PARENS PATRIAE IN ANTITRUST: A BLESSING FOR THE CONSUMER OR AN AFFRONT TO THE FOURTEENTH AMENDMENT?

*By Patricia E. Cole**

The well-worn adage, *caveat emptor*, once looked upon as the cornerstone of the business world, is being replaced today by a concept of consumer protection based upon stringent statutes and governmental enforcement. Accordingly, a bill[1] was introduced in the House of Representatives which would, if passed, authorize state attorneys general to bring treble-damage antitrust actions as *parens patriae* on behalf of their states' economically injured citizens. This note concerns the question of whether a *parens patriae* suit brought under this legislation would violate the due process rights of those injured citizens by usurping their cause of action.

When the antitrust laws have been violated resulting in an economic injury to a large number of citizen-consumers in a state, this bill authorizes the state attorney general to proceed on their behalf to recover treble damages. Nothing in the bill provides for notifying the consumers that their cause of action is being pursued or even that they have a cause of action. The bill allows for neither participation in the suit by an individual nor an opportunity to withdraw and pursue a separate remedy. The recovery, as envisioned by the bill, would be based on the defendants' records rather than on the claims of each injured citizen. In this way the entire amount of the overcharge, trebled, would be recovered, leaving the defendants free from further liability. Therefore, the suit brought by the attorney general necessarily includes the cause of action of every injured citizen in the state.

The courts have recognized that a cause of action is a vested property right protected by the Fifth and Fourteenth Amendments.[2] As such, it cannot be taken from a citizen without due process of law. The focus of this note is whether this *parens patriae* legislation provides that due process for the individual citizen.

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* Member, third year class.

1. H.R. 12921, 93d Cong. 2d Sess. (1974).

2. *See, e.g.*, Coombes v. Getz, 285 U.S. 434, 448 (1932); Edwardsen v. Morton, 369 F. Supp. 1359, 1376 (D.D.C. 1973).

It is necessary to begin by exploring the evolution of the concept of *parens patriae* from its common law roots in England to its looming potential as a highly effective weapon in the arsenal of antitrust enforcement. The relative ineffectiveness of present methods of antitrust enforcement, including class actions and government criminal and injunctive suits, will be considered.

Next the background of the due process requirement of notice will be analyzed. Notice has always been regarded as an important aspect of due process because it ensures that the individual's interest will be adequately represented by informing him of any proceeding in which that interest is involved. Then he may decide whether to participate in the proceeding or let others represent his interests. But the history of the notice requirement reveals that the individual's interest in receiving individual notice and the value of the rights involved must be balanced against the difficulty of sending out individual notice. In a *parens patriae* suit to recover for a widespread consumer injury, an individual's interest in receiving notice and the value of his claim would be small, while the state's interest in bringing the action to deter future violations and to provide the consumer with some method for recovering damages would be great. The economic reality is that if a state had to send out individual notice to every consumer in the state, very few actions would be brought, and the cause of action would, in all probability, be lost to the consumer. The overriding need for *parens patriae* legislation which would enable large-scale consumer antitrust actions to be brought by the state attorney general far outweighs the potential problems that may arise.

Historical Development of Parens Patriae

The concept of *parens patriae* is not new. In early English common law, the king, as "father of the country," had the power to act as guardian of persons under legal disabilities to act for themselves. Blackstone refers to the sovereign or his representative as the "general guardian of all infants, idiots, and lunatics," and as the superintendent of "all charitable uses in the kingdom."[3] *Parens patriae* suits recognize that the law should not permit one person to injure another with impunity merely because the injured person is unable to appear in court.

Three important elements of the original concept of *parens patriae* should be noted: 1) it is a common law doctrine and therefore subject to expansion and development; 2) it is an interstitial doctrine designed to fill a gap in the law; and 3) the *parens patriae* actions were not brought on behalf of the sovereign, but by the sovereign on behalf of the injured persons.

3. 3 W. BLACKSTONE, COMMENTARIES *47.

In the United States, the *parens patriae* function of the king passed to the states.[4]

Early Parens Patriae Cases

The nature and scope of *parens patriae* has been greatly expanded in this country to permit a state to sue when a large number of its citizens is threatened with injury, and the injured citizens are unable to protect their own interests because of the number of people affected and the often complex nature of the problem. This expansion is reflected in a number of cases decided early in this century.[5] These cases were brought under Article III section 2 of the Constitution which provides for the original jurisdiction of the Supreme Court in any case in which a state is suing on its own behalf.[6]

In *Louisiana v. Texas*,[7] the state of Louisiana "presented herself in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens"[8] in a suit to enjoin Texas from so administering its quarantine regulations as to prevent Louisiana merchants from sending goods into or through Texas. The lack of an independent interest in the property of its citizens did not prevent Louisiana from bringing a *parens patriae* claim but merely denied it the original jurisdiction of the Supreme Court to hear that claim because the suit was not brought on the state's own behalf. The propriety and utility of *parens patriae* suits based on an injury to the public at large were clearly recognized in this case.[9]

In *Missouri v. Illinois*,[10] a suit to enjoin the discharge of sewage into the Mississippi River by a Chicago sanitation district, Judge Shiras upheld Missouri's standing to sue, stating "it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and to defend them."[11]

4. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972).

5. North Dakota v. Minnesota, 263 U.S. 365 (1923); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); New York v. New Jersey, 256 U.S. 296 (1921); Kansas v. Colorado, 206 U.S. 46 (1907); Missouri v. Illinois, 180 U.S. 208 (1901); Louisiana v. Texas, 176 U.S. 1 (1900).

6. "In all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction." U.S. CONST. art. III, § 2. This provision was viewed as a substitute for the war- and treaty-making powers which were lost to the states when they joined the Union. It was felt that through litigation in the Supreme Court, a state would be able to protect the interests of its citizens as it had through wars and treaties in the past. *See* Missouri v. Illinois, 180 U.S. 208, 241 (1901); Louisiana v. Texas, 176 U.S. 1, 27 (Brown J., concurring) (1900).

