

1999

## More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General

Susan Beth Farmer

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361 (1999).

Available at: <https://ir.lawnet.fordham.edu/flr/vol68/iss2/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General

### Cover Page Footnote

Associate Professor of Law, the Dickinson School of Law of the Pennsylvania State University. B.A., Wellesley College; J.D., Vanderbilt University School of Law. I would like to thank the many assistant state Attorneys General who provided information, insights, and original documents, including Alan Barr, Ellen Cooper, Thomas Greene, Richard Grimm, Robert Hubbard, Pamela Jones Harbour, and Kevin O'Connor. The helpful comments of Professors Peter Alexander, Christine Kellett, John Maher, Katherine Pearson, and Victor Romero during a faculty presentation of an early version of this Article are much appreciated. I also thank my research assistant, Joanna Toft, for her valuable research assistance.

**MORE LESSONS FROM THE LABORATORIES:  
CY PRES DISTRIBUTIONS IN PARENS  
PATRIAE ANTITRUST ACTIONS BROUGHT BY  
STATE ATTORNEYS GENERAL**

*Susan Beth Farmer\**

INTRODUCTION

**T**WENTY years ago, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act<sup>1</sup> (“Act” or “HSRA”) “[t]o improve and facilitate the expeditious and effective enforcement of the antitrust laws.”<sup>2</sup> The Act made remedies to the antitrust<sup>3</sup> laws more readily available to consumers, who, Congress believed, were frequently and seriously harmed by antitrust conspiracies.<sup>4</sup> Since its

---

\* Associate Professor of Law, the Dickinson School of Law of the Pennsylvania State University. B.A., Wellesley College; J.D., Vanderbilt University School of Law. I would like to thank the many assistant state Attorneys General who provided information, insights, and original documents, including Alan Barr, Ellen Cooper, Thomas Greene, Richard Grimm, Robert Hubbard, Pamela Jones Harbour, and Kevin O'Connor. The helpful comments of Professors Peter Alexander, Christine Kellett, John Maher, Katherine Pearson, and Victor Romero during a faculty presentation of an early version of this Article are much appreciated. I also thank my research assistant, Joanna Toft, for her valuable research assistance.

1. See Hart-Scott-Rodino Antitrust Improvements Act (HSRA) of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended in scattered sections of 15 U.S.C.).

2. 90 Stat. at 1383.

3. The antitrust laws generally prohibit both anticompetitive agreements and unilateral actions having anticompetitive effects. See 15 U.S.C. §§ 1-2 (1994). The cases discussed in this article concern alleged conspiracies among firms at different levels of the distribution chain. Such conspiracies in restraint of trade are unlawful under section 1 of the Sherman Act of 1890 (“Sherman Act”). See Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. § 1). For a thorough description of the law, see generally Phillip Areeda & Louis Kaplow, *Antitrust Law* (1995 & Supp. 1999), Herbert Hovenkamp, *Federal Antitrust Policy* (1994), and Stephen Ross, *Principles of Antitrust Law* (1993).

4. See *infra* notes 119-24 and accompanying text. The bill also established a pre-merger notification and review process by requiring that merging firms notify the federal antitrust enforcement agencies, the United States Department of Justice and the Federal Trade Commission, of their plans to merge. See 15 U.S.C. § 18a. Merging firms must also provide information concerning the proposed transaction, and wait for a period specified by the statute before consummating the transaction. See *id.* The

enactment, the Act has evolved beyond Congress's original conception. Recent cases highlight the need both to examine the theory underlying the *parens patriae*<sup>5</sup> authority created by the Act and to consider its proper application to the distribution of damage awards or settlements obtained by state Attorneys General.

The HSRA empowers state Attorneys General to act as *parens patriae* on behalf of their natural-person citizens in federal antitrust actions that seek to recover treble damages.<sup>6</sup> The common law doctrine of *parens patriae* originated as an aspect of the sovereign's power to supervise charities and protect infants and the insane.<sup>7</sup> American common law applied the theory to include actions by state governments to protect powerless citizens against threats to their physical and economic well-being, such as the transmission of communicable diseases, diversion of natural resources, environmental pollution, and restraints of trade.<sup>8</sup> As the substantive reach of common law doctrine expanded, however, the available remedies remained fixed: states remained limited to equitable relief.<sup>9</sup> Ultimately, passage of the HSRA allowed legal as well as equitable remedies in *parens patriae* antitrust cases, transforming *parens patriae* actions into an efficient alternative to consumer class actions.<sup>10</sup> Today, modern statutory *parens patriae* actions are often multi-state affairs,<sup>11</sup> which involve thousands of consumers and frequently result in large settlement funds for distribution.<sup>12</sup> Antitrust actions brought by state Attorneys General under the state's *parens patriae* authority have covered a broad range of consumer items including automobiles,<sup>13</sup> automotive products,<sup>14</sup> food processors,<sup>15</sup> real estate,<sup>16</sup>

---

HSRA also amended 15 U.S.C. § 26, which concerned injunctive relief in private actions, to provide for the award of costs, including attorney's fees, to successful private plaintiffs. *See id.* § 26.

5. Literally, *parens patriae* means "parent of the country." *See West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971). Early English common law recognized that the King's royal prerogative comprised various powers and duties, including the protection of infants and incompetent persons. *See Michael Malina & Michael Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193, 198 (1970). The King, as *parens patriae*, also acted as the guardian of "all charitable uses in the kingdom." *Id.* at 197 (quoting William Blackstone, Commentaries 47-48 (E. Christian ed., 12th ed. 1794)).

6. *See* 15 U.S.C. § 15c.

7. *See supra* note 5.

8. *See infra* note 37 and accompanying text.

9. *See infra* note 95.

10. *See, e.g., In re Montgomery County Real Estate Antitrust Litig.*, 452 F. Supp. 54, 60 (D. Md. 1978) (allowing state to seek injunctive relief for claimed violations).

11. *See Stephen Calkins, An Enforcement Official's Reflections on Antitrust Class Actions*, 39 Ariz. L. Rev. 413, 435-36 (1997).

12. *See id.* at 436.

