

**Two Enforcers Separated by a Common Mission:  
Public and Private Attorneys General**

**Jay L. Himes  
Chief, Antitrust Bureau  
Office of the New York Attorney General**

**The Federal Bar Council  
Class Actions – The Latest  
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Congress enacted express *parens patriae* provisions in 1976 in an effort to overcome perceived obstacles to consumer recoveries in class actions.<sup>57</sup> Thus, Section 4C of the Clayton Act, adopted as part of the Hart-Scott-Rodino Antitrust Improvements Act,<sup>58</sup> provides that:

Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.<sup>59</sup>

The legislative history of Section 4C is replete with statements showing that *parens patriae* proponents believed restrictive court rulings, together with practical problems of proving damages, had rendered Rule 23 class actions impotent to remedy the injury that individual consumers sustained from antitrust violations.<sup>60</sup> These restrictions were highlighted by three

<sup>55</sup> See Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1039-40 (2001); Note, *Suits by a State as Parens Patriae*, 48 N.C. L. REV. 963, 969 (1970).

<sup>56</sup> See, e.g., 122 Cong. Rec. 15977 (May 28, 1976) (written remarks of Sens. Hart and Scott: “[a] primary duty of the State is to protect the health and welfare of its citizens; and a State attorney general is normally an elected and accountable and responsible public officer whose duty it is to promote the public interest”); *id.* at 7037 (Mar. 18, 1976) (remarks of Rep. Daniels: “a State attorney general is an effective and ideal spokesman for the public in antitrust cases, because he has a primary duty to protect their health and welfare, and he is directly accountable to them”).

<sup>57</sup> See *Pennsylvania v. Budget Fuel Co.*, 122 F.R.D. 184 (E.D. Pa. 1988) (declining to certify a class where there was a pending case brought by a state attorney general); *In re Montgomery County Real Estate Antitrust Litigation*, 1988 WL 125789 (D. Md. 1988) (declining to approve a settlement where a class plaintiff sought to represent persons represented by the state attorney general in a pending *parens patriae* action); *Sage v. Appalachian Oil Co.*, 1994 WL 637443 (E.D. Tenn. 1994) (the state attorney general “is clearly in a superior position to bring a parens patriae action against defendants on behalf of all natural persons in this state”).

<sup>58</sup> Pub. L. No. 94-435, 90 Stat. 1394 (codified, as amended, at 15 U.S.C. §§ 15c-15h).

<sup>59</sup> 15 U.S.C. § 15c(1).

<sup>60</sup> See generally Sen. Rep. No. 94-803, Pt. 1, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess., at 6 (1976) (“consumers have found little relief under the class action provisions of the Federal Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 and practical problems in the proof of individual consumers’ damages under section 4 of the Clayton Act”); *id.* at 40-41 (the statute is a “legislative response to restrictive judicial interpretations of the notice and manageability provisions of Rule 23”); H.R. No. 94-499, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 4-9 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 2575, 2573-78; 122 Cong. Rec. 15974 (May 28, 1976) (written remarks of Sens. Hart and Scott); 10 Earl W. Kintner, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 10-16 (1985) (“Kintner, *Antitrust Legislative History*”); Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens*

then-recent rulings:

- In *Hawaii v. Standard Oil Co.*,<sup>61</sup> the Supreme Court rejected Hawaii's effort to sue as *parens patriae* to recovery damages for injury to the state's general economy from antitrust violations.
- In *California v. Frito-Lay, Inc.*,<sup>62</sup> the Ninth Circuit extended Standard Oil by holding that California could not maintain a *parens patriae* action to recover damages suffered by the state's consumers from an alleged price-fixing conspiracy.
- Finally, in *Eisen v. Carlisle & Jacquelin*,<sup>63</sup> the Supreme Court held that Rule 23 required actual notice to all identifiable class members, thus erecting a logistical and financial hurdle that made consumer class actions a near impossibility.

Against the backdrop of these rulings, Senator Hart, for example, noted that, under then-current law, a state attorney general could represent consumers only by means of a class action:

It is this latter requirement which generally denies consumers an effective remedy. When rule 23 was amended in 1966, it was hoped that this would be the means whereby consumers could recover damages for violations which were individually small but widespread; violations where no individual consumer had a large enough stake to sue. Unfortunately, this has not been the case.