7. 176 U.S. 1 (1900).

8. *Id.* at 19.

9. *Id.; see* Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972).

10. 180 U.S. 208 (1901).

11. *Id.* at 241.

But the Court had an even more compelling interest to consider: "[T]he nature of the injury complained of is such that an adequate remedy *can only be found* in this court at the suit of the State of Missouri."[12] Though this case was primarily concerned with a state's power to protect the "health and comfort" of its citizens, it serves also as an example of the flexible powers of the Court in applying the common law doctrine of *parens patriae* to achieve an equitable result.

Georgia v. Tennessee Copper Co.[13] was not a *parens patriae* case, but its holding has often been erroneously invoked as a standard for *parens patriae* actions. Georgia was suing neither in its sovereign capacity to protect its property nor in its *parens patriae* capacity to protect the property of its citizens, but in its "quasi-sovereign" capacity to protect its residual interest in the property within its borders. For this reason the Court required "an interest independent of and behind the titles of its citizens" in order to show the requisite state interest to invoke the original jurisdiction of the Supreme Court. Justice Holmes described the capacity in which the state was suing as follows:

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power.[14]

Although there is little similarity between a "quasi-sovereign" suit and a *parens patriae* suit,[15] the idea that a state needs "an interest independent of and behind the titles of its citizens" is one which has been erroneously applied in *parens patriae* suits brought since the *Georgia*

12. *Id.* (emphasis added).

13. 206 U.S. 230 (1907).

14. *Id.* at 237.

15. A "quasi-sovereign" suit is a suit brought by a state on its own behalf to protect its residual interest in all the land in the state; a *parens patriae* suit is also brought by the state, but its purpose is to protect the state's citizens from economic injury to their land, business or welfare. The difference is in both the purpose of the suit and the type of injury which may cause the suit to be brought. The procedural differences between the two require that in a "quasi-sovereign" suit the state must have "an interest independent of and behind the titles of its citizens" in order to have standing to bring the suit at all. In a *parens patriae* suit there need only be a large number of the state's citizens who are economically injured for the state to have standing to sue on their behalf.

case.[16] Nothing in *Georgia* would indicate that the state intended to sue as *parens patriae*, nor that the independent interest test should apply to a *parens patriae* suit.

Legal Elements of Parens Patriae

Some commentators are of the opinion that a state as *parens patriae* "cannot sue merely to promote the *individual* interests of some—or even all—of its citizens."[17] Justice Clarke, reporting the opinion of the Court in *New York v. New Jersey*,[18] seems to answer this in his statement: "The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced . . . the State is the proper party to represent and defend such rights . . . ."[19]

The nexus in the *parens patriae* suits discussed above is that a large number of the state's citizens were injured, or threatened with injury, and were unable to protect their own interests because of the number of people affected and the often complex nature of the problem. The courts permitted these suits even though the persons represented were technically competent to bring their own suits, and even though there was no direct injury to any proprietary interest of the state.

Parens Patriae in Antitrust Suits

Georgia v. Pennsylvania Railroad Co.[20] was the first case in which a state sued for injunctive relief and damages under the federal antitrust laws. The state of Georgia filed a complaint against twenty railroads, alleging that they had conspired to restrain trade and to fix prices to the detriment of Georgia shippers. The Court held, in a five-to-four decision, that Georgia, as *parens patriae*, had the right to sue for an injunction under the antitrust laws.[21] In discussing the propriety of such a suit, Justice Douglas stated:

> [W]e find no indication that, when Congress fashioned those civil [antitrust] remedies, it restricted the States to suits to protect their

16. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972); Pennsylvania v. West Virginia, 262 U.S. 553, 591-92 (1923) (suit to enjoin West Virginia's interference with the flow of natural gas).

17. *See, e.g.*, Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193, 209 (1970) (emphasis in original).

18. 256 U.S. 296 (1921) (suit to enjoin the discharge of sewage into New York Harbor).

19. *Id.* at 301-02.

20. 324 U.S. 439 (1945).

21. The only apparent reason for the Court's eventual denial of Georgia's damage claim was the holding in Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922), which stated that once rates were approved by the Interstate Commerce Commission, refunds of any part of the rate would constitute an illegal rebate. *Id.* at 453.

> proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.[22]

There was a strong dissent by Chief Justice Stone in this case, based on his belief (shared by Justices Frankfurter, Jackson and Roberts) that Georgia's citizens could prosecute their own suits, and therefore the state did not have standing to bring the action.[23] Chief Justice Stone seems to have ignored the previous decisions authorizing a state to bring suit *parens patriae* when a large number of its citizens have been injured. In addition, the economic injury to Georgia's citizens was an economic injury to the entire state. As Justice Douglas wrote, "The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia."[24]

The *Georgia* case stands for the proposition that a state can bring a *parens patriae* suit under the federal antitrust laws for injury to its citizens and for injury to its economy. Although the Court did not specifically deal with the question of damages, implicit in the opinion is the assumption that, under different circumstances, damages would be awarded under the antitrust laws.[25]

Two Recent Cases

Within the last five years there have been two significant cases dealing with the question of the applicability of *parens patriae* suits to antitrust violations. In *Hawaii v. Standard Oil Co.*,[26] the state of Hawaii filed suit against four oil companies, charging them with violation of section 1 of the Sherman Act[27] by entering into unlawful contracts, conspiring and combining to restrain trade and commerce in the sale, marketing and distribution of refined petroleum products, and attempt-

22. *Id.* at 447.

23. *Id.* at 473.

24. *Id.* at 447.