13. *See Pennsylvania v. Mid-Atlantic Toyota Distribs.*, 704 F.2d 125, 127 (4th Cir. 1983) (concerning statutory *parens patriae* actions by Delaware, Maryland,

milk,<sup>17</sup> consumer electronics,<sup>18</sup> footwear,<sup>19</sup> toys,<sup>20</sup> cemetery plots,<sup>21</sup>

---

Pennsylvania, Virginia, West Virginia, and the District of Columbia on behalf of consumers who had purchased Toyota vehicles allegedly subject to a price fixing conspiracy).

14. See *Burch v. Goodyear Tire*, 554 F.2d 633, 634-35 (4th Cir. 1977) (concerning state antitrust action relating to tire distribution).

15. See *In re Cuisinart Food Processor Antitrust Litig.*, M.D.L. 447, 1983 WL 153, at \*1 n.2 (D. Conn. Oct. 24, 1983). In *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24 (2d Cir. 1981), states sought access to grand jury materials in connection with the United States's investigation and indictment of Cuisinarts for antitrust violations. See *id.* at 28. Access to the materials was denied by the district court and affirmed on appeal. See *id.* Thereafter, the states investigated and filed a *parens patriae* action on behalf of consumers who had purchased Cuisinart food processors. See *In re Cuisinart Food Processor Antitrust Litig.*, 1983 WL 153, at \*1 n.2.

16. In *In re Montgomery County Real Estate Litigation*, 452 F. Supp. 54, 56 (D. Md. 1978), Maryland sued six real estate brokers and other individuals alleging price fixing of commission rates.

17. See *New York v. Dairylea Coop.*, No. 81 Civ. 1891, 1985 WL 1825, at \*1 (S.D.N.Y. June 26, 1985). In an earlier proposed settlement, the court refused to give its preliminary approval as the settlement required the defendant to spend \$750,000 in printing and redeeming coupons on milk cartons and to pay \$250,000 to governmental entities over five years. See *New York v. Dairylea Coop.*, 547 F. Supp. 306, 308 (S.D.N.Y. 1982). The court decided that the plan had a "clear anti-competitive effect" because it "[gave] substantial future marketing advantages to Dairylea . . . and makes no effort to at least endeavor to provide that payments are at a minimum made to those very consumers actually injured in the past by Dairylea's allegedly wrongful conduct." *Id.* The court acknowledged that there might be no other practical alternatives for distributing the settlement fund, but that the record on that possibility was insufficient. See *id.*

18. See *In re Nintendo Antitrust Litig.*, 775 F. Supp. 676, 678 (S.D.N.Y. 1991); *In re Panasonic Consumer Elecs. Prods. Antitrust Litig.*, No. 89 Civ. 0368 (SWK), 1989 WL 63240, at \*1 (S.D.N.Y. Jun. 5, 1989); *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456, 457-58 (D. Md. 1987).

19. See *New York v. Reebok Int'l Ltd.*, 903 F. Supp. 532, 532-33 (S.D.N.Y. 1995), *aff'd* 96 F.3d 44 (2d Cir. 1996); *New York v. Keds Corp.*, No. 93 Civ. 6708 (CSH), 1994 WL 97201, at \*1 (S.D.N.Y. Mar. 21, 1994).

20. See *Pennsylvania v. Playmobil USA, Inc.*, Civ. A. No. 1: CV-95-0287, 1995 WL 787518, at \*1 (M.D. Pa. Dec. 15, 1995). The state brought the case as *parens patriae* on behalf of consumers who had bought Playmobil toys between Jan. 1, 1991 and Dec. 31, 1993. See *Court Approves Toy Importer's Settlement of State's Vertical Price Fixing Charges*, 70 Antitrust & Trade Reg. Rep. (BNA) 37 (Jan. 18, 1996). The defendant agreed to an injunction prohibiting it from fixing resale prices and requiring it to pay \$275,000 in settlement. See *id.* Approximately \$3,000 was distributed to 86 consumers who could show that they had purchased at least \$50 in Playmobile toys during the relevant time period. See *id.* at 38. Of the remainder, \$201,000 was paid to 12 charitable groups whose purpose was to serve children, and \$50,000 was paid to the state as costs and attorneys' fees. See *id.*

21. See *Tennessee v. Highland Mem'l Cemetery, Inc.*, 489 F. Supp. 65, 66 (E.D. Tenn. 1980).

petroleum products,<sup>22</sup> garbage carting,<sup>23</sup> and cable television services.<sup>24</sup>

The statutory reform that opened the courthouse doors to consumer antitrust actions carried with it the seeds of another problem: distributing monetary relief to unidentified citizens for whom the action was brought.<sup>25</sup> In response, courts adopted the ancient equitable doctrine of *cy pres*.<sup>26</sup> Although originally employed as an equitable device to distribute the undistributable remainder of a trust to a purpose similar to the grantor's original intent,<sup>27</sup> the *cy pres* doctrine has been expanded in some cases to apply to the entire corpus of a trust.<sup>28</sup> These expansive applications do not attempt to distribute antitrust damages to the injured consumers. Instead, the whole fund is put to another court-approved use determined at the discretion of the state Attorney General.<sup>29</sup>

The power to bring an antitrust action in a *parens patriae* capacity provides states with great discretion to conduct, litigate, and settle cases. This Article places that power into perspective and describes the factors that should be considered in determining the appropriate distribution of monetary relief obtained in a statutory *parens patriae* antitrust action.

Part I of this Article traces the development of states' *parens patriae* power, describing the common law doctrine and antitrust decisions that led to the need for legislative reform. Part II.A. examines the statutory solution to the problems that states encountered when bringing antitrust actions *parens patriae*. This part also reviews the legislative history of the HSRA. Part II.B. examines cases prosecuted by state Attorneys General subsequent to the HSRA's enactment and the evolution of the statutory *parens patriae* doctrine. Part II.C. compares and examines the relative merits of prosecuting a statutory

---

22. See *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 436 (9th Cir. 1990); *Pennsylvania v. Budget Fuel Oil Co.*, 122 F.R.D. 184, 185 (E.D. Pa. 1988) (alleging a price fixing conspiracy involving home heating oil); see also *Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594, 595 (Mo. 1982) (holding that the Missouri Attorney General had authority under state law to bring federal statutory *parens patriae* antitrust actions).

