in instances such as this, where price-fixing resulted in a 3,350% upcharge in the cost of tetracycline. 49

The difficulty with relying upon this settlement process as precedent lies in the fact that these drug companies stipulated to the legality of the reimbursement proceedings: the issue of parens patriae’s conceptual validity never arose. Nevertheless, the incidence of parens patriae suits for damages increased dramatically in response to the settlement; herein lies the seed of this current congressional enactment.

CONSUMER CLASS ACTIONS

Though once hailed as “one of the most socially useful remedies in history,” since the 1966 amendments to Rule 23, no antitrust class action which had survived the procedural obstacle course has proceeded through trial to an actual determination on the merits. This is partly due to the high settlement rate in those cases which do make it beyond the procedural hurdles, but largely it is the result of the increasingly rigid construction of these amendments by the courts. 52

51. Amended Rule 23 eliminates distinctions between categories and permits absent parties to be bound whenever specified criteria are met: that there are questions of law or fact common to the class (Rule 23(a)(2)); that the claims of the representative parties are typical of the claims of the class (Rule 23(a)(3)); that the representative parties will fairly and adequately protect the interests of the class (Rule 23(a)(4)); that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members (Rule 23(b)(3)); that a class action is superior to other available remedies for the fair and efficient adjudication of the controversy (Rule 23(b)(3)); and that a class action is capable of judicial management (Rule 23(b)(3)(D)). Added to these precepts are the due process requirements of notice and adequate representation. See Antitrust Violations—Class Action, 6 A.L.R. FED. 19 (1971).
52. See Handler, A Change of Focus From Substance to Procedure—Class Actions, Parens Patriae, and Multidistrict Litigation, 71 Colum. L. Rev. 1, 8 (1971).
53. Id.
54. Id. at 7.
Antitrust class action litigation has had a wide and varied background but for purposes of this comment the progress of a single case, *Eisen v. Carlisle & Jacquelin*, will best exemplify the fortunes of class actions as they relate to the *parens patriae* legislation.

*g Eisen* demonstrates the extreme complexity and uncertain development of class action aspects of antitrust litigation. Begun in 1966, the suit was ultimately to appear before the Supreme Court for a final decision in 1974. The action, on behalf of all odd-lot traders on the New York Stock Exchange over a four year period (6.25 million persons), was declared maintainable as a class action by the District Court. Thereafter the Court of Appeals reversed this ruling; *certiorari* was granted by the Supreme Court.

The controversy engendered by the District Court's decision stems from its introduction of a "fluid class" recovery concept; this entailed aggregation of damages to the entire class without the burden of proving up damages individually per class member. This device was later the model for California in the hybrid *parens patriae/class action* it inaugurated in *Frito Lay* and eventually the approach was adopted by the Congress.

The fluid class recovery concept seeks to establish a fund from which the claims of the class members may either be satisfied independently or set to rest by application of the recovery to the benefit of the 'class' qua class, in its function as a

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55. 417 U.S. 156 (1974). The plaintiff, who had personal damages of only $70, alleged two brokerage firms had conspiratorily fixed odd lot differentials at excessive rates in violation of the Sherman Act. The excessive rates on these transactions were designed to lead to the monopolization of odd lot trading. The action was initiated in the U.S. District Court, Southern District of New York, which held no class action was maintainable—41 F.R.D. 147; the Court of Appeals held the order appealable—370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The decision was thereafter reversed and jurisdiction was taken in Appellate Court which remanded to the District Court for further findings—391 F.2d 555 (2d Cir. 1968). On remand the action was determined maintainable as a fluid class action—52 F.R.D. 253 (1971); the defendant was then instructed to pay a portion of the costs of notice—54 F.R.D. 565. The Court of Appeals reversed—479 F.2d 1005 (2d Cir. 1973), *cert. granted*, 414 U.S. 908 (1973). In the course of coming full circle and holding no class action was maintainable, a number of separate decisions were rendered and never was there a trial on the merits.

56. Id.

57. 52 F.R.D. 253 (S.D.N.Y. 1971). This holding after an alternating series of decisions between the Court of Appeals and the District Court. *Supra* note 55.

58. 479 F.2d 1005.