25. *Id.* at 453. As Chief Judge Pence concluded in the district court opinion in the Standard Oil case: "Absent the impact of the *Keogh* decision, the only rational inference to be drawn from *Georgia v. Pennsylvania R.R.*, is that an antitrust suit for treble damages was properly pled by Georgia in its *parens patriae* capacity. Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder, in a *parens patriae* capacity." Hawaii v. Standard Oil Co., 301 F. Supp. 982, 987 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972). Justice Brennan in his dissent from the Supreme Court opinion in the *Hawaii* case stated: "Implicit in the decision, however, was the holding that Georgia, as *parens patriae*, could have recovered damages under the antitrust laws for a conspiracy involving other than agency-approved transportation charges." Hawaii v. Standard Oil Co., 405 U.S. 251, 272 (1972).

26. 405 U.S. 251 (1972).

27. 15 U.S.C. § 1 (1970).

ing to monopolize and actually monopolizing that trade and commerce.[28] Hawaii sought recovery in three separate capacities: in its proprietary capacity for overcharges on petroleum products which were purchased by the state itself, as *parens patriae* to recover for injuries to the general economy of the state, and as a class representative for all purchasers of petroleum products in the state.[29] The district court dismissed the class action claim as unmanageable, but retained the *parens patriae* claim.[30] The Ninth Circuit reversed the decision of the district court and directed that the *parens patriae* count also be dismissed.[31] The Supreme Court granted certiorari.[32]

The issue as described by the Court was "not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act. Hence, Hawaii's claim cannot be resolved simply by reference to any general principles governing *parens patriae* actions."[33] Section 4 of the Clayton Act 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.[34]

The Court decided that this section did not cover Hawaii's injury, because damage to the state's general economy is not an injury to its "business or property" within the meaning of the act. But the Court did say that "Hawaii plainly qualifies as a person under . . . the statute, whether it sues in its proprietary capacity or as *parens patriae*."[35]

The Court expressed the opinion that if Congress had intended the antitrust laws to cover damage to a state's general economy, it

28. Hawaii v. Standard Oil Co., 405 U.S. 251, 253 (1972).

29. *Id.* at 254-55. The state also sought recovery as *parens patriae* for all purchasers in the state, but this count was dismissed by the district court, and Hawaii replaced it with the count for damages for harm done to the economy of the state. However, the philosophy of the original count was still present when the counsel for Hawaii, in oral argument, suggested that recovery by the state could benefit the injured consumers in one of two ways: 1) the citizens would benefit from reduced taxation if the state retained the funds recovered, or 2) injured citizens would be able to recover their specific claims out of the funds recovered by the state. 40 U.S.L.W. at 3189 (Oct. 26, 1971); *see* Comment, *Hawaii v. Standard Oil Co.: Aloha to Parens Patriae?*, 22 CATHOLIC U.L. REV. 156, 158 (1972).

30. 301 F. Supp. 982 (D. Hawaii 1969).

31. 431 F.2d 1282 (9th Cir. 1970).

32. 401 U.S. 936 (1971).

33. Hawaii v. Standard Oil Co., 405 U.S. 251, 259 (1972).

34. 15 U.S.C. § 15 (1970) (emphasis added).

35. 405 U.S. at 261-62 (1972).

would have expressly provided for it.[36] This view, however, ignores the very nature of the antitrust laws, which were purposely written as broadly as possible to allow for situations not foreseen at the time of drafting.[37]

The other concern of the Court was that since under the antitrust laws each citizen could recover for individual damages, allowing Hawaii to recover for damage to the general economy would be opening "the door to duplicative recoveries."[38] However, in this case such a result hardly seems likely. The district court had denied Hawaii's count as representative of a class of injured consumers, finding that "under the circumstances . . . the class action based upon injury to every individual purchaser of gasoline in the State . . . in the context of the pleadings, would be unmanageable."[39]

The most recent opinion on the applicability of *parens patriae* to an antitrust treble damage action is the Ninth Circuit decision in *California v. Frito-Lay Inc.*[40] In this action California sought to recover treble damages for an alleged conspiracy by twelve manufacturers of "snack food" to fix and maintain prices in violation of section 1 of the Sherman Act. The state's second cause of action reads as follows:

> The State of California, as sovereign, agent and protector of all its citizens, sues *parens patriae* as representative of its citizens who are natural persons and who have not sued in their own right. This action is brought for treble the amount of damages suffered by its citizens due to the defendants' violations of the antitrust laws of the United States. It is impractical or impossible for the citizens represented herein to bring individual suits to recover damages and the duty to protect their interests and to enforce the policy of the antitrust laws rests with their sovereign, the State of California.[41]

The district court had denied defendants' motion to dismiss this cause of action stating:

> Courts cannot shrink from the responsibility of providing a forum for litigating claimed violations of rights—private or public—just because it has never been done before. *Parens patriae* in this representative sense meets both the letter and the spirit of Section 4 of the Clayton Act. This Court has been presented no valid reason why California, insofar as it purports to represent citizens for

36. "At the very least, if the latter type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act." *Id.* at 264.

37. *See* 21 CONG. REC. 2460 (1890) (remarks of Senator Sherman): "All that we, as lawmakers, can do is to declare general principles . . . ." *See generally*, P. AREEDA, ANTITRUST ANALYSIS (2d ed. 1974).

38. 405 U.S. at 264.

39. *Id.* at 256.

40. 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

41. 474 F.2d at 775.

> whom it is impractical or impossible to bring individual suits to recover damages for violation of the antitrust laws, should not be given the opportunity to do so.[42]

The Ninth Circuit reversed on the ground that *parens patriae* had not been recognized in this country as a basis for recovery of money damages for injuries suffered by individuals; but it indicated that such recognition might be in the offing.

> It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution.
>
> However, if 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.[43]

Both these recent cases denied the state standing to bring a *parens patriae* suit for damages to either the state's general economy or the state's individual citizen-consumers because the courts have interpreted the antitrust laws, and particularly the private action section of the Clayton Act, as not permitting this type of suit. In *Hawaii* the Court interpreted the "business and property" requirement of the act as failing to cover damages to the "general economy"; and in *California* the Court believed that for a state to recover the damages of its injured citizens, a specific legislative sanction was necessary, something which it did not find in the present antitrust laws. The opinions in each case indicate a potential acceptance of legislation that would allow these suits.[44] Accordingly, Congressman Peter Rodino, chairman of the House Committee on the Judiciary, introduced his proposed amendment to section 4 of the Clayton Act.

