Notes

Antitrust, Parens Patriae, Damages, and Automobile Emissions: A Potentially Unfair Combination

INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976[1] (ATIA) was signed into law by President Ford on September 30, 1976. While its effect is yet to be seen, the section empowering state attorneys general to bring suit as *parens patriae* on behalf of injured citizen-consumers[2] is of particular significance. Prior to the ATIA, consumers seeking redress for violations of the antitrust laws[3] were without a judicial remedy in cases where injury of a very small nature occurred individually to millions of people.[4] As will be discussed later in this note, the main obstacle to consumer action in the courts was lack of standing. The ATIA effectively overcomes this obstacle by granting standing to state attorneys general acting as *parens patriae* on behalf of consumers in large, otherwise unmanageable, cases.

Parens patriae actions are not new; the concept antedates the formation of the United States. In order to familiarize the reader with *parens patriae* actions and the changes wrought by the ATIA, this note will begin with an overview of *parens patriae*, especially under the Clayton Act,[5] prior to the ATIA.

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1. Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976). The Act contains three titles which are found in different sections of the U.S.C.A. Title I is the Antitrust Civil Process Act, 15 U.S.C.A. §§ 1311-1314 (West Supp. 1976); Title II sets forth new rules for pre-merger notification, 15 U.S.C.A. § 18a (West Supp. 1976); Title III deals with actions by state attorneys general as *parens patriae*, 15 U.S.C.A. §§ 15c-15h (West Supp. 1976).

2. 15 U.S.C.A. § 15c(a)(1) (West Supp. 1976).

3. For purposes of this note the term "antitrust laws" refers to the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (1970), and the Clayton Act of 1914, 15 U.S.C. §§ 12-27 (1970).

4. *See, e.g.*, Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972); California v. Frito-Lay Inc., 474 F.2d 774 (9th Cir. 1973).

5. 15 U.S.C. §§ 12-27 (1970).

Following the history of *parens patriae*, Title III of the ATIA will be examined. This title contains the authorization for *parens patriae* actions. Particular emphasis will be placed upon the sections dealing with assessment and measurement of damages.[6] These sections allow damages in certain cases to be measured using aggregate methods instead of individual proof of damages. Such methods sound simple and equitable when described by the Act's supporters;[7] however, closer examination reveals a possibility for unjust results under this seemingly simple method.

This note will explore such a possibility by hypothetical application of the ATIA damage provisions to the recent case of *In re Multidistrict Vehicle Air Pollution*,[8] a case whose history reveals the complexities of the efforts expended in an attempt to get relief prior to the ATIA. Although the ATIA reduces these complexities, it raises new problems in its damage calculations, as will be shown in the final section of the note.

The Development of Parens Patriae in the United States

Parens patriae is a concept with its roots in the constitutional system of feudal times.[9] The literal translation, "father of the country", refers to the English system in which the monarch was empowered to act as guardian for persons legally unable to act for themselves.[10] Historically, these persons were "infants, idiots, and lunatics."[11] This function is now generally served by actions wherein the state is appointed guardian *ad litem*.

In the United States, the development of *parens patriae* has come under article III, section 2 of the United States Constitution.[12] This allows the government of a state to protect its "quasi-sovereign" interest through *parens patriae* actions. "Quasi-sovereign" interests range from the protection of water rights[13] to an injunction against a restraint on the commercial flow of natural gas.[14] Analysis of the development of *parens patriae* in the United States reveals a "background of unclear principles",[15] especially in terms of possible action under the Clayton Act prior to *Hawaii v. Standard Oil Co*.[16]

In *Hawaii*, Justice Marshall endeavored to set straight the record concerning a state's power to bring a *parens patriae* action under section 4 of

6. 15 U.S.C.A. §§ 15c(a)(2), 15d (West Supp. 1976).
7. *See, e.g.*, 122 Cong. Rec. H2068-2069 (daily ed. March 18, 1976) (remarks of Rep. Jordan).
8. 538 F.2d 231 (9th Cir. 1976).
9. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972).
10. *Id*.
11. 3 W. Blackstone, Commentaries 47.
12. Hawaii v. Standard Oil Co., 405 U.S. 251, 259 (1972).
13. Kansas v. Colorado, 206 U.S. 46 (1907).
14. Pennsylvania v. West Virgina, 262 U.S. 553 (1923).
15. 6 Colum. J.L. & Soc. Prob. 411, 413 (1970).
16. 405 U.S. 251 (1972).