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Title IV [then the *parens patriae* provisions] attempts to give consumers a meaningful remedy and thereby create an effective deterrent to violations which cause individually small but widespread harm.<sup>64</sup>

Assistant Attorney General Thomas E. Kauper, then head of the Antitrust Division, expressed similar views:

Although it was once thought that the 1966 liberalization of Federal Rule of Civil Procedure 23 might provide a satisfactory mechanism for effectuating the deterrent objectives of Section 4, the class action device is apparently of limited utility in securing relief for large classes of individual consumers, see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

The *parens patriae* concept . . . is both desirable and useful from the perspective of better antitrust enforcement.<sup>65</sup>

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*Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORD. L. REV. 361, 370-81 (1999) ("Farmer, Cy Pres Distributions").

<sup>61</sup> 405 U.S. 251 (1972).

<sup>62</sup> 474 F.2d 774 (9<sup>th</sup> Cir.), *cert. denied*, 412 U.S. 908 (1973).

<sup>63</sup> 417 U.S. 156 (1974).

<sup>64</sup> 122 Cong. Rec. 15311, 15312 (May 25, 1976).

<sup>65</sup> Letter from Thomas E. Kauper to Hon. Peter W. Rodino, Jr., dated Sep. 25, 1975, *reprinted in* 10 Kintner,

As thus enacted, besides authorizing suit by state attorneys general, the *parens patriae* provisions, adopted a number of mechanisms designed to facilitate prosecuting and proving price-fixing cases brought on behalf of individual consumers. For example:

- Notice to persons on whose behalf the suit is brought may be given by publication unless the court finds that doing so would violate due process. Then, the court may direct such further notice “according to the circumstances of the case.”<sup>66</sup> Actual notice to individual consumers is not required, however.
- Damages may be proved in the aggregate by statistical or sampling methods, by computing the illegal overcharge in a price-fixing case, or by other reasonable systems to estimate aggregate damages. Individual damage proof is not required.<sup>67</sup>
- Damages proven are, of course, trebled, and may be distributed to injured persons, or to the state as a civil penalty, as directed by the court. In either case, however, injured parties must be given a “reasonable opportunity” to secure part of the net monetary recovery.<sup>68</sup>

These Hart-Scott-Rodino *parens patriae* sections were the product of an intensive legislative battle. As one leading commentator has emphasized:

This provision . . . was the most controversial provision of the Improvements Act. Many of the Act’s opponents argued that *parens patriae* would be held an unconstitutional delegation of federal law enforcement responsibilities to non-federal officials, that its

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*Antitrust Legislative History, supra* n. 60, at 120, 121. See generally 122 Cong. Rec. 30879 (Sep. 16, 1976) (remarks of Rep. Rodino: “the compromise bill is not a rule 23(b)(3) class action under Clayton section 4. . . . In particular, it is a superior alternative to a rule 23(b)(3) class action. Thus, the compromise bill does not incorporate the various requirements of rule 23(b)(3) . . . —for this bill represents the legislative conclusion that the State’s attorney general is the best representative conceivable for the State’s consumers”); *id.* at 29146 (Sep. 7, 1976) (remarks of Rep. Abourezk: (“[t]he need for the *parens patriae* provisions of this bill are especially clear. There is presently no effective remedy for the average consumer who is the victim of antitrust violations”)); *id.* at 15871 (May 27, 1976) (remarks of Sen. Bayh: “*parens patriae* is the only realistic means to insure that consumers do not remain unprotected from Sherman Act violations”); *id.* at 14691 (May 16, 1976) (remarks of Sen. Tunney: the *parens patriae* provisions are “a reasoned response to the virtual foreclosure of the rule 23 class action option by the Supreme Court . . . . By allowing State attorneys general to sue on behalf of many private individuals, we assure that consumers’ interests will be represented”); *id.* at 7034 (Mar. 18, 1976) (remarks of Rep. Seiberling: *parens patriae* cases “are a fairer, more efficient alternative to large antitrust class actions, and the courts have the power to prohibit these large class actions if there is a less burdensome, more efficient alternative. A *parens patriae* action is such an alternative”); *id.* at 7029 (Mar. 18, 1976) (remarks of Rep. McClory: “[e]xisting remedies for class actions on behalf of injured citizens are virtually unavailing and, as a consequence, there is widespread unjust enrichment, extensive price fixing, and other antitrust anticompetitive and monopolistic practices which permit violations of our existing antitrust laws to continue without a remedy”).

<sup>66</sup> 15 U.S.C. § 15c(b)(1).