59. 52 F.R.D. at 264.

60. Id.

Again, the impetus for this innovation was the ingenious settlement procedure devised in the *In Re Antibiotics Antitrust Action*. The one characteristic common to both these cases and which must be regarded as presenting the most unique legal considerations, is the internal fluctuation of class membership in the interim between injury and recovery. Rights vested in former members are cut-off with the resultant benefits accruing to the interest of non-vested newer members. The dilemma is whether this fluidity disrupts constitutional rights or simply impinges on statutory antitrust principles which can be cured by the *parens patriae* legislation? Though the Supreme Court didn't address itself to this issue, it has been a key point of interest for most commentators.

A second departure from normal class action procedure was the proviso in the District Court decision that notice be accomplished in part by publication although the class had 2.25 million members who could be identified through reasonable investigation. This emerged as the second major constitutional impediment to consumer class actions and had analogous ramifications in *parens patriae* suits. According to due process requirements laid down in *Mullane v. Central Hanover Bank & Trust Co.*, separately identifiable members of the class had to be individually notified even though the cost might be prohibitive. "Individual notice (was) clearly the 'best notice practicable' within the meaning of Rule 23(c)(2) and (the court's) prior decisions."

It was argued that the stake was so insignificant that notice requirements were inappropriate in this instance to which the Supreme Court opined:

> notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambigu-

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63. *Supra* note 47.
65. 417 U.S. at 166.
67. 417 U.S. at 156. The cumulative cost of notification was put at around $225,000.
68. 417 U.S. at 175.
ous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit.

This conclusion blindly avoids a pragmatic appraisal of the intricacies of this situation, ignoring the fact that such de minimus stakeholders are legally incapacitated from furthering antitrust suits in their own behalf regardless of what disposition class action procedural requirements mandate.

The perpetrators of antitrust violations resulting in multiple victims, each with minor injuries, have been granted virtual immunity from civil liability. This reinforces anti-competitive market forces with a windfall while undermining truly competitive business practices. Despite these considerations, the Supreme Court refused to maintain the 'fluid class' action, thereby surgically excising what to all appearances, seemed to be a potentially explosive trend in consumer class advocacy.  

The procedural revelations achieved in the area have mirrored the eddies and currents within the Supreme Court itself, shifting to a more restrictive stance with each change in the court's composition. The personnel of the court having remained unchanged recently, this former judicial devastation should signal the tumultuous course of litigation awaiting parens patriae statutory relief before its ultimate acceptance.

**CALIFORNIA'S HYBRID PARENS PATRIAE/CLASS ACTION REMEDY**

*California v. Frito Lay* 71 establishes one final permutation of the parens patriae action as it has devolved down this chain of judicial rejections. In the *Frito Lay* case, California proposed supplemental state inclusion in a private antitrust consumer class action. The state sought to represent all potential claimants so that full notice prerequisites would not stand as an obstacle to advancement of the cause of action. In reality, the cause was a modified class action, one without full notice though still encompassing full damages, California however, was acting in its parens patriae capacity. In declaring its joiner to the class, California argued that full redress for consum-

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70. Admittedly class actions have been sorely abused by attorneys, who to date constitute the single largest 'class' to benefit from such suits.  
71. 474 F.2d 774 (9th Cir. 1973) cert. denied, 412 U.S. 908 (1973). Defendant manufacturers of 'snack foods' were charged with conspiracy to fix and maintain prices at an excessive level. California's claim, although pursued in parens patriae, was in actuality intended to supplement charges brought by class members when they joined the suit.
ers without adequate notice, acknowledgable damages, or simply apathetic potential claimants, was appropriate due to public policy considerations. It cited the impracticability of represented citizens bringing independent suits and the undesirability of allowing antitrust violators to keep their ill-gotten gains.

The Court of Appeals opinion of this ingenious approach is commensurate with the former Supreme Court holdings in this area: "the authority of a state to act here as representative of its citizens cannot be founded on its common law capacity as parens patriae." This reaffirmed the inability of parens patriae principles to empower relief re citizen claimants, still, it did contribute substantially to the emergence of a finely textured parens patriae statutory formula.