the Clayton Act[17] for damages to its general economy. The state of Hawaii alleged that the "conspiracy among the respondent oil companies has 'injured and adversely affected the economy and prosperity' of Hawaii."[18] After discussing the history of the case and the development of *parens patriae* actions, Justice Marshall focused on the necessity of injury to the plaintiff state's "business or property",[19] which was equated with commercial interest. Commercial interest was found necessary by analogy to the power of the United States to sue under the Clayton Act. The Court reasoned that the federal government could sue "only for those injuries suffered in its capacity as a consumer of goods and services" and not for "economic injuries to its sovereign interests."[20] Since section 4, which empowers a state to sue, uses language identical to that which enables the United States to sue, section 4 was interpreted to have the same limitations.

Justice Marshall did not accept the allegations in the plaintiff's complaint[21] as sufficient even though they were very similar to those accepted by the court in *Georgia v. Pennsylvania Railroad*, [22] a case which implicitly allowed a state to sue for damages to its general economy. Instead, the Court held that the injuries alleged by Hawaii were "no more than a reflection of injuries to the 'business of property' of consumers for which they may themselves recover under section 4."[23] The specter of a consequent double recovery was thereby raised and undoubtedly influenced the decision. As an alternative to *parens patriae*, class action suits under Rule 23 of the Federal Rules of Civil Procedure were offered. Such class actions were rendered impossible by the subsequent decision in *Eisen v. Carlisle & Jacquelin*,[24] which established onerous notice requirements for plaintiffs. Attempts by states to protect their quasi-sovereign interests in many cases were thus effectively forestalled.

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17. 15 U.S.C. § 15 (1970).
18. Hawaii v. Standard Oil Co., 405 U.S. 251, 267 (1972) (Douglas, J., dissenting).
19. The statute reads as follows:

> Any person who shall be injured *in his business or property* by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the 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 suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1970) (emphasis added).
20. Hawaii v. Standard Oil Co., 405 U.S. 251, 265 (1972).
21. The allegations were that Standard Oil's actions resulted in:
    1) wrongful extraction of revenues from the state;
    2) higher taxes on citizens and business to make up for lost revenues;
    3) curtailment and restriction of manufacturing, shipping, and commerce;
    4) prevention of maximum utilization of state resources;
    5) preclusion of Hawaiian goods from the national market due to higher manufacturing costs;
    6) frustration of state efforts at improving progress and welfare;
    7) arrest of Hawaii's economic development.

    Id. at 255-56.
22. 324 U.S. 349 (1945).
23. Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).
24. 479 F.2d 1005 (2d Cir. 1973).

Soon after *Hawaii,* in *California v. Frito-Lay Co.*,[25] California sought to sue as *parens patriae*, not for its quasi-sovereign interests, but rather on behalf of its citizen-consumers for injuries they allegedly suffered through price fixing by twelve "snack food" manufacturers. The injury in this case was one to the "business or property" of the consumers.[26] However, the court held that such a suit was not proper under section 4 of the Clayton Act. Instead, a class action, while recognized as difficult, was again considered appropriate. Contained in the decision was a judicial invitation to Congress to provide a solution to problems such as those faced by California's citizens.[27]

Congressional Action

Hawaii, Frito-Lay, and *Eisen* left citizens without an effective judicial remedy for antitrust violations in which individual damage was relatively small, but collective damage was vast. Legislation intended to fill this void is found in the Antitrust Improvements Act[28] first introduced on February 4, 1974, by Congressman Peter Rodino.[29]

The ATIA greatly increases the power of a state's attorney general to bring suit as *parens patriae*. Section 4C[30] contains the broad grant of power:

> [A]ny attorney general of a state may bring a civil action in the name of the State, as *parens patriae* on behalf of natural persons residing in such state, . . . to secure monetary relief . . . for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act.[31]

