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# Antitrust Improvements Act of 1976, Parens Patriae Act: Paper Tiger or Sleeping Giant

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# NOTES

## THE ANTITRUST IMPROVEMENTS ACT OF 1976, *PARENS PATRIAE* ACT: PAPER TIGER OR SLEEPING GIANT

### I. INTRODUCTION

**T**ODAY'S ANTITRUST LAWS GREW OUT OF the post Civil War period of aggressive industrial expansion. Trusts, combinations and industrial predators dominated the American marketplace with the tacit approval of a *laissez faire* economic system, against the backdrop of Social Darwinism's "survival of the fittest"<sup>1</sup> principles. Rapid industrialization was not to be impeded because the "invisible hand" would channel the endeavors of big business to an ultimately beneficial social end.<sup>2</sup>

Nevertheless, as big business continued to expand and thrive in a fertile economic climate, the excesses of the "robber barons" became increasingly flagrant. The young society, imbued with the spirit of democracy and a historical distrust of concentrations of power, grew alarmed as the formerly agrarian culture became increasingly dominated by a few large industrialists. The problem was exacerbated by the reluctance of the legislature to act and the ineffective enforcement of common law prohibitions on restraints of trade. Congress responded to the rising tide of public discontent in 1890 when it passed the Sherman Anti-Trust Act.<sup>3</sup>

Public concern over rapid industrialization and its attendant evils was not completely dissipated with the passage of the Sherman Act. As the judicial branch interpreted the Sherman Act, its enforcement loopholes became exposed and were quickly capitalized on by creative in-

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<sup>1</sup> As John D. Rockefeller once told a Sunday School class:

The growth of a large business is merely a survival of the fittest . . . .  
The American Beauty Rose can be produced in the splendor and fragrance which brings cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working-out of a law of nature and a law of God.

R. HOFSTADER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 45 (Bacon 1962).

<sup>2</sup> Adam Smith introduced the "invisible-hand" doctrine in 1776 to demonstrate that individuals will be guided to achieve the best for all in seeking their own personal self-interest. The "invisible-hand" doctrine was used to show "that any government interference with free competition would be harmful to society, since such competition by itself was able to channel the selfish motives of individuals so that they automatically though unintentionally, furthered the best interests of society." D. GREENWALD, *THE MCGRAW-HILL DICTIONARY OF MODERN ECONOMICS* 314 (2d ed. 1973).

<sup>3</sup> Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1976)) [hereinafter referred to as Sherman Act].

dustrialists.<sup>4</sup> The Act eventually spawned progeny to close the loopholes against would-be violators of the spirit, if not the letter, of antitrust principles. Among the ensuing legislative enactments were the Clayton Act<sup>5</sup> and the Robinson-Patman Act.<sup>6</sup> The reach of the antitrust laws, theoretically, was to extend to every antitrust violator for every conceivable type of antitrust violation.<sup>7</sup>

By the mid-1970's, however, Congress realized that a gaping loophole still remained in the antitrust laws. Almost as an afterthought to nearly a century of vigorous governmental and private antitrust enforcement efforts, Congress determined that the economic burden of antitrust violations was still being borne, to a great extent, by the consumer. Furthermore, the legislature recognized that existing federal antitrust laws did not provide effective remedies for the injury inflicted upon consumers.<sup>8</sup>

The 94th Congress responded to this situation by enacting the *Parens Patriae* Act in 1976<sup>9</sup> to provide redress to the millions of consumers who are frequently injured in relatively small amounts by antitrust violations but who have neither the wherewithal nor the incentive to prosecute private actions.<sup>10</sup> Congress determined that among the powerful obstacles hampering successful consumer antitrust actions were the restrictive class action provisions.<sup>11</sup> The *Parens Patriae* Act was passed

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<sup>4</sup> *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911). Chief Justice White's holding that restraints of trade were to be evaluated under the flexible "rule of reason" gave rise to the concern that this standard would create a gap in the law whereby undesirable combinations would receive judicial approval.

<sup>5</sup> Act of October 15, 1914, ch. 323, 38 Stat. 730 (codified at 15 U.S.C. §§ 12-27) (an Act to supplement existing laws against unlawful restraints and monopolies and for other purposes) [hereinafter referred to as Clayton Act].

<sup>6</sup> Act of June 19, 1936, ch. 592, 49 Stat. 1526 (codified at 15 U.S.C. §§ 13, 13a, 13b) (an Act to prohibit price discrimination) [hereinafter referred to as Robinson-Patman Act].

<sup>7</sup> See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (vertical restrictions); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (mergers); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (group boycotts); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (tying arrangements); *Automatic Radio Mfg. Co., v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950) (patent monopolization); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (horizontal collusion); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (cartels); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) (monopolization).

<sup>8</sup> See H.R. REP. NO. 499, 94th Cong., 1st Sess. 6-8 (1975) [hereinafter cited as HOUSE REPORT].

<sup>9</sup> The *parens patriae* provisions are contained in new sections 4C-4H of the Clayton Act, Pub. L. No. 94-435, 90 Stat. 1394 (codified at 15 U.S.C. §§ 15c-15h (1976)) [hereinafter cited as Act or *Parens Patriae* Act].

<sup>10</sup> See HOUSE REPORT, *supra* note 8, at 6.

<sup>11</sup> FED. R. CIV. P. 23. See S. REP. NO. 803, 94th Cong., 2d Sess. 39 (1976) ("Consumers have found little relief under the class action provisions of the Federal

partially to alleviate these types of problems.<sup>12</sup>

The *Parens Patriae* Act has been in effect for several years. Although there has been relatively little time in which to test the full measure of its effectiveness, it has gradually become apparent that much of the Act's promise remains unfulfilled. Recent federal court decisions, when coupled with the problems of funding which are being encountered by many state attorneys general, might be endangering the Act's continuing vitality and undercutting the legislature's intent in enacting the measure. This Note will discuss some of the major issues which are emerging under the Act and will attempt to separate the promise from the realities of actual enforcement.

## II. BACKGROUND

### A. *Parens Patriae* Actions at Common Law

"*Parens patriae*" is defined as "parent of the country" and "[i]n the United States, the *parens patriae* function belongs with the states."<sup>13</sup> The concept originated in feudal England, where it was the king's "royal prerogative" to act as a guardian for legally disabled citizens including minors, insane and incompetent persons.<sup>14</sup> The "royal prerogative" and *parens patriae* duties of the king became incorporated into the United States body of law through the states.<sup>15</sup> As early as 1900, an expanded *parens patriae* concept began to emerge whereby states were permitted to sue, not only as guardians of "minors, insane and incompetent persons,"<sup>16</sup> but as *parens patriae* for all citizens.<sup>17</sup>

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Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23.") [hereinafter cited as SENATE REPORT].

<sup>12</sup> See HOUSE REPORT, *supra* note 8, at 8 ("The thrust of the bill is to . . . [avoid] the problems of manageability which some courts have found under Rule 23.").

<sup>13</sup> BLACK'S LAW DICTIONARY 1003 (rev. 5th ed. 1979).

<sup>14</sup> See Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1, 18 (1977); Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193, 197 (1970).

<sup>15</sup> *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972).

<sup>16</sup> See 15 U.S.C. §§ 1-7 (1976).

<sup>17</sup> In *Louisiana v. Texas*, 176 U.S. 1 (1900), the State of Louisiana brought suit to enjoin officials of the State of Texas from preventing Louisiana citizens, under quarantine regulations, from sending goods into the State of Texas. Although the Court found that relief could not be granted through the use of a *parens patriae* suit, the Court recognized the general propriety of permitting *parens patriae* actions. *Id.*

A series of *parens patriae* lawsuits followed on the heels of this decision. These early cases established the rights of a state to prevent or repair harm to its quasi-sovereign interest. For example, the Court in *Missouri v. Illinois*, 180 U.S. 208 (1901), held that the State of Missouri was permitted to sue the State of

The concept of *parens patriae* emerged in antitrust litigation in the case of *Georgia v. Pennsylvania Railroad*.<sup>18</sup> The Supreme Court held that a state as *parens patriae* may maintain an action for injunctive relief when it can be shown that antitrust violations injure its economy.<sup>19</sup> Recognizing the importance to antitrust law of permitting *parens patriae* suits, the Court stated:

Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate.<sup>20</sup>

Despite the Supreme Court's imprimatur of *parens patriae* actions in antitrust enforcement,<sup>21</sup> the device was not again utilized until 1968 when the State of Hawaii filed suit against several oil companies to recover treble damages under section 4 of the Clayton Act<sup>22</sup> for injury

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Illinois and the Chicago Sanitation District on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River. In *Kansas v. Colorado*, 206 U.S. 46 (1907), Kansas as *parens patriae* was entitled to restrain the diversion of water from an interstate stream. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (permitting Georgia to enjoin noxious gas from a copper plant across the border from polluting certain lands in Georgia); see also *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (permitting Pennsylvania to sue to enjoin restraints on the commercial flow of natural gas); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (holding that Minnesota could sue to enjoin drainage changes which increased the water flow in a Minnesota stream); *New York v. New Jersey*, 256 U.S. 296 (1921) (holding that New York could seek to enjoin discharge of sewage into the New York harbor).

<sup>18</sup> 324 U.S. 439 (1945). The State of Georgia, in its quasi-sovereign and proprietary capacity, brought suit against twenty railroad companies seeking damages and injunctive relief. The complaint alleged that the defendants had conspired to restrain trade and fix prices in a manner that favored other states to the detriment of Georgia. *Id.*

<sup>19</sup> *Id.* at 447. The Court did not reach the issue of whether the antitrust laws authorized a *parens patriae* action for damages. It found that *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), barred recovery of damages for allegedly excessive rates where the rates had been approved by the Interstate Commerce Commission. 324 U.S. at 453.

<sup>20</sup> 324 U.S. at 451.

<sup>21</sup> *Id.*

<sup>22</sup> 15 U.S.C. § 15 (1976). Section 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

*Id.*

to its general economy.<sup>23</sup> The Supreme Court refused to grant relief on two grounds. First, the Clayton Act's requirement of injury to "business or property" refers to "commercial interests or enterprises," and does not encompass injury to a state's general economy.<sup>24</sup> Second, to permit a state to recover damages for injury to its general economy would duplicate remedies otherwise available to its citizens for damage to their business or property.<sup>25</sup>

In *California v. Frito-Lay, Inc.*,<sup>26</sup> a *parens patriae* action was again attempted, under a different theory. The State of California sued as class representative and *parens patriae* of its citizen-consumers who had suffered injury as a result of twelve snack food manufacturers' alleged price fixing conspiracy. The state sought treble damages under section 4 of the Clayton Act.<sup>27</sup> The Ninth Circuit held that common law principles precluded California from maintaining a treble damage action on behalf of its citizens as *parens patriae*.<sup>28</sup>

The Court, however, observed that "the state is on the track of a suitable answer (perhaps the most suitable yet proposed)"<sup>29</sup> and suggested the need for legislative action:

[I]f the state is to be empowered to act in the fashion here sought 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.<sup>30</sup>

Congress accepted the Ninth Circuit's invitation to authorize *parens*

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<sup>23</sup> *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii 1969), *rev'd and remanded*, 431 F.2d 1282 (9th Cir. 1970), *cert. granted*, 401 U.S. 936 (1971), *aff'd*, 405 U.S. 251 (1972). Hawaii sued in its proprietary capacity as representative of a class of all purchasers in Hawaii and as *parens patriae* for damages to its general economy incurred as a result of defendants' antitrust violations. The district court dismissed the class action but refused to dismiss the *parens patriae* action, certifying its decision for interlocutory appeal. The Ninth Circuit reversed and directed that the *parens patriae* claim be dismissed. The Supreme Court affirmed the circuit court's decision.

<sup>24</sup> 405 U.S. at 265.