The first contribution by the Frito Lay court was a perceptive discussion of the interrelationship between Rule 23 and parens patriae actions. The efficacy of a state's joinder under Rule 23 principles was seriously questioned in view of 1966 amendments to Rule 23, enacting what were attested to be safeguards of constitutional significance. The court commended California's motives in prosecuting the suit but denied the class action on the basis that it hadn't the authority to extend common law remedies into an area pre-empted statutorily. It commented:

we feel that authority must come not through judicial improvisation but by legislation and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf.

As a corollary to this consideration the court pointed out that indeed consumers were legally denied capacity to litigate in this type of action. It recognized that the state was seeking to act as guardians ad litem for disabled members of the damaged class. It seems the court took a pragmatic stance in this regard rather than adhering to the standard pretense that as real pare-

72. Id. at 775.
73. Id. at 777. This was within the purview of contentions in support of California's second cause of action.
74. Id. at 778.
75. Id. at 776.
76. Id.
77. Id.
78. Id. at 777.
79. Id. at 776.
ties in interest, consumers could pursue the vindication of their own rights. Here it was acknowledged *parens patriae* would provide “the injured citizens with the closest equivalent of the recovery which, individually, is beyond their reach.”80 These insights helped stimulate Congressional action.

**PARENS PATRIAE STATUTORY MODIFICATIONS**

Effective Sept. 30, 1976, amendments under the “Antitrust Improvements” Act were to be prospectively applied, empowering State’s attorneys general to pursue antitrust actions for damages incurred by state residents for price-fixing violations.81 It has been stated:82

The thrust of these bills is to overturn *Frito Lay* by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding problems of managability which some courts have found under Rule 23.

The link to class action procedures has been eliminated and the constitutional barriers attenuated; in short, a new form of action has been created. These suits cannot be construed as attempts to represent a segment of dispossessed citizenry in a class action, it is the *total replacement* of that class; the state stands in the shoes of the damaged consumers in a single action.83 This being the case, ‘standing’ is conferred upon the state *per se.*84

The key provision of this *parens patriae* Act, is that which posits the right to aggregate damage85 discussed in detail above. Once the Attorney General has established an illegal overcharge in violation of the Sherman Act—i.e. price-fixing—and

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80. Id. at 776-77.
81. Sections 4C through 4H of the CLAYTON ACT, added by Sec. 301 of Title III, “Parens Patriae,” of the “Antitrust Improvements” legislation:
Sec. 4C(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

See generally CCH TRADE REG. REPORTS No. 249 (Oct. 6, 1976) [hereinafter referred to as Report].
83. Report at 42 et seq.
84. To argue the state doesn’t have standing as a real party in interest is to disregard established *parens patriae* principles. See generally supra note 3.
shown that the overcharge was passed on to the state's consumers, the only remaining point of contention is the amount of damages to be assessed against the defendant.\textsuperscript{86} The code permits any "reasonable system of estimating aggregate damages as the court in its discretion may permit without the need to separately prove the individual claim of, or amount of damages to, persons on whose behalf the suit was brought."\textsuperscript{87} When this process of ascertaining damages was forthrightly discarded in \textit{Eisen}, the inference was that any recovery pursued by a state in substitution for the real parties in interest unconstitutionally impinged on the citizens' vested rights;\textsuperscript{88} that the state's action constituted an unconstitutional 'taking' of property without due process.\textsuperscript{89}

Pursuant to the Act, each citizen has the right to elect to exclude his individual portion of the claim from the total, provided this is accomplished within a specified period following the rendering of proper notice by the state.\textsuperscript{90} Analyzing this provision: if due process has been observed, then relinquishment of the claim is a valid defense to any constitutional objection; where due process was neglected, the claimant has recourse against the delinquent state and may satisfy his interest against the state's recovery. Either way, the Act may not be assailed on constitutional grounds in this fashion because it provides for observance of due process prior to any 'taking' of a vested right.\textsuperscript{91}

As to the second branch of this constitutional objection, i.e. that the Act fails to provide adequate procedures for notification of potential claimants, unfortunately this issue has not been resolved by the legislation. Admittedly, there is a movement toward liberalization of the rigid \textit{Mullane} notice requirements


\textsuperscript{87} \textit{Report} at 38.