The monetary relief is to be "threefold the total damage" plus costs, including a "reasonable attorney's fee."[32] Considering the importance placed on the "business or property" language of the original Clayton Act by the Court in *Hawaii*, the word "business" is conspicuously absent from the new section 4C. Lest this omission be thought inadvertent, the new Act specifically excludes "any business entity" from recovery under the ATIA.[33] The "commercial interest" obstacle is thereby removed, enabling citizens through their attorney general to have standing in virtually any case in which they have lost money as a result of alleged antitrust violations. In fact, this statute is "a response to the judicial invitation extended in *Frito-Lay*. The thrust of the bill is to overturn *Frito-Lay* by allowing State attorneys general to act as consumer advocates . . . ."[34]

25. 474 F.2d 774 (9th Cir. 1973).
26. *Id*. at 775.
27. *Id*. at 776.
28. Pub. L. No. 94-435, 90 Stat. 1383 (1976).
29. 120 Cong. Rec. H2006 (1974).
30. 15 U.S.C.A. § 15c (West Supp. 1976).
31. *Id*. § 15c(a)(1).
32. *Id*. § 15c(a)(2).
33. *Id*. § 15c(a)(1).
34. H.R. Rep. No. 499, 94th Cong., 1st Sess. (1975).

Once a violation under section 4C is shown, the treble damages referred to previously must be calculated. Measurement of damages is covered in section 4D which says:

> In any action under 4C(a)(1), in which there has been a determination that a defendant agreed to fix prices in violation of the Sherman Act, damages may be proved and assessed in the aggregate by statistical sampling methods . . . or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim or amount of damage to persons on whose behalf the suit was brought.[35]

Certainly a plaintiff bringing a suit for an alleged violation of the Sherman Act would want to be able to use aggregation to measure damages since this allows both flexibility and relative ease of calculation.

The general vagueness of the report[36] accompanying the final bill[37] and the following language by one of the Act's cosponsors, the late Senator Philip Hart, lend support to a broad application of measurement by aggregation:

> At the present time there is a division of opinion as to whether the courts have the inherent power to use aggregation as a technique for measuring damages in other [than price fixing] cases . . . . [This issue] is one for the courts themselves to decide. If in the future the courts conclude that they have the inherent power to use the aggregation technique, then that technique would of course also be available for all *parens patriae* damage suits. In this regard, proposed section 4D should be read as an authorization not as a limitation.[38]

Closer examination of the legislative history reveals that the "authorization" is not so clear as Senator Hart would have had us believe. The original Senate bill[39] provided for aggregate damages for all violations of the Sherman Act. In floor debate, the aggregate damage provision was limited to *per se* violations of the Sherman Act.[40] Finally, aggregate damage recoveries were further limited to price fixing and patent fraud.[41] A similar narrowing of the aggregate damage provision occurred in the House.[42] The final result, achieved through the compromise efforts led by Senator Robert Byrd allowed aggregation only for price fixing.[43]

The members of Congress who opposed such a narrowing of the aggregation provisions argued strenuously that many violations of the Sher-

35. 15 U.S.C.A. § 15d (West Supp. 1976).
36. H.R. REP. NO. 499, *supra* note 34.
37. H.R. 8532, 94th Cong., 1st Sess. (1975).
38. 122 CONG. REC. S15417 (daily ed. Sept. 8, 1976).
39. S1284, 122 CONG. REC. D296 (daily ed. Mar. 21, 1975).
40. 122 CONG. REC. S7926 (daily ed. May 25, 1976). *Per se* violations were defined as naked restraint of trade, with no purpose except that of stifling competion. 122 CONG. REC. S8186 (daily ed. May 27, 1976) (remarks of Sen. Morgan).
41. 122 CONG. REC. S8957 (daily ed. June 10, 1976).
42. 122 CONG. REC. H2076-79 (daily ed. Mar. 11, 1976).
43. 122 CONG. REC. S15322-26 (daily ed. Sept. 7, 1976).

man Act would be left uncovered by the new legislation.[44] Despite such arguments, the aforementioned narrowing continued. Thus aggregation was continually and specifically limited in its role as a damage measuring technique. For Senator Hart to have claimed after such development that the bill was an authorization, and not a limitation, was to ignore congressional intent and attempt to shift responsibility for innovation in antitrust law to the courts.