23. See *New York v. Salem Sanitary Carting Corp.*, No. CV85-0208 (ILG), 1989 WL 165596, at \*1 (E.D.N.Y. Nov. 16, 1989); see also *Garbage Haulers Resolve State Section 1 Charges of Allocating Customers, Collusive Bidding*, 58 Antitrust & Trade Reg. Rep. (BNA) No. 17 (Jan. 4, 1990) (discussing background to case and summarizing the terms of settlement).

24. See *New York v. Primestar Partners L.P.*, No. 93 Civ. 3868 (JES), 1993 WL 527984, at \*1 (S.D.N.Y. Sept. 14, 1993); *New York v. Primestar Partners L.P.*, No. 93 Civ. 3868 (JES), 1993 WL 720677, at \*1 (S.D.N.Y. Sept. 14, 1993).

25. See *infra* part III.

26. See *infra* notes 212-17 and accompanying text.

27. See *infra* note 212 and accompanying text.

28. See *infra* part III.B.

29. See *infra* part III.B.

*parens patriae* action versus a consumer class action. Finally, Part III analyzes the *cy pres* distribution of unclaimed and undistributable funds obtained in settlements. Three cases in which the entire corpus was distributed for charitable purposes are used as examples. From these cases, a four-factor test is developed indicating when courts should use the *cy pres* doctrine to distribute settlement funds.<sup>30</sup> This Article concludes with a brief discussion of another option for returning value directly to consumers, which should be considered as a creative alternative to diverting the funds to provide an indirect benefit to consumers through equitable *cy pres* distributions. Thoughtful analysis of *cy pres* distributions that may provide direct benefits to consumers is consistent with the goals of the statute and should be entertained by the parties in proposing distribution plans and by courts in approving such proposals.<sup>31</sup>

Consequently, this Article proposes that *cy pres* distribution of funds in *parens patriae* actions is appropriate when the following factors exist: (1) the class of consumers represented is large and practically unidentifiable; (2) the individual damage suffered by each consumer is relatively small;<sup>32</sup> (3) there are no creative alternatives to provide value directly to consumers;<sup>33</sup> and (4) the recipients who will most likely benefit, albeit indirectly, are the consumers in whose name the original action was brought. This exercise will insure that *parens patriae* settlements actually benefit, directly or indirectly, those consumers whom the statute was enacted to protect. Finally, the HSRA's legislative history supports the conclusion that Congress

---

30. In these exceptional cases, the entirety of very large settlement funds has been distributed to charitable groups with the express purpose of indirectly benefiting the injured group of consumers represented by the state as *parens patriae*. These cases alleged antitrust violations that directly affected consumers, as is required by the *parens patriae* enabling legislation.

31. A review of published cases and interviews with state Assistant Attorneys General reveals only one example of a proposed settlement that was not approved by the court. In that case, *New York v. Dairylea Cooperative Inc.*, the state proposed direct distribution of restitution to consumers through coupons. See 547 F. Supp. 306, 308 (S.D.N.Y. 1982). The court rejected the plan, *see id.*, and ultimately adopted a *cy pres* distribution seeking to indirectly benefit the consumers. See *New York v. Dairylea Coop.*, No. 81 Civ. 1891, 1985 WL 1825, at \*2 (S.D.N.Y. June 26, 1985).

32. In addition, it can be inferred that antitrust enforcement, including *parens patriae* actions, deters other antitrust violations. However, none of the cases described in part III was litigated to a verdict on the merits of the allegations, and none of the defendants admitted to liability in any of the settlement agreements reviewed. Therefore, it is equally plausible that these actions over-deter efficient or pro-consumer behavior rather than deter additional antitrust violations. In the absence of litigated results, both conclusions have some appeal.

33. For example, if the population of affected consumers is very mobile, if time has lapsed between the alleged conspiracy and a distribution method such as coupons, or if the product is a one-time purchase, then alternatives such as the one discussed in part III.C. should not be used.

granted states the power to bring *parens patriae* actions to simplify and streamline class actions for the ultimate benefit of the individual class members—consumers.<sup>34</sup>

## I. PARENS PATRIAE ANTITRUST ACTIONS AT COMMON LAW

### A. *Common Law Parens Patriae*

In English common law, some of the King's royal powers were exercised in his capacity as "father of the country."<sup>35</sup> In the United States, the King's *parens patriae* authority passed to the state governments.<sup>36</sup> Originally, the states exercised their common law *parens patriae* authority essentially in a police capacity to protect the health, welfare, and safety of their citizens. For example, *parens patriae* authority allowed states to enforce air quality standards, to abate pollution, and to remedy water diversion.<sup>37</sup> Courts allowed such actions because they did not deem the large numbers of citizens harmed or threatened with harm able to protect themselves individually due to the legal complexity of pursuing a claim and their small individual interests.<sup>38</sup> In *Pennsylvania v. West Virginia*,<sup>39</sup> for

34. See *infra* part II.A.

35. Malina & Blechman, *supra* note 5, at 197.

36. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972). To sue under *parens patriae*, the governmental body must have had some interest apart from those of its individual citizens. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *Pennsylvania v. West Virginia*, 262 U.S. 553, 564 (1923). This insures that the suit will be prosecuted vigorously. Second, the governmental body must be acting to protect a "substantial portion" of its populace. See *id.* at 592; see also *Louisiana v. Texas*, 176 U.S. 1, 28 (1900) (Brown, J., concurring) (dismissing case where state is not the proper party plaintiff). This insures that the public's resources are not squandered to aid only a discrete number of litigants. See, e.g., *State ex rel. Barker v. Chicago & A.R. Co.*, 178 S.W. 129, 138 (1915) (stating that public funds should not be used in private disputes). The authority to sue *parens patriae*, in federal court, to protect its populace from discrimination is limited to states, commonwealths and territories. See *Estados Unidos Mexicanos v. Decoster*, No. Civ. 98-186-P-H, 1999 WL 636438, at \*3 (D. Me. Aug. 9, 1999).