<sup>25</sup> *Id.* at 263-64. Justice Douglas expressed the position that *Georgia v. Pennsylvania R.R. Co.* authorized recovery. 324 U.S. 439 (1945) (Douglas, J., dissenting).

<sup>26</sup> 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

<sup>27</sup> 15 U.S.C. § 15 (1976).

<sup>28</sup> 474 F.2d at 775.

<sup>29</sup> *Id.* at 777.

<sup>30</sup> *Id.*

*patriae* suits by enacting Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>31</sup>

### B. *Summary of the Parens Patriae Act*

The Hart-Scott-Rodino Antitrust Improvements Act, *parens patriae* provisions,<sup>32</sup> was heralded as "a new federal antitrust remedy"<sup>33</sup> which would permit state attorneys general to recover damages on behalf of individual consumers who were injured by antitrust violations.<sup>34</sup> The legislative history<sup>35</sup> reflects a pervasive concern for the injured consumer who, before the Act was passed, had no practical means of redress. If, for example, a price fixing conspiracy results in an overcharge of one dollar on a common consumer item and fifty million items are sold, the conspirators have reaped approximately fifty million dollars from their anticompetitive behavior. The individual consumer, however, is probably unaware of the overcharge and is almost certainly unaware of the price fixing conspiracy; he has little incentive and meager resources with which to proceed against the conspirators even if he were aware of the conspiracy. Typically, he no longer has receipts or other proof of any purchases and, in any event, the individual injury which he has sustained is monetarily insignificant vis-a-vis the enormous price tag of an antitrust lawsuit.<sup>36</sup>

This situation is illustrative of the problems which Congress intended to resolve by enacting the *Parens Patriae* Act—redress for the consumer as well as deterrence to the Sherman Act violator. Earlier versions of the Act attempted to overturn the result in *Hawaii v. Standard Oil Co. of California*<sup>37</sup> by permitting a state to recover damages for in-

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<sup>31</sup> 15 U.S.C. §§ 15c-15h (1976). See HOUSE REPORT, *supra* note 8, at 8, where the Report of the House Committee on the Judiciary stated that "[t]he thrust of the bill 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 the problems of manageability which some courts have found under Rule 23." *Id.*

<sup>32</sup> The *parens patriae* provisions are contained in new sections 4C-4H of the Clayton Act, 15 U.S.C. §§ 15c-15h (1976).

<sup>33</sup> See HOUSE REPORT, *supra* note 8, at 3.

<sup>34</sup> *Id.* at 6-8.

<sup>35</sup> See Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679, 680 n.6 (1977) (brief chronology of events leading to the passage of the Act).

<sup>36</sup> HOUSE REPORT, *supra* note 8, at 6. There are other societal costs of monopoly. The Court in *Hawaii v. Standard Oil Co. of Cal.*, noted that "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. . . . This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation." 405 U.S. at 262.

<sup>37</sup> 405 U.S. 251 (1972); see notes 23-25 *supra* and accompanying text.

jury to its general economy.<sup>38</sup> This proposal was rejected as creating the possibility of duplicative recoveries as well as presenting serious problems for damage calculation.<sup>39</sup>

The Act as passed permits state attorneys general to recover damages for injury sustained by natural persons by any Sherman Act<sup>40</sup> violations.<sup>41</sup> Although the Act does not specifically authorize *parens patriae* actions for injunctive relief, it is well-established that such actions are maintainable.<sup>42</sup>

The Act excludes from the monetary award any damages which could be duplicated in other actions,<sup>43</sup> including damages properly allocable to business entities and specifically excludes business entities from the purview of the Act.<sup>44</sup> When the state prevails, it is entitled to court-awarded costs, including reasonable attorney's fees in addition to treble damages.<sup>45</sup> A 1980 amendment to the Act added provisions which permit

<sup>38</sup> At various times, both the House and Senate versions contained such a provision. However, the Antitrust Subcommittee deleted the provision from the original Senate Bill and, although such a provision was not in the original House legislation, it was added by the Monopolies Subcommittee, which later deleted it. See S. 1284, 94th Cong., 1st Sess. § 4C(a)(2) (1975); H.R. 38, 94th Cong., 1st Sess. § 4C(a)(2) (1975).

<sup>39</sup> See *The Antitrust Improvements Act of 1975: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm. on S. 1284*, (pt. 1), 94th Cong., 1st & 2d Sess. 133-34 (1975-76) (statement of Walker B. Comegys) [hereinafter cited as *Senate Hearings*]; *Hearings on H.R. 38 & H.R. 2850 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 92-93 (1975) (statement of William Jentes) [hereinafter cited as *House Hearings*]. This deletion was apparently unnoticed by the dissenters to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), who observed that Title III "overruled the holding of *Hawaii v. Standard Oil Co. . . .*" *Id.* at 756 (Brennan, J., dissenting).

<sup>40</sup> 15 U.S.C. §§ 1-7 (1976).

<sup>41</sup> *Id.* § 15c(a)(1). The *Parens Patriae* Act is an addition to the Clayton Act, which permits the award of treble damages to persons injured by anything forbidden in the antitrust laws. Enforcement of the Act, however, is limited to injuries sustained by reason of a Sherman Act violation.

<sup>42</sup> See *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945). The legislative history clearly indicates that *Pennsylvania R.R. Co.* is still good law. See 122 CONG. REC. S15,417-18 (daily ed. Sept. 8, 1976) (remarks of Sen. Hart); *id.* at H10,295-96 (daily ed. Sept. 16, 1976) (remarks of Rep. Rodino); see HOUSE REPORT, *supra* note 8.

<sup>43</sup> 15 U.S.C. § 15c(a)(1) (1976).

<sup>44</sup> *Id.* § 15c(a)(1)(B)(ii); see also *id.* § 15g(3). A small business exemption was proposed but rejected. See 122 CONG. REC. H2,085 (daily ed. March 18, 1976). See also HOUSE REPORT, *supra* note 8, at 9.

<sup>45</sup> 15 U.S.C. § 15(a)(2) (1976), amended by 15 U.S.C. § 15c(a)(2) (Supp. IV 1980). Private attorneys employed by the state are within the statutory definition of "state attorney general," so long as they are not employed on a contingency fee arrangement, unless the court determines the amount of the reasonable attorney fee pursuant to 15 U.S.C. § 15c(d)(1) (1976).



the state to recover an award of prejudgment interest where certain specified considerations are found by the court.<sup>46</sup>

As a means of facilitating the procedural aspects of the suit, the Act provides for notice to state residents by publication.<sup>47</sup> If the court finds that such notice would "deny due process of law to any person or persons," it may, in its discretion, direct that additional notice be given.<sup>48</sup> A person on whose behalf the action is brought may exclude his claim by filing appropriate notice with the court in a timely manner.<sup>49</sup> The individual is then free to institute a private antitrust action. If the person fails for any reason to notify the court of his election to "opt out," however, the final judgment in the *parens patriae* action will be res judicata against his individual claim.<sup>50</sup>

Court approval is required before a suit may be dismissed or settled.<sup>51</sup> This provision operates to safeguard consumers. In addition, if the court finds that the state attorney general has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," it may award a reasonable attorney's fee to the prevailing defendant.<sup>52</sup>

Where the court determines that a defendant has fixed prices in violation of the Sherman Act, damages may be proved and assessed in the aggregate by means of: 1) statistical sampling methods; 2) the computation of illegal overcharges; or 3) such other means of aggregating damages as the court may, in its discretion, require.<sup>53</sup> There is no need to prove separately individual claims or amounts of damage to the persons on whose behalf the suit is brought.<sup>54</sup> This provision is critical in view of the large number of potential claimants on whose behalf a typical *parens patriae* action is brought.

Damages may be distributed in such a manner as the district court deems advisable, or labeled as a "civil penalty" by the court and deposited as revenues with the state.<sup>55</sup> In either case the distribution procedure must afford each person an opportunity to recover his portion of the net monetary relief.<sup>56</sup>

<sup>46</sup> 15 U.S.C. § 15c(a)(2), amended by 15 U.S.C. § 15c(a)(2) (Supp. IV 1980).

<sup>47</sup> 15 U.S.C. § 15c(b)(1) (1976). See SENATE REPORT, *supra* note 11, at 46; HOUSE REPORT, *supra* note 8, at 11-12.

Notice by publication was a provision in the original Senate bill. Although the original House version did not contain such a provision, the House Monopolies Subcommittee later inserted it.

<sup>48</sup> 15 U.S.C. § 15c(b)(1) (1976).

<sup>49</sup> *Id.* § 15c(b)(2).

<sup>50</sup> *Id.* § 15c(b)(3).

<sup>51</sup> *Id.* § 15c(c).

<sup>52</sup> *Id.* § 15c(d)(2).

<sup>53</sup> *Id.* § 15d.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 15e.

<sup>56</sup> *Id.*

The Act further provides that whenever an attorney general of the United States brings an antitrust action which he believes would be maintainable by a state attorney general under this Act, he shall promptly notify the state attorney general in writing.<sup>57</sup> In addition, the attorney general of the United States, upon the request of a state attorney general, shall make available as permitted by law any investigative files or other material pertinent to an actual or potential *parens patriae* action.<sup>58</sup>

### III. ENFORCEMENT PROBLEMS

The Act has been in effect for several years.<sup>59</sup> However, despite the fanfare that greeted its passage,<sup>60</sup> discrepancies between the legislature's intent and the mechanics of actual enforcement have emerged. The remainder of this Note will highlight some of the actual and potential obstacles which must be overcome before the Act's full enforcement potential can be realized.

#### A. Suits on Behalf of Indirect Purchasers

The *Parens Patriae* Act creates a cause of action for injury sustained by natural persons by reason of any violation of the Sherman Act.<sup>61</sup> The touchstone of violation of the *Parens Patriae* Act is a contract, combination or conspiracy in restraint of trade<sup>62</sup> and/or monopolization or an attempt to monopolize interstate trade or commerce.<sup>63</sup> The most logical application of the Act is against price fixing violations at the manufacturer or distributor levels on behalf of consumers who must pay higher prices for their goods as a result of the defendants' anticompetitive conduct.

Consumers rarely purchase goods directly from the manufacturer or distributor; it is far more likely that they will purchase directly from a

<sup>57</sup> *Id.* § 15f(a).

<sup>58</sup> *Id.* § 15f(b). This section of the Act has given rise to the issue of whether grand jury materials constitute "any investigative files or other materials" which are to be made available to state attorneys general. For an excellent discussion of this issue, see Maximov, *Access by State Attorneys General to Federal Grand Jury Antitrust Investigative Materials*, 60 CALIF. L. REV. 821 (1981).

<sup>59</sup> The Act was approved September 30, 1976.

<sup>60</sup> The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976). The entire Act, including Title III—*Parens Patriae*, was billed as "the most far reaching expansion in the nature of antitrust enforcement since the Clayton Act of 1914." *Senate Hearings, supra* note 39 (pt. 3) (statement of Frederick M. Rowe). See also [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 780 at A-1 (Nov. 8, 1976) (statement of Rep. Peter W. Rodino, Jr., chairman of the House Committee on the Judiciary).

<sup>61</sup> 15 U.S.C. § 15c(a) (1976).

<sup>62</sup> *Id.* § 1.