While the ATIA struggled through Congress, an involved antitrust case was being litigated in the Ninth Circuit. The ATIA was not applied to this case since the Act did not become effective until after *In re Multidistrict Vehicle Air Pollution* was decided. If the ATIA had been in effect, it could have been applied with results probably not fully appreciated by the Act's supporters.

THE DEVELOPMENT OF *In re Multidistrict Vehicle Air Pollution*

In 1953, General Motors, Ford, Chrysler, American Motors, and seven other companies entered into a cooperative research and development program.[45] The program enabled the participating companies in 1955 to enter into "an open access, royalty-free, cross-licensing agreement as the basis for exchanges of technical and engineering information about the nature, measurement, and control of vehicle emissions."[46]

The United States Justice Department began investigating the cooperative program in 1965. A grand jury was convened, but after eighteen months, no indictment was returned.[47] On January 10, 1969, a civil action was initiated by the Justice Department against the major automobile manufacturers and their trade association, the Automobile Manufacturers Association.[48] The government charged that the automobile manufacturers and the Automobile Manufacturers Association had conspired in violation of section 1 of the Sherman Act[49] to "eliminate competition in the research, development, manufacture, and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights covering such equipment."[50] The case, and the cooperative agree-

44. *See, e.g.*, 122 CONG. REC. H2077 (daily ed. Mar. 11, 1976) (remarks of Rep. Sieberling); 122 CONG. REC. S15320 (daily ed. Sept. 7, 1976) (remarks of Sen. Abourzek).

45. *In re* Multidist. Vehicle Air Pollution, 538 F.2d 231 (9th Cir. 1976). The signatories were: General Motors Corp., Ford Motor Co., Chrysler Corp., American Motors Corp., Checkers Motor Corp., Diamond T. Corp., International Harvester Co., Mack Trucks, Inc., Studebaker-Packard Corp., White Motor Corp., and Willys, Inc.

46. Brief for Appellee, Ford Motor Co., *In re* Multidist. Vehicle Air Pollution, 538 F.2d 231 (9th Cir. 1976).

47. United States v. Auto. Mfrs. Ass'n, 307 F. Supp. 617, 620 (C.D. Cal. 1969), *aff'd per curiam*, 397 U.S. 248 (1970).

48. *In re* Motor Vehicle Air Pollution Cont. Equip., 52 F.R.D. 398, 400 (C.D. Cal. 1970).

49. 15 U.S.C. § 1 (1970).

50. United States v. Auto. Mfrs. Ass'n, 307 F. Supp. 617, 620 (C.D. Cal. 1969), *aff'd per curiam*, 397 U.S. 248 (1970).

ment, ended in 1969 with a consent decree.[51] The court, in approving the decree, noted that "the Government's case is based upon a novel and unadjudicated theory."[52]

Soon after the consent decree received judicial sanction, some thirty-four states, several political subdivisions, one farmer, and several other individuals, in their respective capacities as *parens patriae*, class representatives, and individuals, brought suit against the same defendants throughout the country. These suits sought treble damages under section 4 of the Clayton Act and equitable relief under section 16.[53] All of these actions were transferred to the Judicial Panel on Multidistrict Litigation in Los Angeles.[54] The defendants' motion to dismiss was denied.[55] Interlocutory appeal of this denial was made.[56] On this appeal, the court dealt extensively with the question of standing under both sections of the Clayton Act. Under section 4, the state governments alleged diminution in value of their property and increased expenses as damages suffered.[57] The court held that the states lacked standing under section 4 because no showing of injury to "business or property" was made. Injury to "business or property" was interpreted as requiring injury to "interests in commercial ventures or enterprises."[58] Unlike section 4, section 16 requires only an injury cognizable in equity and not necessarily to "commercial interests"; consequently, the court found sufficient allegations by the plaintiffs to allow standing under section 16.[59] However, it was expressly held that in this case the grant of standing did not imply that a remedy was available.[60]

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51. The consent decree stated that:

> [P]rohibitions include: (1) restraining in any way the individual decisions of each auto company as to the date when it will install emission control devices; (2) agreeing not to file individual statements with governmental agencies concerned with auto emission and safety standards and from filing joint statements on such standards unless the governmental agency involved expressly authorizes them to do so; (3) continuing a 1955 cross-licensing agreement and refusing to grant royalty-free licenses on auto emission control devices under patents subject to the 1955 agreement to all who may request them; (4) agreeing to exchange their companies' confidential information relating to emission control devices or to exchange patent rights covering future inventions in this area; and (5) continuing their joint assessment of patents on auto emission control devices offered to any of them by outside parties as well as their practice of requiring outside parties to license all of them on equal terms.