Legislative Solution

On February 20, 1974, Congressman Rodino, for himself, Congresswoman Jordan, and Congressmen Mezvinsky and Seiberling, introduced H.R. 12921 on the floor of the House of Representatives.[45]

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42. California v. Frito-Lay Inc., 333 F. Supp. 977, 982 (C.D. Cal. 1971).

43. California v. Frito-Lay Inc., 474 F.2d 774, 777 (9th Cir. 1973).

44. *Id.*; Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).

45. This bill was originally introduced as H.R. 12528 on February 4, 1974, by Congressman Rodino. It was subsequently reintroduced as H.R. 12921 with cosponsors from the Monopolies Subcommittee of the House Judiciary Committee. No action was taken on the bill in the Ninety-third Congress, and at the present time the bill is still in committee as H.R. 38 and H.R. 2850.

This bill was reintroduced in January and February of 1975 as H.R. 38 and H.R. 2850, respectively, and is presently being considered in the House Judiciary Committee. It adds three new subsections to section 4 of the Clayton Act. This note focuses on section 4C.[46]

Subsection (a) of new section 4C authorizes the attorneys general of the various states to bring antitrust treble damage and injunctive actions in each of the following circumstances:

1. As *parens patriae* of the citizen-consumers of the state for injuries individually sustained. This provision is in response to the Ninth Circuit's decision in *California v. Frito-Lay* which denied California standing to sue because there was no judicial or legislative precedent;

2. As a representative of a class of citizen-consumers who were individually injured. It is not clear whether this provision broadens the powers of the attorneys general to represent the state's citizens in a class action when the state itself is not a member of that class.

3. As *parens patriae* for injuries to the general economy of the state. This provision legitimates the type of action brought by the attorney general of Hawaii, but not allowed by the Supreme Court.[47]

Subsection (b) deals with the issues of recovery and distribution of funds when the state is suing on behalf of its injured citizens. During the floor debate, it was stated that paragraph (b)(1) "would streamline and expedite the proof of damages . . . . allowing total pur-

46. H.R. 2850, 94th Cong., 1st Sess. (1975), § 4C provides: "(a) Any attorney general of a State may bring a civil action in the name of such State in the district courts of the United States under section 4, or 16, or both, of this Act, and he shall be entitled to recover damages and secure other relief as provided in such sections—

(1) as parens patriae of the citizens of that State, with respect to damages personally sustained by such citizens, or, alternatively, if the court finds in its discretion that the interests of justice so require, as a representative member of the class consisting of the citizens of that State, who have been personally damaged; or

(2) as parens patriae, with respect to damages to the general economy of that State or any political subdivision thereof.

(b) In any action under paragraph (a)(1) of this section, the attorney general of a State—

(1) may recover the aggregate damages sustained by the citizens of that State, without separately proving the individual claims of each such citizen; and his proof of such damages may be based on statistical sampling methods, the pro rata allocation of excess profits to sales occurring within the State, or such other reasonable system of estimating aggregate damages as the court in its discretion may permit; and

(2) shall distribute, allocate, or otherwise pay out of the fund so recovered either (A) in accordance with State law, or, (B) in the absence of any applicable State law, as the district court may in its discretion authorize, subject to the requirement that any distribution procedure adopted afford each citizen of the State a reasonable opportunity to secure a pro rata portion of the fund attributable to his respective claims for damages, less litigation and administrative costs, before any of such fund is escheated or used for general welfare purposes."

47. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

chases by all the consumers within a state and total overcharges for all such purchases to be proved together." Proof would be based on the use of "reasonable statistical sampling methods and other equitable and expeditious methods of proving the amount of damages that are attributable to proved violations of the law."[48] This system of recovery has been referred to in cases and commentaries as fluid class recovery[49] and has been used successfully in *settlements* of class action suits.[50] It is desirable because it bases recovery on the defendants' records so that the problems of stringent proof of damages are eliminated and the actual amount of illegal gains is recovered providing a significant deterrent to future violations. But in antitrust actions which have *gone to judgment* under the present laws, the recovery has been based only on the proven claims of the plaintiffs. Therefore, without fluid class recovery, the defendants are allowed to keep much of their illegal profits because many plaintiffs do not come forward with their claims, and others who do come forward are unable to produce sufficient evidence to prove their claims. The fluid class recovery alleviates the burdensome necessity of proving individual consumer damages at the time of trial and bases total damage recovery on the defendants' records.

Paragraph (b)(2) provides that the state should maintain a fund against which injured citizens may make individual claims for their share of the recovery. The remainder of the money in the fund would then be distributed according to either state law or judicial authorization. It is likely that these funds would be used by the state in a manner which would benefit the group of injured citizens. For example, if the case were brought for price fixing by the major oil companies, the funds remaining after individual recovery might be used to lower gasoline taxes or build highways. The importance of paragraph (b) is that all the defendants' illegal gains would be recovered, providing a benefit for the injured consumers and a deterrent to future violations of the antitrust laws by making it very costly for the violators to get caught.

One of the underlying principles of antitrust enforcement is the concept of the "private attorney general,"[51] the injured individual who may sue for treble damages under section 4 of the Clayton Act and

48. 120 CONG. REC. 748 (daily ed. Feb. 20, 1974).

49. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1012 (2d Cir. 1973), *aff'd*, 417 U.S. 156, (1974), holding that as a matter of statutory construction the fluid class recovery was not permitted under the federal class action rule, Fed. R. Civ. P. 23. *See also* Comment, *Due Process and Fluid Class Recovery*, 53 ORE. L. REV. 225 (1974).