<sup>63</sup> *Id.* § 2.

retailer or wholesaler.<sup>64</sup> Typically, the finished product may pass through the hands of several middlemen, *i.e.*, distributors, wholesalers or retailers, before it reaches the consumer.<sup>65</sup> On the other hand, the product may be a component part of another good which itself passes through several intermediaries before it reaches the consumer as part of the final product.<sup>66</sup> Alternately, the product may be a machine which is sold to a manufacturer for use in producing consumer goods which are, in turn, passed through various middlemen to the consumer.<sup>67</sup>

Illegal price fixing may be perpetrated by any one of the actors in any level of the chain of distribution. The profit-oriented economic system of the United States dictates that each actor, in order to maximize profits, pass on its costs to the next member of the chain. It is clear that the ultimate economic burden is largely borne by the final participant in the chain: the purchaser-consumer who must pay higher prices for his goods and services.<sup>68</sup> Unless the price fixing occurred at the retail level, the consumer is almost always an indirect purchaser of the overpriced goods.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>69</sup> the Supreme Court was petitioned to decide whether a direct purchaser seeking treble damages against his supplier who allegedly fixed prices was entitled to recover for the full overcharge, where defendant offered to show that the plaintiff-purchaser "passed on" the higher costs to his own customers. The Court rejected defendant's "pass-on" defense on two grounds:<sup>70</sup> 1) the Court was unwilling to complicate treble damage ac-

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<sup>64</sup> See, *e.g.*, HOUSE REPORT, *supra* note 8, at 6.

<sup>65</sup> See, *e.g.*, *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973) (suit by state on behalf of citizens against twelve manufacturers of snack foods charging conspiracy to fix and maintain prices in violation of the Sherman Act); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973) (motion to intervene by putative class of twenty million consumers of bread in treble damage action against bread manufacturers).

<sup>66</sup> See, *e.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *reh'g denied*, 434 U.S. 881 (1977) (price fixing alleged against concrete block manufacturers, which sell to masonry contractors, which in turn sell to general contractors, from which consumer-respondents purchase the block as incorporated in masonry structures); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970) (plaintiff-homeowners sued manufacturers of plumbing fixtures for overcharges allegedly passed on to them when they purchased homes from builders or prior homeowners).

<sup>67</sup> See, *e.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (treble damage action brought by shoe manufacturer against manufacturer of shoe machinery; defendant sought to show that shoe manufacturer had not been injured because it passed on illegal overcharge to those who bought shoes from it).

<sup>68</sup> See HOUSE REPORT, *supra* note 8, at 3.

<sup>69</sup> 392 U.S. 481 (1968).

<sup>70</sup> The Court carved out an exception to its holding in permitting pass-on

tions with the economic uncertainties and complexities involved in proving "pass-on";<sup>71</sup> and 2) unless a direct purchaser was entitled to recover the full overcharge, antitrust violators would "retain the fruits of their illegality" because indirect purchasers "would have only a tiny stake in the lawsuit," and therefore little incentive to sue.<sup>72</sup> The practical result of this decision is a windfall to the direct purchaser who can pass on the overcharge to his own purchasers, as well as recover the full amount of the illegal overcharge from the antitrust violators.

After *Hanover Shoe*, controversy developed among courts and commentators as to whether the Court's rejection of "defensive" pass-on also barred its "offensive" use by plaintiffs.<sup>73</sup> The offensive use of pass-on was first presented to the Supreme Court in *Illinois Brick Co. v. Illinois*.<sup>74</sup> In that case, plaintiffs were indirect purchasers who alleged that concrete block manufacturers had engaged in a price fixing conspiracy, whereby the illegal overcharge was fixed by defendant manufacturers and then passed on through two separate levels in the chain of distribution, *i.e.*, through masonry contractors and general contractors, before reaching plaintiffs. Plaintiffs argued that inasmuch as the prices which they paid for concrete block were more than three million dollars higher by reason of the price fixing conspiracy, they were injured in their "business or property." The Court ruled that because *Hanover Shoe* bars a defendant from asserting a pass-on theory as a defense to price fixing in a treble damage action, indirect purchasers may not use a pass-on theory offensively to recover damages from the alleged price fixer. The Court reached this holding through a two-step reasoning process:

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where "an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged . . ." *Id.* at 494.

<sup>71</sup> *Id.* at 492-93.

<sup>72</sup> *Id.* at 494.

<sup>73</sup> Some commentators and courts construed *Hanover Shoe* as barring the offensive use of pass-on, on the ground that the injury was too remote, or that plaintiffs lacked privity with the defendant. *See, e.g.*, *Bill Minielli Cement Contracting, Inc. v. Richter Concrete Corp.*, 62 F.R.D. 381 (S.D. Ohio 1973); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.*, *Mangano v. American Radiator & Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) (*per curiam*). *See also* *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973); *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970).

Other courts disagreed, reasoning that *Hanover Shoe* should be limited to defensive pass-on, that the offensive use of pass-on would further the antitrust goal of deterrence by preventing windfall recoveries by uninjured middlemen, and that an injured indirect purchaser who could show causation or "fact of damage" should be permitted to recover. *See, e.g.*, *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Illinois v. Bristol-Myers Co.*, 470 F.2d 1276 (D.C. Cir. 1972) (*per curiam*).

<sup>74</sup> 431 U.S. 720 (1977).

Any rule which was to be adopted must apply equally to plaintiffs and defendants alike, and the Court declined to abandon its holding in *Hanover Shoe* that the party injured in his "business or property" is the direct purchaser.<sup>75</sup>

It is noteworthy that the *Illinois Brick* decision was rendered approximately nine months after the Act was passed. The subsequent claims of indirect purchasers who brought actions as *parens* plaintiffs have been dismissed by courts on the basis of this decision.<sup>76</sup> Yet *Illinois Brick* neither arose nor was decided under the *Parens Patriae* Act. Instead, it was a private class action instituted under section 4 of the Clayton Act. In fact, the only reference to the *parens patriae* provisions of the recently enacted Hart-Scott-Rodino Antitrust Improvements Act appears in two footnotes.<sup>77</sup> Moreover, at least one of the Court's reasons for barring indirect purchaser actions is inapplicable to *parens patriae* actions. The Court declined to overrule *Hanover Shoe*, which held that the party injured in his "business or property" under section 4 of the Clayton Act is the direct purchaser. The *Hanover Shoe* Court justified this holding by reasoning that, *inter alia*, unless direct purchasers were permitted to sue for that portion of the overcharge which they had passed on to indirect purchasers, then antitrust violators would retain the fruits of their unlawful acts because indirect purchasers would have too small a stake in the potential recovery to bring suit.<sup>78</sup> That reason was presumably viable in the economic and legal climate which prevailed at the time the *Hanover Shoe* decision was rendered, but one of the specific reasons for the passage of the *Parens Patriae* Act was to prevent that kind of result. Congress, in passing the Act, intended to protect the individual consumer who typically sustains only minor injuries to his business or property as a result of antitrust violations.<sup>79</sup> Nevertheless, when the aggregate amount of relatively insignificant individual injuries is tabulated, a state attorney general has sufficient incentive to

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<sup>75</sup> *Id.* at 728-29.

<sup>76</sup> See generally *In re* Mid-Atlantic Toyota, Inc., 516 F. Supp. 1287 (D. Md. 1981); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 497 F. Supp. 218 (C.D. Cal. 1980). See notes 101-19 *infra* and accompanying text.

<sup>77</sup> The majority refers to the Hart-Scott-Rodino Antitrust Improvements Act in two footnotes. See 431 U.S. 720, 773 n.14; *id.* at 747 n.31. Although the Court recognizes that Congress could amend section 4 to permit actions by indirect purchasers, it does not reach the issue of whether the Act is such an amendment. *Id.* at 733 n.14.

The dissenters argued that the Act was expressly intended to provide a remedy for injured consumers whether or not they purchased directly from the violator. *Id.* at 756-58.

<sup>78</sup> See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968).

<sup>79</sup> See notes 33-36 *supra* and accompanying text.

bring suit against the antitrust violator on behalf of the injured consumers.<sup>80</sup> To permit *Illinois Brick* to bar the state attorney general from bringing a *parens patriae* action on behalf of injured consumers who are indirect purchasers is to frustrate one of the primary purposes for which the Act was passed.<sup>81</sup>

The *Illinois Brick* Court's remaining ground for justifying its holding can be easily dispensed with for purposes of private treble damage actions as well as *parens patriae* actions. The Court expressed the need for symmetrical application of pass-on to defendants and plaintiffs alike. However, the interests at stake in permitting the defensive use of pass-on are simply inappropriate to the use of offensive pass-on. As Justice Brennan's dissent correctly points out,<sup>82</sup> the defensive use of pass-on would permit the antitrust violator to retain a portion of his ill-gotten overcharges. This result is inconsistent with the importance of treble damage actions in deterring antitrust violations.<sup>83</sup> The offensive use of pass-on, on the other hand, would both further the purposes of the antitrust laws and recompense the injured party.<sup>84</sup> The need for symmetry is particularly difficult to justify with respect to *parens patriae* actions in light of the general objectives of the antitrust laws and the specific

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<sup>80</sup> The dissent to *Illinois Brick* recognized this legislative purpose when it stated:

Indeed, Congress acted on the premise that § 4 gave a cause of action to indirect as well as direct purchasers when it recently enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976 . . . and authorized state attorneys general to sue as *parens patriae* to recover damages on behalf of citizens of their various States.

*Illinois Brick v. Illinois*, 431 U.S. 720, 749 (1976) (Brennan, J., dissenting).

<sup>81</sup> For example, the Senate Report states:

A direct cause of action is granted the States to avoid the inequities and inconsistencies of restrictive judicial interpretations. . . . Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], standing, privity, target area, remoteness, and the like.

SENATE REPORT, *supra* note 11, at 42.

Representative Rodino, a sponsor, stated:

[A]ssuming the State attorney general proves a violation, and *proves an overcharge was "passed on" to the consumers*, injuring them "in their property"; that is, their pocketbooks—*recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or other middlemen.*

122 CONG. REC. H10,295 (daily ed. Sept. 16, 1976) (emphasis added). See also HOUSE REPORT, *supra* note 8, at 44.

Congress rejected earlier lower court decisions which erected standing barriers to indirect purchasers. See SENATE REPORT, *supra* note 11, at 42-43.

<sup>82</sup> 431 U.S. at 753-54.

<sup>83</sup> *Id.* at 752-53.

<sup>84</sup> *Id.*

goal of permitting a state to recover the amount of illegal overcharges on behalf of its indirect purchaser-citizens.

Beyond its refusal to overrule *Hanover Shoe* and its perceived need for symmetry, the *Illinois Brick* majority expressed the additional concern that the offensive use of pass-on might create a serious risk of multiple defendant liability. The Court observed that even though an indirect purchaser had recovered, a direct purchaser could still automatically recover the full amount of the overcharge that the indirect purchaser had shown to be passed on.<sup>85</sup> This concern is groundless in the framework of a *parens patriae* action, however, because the Act itself contains a procedural check against duplicative remedies by excluding from the recovery any amount which duplicates damages awarded for the same injury or which is properly allocable to any business entity.<sup>86</sup> Thus, where a direct purchaser has been recompensed for an antitrust injury, a *parens patriae* indirect purchaser can recover only to the extent that the direct purchaser has not done so. Moreover, the indirect purchasers are precluded from recovering any damages which are properly allocable to any business entity.

The use of existing procedural mechanisms would further reduce the remaining dangers of duplicative recovery. For example, safeguards such as statutory interpleader, compulsory joinder and the doctrines of *res judicata* and collateral estoppel could be incorporated into *parens patriae* adjudications to eliminate the risk of double recoveries.<sup>87</sup> Justice

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<sup>85</sup> *Id.* at 730.

<sup>86</sup> 15 U.S.C. § 15c(a)(1)(A), (B) (1976).