37. See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238-39 (1907) (discussing action to enjoin air pollution); *Kansas v. Colorado*, 185 U.S. 125, 145-47 (1902) (discussing action to enjoin water diversion); *Missouri v. Illinois*, 180 U.S. 208, 248 (1901) (discussing action to enjoin sewage discharges into a river); *Louisiana v. Texas*, 176 U.S. 1, 22-23 (1899) (allowing quarantine of imported goods assertedly to prevent spread of communicable disease).

38. See, e.g., *Tennessee Copper Co.*, 206 U.S. at 238-39 (declaring the state to be the appropriate plaintiff on behalf of citizens); *Kansas*, 185 U.S. at 142 ("That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate, receives no arguments."); *Missouri*, 180 U.S. at 241 (declaring that suits brought by individual plaintiffs would be "wholly inadequate"); *Louisiana*, 176 U.S. at 28 (Brown, J., concurring) (stating that individual citizens are not proper plaintiffs). It should be noted that these were true



example, the Supreme Court stated:

The private consumers in each State not only include most of the inhabitants of many urban communities but *constitute a substantial portion of the State's population*. Their *health, comfort and welfare are seriously jeopardized* by the threatened withdrawal of the gas from the interstate stream. This is a matter of *grave public concern* in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law.<sup>40</sup>

Thus, although a state's authority to sue *parens patriae* was well established by the time of the Sherman Act's passage, almost a half-century passed before a court first allowed a *parens patriae* action for trade restraints in violation of the antitrust laws.<sup>41</sup> Once courts confirmed their quasi-sovereign authority to challenge trade restraints and barriers on behalf of citizens, states sought to exercise and expand their common law *parens patriae* authority to other sorts of antitrust violations.<sup>42</sup> In federal antitrust actions, states may use their *parens patriae* authority to represent the interests of consumers and seek injunctive relief on their behalf,<sup>43</sup> and to seek injunctive relief on behalf of the general economy of the state.<sup>44</sup> Prior to the enactment of the HSRA, however, the courts frustrated the attempts by state Attorneys General to extend their common law *parens patriae* authority in order to obtain damages for antitrust violations.<sup>45</sup> The following section explores the development and limitations of the

---

*parens patriae* actions, brought solely on behalf of the interests of the citizens. The proprietary interests of the states were not alleged to have been harmed.

39. 262 U.S. 553 (1923).

40. *Id.* at 592 (emphasis added). In *Pennsylvania*, the states of Pennsylvania and Ohio challenged the constitutionality of a West Virginia statute that required West Virginia natural gas producers to sell to state purchasers before shipping out-of-state. *See id.* at 581. Pennsylvania and Ohio sued in their proprietary capacity as the operator of schools, and as *parens patriae* on behalf of consumers of natural gas. *See id.* at 591.

41. *See Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 447 (1945); *Louisiana*, 176 U.S. at 23 (Harlan, J., concurring); *Malina & Blechman*, *supra* note 5, at 203.

42. *See Pennsylvania R.R.*, 324 U.S. at 447-49.

43. *See id.*

44. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260 (1972); *Pennsylvania R.R.*, 324 U.S. at 450.

45. *See Hawaii*, 405 U.S. at 253 (disallowing state claims seeking damages for harm to the general economy of the state); *California v. Frito-Lay, Inc.*, 474 F.2d 774, 778 (9th Cir. 1973) (barring state's claim for damages on behalf of individual consumers allegedly harmed by antitrust price fixing conspiracy); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971) (affirming denial of state common law *parens patriae* claims and stating that the "use of the *parens patriae* theory has not, however, met with much success in the few attempts to apply it to the recovery of treble-damage antitrust claims" (citations omitted)).

common law antitrust *parens patriae* power that set the stage for federal legislation enacted to fill in the gaps in the common law power.

### B. *Leading Common Law Parens Patriae Antitrust Cases*

In *Georgia v. Pennsylvania Railroad Co.*,<sup>46</sup> the state of Georgia, acting both in its proprietary capacity<sup>47</sup> and as *parens patriae* on behalf of the citizens of the state,<sup>48</sup> sued twenty railroads alleging interstate rail freight rate fixing.<sup>49</sup> Georgia sought treble damages and injunctive relief for the alleged antitrust violations.<sup>50</sup> The defendants argued that the case was not justiciable and that the state lacked the authority to sue as *parens patriae*.<sup>51</sup> The Court, however, acknowledged the authority of a state to represent its citizens as *parens patriae*.<sup>52</sup> According to the Court, price fixing and price discrimination were "trade barriers" harmful to the "prosperity and welfare" of the state, and therefore constituted the type of harm upon which *parens patriae*

---

46. 324 U.S. 439 (1945). The Court granted Georgia leave to file its complaint in the Supreme Court, seeking to invoke the Court's original jurisdiction. *See id.* at 452. However, the state could not recover damages, even if it proved the alleged conspiracy, because the challenged rail rates had been approved by the Interstate Commerce Commission. *See id.* at 453. The state could, however, obtain injunctive relief if it prevailed. *See id.* at 454.

47. Georgia, which owned a railroad and other institutions that shipped freight, sued to recover treble damages for harm to those businesses caused by the alleged rate fixing. *See id.* at 447. States are "persons" under the antitrust laws and are entitled to sue to recover damages and injunctive relief for their own proprietary injuries. *See Georgia v. Evans*, 316 U.S. 159, 162 (1942); *see also Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906) (finding that the plaintiff, the City of Atlanta, was a person under section 7 of the Sherman Act and under the express provisions of section 8 of the Sherman Act). The Court, however, deemed the proprietary claim as "makeweight." *Pennsylvania R.R.*, 324 U.S. at 450. The dissent agreed. *See id.* at 473.

48. In this claim, the state alleged that the illegal price fixing harmed the state in four ways: (1) it denied access to national markets for Georgia products; (2) it foreclosed development of Georgia's economy into manufacturing and other commercial enterprises; (3) it prevented progressive government initiatives; and (4) it prevented the economy from developing. *See id.* at 444.