50. *See, e.g., In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

51. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

thereby provide an additional deterrent to any potential violations of the antitrust laws. The proposed amendment to section 4 would expand this principle to make consumer treble damage actions a workable reality.

Why Not a Class Action?

Technically, a large group of injured consumers could bring a class action for treble damages under section 4 of the Clayton Act. This type of suit is regulated by Federal Rule of Civil Procedure 23, which sets out four prerequisites:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.[52]

In addition to these prerequisites under Rule 23(a), Rule 23(b) establishes three categories of actions under which the suit must fit. Rule 23(b)(3) is the only category which is applicable to a treble damage action; it requires that:

> the court [find] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[53]

The applicability of these rules to consumer antitrust actions has never been definitively settled. The Advisory Committee originally addressed itself to this issue in a less than straightforward manner. It said that "[p]rivate damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions."[54]

Assuming that a large-scale antitrust class action could satisfy Rule 23(a) and did involve "predominating common questions," it still must be shown that "a class action is superior to other available methods. . . ." One of the factors taken into consideration in determining this is whether the class will prove to be manageable. Manageability encompasses the whole range of practical problems that may render a class action format inappropriate for a particular suit. This includes notice to class members, proof of damages and distribution of damages.

52. Fed. R. Civ. P. 23(a).

53. Fed. R. Civ. P. 23(b)(3).

54. Proposed Rules of Civil Procedure, Advisory Committee Note to Rule 23, 39 F.R.D. 69, 103 (1966) [hereinafter cited as Proposed Rules].

There are very few large-scale consumer class actions which are able to pass the manageability test. As one commentator states: "These difficulties in managing class actions are not solved by rule 23, perhaps because the rulemakers did not fully anticipate the extent to which the new rule would be applied to such large class suits."[55]

Manageability of a large class is not the only problem Rule 23 fails to solve. Few small law firms on a contingent-fee basis, and even fewer consumers, have the resources to finance an extended suit which may take ten years and tens of thousands of dollars to bring to fruition. The tremendous expense of litigating an antitrust claim is a significant deterrent when a great number of individuals are each injured only slightly, as is usually the case in consumer actions. The existence of a class lends no aid at all to the representative party in his pursuit of the case. It is now common procedure for district courts to forbid any contact not pursuant to court order between the representative party and any actual or potential class member who is not a formal party to the proceeding.[56] Even if contact were permitted, most individual consumers cannot be identified during the preliminary stages, and few, if identified, would be willing to contribute funds. Though section 4 of the Clayton Act provides for treble damages, litigation costs and attorneys' fees if the suit is successful, the vast amount of time and money that is required to litigate an antitrust claim deters many potential plaintiffs.

Recognizing the obstacles confronting the consumer and the need for some alternative, the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* made the following statement on the likelihood of a consumer class action in an antitrust case:

> These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.[57]

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55. Comment, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 427 (1973); *see, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 256 (1972); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017 (2d Cir. 1973).

56. *See* Section 1.41 and Appendix 1.41 in Manual for Complex Litigation (West 1973). The purpose of this procedure is to prevent the attorney for the class from soliciting class members to become named plaintiffs in order to increase the contingent fee.

57. 392 U.S. 481, 494 (1968). The Court rejected the defense that the plaintiff firm was not injured by defendant's antitrust violations because it "passed on" the additional cost to consumers.

There is one massive class action suit which did seem to overcome many, if not all of the objections to class actions posited above. *In re Antibiotic Antitrust Actions*,[58] was a joinder of 114 actions brought against five corporate defendants for price fixing in the marketing of broad spectrum antibiotics. Several of the actions were brought by states as representatives of a class of retail purchasers within the state. Since each state supports welfare programs which reimburse welfare recipients for the purchase of prescription drugs, including broad spectrum antibiotics, the state stands in the shoes of a substantial number of retail purchasers and thereby satisfies the requirement of Rule 23 that the representative of a class must be a member of that class.

The district court granted class action status contingent on a showing by the states that the action was manageable and that the classes could be adequately notified. The court foresaw the establishment of a fund of total damages—a fluid class recovery—which would increase the manageability of the classes by doing away with the necessity of rigorously proving every individual claim. The case was settled, so this issue was not ruled on by a higher court.

The notice required by Rule 23 was satisfied by "occupant" mailings to all addresses within the state which could be reasonably determined. This was sent by state government franked mail.

While this case seems to be an exception to the idea that the class action mechanism is inadequate for large-scale consumer actions, three factors distinguish this case from the norm and make it an exception which does not invalidate the rule. First, the suit was brought as a class action by the attorneys general. This is permitted only when a state has suffered the same type of injury as the members of the class. Since in a consumer action the class consists of retail purchasers, the state which does most of its purchasing at wholesale is rarely able to qualify. Without the facilities and resources of the various states, this action could not have proceeded past the notice stage. Second, the case was settled without having the decisions of the district court reviewed by a higher court. Third, this case was settled before the decision in *Eisen v. Carlisle & Jacquelin*,[59] commonly known as *Eisen III*, which held that a fluid class recovery was not permitted under Rule 23 and that a class action with millions of claimants, all of whom must present their individual claims to the defendants to recover, is unmanageable. Had the *Eisen* decision been handed down before the *Antibiotics* cases, the result of *Antibiotics* would probably have been different.

58. 333 F. Supp. 278 (S.D.N.Y. 1971).
59. 479 F.2d 1005 (2d Cir. 1973).

Because of the potential problems of manageability, the high costs of litigating and the low individual returns, the class action is not the optimal vehicle for effectuating the "private attorney general" concept authorized in section 4 of the Clayton Act. The alternative is the *parens patriae* suit under the proposed amendment to section 4.

Why Parens Patriae?