<sup>87</sup> Congress debated the issue of duplicative recovery in connection with the Hart-Scott-Rodino Act. The Senate Report paid short shrift to the issue. Quoting from the Ninth Circuit in *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.*, *Standard Oil Co. of Cal. v. Alaska*, 415 U.S. 919 (1974), the Report stated:

We therefore see no problem of double recovery, and we believe that if this difficulty should arise in some other connection, the district court will be able to fashion relief accordingly. In addition to the court's control over its decree, numerous devices exist. We note that the consolidation of cases, which has already occurred, is one means of averting duplicative awards. The short, four-year statute of limitations is another; later suits, after final judgment herein, are unlikely. 15 U.S.C. § 15b. In other cases, it may be that statutory interpleader, 28 U.S.C. § 1335, could be used by antitrust defendants to avoid double liability. If necessary, special masters may be appointed to handle complex cases. Finally, there are the doctrines of *res judicata* and collateral estoppel and procedures for compulsory joinder. The day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.

We would prefer to place the burden of proving apportionment upon appellees, rather than deny all recovery to appellants. Such a burden would be the consequence of appellees' illegal acts, not appellants' suits.

Brennan's dissenting opinion dismissed the majority's fears, reasoning that: 1) procedural mechanisms will substantially eliminate the risk of duplicative recovery, and 2) even if these mechanisms are not completely effective, the danger of multiple liability as to a few defendants does not justify barring all indirect purchasers from recovery.<sup>88</sup>

The questionable status of *parens patriae* after *Illinois Brick* is partially dependent upon whether the Act creates new substantive rights or is merely a new procedural device. Theoretically, if the Act created new substantive rights apart from the Clayton Act, cases arising under it could be distinguished so as not to fall within the *Illinois Brick* rule, which arose in a Clayton Act suit. The *Illinois Brick* majority noted, however, that the Act "simply created a new procedural device—*parens patriae* actions by states on behalf of their citizens—to enforce existing rights of recovery under § 4."<sup>89</sup> While the version originally passed by the House authorized *parens patriae* suits "under § 4,"<sup>90</sup> the Senate version made no reference to section 4. This omission could be construed as indicating the creation of a new cause of action.<sup>91</sup> Representative Flowers, a member of the House Judiciary Committee who was instrumental in shaping the Act, noted during final debate that the Act does not create a new cause of action;<sup>92</sup> the enacted version, however, retains the Senate language. Further, Senator Hart<sup>93</sup> and Representative Rodino,<sup>94</sup> two of the Act's original sponsors, stated that a new cause of action was being created.

The impact of *Illinois Brick* on *parens patriae* is not yet known and is largely dependent on future judicial interpretation.<sup>95</sup> Because the Act

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Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe, supra*, 392 U.S. at 494. So, too, between ultimate purchasers and defendants.

S. REP. NO. 94-803, p.44 (1976) (quoting 487 F.2d at 201) (citation omitted).

<sup>88</sup> 431 U.S. at 761-62 (Brennan, J., dissenting).

<sup>89</sup> *Id.* at 734 n.14.

<sup>90</sup> See H.R. 8532, 94th Cong., 2d Sess. (1976).

<sup>91</sup> H.R. 8532 was passed by the Senate June 10, 1976. Because it made no reference to § 4 and its standing requirements, it is arguable that *parens patriae* is a new substantive right.

<sup>92</sup> 122 CONG. REC. H10,300 (daily ed. Sept. 16, 1976).

<sup>93</sup> *Id.* at S15,324 (daily ed. Sept. 7, 1976); *id.* at S15,417 (daily ed. Sept. 8, 1976).

<sup>94</sup> *Id.* at H10,294 (daily ed. Sept. 16, 1976).

<sup>95</sup> Following the *Illinois Brick* decision, Congress introduced bills designed to permit treble damages under § 4 to indirect purchasers. See S. 300, 96th Cong., 1st Sess. (1979); H.R. 11942, 95th Cong., 2d Sess. (1978); S. 1874, 95th Cong., 1st Sess. (1977); H.R. 8359, 95th Cong., 1st Sess. (1977). Moreover, the District of Columbia has enacted a local bill which contains an *Illinois Brick* repealer. In addition to prohibiting contracts, combinations and conspiracies to restrain trade, as well as monopolies and attempts to monopolize trade or commerce, the bill allows the assertion of a pass-on defense and permits courts to apportion damages so as to avoid duplicative recoveries. *Uniform Schedule of Rate Ceilings*, [July-Dec.]



was passed so recently, few *parens patriae* cases have arisen under which an *Illinois Brick* issue has been presented. One such case is *Vermont v. Densmore Brick Co.*,<sup>96</sup> in which the state, as *parens patriae*, brought a damage action for price fixing on behalf of a class of all Vermont residents who purchased a certain brand of woodburning stove from defendant's retailers. The state alleged, *inter alia*, that defendant artificially fixed the prices at which the stoves were advertised and offered at retail sale and coerced its Vermont retailers to advertise and sell the stoves at its established or suggested resale prices. Defendant moved for partial summary judgment on the grounds that *Illinois Brick* precluded recovery by indirect purchasers. The court construed the *Illinois Brick* restriction as applicable "where a plaintiff suing to terminate a price-fixing conspiracy is removed from the conspiracy by one or more stages of distribution."<sup>97</sup> Because the state, as plaintiff, alleged that the retailers were co-conspirators in this price fixing scheme, the court declined to grant defendant's motion.<sup>98</sup> This court would seem to give the *Illinois Brick* holding full effect in *parens patriae* actions.

The California court took a somewhat different approach in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*.<sup>99</sup> In this multidistrict litigation, each state suing as *parens patriae* sought recovery from many producers and distributors of crude oil and refined petroleum products on behalf of indirect purchasers. Their theory of recovery was principally based upon increases in the retail prices of gasoline resulting from defendants' alleged antitrust violations. The defendants challenged these suits on grounds that such suits by state attorneys general under the federal antitrust laws were unconstitutional. Specifically, defendants argued that the alleged acts of wrongdoing were so remote from the actual retail prices that any attempt to establish a causal relationship would not only be futile, but would also deny them due process. In response, the court stated that

[i]n order to recover, the plaintiffs will have to prove the antitrust violations upon which they rely and *they will have to trace the injurious effects of such violations upon the individual con-*

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ANTITRUST & TRADE REG. REP. (BNA) No. 992, at D-10 (Dec. 4, 1980).

At the state level, five states—California, Hawaii, Illinois, New Mexico and Wisconsin—have amended their antitrust laws to permit indirect purchasers to sue. This liability to antitrust violators is in addition to their liability to direct purchasers for treble damages under the Clayton Act. See CAL. BUS. & PROF. CODE § 16750(a) (West Supp. 1980); HAWAII REV. STAT. § 480-14(c) (Supp. 1980); ILL. ANN. STAT. ch. 38, § 60-7(2) (Smith-Hurd Supp. 1981); N.M. STAT. ANN. § 57-1-3(A) (Supp. 1980); WIS. STAT. ANN. § 133.18(1) (West Supp. 1980).

<sup>96</sup> 1980-2 Trade Cas. (CCH) ¶ 63,347, at 75,775 (D. Vt. 1980).

<sup>97</sup> *Id.* at 75,778.

<sup>98</sup> *Id.* This refusal to dismiss was based on the co-conspirator exception to *Illinois Brick*. See notes 101-19 *infra* and accompanying text.

<sup>99</sup> 1978-1 Trade Cas. (CCH) ¶ 61,839, at 73,495 (C.D. Cal. 1978).

sumers or other members of a plaintiff class. And, of course, this task is believed to be compounded (and perhaps seriously impaired) by the decision of the Supreme Court in *Illinois Brick Co. v. Illinois* . . . , which precludes recovery on behalf on any consumer that bought from a vendor that otherwise would have had his own right of action for the antitrust violation concerned. Such proofs will have to be made in full accord with the principles of due process.<sup>100</sup>

The court did not ignore the possible impact of *Illinois Brick*, but by declining to rule out the offensive use of pass-on, the court at least discounted the effects of *Illinois Brick's* indirect purchaser rule on *parens patriae* and focused instead on the *evidentiary difficulties* of tracing injurious effects from the producer-distributor level to the retailer level, regardless of plaintiffs' status as direct or indirect purchasers. The defendants then moved to dismiss the indirect purchaser claims in reliance on *Illinois Brick*.<sup>101</sup> At the outset, the court noted three exceptions to the indirect purchaser bar which it derived from the *Illinois Brick* opinion. First, where plaintiffs pay the illegal overcharge directly to defendant's co-conspirators, plaintiffs can still recover on the ground that the "conspirators are mutual agents and each is liable for the acts of the other. *Illinois Brick* does not alter the rule since no pass-on of overcharges is involved."<sup>102</sup> Second, consistent with *Illinois Brick*, plaintiffs can recover for indirect purchases under "pre-existing, fixed-quantity, cost-plus contracts with the direct purchaser."<sup>103</sup> Third, plaintiffs will be permitted to recover for overcharges passed on by entities which are owned or controlled by defendants.<sup>104</sup> The court was unwilling to expand these exceptions, and accordingly held that indirect purchasers would be permitted to prosecute their claims only if they fit

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<sup>100</sup> *Id.* at 73,497 (citation omitted) (emphasis added). As a preliminary suggestion, the court proposed that plaintiffs chart the course by which they believe they can establish the proof that will connect violation to recoverable damage.

<sup>101</sup> *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 497 F. Supp. 218 (C.D. Cal. 1980).

<sup>102</sup> *Id.* at 226. *See also* Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980).

<sup>103</sup> 497 F. Supp. at 226. Such a fixed cost contract would obviate the intricacies of tracing the effect and amount of an overcharge on the purchaser's prices, costs, sales and profits. *See also* Jewish Hosp. Assoc. of Louisville, Ky. v. Stewart Mechanical Enter., 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981).

<sup>104</sup> 497 F. Supp. at 226. The source of this theory is the now notorious footnote 16 of the *Illinois Brick* decision, in which the Court noted that "[a]nother situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1976). *See also* Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980).

within one of the *Illinois Brick* exceptions.<sup>105</sup> Despite the California court's early willingness to give plaintiffs an opportunity to trace their injuries through the chain of distribution,<sup>106</sup> it ultimately chose to adhere to the *Illinois Brick* holding and its specified exceptions, giving no indication that the *parens patriae* character of the action entitled plaintiffs to special considerations under *Illinois Brick*.

In a more recent *parens patriae* case, *In re Mid-Atlantic Toyota Antitrust Litigation*,<sup>107</sup> state attorneys general brought a *parens patriae* action on behalf of automobile purchasers, who also sued as individuals, against the Toyota automobile distributor and its dealers. The *parens* plaintiffs alleged a voluntary price fixing conspiracy between the Toyota distributor and its various dealers, in which the defendants fixed the retail price of Toyotas in order to recover unlawful overcharges from the automobile purchasers. The defendant distributor moved to dismiss on the grounds that plaintiffs, as its indirect purchasers, were barred from recovering under *Illinois Brick*. The court held that plaintiffs would be allowed to sue the distributor as well as dealers under the co-conspirator exception to *Illinois Brick*.<sup>108</sup> With respect to the risk of duplicative liability, the court held that the defendant dealers would be precluded from suing their distributor under the doctrine of *in pari delicto*.<sup>109</sup>

Like the court in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*,<sup>110</sup> the *Mid-Atlantic* court chose not to distinguish the Clayton Act private plaintiffs in *Illinois Brick* from the *parens patriae* plaintiffs in *Mid-Atlantic*. Moreover, although the *Mid-Atlantic* court declined to dismiss the indirect purchasers' *parens patriae* claims as such, the claims were not dismissed on the basis of the already recognized co-conspirator exception.

In addition to the co-conspirator exception on which it relied, the court also recognized the "cost plus" contract and "ownership or control" exceptions.<sup>111</sup> However, the *Mid-Atlantic* court went a step further

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<sup>105</sup> 497 F. Supp. at 227.

<sup>106</sup> See note 100 *supra* and accompanying text.

<sup>107</sup> 516 F. Supp. 1287 (D. Md. 1981).