[1969] Trade Cases (C.C.H.) ¶ 72,907.

52. United States v. Auto. Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969) *aff'd per curiam*, 397 U.S. 248 (1970).

53. 15 U.S.C. § 27 (1970).

54. *In re* Multidist. Vehicle Air Pollution Cont. Equip., 311 F. Supp. 1349 (J.P.M.D.L. 1970).

55. *In re* Motor Vehicle Air Pollution Cont. Equip., 52 F.R.D. 398 (C.D. Cal. 1970).

56. *In re* Multidist. Vehicle Air Pollution Cont. Equip., M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973).

57. The farmer, who alleged crop damage, was dealt with separately. The individuals and political subdivisions were represented by the states. From this point on, this note will deal only with the states.

58. *In re* Multidist. Vehicle Air Polution Cont. Equip., M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir. 1973).

59. *Id.* at 131.

60. *Id.*

The case returned to the district court where the plaintiffs sought equitable relief in the form of "all possible tort remedies to cure the effect of the 'continuing injury' caused by their [the defendants'] unlawful conspiracy."[61] Judge Real was not overly sympathetic to the defendants, calling their cooperative efforts "less than spectacular" and bordering on "legerdemain."[62] Nevertheless, he refused to grant equitable relief under section 16 because such remedies had no "antitrust application"[63] and were an attempt to squeeze a nuisance body into antitrust form.[64]

Another appeal was then made, and again the plaintiffs lost.[65] In this proceeding, the relief sought was narrowed to two basic forms: 1) retrofitting, *i.e.*, installation of current pollution control devices on all autos not so equipped, and 2) restitution, *i.e.*, payment to all persons who had already paid to have pollution control devices installed on their own cars.[66] The court, per judge Duniway, held that section 16 deals with threatened or future loss of damage. Therefore, restitution was inappropriate since it is a remedy based on past losses.[67] Furthermore, the retrofit remedy was not available because it did not serve any of the antitrust functions that section 16 was meant to serve.[68]

Damage Determination in Vehicle Air Pollution Under the ATIA

A primary purpose behind the ATIA is to end standing problems in certain cases,[69] and although it is not supposed to create any new liability, the likelihood of financial recovery is "significantly increased."[70] Since it was the failure of the states in *Vehicle Air Polution* to show injury to "commercial interests" that prevented them from having standing to sue, they would clearly have standing now that the requirement has been removed. The reprieve for the plaintiffs on this point would provide them with a judicial forum in which to argue the merits of their case. Should the plaintiffs prevail, the defendants would be faced with damage determination under an uncertain combination of pre-ATIA case law and the new ATIA provisions.

Under pre-ATIA case law, antitrust damage calculation may be predicated upon "a just and reasonable estimate of the damage based upon

61. *In re* Multidist. Vehicle Air Pollution, M.D.L. No. 31, 367 F. Supp. 1298, 1302 (C.D. Cal. 1973).
62. *Id.* at 1304
63. *Id.* at 1302.
64. *Id.* at 1305.
65. *In re* Multidist. Vehicle Air Pollution, 538 F.2d 231 (9th Cir. 1976).
66. *Id.* at 234.
67. *Id.*
68. *Id.* at 236. The functions are set forth as follows: 1) putting an end to illegal conduct, 2) depriving violators of the benefits of their conduct, 3) restoring competition to the marketplace, and 4) making whole those who have been injured by the conduct of the violators. *Id.* at 234.
69. 122 Cong. Rec. S15417 (daily ed. Sept. 8, 1976) (remarks of Sen. Hart).
70. H.R. Rep. No. 499, 94th Cong., 1st Sess. 9 (1975).