"Every 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. In enacting these laws, Congress had many means at its disposal to penalize violators."[60]

Several methods of antitrust enforcement exist in addition to the individual or class actions discussed above. The Antitrust Division of the Department of Justice has the authority to bring criminal and injunctive proceedings for violations of the Sherman and Clayton Acts.[61] Successful criminal prosecution carries the potential of both fines and imprisonment for the officials of the company, and a $1,000,000 maximum fine for the company itself.[62] Although this may appear to be a significant deterrent, it must be realized that the profits gained from the type of violation that generally affects consumers far exceed the fines imposed.[63]

An injunction is equally ineffectual. Although it stops the practices complained of, its prospective nature diminishes its value as a deterrent. It would be quite rational for any profit-oriented company to continue to violate the antitrust laws until an injunction was issued.[64]

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60. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

61. Sherman Act, 15 U.S.C. §§ 1-4 (1970); Clayton Act, 15 U.S.C. §§ 12-27 (1970).

62. PUB. L. No. 93-528, § 3 (Dec. 21, 1974), *amending* 15 U.S.C. §§ 1-3 (1970). The maximum penalty for these officials is $100,000 and three years in prison.

63. Although the maximum fines have increased dramatically with legislation passed in 1975 (the previous maximums were $50,000 for a company and $5,000 for an individual), the courts rarely impose the maximum penalty. Since 1955 when the Sherman Act was amended to raise the maximum fine for corporations from $5,000 to $50,000, the average fine has increased by a factor of less than four. Imprisonment for corporate officers is rarely resorted to; prison sentences have been imposed in only 26 cases out of a total of 536 criminal convictions under the antitrust laws from 1890 to 1969. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 389-91 (1970) [hereinafter cited as Posner].

64. Injunctions, like consent decrees, merely prohibit a person or corporation from engaging in specific conduct which has been found to violate the antitrust laws. An injunction prohibits conduct which the entity has engaged in, while a consent decree prohibits conduct which the entity has allegedly engaged in without any admissions of past guilt. Both may effectively stop the specific prohibited practice, but both are

It is true that a successfully prosecuted civil or criminal action will be prima facie evidence in any subsequent civil suit, but a judgment issued either pursuant to a consent decree or before taking testimony will have no collateral effects.[65] Because of the limited legal resources of the Antitrust Division, the small percentage of violations that do get prosecuted are often settled by consent decree.[66] Therefore, the deterrent effect is almost entirely lacking.

In addition to giving authority to the Department of Justice, Congress created the Federal Trade Commission[67] to prevent unfair methods of competition.[68] The commission has the power to issue cease and desist orders when it finds a violation of the Federal Trade Commission Act or the Clayton Act. If the cease and desist order is disobeyed, the commission can impose a statutory penalty for each violation. This is essentially an injunction and carries no penalty unless there is a violation of a cease and desist order issued subsequent to a violation of either act. As was discussed above, while this may stop the specific conduct complained of, it does almost nothing to deter future violations of a different type.

Because of the lack of resources[69] and the limited range of penalties available, the federal government alone is not able to provide sufficient deterrents to prevent violations of the antitrust laws. Judge Real, in the district court opinion in *California v. Frito-Lay*,[70] observed:

> But what corporation would not risk violation of the antitrust laws where maximum penalties are miniscule compared to the potential harm to a public unable to meet "technical" requirements of proof of damage? Or, even more to the point—what corporation would risk violation of the antitrust laws if they were assured every penny of conspiratorial gain, three times over, were the ultimate result of a proven price-fixing conspiracy? Putting the question is its own obvious answer.[71]

Clearly the threat of a treble damage claim is the only penalty that will make a company scrupulously observe the antitrust laws.

somewhat ineffectual as a deterrent to future violations of a different nature or to similar violations by a different company. This is because injunctions and consent decrees impose no penalties unless they are violated. Any gains which were achieved through the illegal acts prior to the prohibition are retained by the offending company.

65. 15 U.S.C. § 16(a) (1970).

66. Seventy-six percent of the judgments in favor of the government from 1890 to 1969 have been consent judgments. Posner, *supra* note 63, at 375.

67. 15 U.S.C. §§ 41-58 (1970).

68. 15 U.S.C. § 45(b) (1970).

69. Between 1965 and 1969 the Justice Department brought only 195 antitrust suits while the Federal Trade Commission brought only 76 (an average of 39 and 15 a year respectively). Posner, *supra* note 63, at 366-69.

70. 333 F. Supp. 977 (C.D. Cal. 1971), *rev'd*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

71. 333 F. Supp. at 981.

With the present restrictions on class actions and the impracticality of individual suits, the type of antitrust enforcement system proposed under Congressman Rodino's bill is necessary.

It is the primary responsibility of the state attorney general to protect the legal rights of the state and its citizens; it seems a natural extension of this responsibility to allow the state to represent its citizens' interests in court when they are unable to do so themselves.

Violations of the antitrust laws are often difficult to detect as the evidence is usually buried in voluminous documents. The attorney general has the investigative and legal capacity to discover the violations and prosecute the case. Furthermore, the attorney general would not have the problem of meeting the requirements of Rule 23 to which any class action suit is subject.

Judge Lord in the *Antibiotics* case indicated that the attorney general was an ideal representative of the state's consumers.

> [I]t is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general. Historically the common law powers of the attorney general include the right and duty to take actions necessary to the maintenance of the general welfare and his presence in these actions is but a modern day application of that right and duty.[72]

Beyond the fact that the state is an appropriate agent for the enforcement of the treble damage claims of its citizens, there are compelling reasons why this enforcement should exist. The first of these is the deterrent value of the treble damage action.[73] While it is worthwhile for a company to violate the antitrust laws if its potential liabilities are less than its potential profits from the illegal activity, most companies will think carefully before violating the antitrust laws if there is the real probability that not only will all of the profits be confiscated, but double that amount will be taken as a penalty. Under the proposed amendment to section 4 of the Clayton Act, total actual damages, computed by statistical or sampling methods, will be trebled and then turned over to the attorney general for distribution. Faced with that unpleasant prospect, most companies will have a much greater incentive to remain inside the law.