<sup>108</sup> *Id.* at 1295. The court observed that some courts have justified the co-conspirator exception on the ground that the ultimate consumer, such as plaintiffs, is a direct rather than indirect purchaser. It noted that still other courts have concluded that in a situation such as that presented in *Mid-Atlantic Toyota*, there is no passed-through overcharge. *Id.*

<sup>109</sup> *Id.* at 1295-96. The *in pari delicto* doctrine can be summarized as follows: "[A] party, who voluntarily formulates and equally participates in a non-coercive agreement for reciprocal dealing . . . cannot maintain an action under § 1 of the Sherman Act against its trading partner." *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 16 (4th Cir. 1971).

<sup>110</sup> 497 F. Supp. 218 (C.D. Cal. 1980).

<sup>111</sup> 516 F. Supp. at 1292.

in expanding the parameters of the indirect purchaser exceptions. It first noted that tracing problems was the primary policy consideration underlying the *Illinois Brick* rule. It then observed that the *Illinois Brick* Court characterized the "ownership or control" exception as an example of a situation in which "market forces have been superseded . . ." <sup>112</sup> The court in *Mid-Atlantic* conceded that other situations in which market forces are superseded could similarly fall outside the *Illinois Brick* rationale. Where market forces have been superseded, the court reasoned, tracing problems disappear and where tracing problems are nonexistent, so likewise is the rationale underlying *Illinois Brick*. The court concluded that "when the reasons for the rule do not apply, application of the rule would be plainly inappropriate." <sup>113</sup> The court believed that since the Supreme Court could not possibly have listed every circumstance where an exception might be warranted, it listed some exceptions only to guide lower courts in determining the *types* of situations in which application of the rule would not be required. <sup>114</sup> This court refused to apply the *Illinois Brick* rule woodenly where plaintiffs are indirect purchasers; instead, it not only acknowledged the three well-recognized narrow exceptions, but also considered as an exceptional situation one in which the market forces have been superseded. Unfortunately, the court provided no guidance as to what factors must be shown before such a situation will be found to exist.

It is conceivable that the court would consider as such a factor a circumstance where, as in *Mid-Atlantic*, defendants would not face a risk of duplicative recoveries. The court noted that inasmuch as the doctrine of *in pari delicto* barred defendant dealers from recovery against defendant distributor, the risk of duplicative recovery was negligible. The court considered this to be a significant "policy factor [which] militates against dismissal of the *parens* suits as well." <sup>115</sup> Although the court does not specifically recognize this circumstance as evidence that the market forces have been superseded, which would require suspension of *Illinois Brick*, it does indicate that negligible risk of multiple recovery is an important policy consideration which might be used to justify an exception to *Illinois Brick*. In any event, following *Mid-Atlantic*, a state attorney general would be well-advised to allege suspension of market forces and, if possible, minimal risk of double recovery.

The impact that *Illinois Brick* will have on future *parens patriae* actions is still unknown. Some tentative conclusions can be drawn, however,

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<sup>112</sup> 431 U.S. at 736 n.16. It should be noted that the Court in footnote 16 suggested the "suspension of market forces" exceptions in the context of defensive pass-on. *Id.* Its policy of symmetry would presumably make these exceptions, if they are found to exist, equally applicable to the offensive use of pass-on.

<sup>113</sup> 516 F. Supp. at 1293.

<sup>114</sup> *Id.* at 1293 n.14.

<sup>115</sup> *Id.* at 1296.

from those few *parens patriae* cases<sup>116</sup> in which the courts have faced an indirect purchaser situation: 1) *Parens patriae* claims will not be afforded any different treatment under *Illinois Brick* than are private antitrust actions; 2) courts will recognize the narrow "cost plus" contracts, "ownership and control" and "co-conspirator" exceptions to the rule; 3) at least one court<sup>117</sup> will recognize additional exceptions in situations where market forces have been suspended because tracing problems are no longer present; and 4) the fact that the risk of double recovery does not exist militates against dismissal of *parens patriae* indirect purchaser actions.

If *Illinois Brick* is made fully applicable to *parens patriae* suits, the Act will be eviscerated.<sup>118</sup> It does not seem proper that courts should afford *Illinois Brick* so broad an interpretation within the context of *parens patriae* actions.

### B. *Bypassing Obstacles to Class Actions*

The maintenance of consumer class actions under the antitrust laws has been particularly troublesome as a result of three requirements of Federal Rule of Civil Procedure 23(b)(3): 1) the requirement that questions of law or fact common to all class members predominate over individual questions; 2) the requirement that a class action be superior to other available methods of adjudication, with special emphasis on "manageability"; and 3) the requirement that members of the class receive individual notice to the extent practicable.<sup>119</sup> The stringency of these requirements and the particular difficulties which they have presented to consumer class actions caused the 94th Congress to conclude that the class action is not a viable technique for consumer damage recovery under the antitrust laws.<sup>120</sup>

<sup>116</sup> See also *In re Mid-Atlantic Toyota, Inc.*, 516 F. Supp. 1287 (D. Md. 1981); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 497 F. Supp. 218 (C.D. Cal. 1980).

<sup>117</sup> See *In re Mid-Atlantic Toyota, Inc.*, 516 F. Supp. 1287 (D. Md. 1981).

<sup>118</sup> As one state attorney general has said:

[T]he intended utilization of the protection afforded consumers under Section 4C will not fully be realized until the decision in *Illinois Brick* is overruled by future judicial or congressional action, or a judicial determination is made that *parens patriae* actions are not subject to the indirect purchaser holding established in *Illinois Brick*.

Browning, Jr., *Parens Patriae Actions: An Assessment*, 49 ANTITRUST L.J. 1015, 1019 (1980).

<sup>119</sup> Other aspects of maintaining consumer class actions under antitrust laws which have not proven to be especially problematic are the requirements that individual actions would result in varying adjudications, that the class can be so numerous as to make joinder impracticable, that representative parties can fairly and adequately represent the interest of the class, and that the claims or defenses of the representative parties can be typical of the class. FED. R. CIV. P. 23.

<sup>120</sup> See SENATE REPORT, *supra* note 11, at 39 ("consumers have found little

### 1. Requirement of Common Questions of Law or Fact

Section 4 of the Clayton Act requires proof that damages, in fact, were incurred ("fact of damage") before the plaintiff must prove the precise amount of damages.<sup>121</sup> After meeting this threshold requirement, plaintiff must bear the further burden of proving the amount of damages sustained.<sup>122</sup> As a result of these individualized proof requirements, class actions have often failed to meet the "predominance of common question" requirement of Rule 23(b)(3)<sup>123</sup> where thousands or millions of plaintiff class members must come forward with individualized proof of injury.<sup>124</sup> Although some courts have ruled that proof of individual damages might, if necessary, be treated in later proceedings,<sup>125</sup> or that "fact of damage" might be proven on the basis of generalized injury to the class,<sup>126</sup> a widely accepted requirement of individual proof of damage could well prove fatal to actions where the class consisted, for instance, of all the citizens of a state.

The Act theoretically circumvents the burdensome and perhaps impossible proof of individual claims by providing that damages may be proved and assessed in the aggregate when a price fixing violation has been found.<sup>127</sup> This method, which is commonly referred to as "fluid recovery," makes *parens patriae* suits more efficient than class actions by reducing the parties' time and monetary expenditures and by simplifying the court's task.<sup>128</sup> Due to the discretionary wording of the

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relief under the class action provisions of the Federal Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 . . ."); HOUSE REPORT, *supra* note 8, at 8 ("The thrust of the bill is to . . . [avoid] the problems of manageability which some courts have found under Rule 23.").

<sup>121</sup> See, e.g., *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973); *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970) *cert. denied*, 402 U.S. 983, *reh'g denied*, 404 U.S. 877 (1971).

<sup>122</sup> See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

<sup>123</sup> FED. R. CIV. P. 23(b)(3).

<sup>124</sup> See, e.g., *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974); *Lohse v. Dairy Comm'n of Nevada*, 25 Fed. R. Serv. 2d 1018 (C.D. Nev. 1977); *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975), *appeal dismissed*, 557 F.2d 1218 (5th Cir. 1977).

<sup>125</sup> See *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532 (N.D. Ga. 1972).

<sup>126</sup> See *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re Sugar Indus. Antitrust Litig.*, 1977-1 Trade Cas. (CCH) ¶ 61,373, at 71,336-37 (N.D. Cal. 1977).

<sup>127</sup> 15 U.S.C. § 15d (1976). Absent a finding of price fixing, the basic rules for measurement of damages will apply.

<sup>128</sup> See H.R. Rep. No. 94-499, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4066.

Act,<sup>129</sup> however, it is possible for a court to reject the fluid recovery technique and require individualized proof of "fact of damage" and a showing of the precise amount of damages sustained by each individual, as required in class actions brought under section 4 of the Clayton Act.<sup>130</sup>

*Eisen v. Carlisle & Jacquelin*<sup>131</sup> was a private treble damage action in which the Second Circuit rejected fluid recovery procedures as an unconstitutional violation of due process of law. *In re Hotel Telephone Charges*<sup>132</sup> was also a private treble damage action in which the Ninth Circuit elected to follow *Eisen* on the ground that treating the unsubstantiated claims of class members collectively alters substantive rights under the antitrust laws. The court felt that such enlargement of substantive statutory rights is prohibited by the enabling act that gives the Supreme Court authority to promulgate the Federal Rules of Civil Procedure and constitutes a denial of due process.<sup>133</sup> The Fourth Circuit, in *Windham v. American Brands, Inc.*,<sup>134</sup> has also elected to follow *Eisen's* rejection of fluid recovery.

If the application of fluid recovery to *parens patriae* actions is characterized as merely a procedural alternative to individual damage assessment, it is likely that most courts will welcome the opportunity to employ that method of damage calculation out of considerations of judicial convenience. On the other hand, if the majority of jurisdictions elect to view the technique as an issue of constitutional dimension, as *Eisen* and its progeny perceive it, the legislature's purpose in providing for aggregation of damages will be severely limited.<sup>135</sup>

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<sup>129</sup> "[D]amages may be proved and assessed in the aggregate . . ." 15 U.S.C. § 15d (1976) (emphasis added).

<sup>130</sup> See 16N J. VON KALINOWSKI, BUSINESS ORGANIZATIONS-ANTITRUST LAWS AND TRADE REGULATIONS § 115.05(1) (1980), for a general discussion of damages in civil antitrust suits.

<sup>131</sup> 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). The court held that "[e]ven if amended Rule 23 could be read so as to permit any such fantastic procedure [as fluid recovery], the courts would have to reject it as an unconstitutional violation of the requirement of due process of law." 479 F.2d at 1018.

<sup>132</sup> 500 F.2d 86 (9th Cir. 1974).

<sup>133</sup> *Id.* at 89-90.

<sup>134</sup> 565 F.2d 59, 72 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (action for certification of class of tobacco growers who seek to sue tobacco companies for alleged Sherman Act violations). See also *Van Gemert v. Boeing Co.*, 573 F.2d 733, 738 (2d Cir. 1978), *aff'd on other grounds*, 440 U.S. 472 (1980) (class action against corporation for failure to give notice of its intention to call certain convertible debentures in which court rejected fluid class recovery); *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100 (E.D. Va. 1980) (holding fluid recovery unacceptable, and requiring individual proof of damage in action for certification of class seeking damages for discharge of toxic effluents into interstate waterways); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 64 F.R.D. 43, 55 (D. Del. 1974) (fluid recovery award in treble damage action erodes due process).