relevant data"[71] which is proper "although the result is only approximate."[72] Still, the jury may not return a verdict based on speculation or guesswork,[73] and the plaintiff may not use just any method of damage estimation. If estimated, it must be done reasonably. Implicit in the requirement of reasonableness is a rational basis for establishing a damage figure, however, obtaining such a rational economic basis is not always easy. "[T]he more dissimilar a violation is from the exaction of overcharges through price-fixing, the more difficult it becomes to prove that consumers have suffered any compensable injury at all . . . ."[74]

The actions of the automakers in *Vehicle Air Pollution* would have to be construed as either price fixing, with its aggregation of damages potential, or non-price fixing with consequent increased difficulty in damage calculation. Clearly, the defendants' activities were not classic price fixing. Instead, the definition of price fixing would have to be expanded from one where merchants agree to maintain artificially high prices, to one where price is improperly influenced in an indirect way. The following comment of one of the Act's cosponsors, Congressman Peter Rodino, would appear to prevent such a broadening of the term price fixing. "Under the compromise bill, 'price fixing' means horizontal price fixing or vertical price fixing. It does not mean monopolization, market allocations, output restrictions, customer or territorial restraints, tie-ins, group boycotts or other non-price fixing violations of the Sherman Act."[75] If, due to such language, the plaintiffs in *Vehicle Air Pollution* were not able to have the defendants' actions construed as price fixing, the aggregation technique could not be used. If the aggregation technique were not available, the plaintiffs might again be in the position of having standing but no judicial remedy, since individual injury to all possible claimants would be extremely difficult to prove. However, Congressman Rodino's reference to "other non-price fixing violations" implies that he believes price fixing to be a strictly defined term. In fact, it is not always strictly defined. The case of *United States v. Socony-Vacuum Oil Co.*[76] held that price fixing can result even through the intent or design behind the actions is not directed specifically toward price fixing. This case was cited by one of the Act's cosponsors as providing the definition of price fixing covered by the ATIA.[77] By developing the rationale of *Socony*, it can be argued that in such cases the court must look to see if the effect of the defendant's efforts was to cause the price structure to be artificially influenced, thereby frustrating the free play of market forces. In other words,

71. Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264 (1946).
72. Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931).
73. Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264 (1946).
74. Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 85 YALE L.J. 626, 655 (1976).
75. 122 CONG. REC. H10296 (daily ed. Sept. 16, 1976).
76. 310 U.S. 150 (1936).
77. "It is the purpose of this provision [aggregation of damages] to assure that potential violators be deterred by the courts under existing case law." (citing Socony) 122 CONG. REC. S15417 (daily ed. Sept. 8, 1976) (remarks of Sen. Hart).

any action which is marginally price sensitive is a potential price fixing violation.

Such a broad definition of price fixing would include cases in which all competition, including price competition, had been eliminated. In *Vehicle Air Pollution*, the cooperative agreement eliminated competition in the development of emission control devices. The price of each manufacturer's device was not allowed to be determined by unfettered competition, but rather it was postponed until some point in the future when a presumably uniform device could be installed in the cars of all manufacturers. The price of such uniform devices would be uniform as well, resulting in an equal increase in the price of each company's automobiles. Under this reasoning, the automakers' activities could be construed as price fixing, thereby allowing damages to the many claimants to be calculated in the aggregate.

Even if the court found that the automakers had engaged in price fixing, the task of damage calculation would not be easy. In order to understand why this is so, one must consider the nature of the automobile market. Car dealing has been judicially noticed as being "notorious for its haggling" with the result that "prices vary even among identical automobiles sold by different dealers."[78] Simply figuring the cost of pollution equipment as of a base year and then multiplying that by the number of cars sold without such equipment for a certain number of years is the type of calculation envisioned in the Act.[79] Such calculation ignores many variables that affect the price and sale of cars, such as the aforementioned discrepancies between dealers. It would also have to be determined whether or not the damage ended with the first purchaser or continued to the buyer of used cars. The inclusion of used car buyers would raise the number of potential claimants to a staggering level, with the allocation of the extent of damage becoming more attenuated with each subsequent purchaser.