Another reason for the prosecution of treble damage claims is to provide compensation to the injured parties. Though an injury may be small, this is nevertheless money to which the injured party is en-

72. *In re* Antibiotics Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971).

73. "Another purpose in permitting an injured party to recover threefold his actual damage was that substantial verdicts against the wrongdoer would constitute punitive sanctions—to act as a deterrent against a repetition of the offense and to serve as a warning to potential violators." United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 171 (S.D.N.Y. 1955).

titled and should be given access. The traditional methods, individual and class actions, have not been found to be effective for small claims, leaving the consumer no options for recovering his money. Though one recent case suggests that small claims are not sufficiently important to require adjudication,[74] this seems to overlook the right of an individual to his property[75] as well as the deterrent effect of the action on the offending company.

Although the proposed amendment seems to answer many of the pressing problems in enforcing the antitrust laws, it may create some problems of its own in effecting that enforcement.

A Potential Problem: Due Process in Parens Patriae Actions

Since a *parens patriae* suit is an entirely separate entity from a class action, it does not fall under the restrictions of Rule 23. This allows *parens patriae* suits to be brought in cases where class actions are not feasible. But there are certain safeguards to an individual's claim under Rule 23, the absence of which may render a *parens patriae* suit violative of due process.[76]

Because there is no notice requirement nor opportunity to participate in the litigation, a citizen may raise a constitutional objection and assert that the state has expropriated his personal claim. The question raised is whether citizens who have personally sustained damages are constitutionally entitled to notice of the commencement of the suit in order to exclude or include themselves in the action.

The Development of the Due Process Requirement of Notice

The constitutional requirement of due process is expressed in the Fifth and Fourteenth Amendments which provide, "No person shall . . . be deprived of life, liberty or property without due process of law."[77] *Mullane v. Central Hanover Bank & Trust Co.*[78] is generally cited as the principal authority for the proposition that individual notice to all known, interested parties is a requirement of due process.[79] But a

74. Hawaii v. Standard Oil Co., 405 U.S. 251, 263 (1972).

75. The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that an individual may not be deprived of property without "due process of law."

76. *See* Philadelphia Housing Auth. v. American Radiator, 309 F. Supp. 1057, 1062-63 (E.D. Pa. 1969).

77. U.S. CONST. amends. V, XIV.

78. 339 U.S. 306 (1950).

79. Proposed Rules, *supra* note 54, at 107.

close reading of *Mullane* reveals that this interpretation is not wholly accurate. The central issue in *Mullane* was the constitutional sufficiency of notice by publication to beneficiaries of a common trust fund for the judicial settlement of accounts by the trustee. The trust fund was organized under the New York Banking Law which required only publication in a local newspaper. The Court ruled that individual notice was required for "known present beneficiaries of known place of residence."[80] However, the Court did not rule that personal notice to all identifiable beneficiaries was an inflexible standard of due process to be applied in every case. It reached the result it did by balancing the protection of the individual afforded by the Fourteenth Amendment against the interests of the state in bringing any issue to a final settlement.[81] *Mullane*, then, stands for the proposition that a balancing test should be applied in each case to determine the extent of the due process notice requirements.

The factors which influenced the Court's decision were: 1) the trustee was in regular communication with the beneficiaries, so that the giving of notice was cheap and easy; 2) the interests of the various beneficiaries were adverse to one another, so that no one party could represent all of their interests adequately; 3) the trustee himself had interests adverse to the beneficiaries in that his main concern was to settle the account with a minimum of interference; 4) a relatively small number of beneficiaries were involved; and 5) the interests of many of the beneficiaries were substantial.[82] The Court held that there was sufficient individual interest to require personal notice; however, it declined to set up any parameters within which the balancing test would work:

> The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects.[83]

The principle implied in *Mullane* is that due process does not require efforts which go beyond the value of the right involved, when that right is a financial one.

Another case which has had a noted effect on the interpretation

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80. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).

81. *Id.* at 314.

82. *Id.* at 309, 316-18; McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351, 1391 (1974).

83. 339 U.S. at 314.

of the due process requirement is *Hansberry v. Lee*,[84] which held that a judgment in an earlier class action was not res judicata against the defendant in the second action since his interests as plaintiff had not been adequately represented in the first suit. The plaintiff in *Hansberry* sought to enjoin the breach of a racially restrictive covenant by the black defendant who had acquired title to land in the restricted area. A stipulation by the plaintiff in a former class action that the covenant had been validated by a sufficient number of signatures was held not binding on the defendant in *Hansberry*. The decision notwithstanding, the Court noted that class actions were a long-standing exception to the rule that res judicata can be applied only to those who have adequate notice of the proceedings.[85] In class actions, and by analogy in *parens patriae* suits, the essential elements to satisfy the requirements of due process are a commonality of interests and a representative who adequately and fairly represents all of the members of the class.[86]

In reading *Mullane* and *Hansberry* together there seems to be no authorization for a rigid standard of individual notice, but rather a balancing of interests with adequacy of representation playing an important role in determining what type of notice, if any, is required.

Notice Under Rule 23

In 1966 the Advisory Committee completely revised Rule 23. One change was the addition of two notice requirements. Rule 23 (c)(2) provides, "In any class action maintained under subdivision (b)(3), the Court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Advisory Committee described (c)(2) notice as mandatory "to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class."[87] Rule 23(d)(2) provides for discretionary notice at the option of the court. The Advisory Committee viewed these two subsections as fulfilling "requirements of due process to which the class action procedure is of course subject."[88] But as was noted above, the due process requirement of notice as interpreted by *Mullane* and *Hansberry* does not mandate the type of notice required by Rule 23(c)(2). *Mullane* called for a balancing of interests, not an abso-

84. 311 U.S. 32 (1940).

85. *Id.* at 41.

86. *Id.* at 42-43.