<sup>135</sup> From the outset, Congress perceived the ascertainment and distribution of

The fluid recovery technique was proposed in *In re Coordinated Pre-trial Proceedings in Petroleum Products Antitrust Litigation*,<sup>136</sup> an action brought under the Act. This case constituted several combined actions in which plaintiff states sued many producers and distributors of crude oil and refined petroleum. Plaintiff states sought monetary damages for themselves, as consumers, and as *parens patriae* on behalf of all consumers of petroleum products who are natural persons residing in such states. Defendants raised constitutional objections to the proposed use of fluid recovery. They contended that assessing damages by statistical or sampling methods or the like, as provided by the Act, deprived defendants of due process because defendants' property would be taken for an indefinite class of people whom defendants would have no opportunity to identify or cross-examine. Defendants also contended that because there was little likelihood that the damages they would be required to pay would be used to compensate for actual injuries suffered, the extraction of damages from them would constitute a taking of defendants' property for public use without just compensation.

Although the court rejected defendants' contentions, it recognized that damage aggregation "will present some very substantial due process problems."<sup>137</sup> The court declined to rule on this issue until the context in which plaintiffs proposed to prove their case had been presented to and was fully understood by the court.

Subsequent to this opinion, the California court, in *In re Coordinated Pre-trial Proceedings in Petroleum Products Antitrust Litigation*,<sup>138</sup> relied on *Illinois Brick* to dismiss all the *parens patriae* claims, except those which related to direct purchases from defendants, their co-conspirators, sellers with whom they had cost plus contracts, or entities which were owned or controlled by defendants. Although in this opinion the court did not discuss the fluid recovery technique, its position as to that issue was presumably not altered by its dismissal of *parens* plaintiffs' indirect purchaser claims.

This court was cautious about rejecting the aggregation of damages method in a suit brought under the Act, where the Act specifically authorized fluid recovery techniques. The court's "wait and see" approach indicates that it does not believe that the employment of fluid recovery necessarily constitutes an automatic constitutional infringement. Instead, the court is willing to let the remaining plaintiffs proceed with

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damages to be a major obstacle to consumer antitrust suits. Both chambers responded with versions permitting the use of statistical or sampling techniques in all *parens patriae* actions to assess damages in the aggregate. See SENATE REPORT, *supra* note 11, at 156; HOUSE REPORT, *supra* note 8, at 2. See also 122 CONG. REC. S15,321 (daily ed. Sept. 7, 1976) (Senator Abourezk's comments).

<sup>136</sup> 1978-1 Trade Cas. (CCH) ¶ 61,839 (C.D. Cal. 1978).

<sup>137</sup> *Id.* at 73,498.

<sup>138</sup> 497 F. Supp. 218 (C.D. Cal. 1980).



damage aggregation under a presumption of constitutionality until such time as the court has sufficient information on which to determine whether or not defendants are being deprived of their constitutional rights. This decision in *Petroleum Products* bodes well for fluid recovery in *parens patriae* actions by setting up a rebuttable presumption that fluid recovery is constitutional and complies with the Act's damage provisions.

## 2. Requirement of Superiority/Manageability

Consumer class actions brought under the antitrust laws have frequently involved thousands and even millions of prospective class members. Pertinent to whether such class actions may be maintained under Rule 23(b)(3) are the courts' assessment of difficulties likely to be encountered in managing the actions. A significant source of management difficulty is the size of the class. Size can present severe manageability problems to antitrust class actions in two respects: 1) the feasibility of effecting notice, as required by Rule 23(c)(2),<sup>139</sup> and 2) adjudication of damages and apportionment of relief.<sup>140</sup>

Illustrative of such management problems is *City of Philadelphia v. American Oil Co.*,<sup>141</sup> a class action brought on behalf of all gasoline purchasers in New Jersey, Pennsylvania and Delaware. The district court observed:

Despite the commendable ends sought to be achieved by these and other cases to reach millions of ultimate consumers of a variety of products by the technique of class representation, this Court believes that the line must be drawn somewhere in those cases involving untold numbers of members of the general public. The manageability requirement of Rule 23 is a significant factor that must be given due weight in reaching a determina-

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<sup>139</sup> See, e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (formidable class of 3.75 million people could not be given adequate notice); *Schaffner v. Chemical Bank*, 339 F. Supp. 329 (S.D.N.Y. 1972) (class action treatment denied in action against trustee, where there were more than 5,000 trusts involved and thousands of identifiable and unidentifiable beneficiaries because, *inter alia*, adequate notice could not be given); *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970) (denying class action on behalf of all citizens of United States who purchased eggs); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973) (impossibility of notice to class of thirty to forty million purchasers of defendant's automobiles over a period of years precluded maintenance of class action for treble damages); see notes 149-59 *supra* and accompanying text.

<sup>140</sup> See, e.g., *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 156 (1974) (this aspect together with difficulties in giving notice resulted in the case's dismissal as unmanageable); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 64 F.R.D. 43 (D. Del. 1974); see notes 122-37 *supra* and accompanying text.

<sup>141</sup> 53 F.R.D. 45 (D.N.J. 1971).

tion on the propriety of class representation in any given case. It is recognized, of course, that each case must turn on its own facts. Numbers alone would not necessarily be determinative as to whether a particular class should be certified. Methods of marketing, price structures, availability of records, economic data, and other considerations enter into the picture . . . . By any reasonable standard, it is difficult for this Court to believe that Rule 23, as presently written, was intended to reach the overly broad non-governmental class sought to be represented by Philadelphia-New Jersey in the pending actions. This is not to say that guilty conspirators should not be compelled to disgorge their ill-gotten gains. The solution of the problem, however, lies not in imposing an increased burden on the federal courts over and above that which may or should normally be expected of judges in the discharge of their judicial duties, but rather in having the antitrust laws or rules amended to alleviate the problem of manageability inherent in class actions wherein millions of members of the consuming public are involved.<sup>142</sup>

These typical difficulties of class manageability should be immaterial in a *parens patriae* action. The Act frees state attorneys general from the Rule 23 requirement of class certification and maintenance.<sup>143</sup> Damages may be assessed in the aggregate,<sup>144</sup> eliminating the need for individualized proof from millions of consumers. Moreover, notice may be effected by publication,<sup>145</sup> eliminating the need for giving expensive and time-consuming individual notice. However, as indicated elsewhere in this Note, several courts have rejected aggregation of damages,<sup>146</sup> and the Act itself provides that a court may direct such notice other than by publication to the extent it deems necessary to meet due process requirements.<sup>147</sup>

It is quite likely that a typical *parens patriae* action will be brought on behalf of millions of consumers.<sup>148</sup> In an action of that size, an order

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<sup>142</sup> *Id.* at 73-74.

<sup>143</sup> FED. R. CIV. P. 23(a), (b).

<sup>144</sup> 15 U.S.C. § 15d (1976).

<sup>145</sup> *Id.* § 15c(b)(1).

<sup>146</sup> See notes 122-37 *supra* and accompanying text.

<sup>147</sup> 15 U.S.C. § 15c(b)(1) (1976).

<sup>148</sup> See, e.g., *Washington v. Standard Oil Co. of Cal.*, No. C-77-596 (W.D. Wash., filed Aug. 15, 1977), reported in *Washington Charges 10 Major Oil Cos. with Antitrust Violations*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA), No. 834, at D-5 (Oct. 13, 1977). The State of Washington on behalf of its natural citizens brought a *parens patriae* action charging ten major oil companies with monopolization and restraint of trade. The complaint alleges, *inter alia*, that the defendants own and control seventy-one percent of California crude oil products, own and operate substantially all of the refining capacity in six western states, and share ninety percent of the market for refined oil products.

directing that individual notice be sent to each consumer, coupled with the requirement of individualized proof of damage, will prove too unwieldy for the offices of most state attorneys general and will likely sound the death knell to a suit of such magnitude.

### 3. Notice Requirements

Another barrier to the successful maintenance of consumer class actions has been the notice requirement of Rule 23(c)(2).<sup>149</sup> It permits the court to require notice to class members in the best method practicable, including particularized notice to all members who can be identified through "reasonable effort."<sup>150</sup> It is patent that particularized notice to members of a large class is costly and burdensome.

The notice problem was highlighted in *Eisen v. Carlisle & Jacquelin*.<sup>151</sup> A treble damage antitrust action was brought by an odd-lot investor against the New York Stock Exchange and two brokerage firms on behalf of some six million odd-lot investors, of which approximately two million could be readily identified. The court held in no uncertain terms that because Rule 23 has "decided constitutional overtones," individual notice must be given to each member of the class who can be identified and the class representative must bear the cost of such notice.<sup>152</sup>

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In *Utah v. Utah Gas Serv. Co.*, No. C79-0652 (D. Utah, filed Nov. 8, 1979), reported in *Companies Charged with Fixing Natural Gas Prices in Utah*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 940, at D-4 (Nov. 22, 1979), the State of Utah, on behalf of its citizen consumers, charged six major firms with conspiracy to fix the price and terms of sale of natural gas.

*In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 1978-1 Trade Cas. ¶ 61,839 (C.D. Cal. 1978), is a multi-district litigation brought by general states on behalf of all consumers of petroleum products that are natural persons residing in such states.

<sup>149</sup> See FED. R. CIV. P. 23(c)(2).

<sup>150</sup> *Id.* The rule further provides:

The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

*Id.* The notice requirements of Rule 23(c)(2) must be met if a class action is to be maintainable under Rule 23(b)(3).

<sup>151</sup> 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

<sup>152</sup> 479 F.2d at 1015. The Supreme Court upheld the Second Circuit on its requirement that individual notice be sent to identifiable class members. The Court reasoned that notice was important in that each class member must be given the opportunity to request exclusion from the action, if he so desires, and thereby preserve his individual claim.

Although the lower court in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2d Cir. 1968), had concluded that the notice requirement was a matter of due process, the Supreme Court did not specifically address that issue. The Court

It is not difficult to imagine the heavy expenditures of time and money which would be borne by a state attorney general who purported to represent a class comprised of all consumers in the state. The Act clearly intended to alleviate this possibility by specifically sanctioning notice by publication.<sup>153</sup> Only if the court should conclude that such notice would deny due process of law need it direct further notice.<sup>154</sup>

The *Eisen* decision and its progeny<sup>155</sup> call into question the Act's viability as it pertains to notice. If notice is perceived to be merely a procedural technicality of Rule 23(c)(2),<sup>156</sup> then notice by publication is not a constitutional requirement and individual notice would be directed *only* where a court found that publication would deny due process. On the other hand, if particularized notice is deemed to be a requirement of due process,<sup>157</sup> then courts will be compelled to follow the *Eisen* approach of requiring individual notice to "all members who can be identified

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observed:

Petitioner further contends that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23. We think this view has little to commend it. To begin with, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. Moreover, petitioner's argument proves too much for it quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case. This cannot be so, for *quite apart from what due process may require, the command of Rule 23 is clearly to the contrary*. We therefore conclude that Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.

417 U.S. 156, 176-77 (1974) (emphasis added). *But see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (mandatory notice pursuant to Rule 23(c)(2) designed to fulfill due process requirements).

<sup>153</sup> 15 U.S.C. § 15c(b)(1) (1976).

<sup>154</sup> 15 U.S.C. § 15c(b)(1) (Supp. IV 1980).

<sup>155</sup> *See, e.g.,* Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 412 (2d Cir. 1975); Schrader v. Selective Service System Local Board No. 76, 470 F.2d 73, 75 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); J.W.T., Inc. v. Joseph E. Seagram & Sons, Inc., 63 F.R.D. 139, 142 n.7 (N.D. Ill. 1974); Malby v. General Electric Credit Corp., 61 F.R.D. 59, 61 (N.D. Ohio 1973).

<sup>156</sup> There is considerable authority for the position that prejudgment notice to absent class members is not required in actions certified under sections of the rule other than 23(b)(3). *See, e.g.,* Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.); *cert. denied*, 419 U.S. 885 (1974) (Rules 23(b)(1) and 23(b)(2)); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (Rule 23(b)(2)); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (Rule 23(b)(2) (by implication)), *vacated and remanded on other grounds*, 488 F.2d 714 (5th Cir. 1974). *See also* 3B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 23.55 (1978) (Rules 23(b)(1) and 23(b)(2)); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1786 (1972) (Rules 23(b)(1) and 23(b)(2)).