49. *See id.* at 443-44.

50. The state argued that these fixed rates were nearly 40% higher than competitive rates in the North. *See id.* at 444.

51. Defendants also alleged that the complaint did not state a claim for relief, and that two defendants were Georgia citizens and therefore an original action in the Supreme Court could not be maintained. *See id.* at 445.

52. In enacting the antitrust laws, Congress authorized civil and criminal enforcement by the federal government and civil suits by other persons. *See id.* at 447. The Court found nothing in the statutes limiting civil actions brought by States to proprietary actions, and therefore concluded that there was no reason to exclude *parens patriae* antitrust actions. *See id.*

actions had traditionally been based.<sup>53</sup> The Court concluded that Georgia could represent “the public” and vindicate its interests in redressing “matters of grave public concern.”<sup>54</sup>

The *parens patriae* action in *Pennsylvania Railroad*, however, should be distinguished from the actions authorized under section 4C of the Clayton Act.<sup>55</sup> Statutory *parens patriae* actions are brought on behalf of consumers who have been victimized by price fixing or another antitrust violation. In *Pennsylvania Railroad*, the state did not allege that consumers were entitled to damages because they could not ship their goods. Instead, the state claimed that its general welfare was harmed by a wrong that “limit[ed] the opportunities of her people, shackle[d] her industries, retard[ed] her development, and relegate[d] her to an inferior economic position among her sister States.”<sup>56</sup> The Court found that injuries to the general welfare of Georgia’s citizens were actionable wrongs different from injuries of particular individuals.<sup>57</sup>

The majority implicitly recognized the principle of dual sovereignty embodied in allowing enforcement actions by both the federal government<sup>58</sup> and by states.<sup>59</sup> The majority decision also implicitly

---

53. *Id.* at 450.

54. *Id.* at 451.

55. 15 U.S.C. § 15c (1994); see *infra* part II.B. for a discussion of statutory *parens patriae* actions.

56. *Pennsylvania R.R.*, 324 U.S. at 451.

57. See *id.* at 452 (“This is not a suit in which a State is a mere nominal plaintiff . . . This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers.”).

58. The United States may bring criminal prosecutions or suits for injunctions under the antitrust laws. See *id.* at 447. Under section 4a of the Clayton Act, the government may also bring suit to recover damages inflicted upon its proprietary interests. See 15 U.S.C. § 15a (1994).

59. The majority implicitly recognized that state actions for injunctive relief not brought in a proprietary capacity are law enforcement actions, stating that “Georgia is a ‘person’ entitled to enforce the civil sanctions of the anti-trust laws. . . .” *Id.* at 452. Therefore, the majority implicitly foresaw that the states could have a role in enforcing the antitrust law, not merely in obtaining redress for injury to the state or as *parens patriae* for the citizens of the state.

The dissent warned that allowing states to enforce the antitrust laws, except in a proprietary capacity, risked creating an inconsistent competition policy. The dissent cautioned that:

The authority to bring such [antitrust] suits includes the discretionary authority not to bring them, if the responsible officers of the government are of the opinion that a suit is not warranted or would be of disservice to the national interest. To permit a State to bring a Sherman Act suit in [sic] behalf of the public is to fly in the face of the national policy established by Congress that the federal government should determine when such a suit is to be brought and how it should be prosecuted.

*Id.* at 474.

recognized the possibility, although not the risk, of multiple actions brought by persons seeking damages for individual antitrust injuries, and by states as *parens patriae* on behalf of the interests of the state and its citizens.<sup>60</sup>

Chief Justice Stone, joined by Justices Frankfurter, Jackson, and Roberts, dissented, concluding that Georgia citizens harmed by the alleged price fixing should pursue actions apart from the state to protect their rights.<sup>61</sup> In the dissent's view, a state does not have standing to sue for damages or injunctive relief on behalf of its citizens if they can bring their own actions.<sup>62</sup> Because the Sherman Act authorizes federal enforcement of federal laws relating to interstate commerce, the dissent reasoned that only the United States could pursue a *parens patriae* suit for the actions alleged in *Pennsylvania Railroad*.<sup>63</sup> Therefore, the dissent argued that the United States, not an individual state, is the proper representative of consumers in antitrust cases.<sup>64</sup> The dissent also justified this conclusion by examining sections 1 to 4 of the Sherman Antitrust Act, and determined that these provisions allowed only the federal government to act as *parens patriae*. Accordingly, every criminal antitrust prosecution and civil injunctive case brought by the United States is a *parens patriae* action because "[w]hen the United States brings such a suit it is acting on behalf of the people of the United States, and in the national interest."<sup>65</sup>

In a second, major *parens patriae* case, *Hawaii v. Standard Oil Co.*,<sup>66</sup> Hawaii sued four oil companies for fixing and raising the prices of refined petroleum products.<sup>67</sup> In addition to suing in its proprietary capacity, which would allow it to recover treble damages for overcharges paid by the state, Hawaii sued as *parens patriae* on behalf of its citizens, seeking to recover treble damages for its citizens'

---

60. *See id.* at 447.

61. *See id.* at 473.

62. *See id.*

63. *See id.* at 474 (stating that "the Sherman Act entrusted to the national government the duty to represent the people in the vindication of their rights under the antitrust laws"). "Vindication," as referred to in the preceding parenthetical, referred only to actions for equitable relief or to the punitive and deterrent effect of a criminal prosecution. The dissent does not suggest that the United States can bring a civil action for treble damages on behalf of "the people." *See id.*

64. *See id.*

65. *Id.* This statement is a tautology. Criminal indictments and prosecutions are traditionally brought on behalf of the community in the name of the people. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 403-04 (1958).

66. 405 U.S. 251 (1972).