87. Proposed Rules, *supra* note 54, at 107. The purpose of excluding oneself from the class is to avoid the res judicata effect which would otherwise attach to a final judgment in an action prosecuted under 23(b)(3).

88. Proposed Rules *supra* note 54, at 107 (citing *Mullane* and *Hanover*).

lute requirement of individual notice; and *Hansberry* relied on adequacy of representation to insure procedural safeguards. Despite the actual holdings in these cases, many courts have been guided by the Advisory Committee's erroneous interpretation of what due process requires.

The most recent case to rule on this issue is *Eisen v. Carlisle & Jacquelin.*[89] The district court decided that the suit could be maintained as a class action on behalf of approximately six million odd-lot traders, and developed a plan by which the notice requirements of Rule 23(c)(2) could be satisfied by individual notice to a relatively small portion of the more than two million identifiable members of the class and published notice to the rest.[90] Judge Tyler made the following statement about his decision:

> [I]n determining what kind of notice is required by due process and Rule 23(c)(2), it must be recalled that expensive and stringent notice requirements could vitiate the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer and environmental litigation.[91]

In a decision referred to as *Eisen III*,[92] the Second Circuit reversed the holdings of the district court. Judge Medina, speaking for the court of appeals, determined that Rule 23(c)(2) "unambiguously" requires that individual notice must be given to all members of the class who can be readily identified, and that the cost of the notice must be borne by the plaintiff. He based his reasoning on Rule 23 language and its interpretation by the Advisory Committee, and on the "decided constitutional overtones" of the notice question.[93] It seems, however, that Judge Medina's view was unduly harsh in light of the interpretations of due process discussed earlier. Judge Oakes in his dissenting opinion cites *Hansberry* for the proposition that the due process requirements are met by a procedure that "fairly insures the protection of the interests of absent parties who are to be bound by [the judgment]."[94] Judge Oakes did not indicate whether he believed

89. 417 U.S. 156 (1974).

90. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265-68 (S.D.N.Y. 1971). The court also provided for a "preliminary mini-hearing on the merits" which determined that defendants should pay for 90% of the notice costs, (54 F.R.D. 565 (S.D.N.Y. 1972)), and a fluid class recovery, without which, the court acknowledged, the class would be unmanageable. 52 F.R.D. 253, 264-65 (S.D.N.Y. 1971).

91. 52 F.R.D. at 266.

92. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973). This is the third decision by the Court of Appeals in this case.

93. *Id.* at 1015. The fluid class recovery concept was also rejected by the court as outside the language of Rule 23. *Id.* at 1018.

94. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1024 (2d Cir. 1973) (dissenting opinion of Oakes, J., from the denial of rehearing en banc), *quoting* Hansberry v. Lee, 311 U.S. 32, 42 (1940).

this "procedure" was present in *Eisen*, but only that the decision should be based on equitable grounds rather than on a strict interpretation of the requirements of Rule 23.

The Supreme Court affirmed the Second Circuit's decision, but did so strictly on the basis of the specific language of Rule 23. Justice Powell, delivering the opinion of the Court, said that Rule 23 required individual notice to all class members who could be identified with reasonable effort and that no portion of the costs of that notice could be imposed on the defendants.[95]

The courts and the Advisory Committee cite two purposes for their strict reading of the requirement of individual notice. The first is to allow any class member to exclude himself from the class and thereby avoid being bound by the decision.[96] The second is to give any class member an opportunity to enter an appearance in the action.[97] While both of these purposes are laudatory, they are not the only factors to be considered when deciding whether to allow an action to proceed. There may be equally compelling reasons for allowing an action to be brought when there is no other alternative and when the injured members are represented fairly and adequately, even though they may be denied the protections of voluntary exclusion and active participation.

Conclusion

It may be argued that a *parens patriae* suit for damages brought on behalf of a state's injured consumer-citizens violates the due process of those citizens by appropriating their cause of action. This argument seems to disregard the realities of the situation. Given the limitations of the antitrust laws and the inadequacies of Rule 23, if the suit were not brought by the state, it would, in all probability, not be brought at all.

There must be a balancing of interests to determine the extent to which the state must ensure the due process of its citizens. The state's interests include recovering damges for its consumer-citizens, depriving the violators of their illegal profits, and deterring future violations of the antitrust laws by showing that the state is willing to actively pursue any case within its realm. Against these must be balanced the individual's interests in avoiding the res judicata effect of a judgment in a case in which he was not an active participant in pursuing his own cause of action. These interests of the consumer are largely illusory as few consumers realize that an injury has occurred and even fewer

95. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
96. Proposed Rules, *supra* note 54, at 107.
97. Fed. R. Civ. P. 23(c)(2)(C).

have a sufficient amount at stake to pursue an individual action. Though the consumer may be deprived of his cause of action, which is a form of property, if the suit is successful, he is not being deprived of his pro rata share of the recovery. The provisions of the bill allow the consumer to make his claim to the fund for his damages before any of the money escheats to the state. Indeed, to disallow the *parens patriae* suit would be a far greater denial of due process, because it would deprive the consumer of his one realistic opportunity to recover his property.[98]

The interest of the state in bringing a *parens patriae* action cannot be minimized. Aside from the potential recovery for the state and its citizens, the prophylactic effect of a treble damage suit is an important consideration. This would be the state's most potent weapon to protect its citizens from both present and contemplated violations of the antitrust laws. Without it a state would be left with the ineffectual alternatives of injunction under state and federal law and criminal penalty under state law.

98. Even Judge Medina in his harsh Eisen III opinion admitted that some alternative to a class action was needed in massive consumer suits: "And yet, even if amended Rule 23 furnishes no satisfactory solution in situations where immense numbers of consumers have been mulcted in various ways by illegal charges, it would seem that some means should be provided by law for the redress of these wrongs to the community and to society as a whole. The numerous decisions by courts in these class action cases have at least exposed the lack of adequate remedy under existing laws. From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent." Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019 (2d Cir. 1973).