<sup>157</sup> *See* FED. R. CIV. P. 23, ADVISORY COMM. NOTE, which indicates that the Advisory Committee thought that due process required prejudgment notice in Rule 23(b)(3) cases.

through reasonable effort,"<sup>158</sup> regardless of the absence of due process overtones.

As yet, courts have not been required to address prejudgment notice under the Act.<sup>159</sup> It is clear, however, that if it is determined that due process mandates individualized notice wherever practicable, state attorneys general will be severely handicapped with respect to staff hours as well as financial outlays, which may possibly exceed their allowable resources. Furthermore, the total recovery in a successful *parens patriae* suit may be far outweighed by the cost of bringing the action.<sup>160</sup>

### C. Miscellaneous Enforcement Problems

#### 1. Funding

Pursuant to the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the 94th Congress authorized a thirty million dollar seed money program, which was distributed to forty-six states.<sup>161</sup> The funding was applied to state antitrust enforcement programs and resulted in the doubling of state enforcement efforts.<sup>162</sup> However, the funding dried up for some states in 1981;<sup>163</sup> as early as mid-1980 funding cutbacks had already jeopardized the existence of antitrust enforcement programs in seventeen states.<sup>164</sup>

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<sup>158</sup> See FED. R. CIV. P. 23(c)(2). The requirement that "reasonable effort" be used to identify class members raises additional threshold obstacles for state attorneys general. "Reasonable effort" may encompass individual notice, publication in newspapers or a combination of both. See, e.g., *Cohen v. District of Columbia Nat'l Bank*, 59 F.R.D. 84 (D.C. 1972).

<sup>159</sup> The case of *Colorado v. Valley Petroleum Co.*, Civ. No. 77-W-352 (D. Colo., filed Apr. 12, 1977), was a *parens patriae* action against seven oil companies for price fixing. When the case was settled, Colorado's attorney general ordered that consumers who might be eligible to receive a portion of the \$140,404 settlement be notified by direct mailings, statewide radio, television, newspaper messages and courthouse and post office postings. See *Colorado Files Proposed Notice to Consumers Affected by Settlement of Parens Patriae Action*, [July-Dec.] ANTI-TRUST & TRADE REG. REP. (BNA) No. 835, at D-2 (Oct. 2, 1977).

<sup>160</sup> As the court observed in *Eisen v. Carlisle & Jacquelin*, 479 F.2d at 1010, the first round of notices becomes relatively unimportant if the concept of fluid recovery is employed, thereby substituting the "class as a whole" for individual claimants. For an analysis of the problems in applying fluid recovery in *parens patriae* actions see notes 122-39 *supra* and accompanying text.

<sup>161</sup> *State Enforcement "Oaks" Grow From "Acorns" Planted by Congress*, [Jan.-June] ANTI-TRUST & TRADE REG. REP. (BNA) No. 909, at D-1 (Apr. 12, 1979) [hereinafter cited as *State Enforcement*]. Wyoming, Oklahoma, Indiana and Georgia refused the funds. The grants were made largely on a population formula and ranged in size from \$130,000 to \$412,500.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at D-3.

<sup>164</sup> Endangered programs were those in Alabama, Arkansas, Colorado,

The Act provides that the court shall award the prevailing state treble damages plus the cost of the suit, including "a reasonable attorney's fee."<sup>165</sup> Payment of attorneys' fees alone could provide sufficient funding to maintain the state attorney's *parens patriae* program. However, many state attorneys have indicated their reluctance to file *parens patriae* actions because of the perceived impact of *Illinois Brick*.<sup>166</sup>

At least a dozen states have established "revolving funds" in an effort to ensure future funding and to achieve self-sufficiency.<sup>167</sup> When these states have recovered funds through successful *parens patriae* damage suits, a portion of the award is invested in the revolving fund, which is then the primary source of the antitrust unit's future budget.<sup>168</sup> However, federal cutbacks and an atmosphere of growing public disillusionment with antitrust enforcement<sup>169</sup> may cause a decline in state enforcement efforts. Moreover, state legislatures seem reluctant to provide future funding for such programs when federal monies run out.<sup>170</sup>

If additional funding is not forthcoming, the future of *parens patriae* actions grows dimmer. It is unlikely that a state attorney general would consider bringing a *parens patriae* action on behalf of his injured citizens in view of high enforcement costs in general, coupled with the possible additional obstacle of meeting judicial opposition based on *Illinois Brick*,<sup>171</sup> judicial refusal to permit fluid recovery techniques<sup>172</sup> and particularized notice requirements.<sup>173</sup>

Although many state antitrust programs are years away from reaching self-sufficiency, the general outlook indicates that many more programs are now self-sustaining and generally favorable for the consumer.<sup>174</sup> If the state antitrust enforcement officers can demonstrate to the legislatures the need for continued antitrust enforcement, the funding may be provided.<sup>175</sup> If such a showing cannot be made, however, needed funding will be withheld, and *parens patriae* may well be strip-

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Delaware, Hawaii, Iowa, Kansas, Maine, Montana, Nevada, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Carolina, Vermont and West Virginia. See *Hope Dims for Further Federal Funding of State Antitrust Enforcement Programs*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 967, at D-6 (June 5, 1980) [hereinafter cited as *Federal Funding*].

<sup>165</sup> 15 U.S.C. § 15c(a)(2) (Supp. IV 1980).

<sup>166</sup> *State Enforcement*, *supra* note 160, at D-3.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Federal Funding*, *supra* note 164, at D-7.

<sup>170</sup> *Id.* at D-6.

<sup>171</sup> See notes 74-119 *supra* and accompanying text.

<sup>172</sup> See notes 122-38 *supra* and accompanying text.

<sup>173</sup> See notes 149-59 *supra* and accompanying text.

<sup>174</sup> *State Enforcers Examine Methods to Get More Impact From Funding*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 979, at D-5 (Aug. 8, 1980).

<sup>175</sup> *Id.*

ped of vitality and become just another archaic piece of legislation that simply did not work.

## 2. Award of Attorneys' Fees to Defendants

The Act provides that a court may, in its discretion, award attorneys' fees to prevailing defendants who can show that a state attorney general acted in "bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>176</sup> This represents a departure from antitrust tradition in that a successful defendant cannot, as a rule, recover attorney fees and costs, even if the suit against him is found to be without merit.<sup>177</sup>

In *parens patriae* as well as private actions, the punitive nature of treble damages serves the dual purpose of deterring potential antitrust violators while providing plaintiffs with an incentive to institute the action.<sup>178</sup> This disincentive of attorney fee awards to defendants might give state attorneys general cause to consider the wisdom of instituting a *parens patriae* action unless preliminary proof against a defendant constitutes a *prima facie* case. As a general rule, however, it is reasonable to assume that the already limited resources of a state attorney general would preclude him from bringing *any* action unless he had reasonable expectations of ultimate victory, while, as a practical matter, a successful defendant would be hard pressed to show "bad faith." It is likely that this provision of the Act will have a negligible impact on the future of *parens patriae* damage actions.<sup>179</sup>

## IV. POSSIBLE ALTERNATIVES

It would be unduly optimistic to conclude that *parens patriae* damage

<sup>176</sup> 15 U.S.C. § 15c(d)(2) (1976).

<sup>177</sup> See *Bryam Concretanks, Inc. v. Warren Concrete Prod. Co. of N.J.*, 374 F.2d 649 (3d Cir. 1967). After dismissal of a private treble damage action the District Court for the District of New Jersey awarded defendants attorneys' fees and costs on the grounds that the suit was baseless. In reversing the decision, the Third Circuit held that in the absence of specific legislative authorization, attorneys' fees could not be awarded to defendants in private antitrust litigation. *Id.* at 651.

<sup>178</sup> *Id.*

<sup>179</sup> As one state attorney general remarked:

Some members of the bar and of the press, no doubt through ignorance or even antagonism, might conclude that the reason for the institution of . . . [only four *parens patriae* cases in the eight month period after the Act was passed] was the inclusion of the provisions of Section 4C(d)(2) of the Clayton Act . . . Even in your wildest imaginations can you possibly conceive of a state attorney general acting in bad faith, vexatiously, wantonly, or for oppressive reasons . . .? [That possibility is] as likely as the business roundtable petitioning the Supreme Court for a rehearing in *Illinois Brick* as a friend of the court.

Browning, Jr., *Parens Patriae Actions: An Assessment*, 49 ANTITRUST L.J. 1015, 1017 (1980).

actions are here to stay. A plethora of obstacles, when confronted either individually or cumulatively, stand to defeat the legislative purpose of providing redress for consumers injured by antitrust violations.

A formidable barrier to the future of *parens patriae* actions is the *Illinois Brick* holding.<sup>180</sup> Congressional efforts to overrule that decision have been unsuccessful and there is no indication that the Supreme Court, itself, will overrule the decision in the foreseeable future. Thus, *Illinois Brick's* direct purchaser rule must somehow be reconciled with *parens patriae* consumer actions if the Act is to become the viable antitrust enforcement tool which Congress intended.

The recent case of *In re Mid-Atlantic Toyota Antitrust Litigation*<sup>181</sup> applies *Illinois Brick* rational to its holding but at least admits that there may be additional exceptions to the rule where plaintiffs can show that market forces have been superseded. Unfortunately, the court left the explanation of what is meant by the suspension of market forces, as well as the delineation of additional exceptions which might result from such suspension, to future decisions. The most recent *Petroleum Products*<sup>182</sup> decision automatically applies *Illinois Brick* to bar all suits by indirect purchasers which do not fall within one of three narrow exceptions. The court in *Vermont v. Densmore Brick Co.*,<sup>183</sup> would also bar indirect purchasers from recovery on *Illinois Brick* grounds.

One of the primary, and perhaps most understandable, concerns of the *Illinois Brick* majority was the spectre of double recovery to defendants. This problem is an insignificant one in *parens patriae* actions, where the Act has built-in mechanisms to preclude double recovery. Further, courts and state attorneys general could fashion additional procedures which would limit, if not entirely eliminate the risk. Existing discovery methods would permit a state attorney general to reasonably identify all direct purchasers of the product. The state attorney or the district court could then easily and at negligible expense notify the direct purchasers of the pending *parens patriae* action to determine the amount of injury they sustained, if any, and whether they intend to seek redress. The district court would then be in a position to exclude, as prescribed by the Act,<sup>184</sup> the amount of injury suffered by direct purchasers from the damages awarded to *parens patriae* claimants. If the direct purchasers were themselves co-conspirators, they should be joined as defendants and precluded from recovering against their suppliers through the doctrine of *in pari delicto*. Likewise, if the direct purchasers were owned or controlled by their suppliers, they should be

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<sup>180</sup> See notes 74-119 *supra* and accompanying text.

<sup>181</sup> 516 F. Supp. 1287 (D. Md. 1981).

<sup>182</sup> 497 F. Supp. 218 (C.D. Cal. 1980).

<sup>183</sup> 1980-2 Trade Cas. (CCH) ¶ 63,347 (D. Vt. 1980), see generally notes 96-98 *supra* and accompanying text.

<sup>184</sup> 15 U.S.C. § 15c(a)(1) (1976).



named as defendants. The short, four-year statute of limitations,<sup>185</sup> in light of the extended nature of antitrust actions, makes it unlikely that additional private treble damage actions will be filed after a final judgment is rendered in a *parens patriae* suit.

Before the Act was passed, the Senate believed that the danger of double recovery in *parens patriae* was minimal in light of the district court's control over its decrees.<sup>186</sup> It contemplated the use of such procedural devices as statutory interpleader by antitrust defendants, the appointment of special masters to handle complex cases, compulsory joinder and doctrines of *res judicata* and collateral estoppel to minimize or eliminate double recoveries.