<sup>67</sup> 15 U.S.C. § 15d. See *In re Mid-Atlantic Toyota Antitrust Litigation*, 525 F. Supp. 1265, 1285 (D. Md.) (section 15d creates a “rebuttable presumption of the measure of damages” and shifts the burden to defendants “to prove that purchasers were not injured as much as plaintiffs’ statistical method would assume”), *aff’d sub nom.* *Pennsylvania v. Mid-Atlantic Toyota Distributors*, 704 F.2d 125 (4<sup>th</sup> Cir. 1983).

<sup>68</sup> 15 U.S.C. § 15e.

notice provisions would violate the due process rights of the injured persons, and that the aggregation of damages and fluid recovery provisions would violate the defendant's due process rights. It was also argued that there would be bad faith suits brought by politically ambitious state attorneys general and private attorneys solely interested in obtaining large contingency fees.<sup>69</sup>

Proponents of the *parens patriae* approach prevailed, however, and this construct thus became Congress' chosen means to give consumers an effective antitrust remedy against price fixing.<sup>70</sup> By contrast, prior to this legislation, judicial comments favoring class actions predominated.<sup>71</sup> Pre-Hart-Scott-Rodino, courts considered *parens patriae* a device to avoid not the "obstacles" of Rule 23, but rather its "safeguards."<sup>72</sup>

The congressional vision has never been fully realized, of course, because the Supreme Court's "direct purchaser requirement" — adopted in *Illinois Brick*<sup>73</sup> a year after Hart-Scott-Rodino became law — blocks most consumer antitrust cases under federal law. That ruling set into motion the process, still on-going, of protecting consumers from antitrust violations under state indirect purchaser laws, which many states now invoke as *parens patriae*.<sup>74</sup>

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<sup>69</sup> 10 Kintner, *Antitrust Legislative History*, *supra* n. 60, at 11.

<sup>70</sup> *New York v. Reebok International Ltd.*, 96 F.3d 44, 48 (2<sup>nd</sup> Cir. 1996) (Section 4C was enacted "to overcome obstacles to private class actions through enabling state attorneys general to function more efficiently as consumer advocates") (quoting *In re Grand Jury Investigation of Cuisinarts*, 665 F.2d 24, 35 (2<sup>nd</sup> Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983)). *See also* *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 573 n.29 (1983) (Section 4C is designed to remedy problems inherent in private Rule 23 antitrust class actions); *Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc.*, 704 F.2d 125, 128 (4<sup>th</sup> Cir. 1983) (the law "was aimed primarily at enlarging the potential for consumer recovery . . . by effectively bypassing the burdensome requirements of Rule 23"); Farmer, *Cy Pres Distributions*, *supra* n. 60, 68 FORD. L. REV. at 380-87. *But see* *In re Arizona Escrow Fee Antitrust Litigation*, 1982-83 Trade Cas. (CCH) ¶ 65,198, at 71,802 (D. Ariz. 1982) (directing that the Hart-Scott-Rodino Act "does not reflect[] an intention to supersede Rule 23 class actions on behalf of consumers").

<sup>71</sup> *See* *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) ("[p]arens patriae actions may, in theory be related to class actions, but the latter are definitely preferable in the antitrust area"); *Pfizer, Inc. v. Lord*, 522 F.2d 612, 618 (8<sup>th</sup> Cir. 1975) ("[t]his strong preference for class actions over parens patriae has been repeatedly expressed") (citing authorities), *cert denied*, 424 U.S. 950 (1976). *But see* *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 280 (S.D.N.Y. 1971) ("it is difficult to imagine a better representative of retail consumers within a state than the state's attorney general").

<sup>72</sup> *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1063 (E.D. Pa. 1969). *See also* *California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 (9<sup>th</sup> Cir.) (the practical inability of injured citizens to bring individual suits has "found expression in provisions for class actions"), *cert. denied*, 412 U.S. 908 (1973).

<sup>73</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 734, n.14 (1977) (describing Clayton Act § 4C as creating "a new procedural device — *parens patriae* actions by States on behalf of their citizens — to enforce existing rights" under Clayton Act § 4, not a new substantive liability). *See also* *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 218 (1990).

<sup>74</sup> *See* *California v. ARC America Corp.*, 490 U.S. 93 (1989) (upholding state indirect purchaser statutes). *See generally* Antitrust Modernization Commission, REPORT AND RECOMMENDATIONS, at Ch. III.B ("Indirect

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Purchaser Litigation”) (Apr. 2007) (“AMC Report”); Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling*, 15 ANTITRUST 34 (Summer 2001).