67. *See id.* at 253.

antitrust injuries.<sup>68</sup> Alleging that the economy and prosperity of the state had been harmed by the conspiracy,<sup>69</sup> the state sought to apply the principles established in *Georgia v. Pennsylvania Railroad Co.* to recover damages on behalf its citizens and to preserve "the general welfare of the State and its citizens."<sup>70</sup>

The Court concluded that common law *parens patriae* actions were limited to interests that were uniquely held by the state. According to the Court, a state only had the power to sue "as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests."<sup>71</sup> Such quasi-sovereign interests recognized in earlier cases included prevention of pollution, protection of natural resources, and promotion of commerce in the state's products.<sup>72</sup> Although the weight of precedent clearly allowed Hawaii to represent its citizens,<sup>73</sup> it was less clear whether Hawaii could obtain damages on behalf of citizens while acting as *parens patriae*. The only analogous reported case, *Georgia v. Pennsylvania Railroad Co.*,<sup>74</sup> did not reach the issue of whether a state, when acting in a *parens patriae* capacity, could recover monetary damages on behalf of its citizen-consumers for their injuries.<sup>75</sup>

---

68. The first count of the complaint was the state's proprietary claim for damages. *See id.* The second count, which Hawaii filed as *parens patriae*, sought damages on behalf of its citizens for treble the amount that they were overcharged from purchasing the defendants' petroleum products. *See id.* The third count was a class action for Hawaii citizens who had been overcharged for their gas. *See id.* The district court dismissed the first and third counts because the state "has not even alleged an interest in its citizens' claims, much less interest of its own aside from the State's proprietary rights . . ." *Id.* at 254 (quoting the unreported decision of the district court).

69. *See id.* at 255. The seven specific allegations of injury were that: (1) Hawaii citizens lost revenue; (2) the state had to increase taxes to make up the shortfall; (3) business opportunities were harmed; (4) the state was unable to fully exploit its natural resources; (5) manufacturing costs of Hawaiian products increased, making them non-competitive with other products; (6) the state was prevented from promoting the welfare of the citizens of Hawaii; and (7) the economy of the state was depressed. *See id.* at 255-56.

70. *Id.* at 255.

71. *Id.* at 258. The Court pointed out that the United States's *parens patriae* doctrine is considerably broader than the English doctrine from which it was derived, and that "the 'royal prerogative' and the 'parens patriae' function of the King passed to the States." *Id.* at 257.

72. *See id.* at 258 (collecting cases where states brought *parens patriae* suits). For examples of such cases, see *supra* note 37.

73. *See Hawaii*, 405 U.S. at 258.

74. 324 U.S. 439 (1945). The Supreme Court authorized Georgia to proceed with its claim for injunctive relief but dismissed the damages claim because the challenged freight rates had been approved by the Interstate Commerce Commission. *See id.* at 468. For a discussion of the case, see *supra* notes 46-65 and accompanying text.

75. *See Hawaii*, 405 U.S. at 260.

In determining whether Hawaii could seek treble damages when suing in its capacity as *parens patriae*, the Court examined section 4 of the Clayton Act,<sup>76</sup> which authorizes treble damages for persons injured in their "business or property," and section 16 of the Clayton Act,<sup>77</sup> which authorizes persons to obtain injunctive relief for "threatened loss or damage by a violation of the antitrust laws." In accordance with *Pennsylvania Railroad's* holding that states are considered "persons" under the Sherman Act, the Court determined that Hawaii is a "person" regardless of whether it acts in a proprietary or *parens patriae* capacity.<sup>78</sup> Thus, Hawaii, like Georgia in *Pennsylvania Railroad*, could bring a suit for injunctive relief. Section 4, however, contains the additional requirement that the "person" must assert an injury to "business or property."<sup>79</sup> Whether the injury asserted by Hawaii in its *parens patriae* claim was an injury to its "business or property" was a question of first impression before the Court.<sup>80</sup>

Unlike the *Pennsylvania Railroad* Court, which recognized but ignored the likelihood of multiplicitous actions,<sup>81</sup> the *Hawaii* Court was concerned about defendants' risk of multiple liability. The Court was also concerned about the extreme difficulty of calculating damages caused to Hawaii's "general economy." In addition, the Court found that the asserted injury to a state's "general economy" partially consists of the sum of the injury to the business and property of all state citizens.<sup>82</sup>

Although the legislative history of section 4 of the Clayton Act does not address *parens patriae* actions, the Court relied on its previous interpretation of identical language in section 4A,<sup>83</sup> which authorizes the United States to sue for damages in its proprietary capacity.<sup>84</sup> In section 4A, Congress expressly limited the government's authority to bring actions for antitrust damages to those actions that sought to recover the government's own injury as a buyer.<sup>85</sup> Section 4A's legislative history evidenced Congress's intent to allow the government to commence either a criminal prosecution or a civil

---

76. See 15 U.S.C. § 15 (1994).

77. See *id.* § 26.

78. See *Hawaii*, 405 U.S. at 261.

79. See 15 U.S.C. § 15.

80. See *Hawaii*, 405 U.S. at 261.

81. See *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 447 (1945).

82. Although the Court recognized that claims under antitrust law for injuries to the quasi-sovereign interests of the state could exist, it declined to allow for recovery without explicit Congressional authorization. See *Hawaii*, 405 U.S. at 264.

83. See 15 U.S.C. § 15a ("Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor . . . and shall recover threefold the damages by it sustained . . .").

84. See *Hawaii*, 405 U.S. at 265.

85. See 15 U.S.C. § 15a.

action for injunctive relief as a means to enforce the antitrust laws on behalf of the general economy of the nation in its sovereign capacity as *parens patriae*.<sup>86</sup> Consequently, the Court ruled that when acting in its capacity as *parens patriae*, Hawaii could not recover treble damages for its citizens.<sup>87</sup> In reaching its decision, the Court rejected the State's concern that, absent *parens patriae* actions for damages, consumers would be without a remedy. Instead it noted that consumers have several options, including individual private-damages actions and class actions where either an individual or a state can act as lead plaintiff.<sup>88</sup> The Court thereby suggested that a state could represent consumers in a class action.<sup>89</sup>

Dissenting, Justice Douglas argued that the claims set forth in *Hawaii* were virtually indistinguishable from the claims set forth in *Pennsylvania Railroad* because both Hawaii and Georgia sought judicial relief from harm to the general economy of their respective states.<sup>90</sup> Therefore, if the state could prove damages, *Pennsylvania Railroad* authorized recovery.<sup>91</sup> Justice Douglas distinguished allegations of injury to individual consumers from Hawaii's "collective" claim alleging injury to the general economy of the state. Yet he blurred this distinction by pointing out that the "[i]njury to the collective will commonly include[s] injury to members of the collective."<sup>92</sup> If the state proved damages, then individuals could not recover for the same injury in a later action, although a consumer or business person could recover treble damages for a different type of

---

86. See *Hawaii*, 405 U.S. at 265 ("[I]t is manifest that the United States cannot recover for economic injuries to its sovereign interests, as opposed to its proprietary functions.").