Any one or more of these procedures should be freely employed by a district court in *parens patriae* suits where the possibility of double recovery exists. These devices will largely eliminate the risk of multiple liability from suits brought on behalf of indirect purchaser-consumers. In any event, long-standing policy considerations underlying antitrust enforcement, and particularly the *Parens Patriae* Act, should compel a court to impose liability where the choice is between awarding indirect purchasers duplicative recoveries or permitting antitrust violators to retain the fruits of their illegality.

The most significant hurdles faced by consumers in antitrust class actions which are most likely to be transferred to *parens patriae* are: 1) the requirement of common questions of law or fact as applied to proof of damages, and 2) the individual notice provisions. The Act sought to remove these impediments by substituting fluid recovery techniques in place of individualized proof of damages,<sup>187</sup> and by providing for notice by publication in place of the onerous requirement of particularized notice. Each of these provisions has met with some judicial resistance.

Fluid recovery has been rejected as an unconstitutional denial of due process by at least three circuits in private treble damage class

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<sup>185</sup> *Id.* § 15b.

<sup>186</sup> See SENATE REPORT, *supra* note 11, at 44. In his dissenting opinion to *Illinois Brick Co. v. Illinois*, Justice Brennan points out that the possibility of multiple recovery exists in only two situations: "(1) where suits by direct and indirect purchasers are pending at the same time but in different courts; and (2) where additional suits are filed after an award of damages based on the same violation in a prior suit." 431 U.S. at 762 (Brennan, J., dissenting).

In the first situation, Justice Brennan suggested that district courts use the intradistrict transfer power provided by 28 U.S.C. § 1404(b); coordinate pretrial proceedings of cases filed in other districts, or transfer cases to a single district as provided by 28 U.S.C. § 1404(a); or facilitate transfers by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407 where such transfer will promote efficiency and the convenience of the parties. *Id.* at 762-63.

As to the second situation, Justice Brennan believed that the four-year statute of limitations would make it "impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit." *Id.* at 764.

<sup>187</sup> 15 U.S.C. § 15d (1976).

actions.<sup>188</sup> However, the court in *Petroleum Products*<sup>189</sup> refused to disallow the use of fluid recovery until such time as substantial due process violations were shown. Although *Petroleum Products*,<sup>190</sup> when favorably construed, may indicate that courts will be inclined to permit fluid recovery in *parens patriae* actions where it is specifically authorized by the Act, the decision nevertheless represents only one interlocutory opinion, which is less than decisive, from one circuit.

The constitutional dimensions identified with fluid recovery are problematic to the future of *parens patriae*. If the technique were rejected on purely procedural grounds, the provisions of the Act would clearly override such objections. If, however, fluid recovery is found to be a *per se* deprivation of the antitrust defendants' constitutional rights, then each *parens patriae* consumer will be required to prove his individual damages—a formidable, if not impossible, task where millions of consumers are represented in a typical *parens patriae* damage action. To hold that fluid recovery is unconstitutional in all circumstances would, in effect, be the equivalent of finding the Act unconstitutional.

A more reasoned approach, however, was taken by the court in the first *Petroleum Products*<sup>191</sup> opinion, a case in which fluid recovery was proposed. Although the court did not ignore the possible due process implications of the procedure, it chose to permit plaintiffs to proceed with their case. Only when all relevant facts were considered, together with the context in which the case arose, would that court rule on whether or not to permit fluid recovery.<sup>192</sup>

While the *Petroleum Products* approach does not fully resolve the due process challenge to fluid recovery, it does give a state attorney general the opportunity to present his case with a proposed method of proving damages to the court during the pretrial stage of the litigation. When the court is familiar with the facts, it will be in a better position to intelligently weigh the pros and cons of fluid recovery. This approach is certainly preferable to one which would find a key section of the Act unconstitutional.

Closely related in theory to the operation of proof of damage is the problem of particularized notice.<sup>193</sup> Although the Act recommends that notice be given by publication,<sup>194</sup> at least two circuits have ordered that

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<sup>188</sup> See notes 131-34 *supra* and accompanying text.

<sup>189</sup> 1978-1 Trade Cas. (CCH) ¶ 61,839 (C.D. Cal. 1978).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* It should be noted, however, that the most recent decision in that case dismissed plaintiffs as indirect purchasers, whose claims did not come within any of the stated exceptions to *Illinois Brick*. The fluid recovery method, if it can be applied to any of the remaining claims, has not been precluded by the court. See notes 127-38 *supra* and accompanying text.

<sup>193</sup> See notes 149-59 *supra* and accompanying text.

<sup>194</sup> 15 U.S.C. § 15c(b)(1) (1976).

individual notice be given to each class member who can be identified, with the class representative bearing the cost of such notice.<sup>195</sup> These courts, like those which rejected fluid recovery, based their decision on constitutional grounds. In the context of *parens patriae*, the res judicata effect of a judgment would preclude any citizen who failed to exclude himself from the action (perhaps because he never received notice) from bringing a subsequent private action.<sup>196</sup> It is not unseemly to relate lack of notice in such a situation to a deprivation of due process.

Nevertheless, individual notice to all consumers of a state is an economically impossible task for a state attorney general. Such a requirement, particularly when coupled with individualized proof of damage, could ultimately foreclose the majority of state attorneys general from bringing *parens patriae* damage actions.

As a practical matter, however, the typical *parens patriae* action was intended to be brought on behalf of consumers with small individual claims who would be unlikely to prosecute a private treble damage action.<sup>197</sup> Whether or not such a consumer would be precluded from bringing a subsequent private action by the res judicata effect of a *parens patriae* judgment is probably of little consequence to him. Although he might suffer a technical denial of procedural due process through notice by publication, it is unlikely that his substantive due process rights would be infringed. The cases in which notice by publication was held to be a constitutional deprivation involved class members who each had potentially major damage claims. These cases are readily distinguishable from the typical *parens patriae* action in terms of the individual amount of damages at stake. There is little to be lost by a typical consumer who is bound by a judgment rendered in a *parens patriae* action. Shortly after a *parens patriae* action is filed, the district court should realistically assess the amount of a representative individual claim by determining the dollar amount which constitutes the illegal overcharge on a product and, if possible, estimate the frequency with which the typical consumer would have incurred the overcharge. Only where the overcharge on each product is substantial should a court consider the due process implications of notice by publication, as is contemplated by the Act.<sup>198</sup>

Should the aforementioned issues be successfully resolved, the problem of funding will continue, nonetheless, to burden many state attorneys general and will be exacerbated if additional dollars are not forthcoming from federal and state legislatures. The Act provides that reasonable attorney fees shall be awarded to the successful attorney general. As is generally the case in antitrust litigation, it is likely that

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<sup>195</sup> 479 F.2d 1005 (2d Cir. 1973); see also note 152 *supra* and accompanying text.

<sup>196</sup> 15 U.S.C. § 15c(b)(3) (1976).

<sup>197</sup> See note 36 *supra* and accompanying text.

<sup>198</sup> 15 U.S.C. § 15(b)(1) (1976).

these fees would be sizeable enough to totally fund the state's program. However, *Illinois Brick* has deterred many state attorneys general from bringing *parens patriae* damage actions on behalf of indirect purchasers. Because these actions would probably involve the greatest potential recoveries and the largest number of plaintiffs, they would likely bring in the greatest amount of attorney fees. Failure to bring such actions and ultimately prevail in them prevents states from acquiring lucrative fees which could be so large as to fund totally the state's program. Perhaps the most feasible solution yet proposed is the "revolving fund," currently in effect in several states.<sup>199</sup> When a state recovers a *parens patriae* award, it should set part of it aside in a fund reserved for financing subsequent *parens patriae* actions. A well-managed revolving fund will permit a state attorney general's office to eventually attain self-sufficiency and the amount retained from the damage award will ultimately benefit the state's consumers, the intended beneficiaries of the state's action.

## V. CONCLUSION

Numerous potential difficulties beset the future of *parens patriae*. The Act faces procedural as well as constitutional attacks from potential antitrust defendants and courts alike. Whether or not it will survive these challenges in its present form is mere conjecture. Yet, it is certain that the powerful policy considerations underlying the Act are no less compelling today than they were when the Act was passed. Perhaps the full potential of the Act will be realized only if the Act, itself, is scrapped and restructured.

One intriguing possibility is to model the Act on the plaintiffs' theory in *Hawaii v. Standard Oil Co. of California*,<sup>200</sup> where plaintiff state, as *parens patriae*, sought damages for any injury to its general economy attributable to a violation of the antitrust laws.<sup>201</sup> The Supreme Court

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<sup>199</sup> See notes 165-67 *supra* and accompanying text.

<sup>200</sup> 405 U.S. 251 (1972). *But see* note 39 *supra* and accompanying text.

<sup>201</sup> The state's *parens patriae* claim was stated in the following manner:

19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.

20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the state of Hawaii in, among others, the following ways:

(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;

(b) taxes affecting the citizens and commercial entities have been in-

denied recovery solely on the ground that an injury to a state's general economy is not compensable under the antitrust laws. The Court observed that if Congress had intended to provide such a remedy, it could have done so.<sup>202</sup>

Where the property of a state's citizens is diminished by an antitrust violation, there is harm to the economic wealth of the state. In seeking to preserve the economic opportunities of its people, a state, under the *Hawaii v. Standard Oil Co. of California* theory, would sue for damages to its economy resulting from antitrust violations and retain the damage award in its general coffers, where the monies would be expended for the benefit of all citizens in that state. In fact, the Act in its present form permits the court to characterize the damage award as a "civil penalty" to be deposited with the state as general revenues.<sup>203</sup> This approach would, in theory, eliminate the difficulties besetting current *parens patriae* actions and, at the same time, retain the benefits of redress to consumers and deterrence to antitrust violators contemplated by the Act. Specifically, the *Illinois Brick* rule would be irrelevant to such an action. Instead of the state claiming injury to indirect purchasers who might be barred under the rule, the state would claim injury to its economy in the form of, for example, impairment of its tourism industry, growth, industry or development resulting from defendants' antitrust violations. Assessment of actual damages would present no greater problems than those routinely encountered in antitrust suits. As Justice Douglas stated in his *Hawaii v. Standard Oil Co. of California* dissent, "[e]conomists have developed models for measuring the effects upon local economies from infusions or extractions of given sums of money from those economies. In short, a state's economy is susceptible of articulation and measurement."<sup>204</sup> The state's interest

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creased to affect such losses of revenues and income;

(c) opportunity in manufacturing, shipping and commerce have [sic] been restricted and curtailed;

(d) the full and complete utilization of the natural wealth of the State has been prevented;

(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

(g) the Hawaii economy has been held in a state of arrested development.

21. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein.

405 U.S. at 255-56 (opinion of the Court, quoting from the State's Complaint).

<sup>202</sup> *Id.* at 262.

<sup>203</sup> 15 U.S.C. § 15e(2) (1976).

<sup>204</sup> 405 U.S. at 269 (Douglas, J., dissenting) (quoting from State of Alabama's *amicus* brief).

in its economy is arguably within its "business or property" interests. The damages recovered by the state would be used to recompense the collective community. Damage actions by individuals for the same violations would be precluded unless potential individual plaintiffs could show special or different injury from that suffered by the community. This approach would minimize the risks of duplicative recovery.

Complications could, of course, arise under this approach. Nevertheless, it is one worth considering, particularly if the only alternative is the demise of *parens patriae* consumer actions for antitrust violations. This very real possibility, while admittedly pessimistic at this point in the Act's existence, could become a reality in the not so distant future unless the barriers are lifted or the Act is restructured.

PATRICIA J. O'DONNELL-GAYNOR