The damage calculation problem in *Vehicle Air Pollution* would not end with price fixing calculations since the damage claimed included the allegation that the defendants were responsible for greatly increasing air pollution.[80] Air pollution and its detrimental effects are well documented,[81] so damage in a broad sense would be relatively easy to prove. However, in order to equitably assess the amount and type of pollution attributable to each defendant, more precise calculation would be necessary. Such a calculation would introduce many variables, such as climate, maintenance

78. Boshes v. General Motors Corp., 59 F.R.D. 589, 600 (N.D. Ill. 1973).

79. H.R. REP. NO. 499, 94th Cong., 1st Sess. (1975).

80. Brief for Appellants, *In re* Multidist. Vehicle Air Pollution, 538 F.2d 231 (9th Cir. 1976).

81. *See, e.g.*, Higgins, *Epidemological Evidence on the Carcenogenic Risk of Air Pollution*, 13 INT'L AGENCY FOR RESEARCH ON CANCER, SCI. PUB. 41 (1976); Kagawa, *Photochemical Air Pollution: Its Effect on Respiratory Function of Elementary School Children*, 30 ARCH. ENVIRON. HEALTH 117 (1975); Lawther, *Coal Fires, Industrial Emissions and Motor Vehicles as Sources of Environmental Carcinogens*, 13 INT'L AGENCY FOR RESEARCH ON CANCER, SCI. PUB. 27 (1976).

of automobiles, and altered location of potential claimants during the period, which would create possibly insurmountable barriers to a truly just and accurate damage figure.

While difficulty in determining the quantum of damage once injury has been shown is not necessarily enough to prevent a court from setting a damage figure,[82] the specter of potentially arbitrary and unjust estimates in a case such as *Vehicle Air Pollution* cannot be lightly dismissed. This potential is made more likely by the reference in the committee report to the concept of "social cost" as an indicium of damages.[83] No definition of "social cost" is provided in the report, but a phenomenon such as air pollution, with its effects being felt to some extent by all persons located in a high smog area, would seem to be a prime example of an antitrust violation that has great "social cost." Millions of citizens obviously are adversely affected. Once the potential for such a large figure in actual damages is realized, it must be remembered that this figure will always be *trebled* before being applied to the defendants.

CONCLUSION

It is possible to set a treble sum based upon both price fixing and the "social cost" in a case such as *Vehicle Air Pollution*. Such a figure could be astronomically high with Draconian punishment as the result. While a certain deterrent effect may be desired and served by the potential damage assessment under the ATIA, the possibility of hobbling even the strongest corporation with unpredictable and insurmountable obligations should be further addressed by the statute's supporters. Perhaps the feasibility of fines or single damages for unwitting violations should be reassessed.[84] In this period of inflation and high unemployment, the possible social displacement of shackling a corporation with a debt that may severely affect its economic viability should be weighed against the seriousness of the violation.

Antitrust violations, outside of clear cut *per se* offenses, are often difficult to define for even skilled legal minds. It is quite possible that the deterrent effect of the ATIA will be frustrated by unwitting violators. The corporate board may not have actually or intentionally violated the law, but, when faced with actions under the ATIA, may well decide to enter into a consent decree. This will occur because even the remote possibility of an adverse verdict with the aforementioned damage calculation would be a prohibitive risk. The comment of Senator Sam Ervin in reference to an

82. Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 562 (1931); Terrell v. Household Goods Carriers Bur., 494 F.2d 16, 23-24 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987 (1974).

83. H.R. REP. No. 499, 94th Cong., 1st Sess. 6 n.5 (1975).

84. *See, e.g., Hearing on H.R. 8532 Before the Subcomm. on Antitrust and Monopolies of the Senate Judiciary Comm*, 94th Cong., 2d Sess. 64 (1976) (statement of Allen C. Holmes). *Id.* at 99 (statement of Sen. Wiggins).

antitrust-related bill[85] is equally applicable to the ATIA in its possible application to cases such as *Vehicle Air Pollution*. Senator Ervin suggested that settled cases and consent decrees will occur because "it is cheaper to settle them, cheaper to buy your peace, than it is to seek justice."[86]

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85. S. 3201, 116 CONG. REC. S29006 (1970).
86. *Hearings on S.3201 Before the Senate Judiciary Comm.*, 91st Cong., 2d Sess. 116, 118 (1970) (statement of Sen. Ervin).