87. See *id.*

88. See *id.* at 266. If the state government acts as the lead plaintiff, it must satisfy the standing requirements, as all plaintiffs must.

89. Although the district court had dismissed Hawaii's initial class action suit, the district court based its dismissal on considerations of the unwieldy nature of class litigation; it did not hold that a state could never bring a class action on behalf of some or all of its consumer citizens. See *id.*

90. See *id.* at 268 (citing *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945)); see also *id.* at 272-73 (Brennan, J., dissenting) ("As in *Georgia*, this can only be characterized as a wrong to the State . . . . If that injury would have been a sufficient basis for a damage claim by Georgia, as we held in that case, then it supports an identical action by Hawaii here."). For a discussion of *Pennsylvania Railroad*, see *supra* notes 46-65 and accompanying text.

91. See *Hawaii*, 405 U.S. at 269. Any harm to a state's economic growth and development constitutes the "collective" harm that is injury to the state's general economy. See *id.*

92. *Id.* The majority also viewed these concepts as essentially inseparable, characterizing the alleged injury to the general economy as no more than the sum of all injuries to individuals. See *id.* at 264.

injury, distinct from the collective harm.<sup>93</sup>

In *California v. Frito-Lay, Inc.*,<sup>94</sup> California unsuccessfully sought to expand the common law *parens patriae* theory to include claims for damages for private consumers' antitrust injuries.<sup>95</sup> In *California*, the state sued twelve snack food producers, alleging that they had conspired to fix food prices in violation of the Sherman Act. The suit sought to recover treble damages for all consumers who had not brought their own individual actions.<sup>96</sup> Rather than making a quasi-sovereign, *Hawaii*-type *parens patriae* claim, which would seek damages for injury to the state's general economy,<sup>97</sup> California attempted to stand in the shoes of consumers and recover damages on their behalf for injuries to their business or property.<sup>98</sup>

The court held that the state's common law *parens patriae* authority did not authorize the state to sue for antitrust damages on behalf of California consumers<sup>99</sup> because only *parens patriae* suits to halt injury to quasi-sovereign state interests were traditionally allowed.<sup>100</sup> Although the states originally assumed the historic, common law *parens patriae* power in the United States, the court found that citizens often did not need state protection if other

---

93. See *id.* at 269-70 (Douglas, J., dissenting). Finding the difficulty of separating individual damages from collective ones to be "more imaginary than real," Justice Douglas described the majority decision as "rationales that express a prejudice against liberal construction of the antitrust laws. Since a collective damage is alleged, I would allow the case to go to trial, saving to [sic] Congress the question whether § 4 of the Clayton Act should be restricted to a State's proprietary interests." *Id.* at 270 (Douglas, J., dissenting).

94. 474 F.2d 774 (9th Cir. 1973).

95. See *id.* at 778. The same issue had been decided by district courts in *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 986 (D. Haw. 1969), *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1061 (E.D. Pa. 1969), and *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398, 401 (C.D. Cal. 1970), all holding that states lacked the authority to recover treble damages on behalf of consumers in *parens patriae* actions.

96. See *Frito-Lay*, 474 F.2d at 775 (alleging that "the duty to protect [California citizens'] interests and to enforce the policy of the anti-trust laws rests with their sovereign, the State of California").

97. See *Hawaii*, 405 U.S. at 258-59.

98. See *Frito-Lay*, 474 F.2d at 775. In *Hawaii*, the issue was whether the alleged injury constituted harm to the state's business or property. See *Hawaii*, 405 U.S. at 260. In *Frito-Lay*, the alleged harm was to the business or property of the consumers, and thus the issue was whether the state could sue on their behalf. See *Frito-Lay*, 474 F.2d at 775.

99. See *Frito-Lay*, 474 F.2d at 778.

100. See *id.* at 775 (noting that, despite some academic criticism, such claims had received "no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals").



remedies were available, such as class actions.<sup>101</sup> Therefore, California's claim diverged from the common law *parens patriae* theory, which allowed a state to vindicate only its quasi-sovereign rights, and was dismissed.<sup>102</sup>

Despite California's argument that class actions were not a realistic option for consumer plaintiffs in antitrust cases,<sup>103</sup> the court questioned the state's motives in bringing the case. The court's decision appears to have been influenced by its sense that the state sought to maintain a class-action-like case while evading some of the procedural requirements of Rule 23 of the Federal Rules of Civil Procedure.<sup>104</sup> Implicitly recognizing the great difficulties of refunding damages to the millions of consumers who had purchased snack foods, the court described California as "looking beyond recovery for injuries to its citizens to its own ultimate acquisition of the recoveries obtained."<sup>105</sup> Although the state's aim was worthy, the purpose of common law *parens patriae* was to allow the sovereign to protect those citizens who were unable to protect themselves. *Parens patriae* did not authorize the sovereign to act on behalf of consumers and to amass a fund which would, in large part, eventually escheat to the state to be used in some unspecified way.<sup>106</sup> Although recognizing the need to deter antitrust violations and to protect consumers,<sup>107</sup> the

---

101. See *id.* at 776. California's theory comported with traditional common law *parens patriae* doctrine in its original sense as guardian of incompetent citizens, because its argument assumed that individual consumers with small stakes could not maintain massive antitrust actions. See *id.* Historically, *parens patriae* authority established the sovereign as the guardian of "infants, idiots and lunatics." *Id.* (citing William Blackstone, Commentaries 47-48 (E. Christian ed., 12th ed. 1794)). According to the court, guardianships administered by the courts have taken over the care of these classes and others, making protection in the form of *parens patriae* actions by the sovereign unnecessary. See *Frito-Lay*, 474 F.2d at 776. Similarly, consumers may assert their own antitrust claims in class actions, so *parens patriae* actions by the sovereign are not required to protect consumers' interests. See *id.* at 776-77.