\textsuperscript{88} \textit{Supra} note 64 & accompanying text.

\textsuperscript{89} U.S. Const., amend V.


\textsuperscript{91} \textit{Supra} note 64 & accompanying text.
in this Act.\textsuperscript{92} Initially the standard is notice by publication,\textsuperscript{93} however a qualification is posed: "If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case."\textsuperscript{94} Upon analysis it would appear that the strict \textit{Mullane} criterion is still in full force and effect. Despite this, the trend toward easing the influence of this impediment is evident, and courts are, for the time being, given a full measure of discretion in this area. At least, in contrast to private consumer class actions, the states are more financially able to meet the needs of whatever notification procedure the courts mandate.

From the defendant's point of view, the possibility of multiple recovery looms as the most frightening consequence of new \textit{parens patriae} procedures: three means of avoiding this specter have been employed. First, the Act expressly excludes from any determination of damages duplicative recoveries;\textsuperscript{95} second, the ambit of the Act extends representation solely to 'natural persons' thereby negating the likelihood of duplicating claims by commercial interests;\textsuperscript{96} third, there is the aforementioned election procedure which allows any consumer to exclude his portion of the recovery ratably from the aggregate damages against the defendant.\textsuperscript{97} The probability that multiple recoveries might occur runs contra to the very essence of the Act. \textit{Parens patriae} doctrine is founded in the concept that \textit{all} claims are accumulated, therefore any recovery against the defendant constitutes a perfect defense against ensuing allegations by injured parties. Those past claimant's rights have been severed by the \textit{parens patriae} action in their behalf and they are estopped from pressing further action unless their damages can be distinguished from the state's recovery—e.g. commercial injuries or excluded claims.

One final topic must be broached if one is to adequately convey the continuing complexities to be unraveled in this brand of consumer advocacy. With the elimination of the class action 'managability' standard,\textsuperscript{98} how will courts contend with \textit{parens patriae} suits which due to their magnitude exceed the bounds of the competency of the court to efficiently adjudicate the

\begin{itemize}
\item\textsuperscript{92} 339 U.S. 308 (1950).
\item\textsuperscript{98} \textit{Supra} note 51 & accompanying text.
\end{itemize}
issues? It is contended if the elements of the cause of action are reduced to their most fundamental form to prevent managability problems, the defendant will suffer from a lack of due process in the establishment of claims against him. Pursuant to the Act, courts are given broad discretionary powers to fit solutions to what before were deemed insoluble facets of the action. This freedom can be expected to result in greater ease in the handling of these cases without concomitant relaxation of due process precepts. Nonetheless, where either the burden of proof or due process sanctions can't realistically be sustained at this level of simplicity, the complaint will be susceptible to a motion to dismiss. Clearly there remain ever-present safeguards against the potentiality of a court being shackled with an unmanagable claim.

CONCLUSION

The advent of parens patriae may be saluted as signalling an auspicious trend in the law. As the doctrine is readily adaptable to a wide variety of wrongs currently beyond redress, it is not difficult to envisage extension of parens patriae concepts to antitrust suits by foreign nations, or even actions to recover for injury done a state's citizens through environmental pollution.

In conclusion, it seems essential to keep in mind that though Congress does contemplate a measure of indirect relief to states' citizens through tax reduction and administrative funding from recoveries, primarily parens patriae actions serve an in terrorem purpose; this is a policing act to deter future antitrust violations. It surrenders transgressors to the mercies of fifty highly efficient legal organizations rather than the apathetic efforts of thousands of consumers who are without any real interest in expending the energy necessary to deter this illicit conduct.

The immediate outlook for the success of parens patriae actions is rather grim. Regardless of who advances these antitrust

consumer complaints, certain lingering problems will survive. Even the most industrious renovation will not diminish the complexity and expense of furthering such suits and these constrictions result in long term ramifications, diverting tremendous quantities of energy and resources away from more functional pursuits. Although the legislature has come to the realization that states, rather than individual consumers, are more properly suited to bear the burden of undertaking civil actions in relief of citizen defraudation, judicial realignment in compliance with this premise may take a while to materialize.102

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102. Report at 43.