102. See *id.* at 776-78.

103. See *id.* at 775. California also argued that unless the court allowed actions like California's to proceed, future conspiracies would not be deterred, and both consumers as well as competition would suffer. See *id.* at 777.

104. See *id.* at 776 & n.9. The Court saw Rule 23 as providing "safeguards" that the state sought to evade. *Id.*

105. *Id.* at 776. California had argued that any unclaimed damages would escheat to the state and "will serve a valid public purpose by providing the injured citizens with the closest equivalent of the recovery which, individually, is beyond their reach." *Id.* at 776-77.

106. See *id.* at 777. The Court refused to "restore[] to the substance of the common law rules of law in an area which has been pre-empted by legislation because of the need for careful control." *Id.*

107. See *id.* The Court "disclaim[ed] any intent to discourage the state in its search for a solution" to achieving maximum deterrence and protecting consumers. *Id.*

court concluded that only the legislature could expand the limitations of common law *parens patriae* actions.<sup>108</sup> In response to *Frito-Lay* and other cases holding that states could not bring antitrust suits in their *parens patriae* capacity, Congress amended the Clayton Act to allow such antitrust suits. Part II will discuss the sections of the Hart-Scott-Rodino Act that create this right.

## II. THE STATUTORY SOLUTION

### A. *Enactment Of A Statutory Parens Patriae*

The HSRA amended the Clayton Act to authorize state Attorneys General to bring antitrust actions on behalf of their natural-person citizens.<sup>109</sup> Thus, this Act expanded the common law *parens patriae* power of states in antitrust cases.<sup>110</sup> The statute did not change substantive antitrust liability; instead it eased restrictions on the use of *parens patriae* actions.<sup>111</sup> Previously, individual states and the United States could sue under the antitrust laws only to obtain injunctive relief or to recover for injury to *their* business or property. The enactment of the HSRA, however, gave states the authority to represent consumers directly in antitrust actions seeking damages.<sup>112</sup>

As part of its law enforcement duties, the federal government prosecuted antitrust violations through both civil and criminal actions.<sup>113</sup> However, Congress did not consider federal enforcement

---

108. *See id.* (stating that the authority to sue *parens patriae* for antitrust injury can only come through "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 [sic] his behalf").

109. *See* HSRA, Pub. L. No. 94-435, sec. 301, § 4C, 90 Stat. 1383, 1394 (codified at 15 U.S.C. § 15c (1994)).

110. *See* H.R. Rep. No. 94-499, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2578.

111. *See id.* at 9, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2579; *see also* *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 219 (1990) ("[Section] 4C did not establish any new substantive liability. Instead, '[i]t simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4 [of the Clayton Act].'" (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734 n.14 (1977))).

112. *See* 15 U.S.C. § 15c; *see also id.* § 15 (allowing private actions by injured persons, including foreign states); *id.* § 15a (allowing treble damages actions by the United States for injury to its business or property). For a discussion of the state of the law at the time of the HSRA's passage, *see generally* *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973). These cases are discussed extensively *supra* notes 66-108 and accompanying text.

113. *See* 15 U.S.C. § 1 (declaring contracts, combinations, and conspiracies in restraint of trade or commerce to be felonies); *id.* § 2 (declaring monopolization,

adequate protection of consumers' interests. Criminal prosecution and equitable relief could only punish conspirators, take away the illegal profit from their schemes, enjoin them from future offenses, and deter them and others from breaking the law in the future. Federal actions can not, however, compensate the victims of antitrust violations.<sup>114</sup> When actual injury to consumers was minimal yet widespread, the victims of the illegal conspiracies lacked incentive to obtain any redress for antitrust injuries to their business or property.<sup>115</sup> Congress passed the HSRA to address this rational apathy toward redress by empowering state Attorneys General to sue on behalf of their state's consumers.

The legislative history of the Act demonstrates that Congress sought to achieve three goals: (1) compensation of victims of antitrust violations; (2) disgorgement of profits by the offenders; and (3) deterrence of future anticompetitive actions.<sup>116</sup> In the view of the House Judiciary Committee, the legislation was necessary to protect consumers, the primary victims of antitrust conspiracies.<sup>117</sup> The Committee believed that unlawful price fixing and other antitrust conspiracies were both "common and widespread."<sup>118</sup>

---

conspiracy, or attempts to monopolize to be felonies); *id.* § 4 (assigning to United States Attorneys the duty to institute equitable antitrust proceedings); *id.* § 25 (same).

114. Under 15 U.S.C. § 15, individuals may bring suit against an antitrust violator to recover treble the amount of antitrust damages suffered as a consequence of the defendant's actions.

115. See H.R. Rep. No. 94-499, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2576 (observing that consumers had "neither the incentive nor the resources to engage in protracted and extremely costly litigation to recover [their] tiny individual stake"). For a discussion on the relative merits of class action and *parens patriae* antitrust actions, see *infra* part II.C.

116. See H.R. Rep. No. 94-499, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2572.

117. See *id.* at 3, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2572-73. The year after Congress enacted the HSRA, however, the Supreme Court held that states could not represent purchasers who had not bought directly from the antitrust violator ("indirect purchasers") in actions under the antitrust laws. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977). The Court held that tracing overcharges, which had been passed through the chain of distribution, was too complex and, as a matter of judicial efficiency, barred indirect purchaser suits. See *id.* at 745. The Court recognized pre-existing cost-plus contracts as the only exception to the absolute bar on indirect purchaser antitrust actions. See *id.* at 736; see also *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 217-18 (1990) (reinforcing the existence of such an exception). Many state legislatures circumvented the Court's holding in *Illinois Brick* by passing state antitrust laws that allowed suits by indirect purchasers. See, e.g., *California v. ARC America Corp.*, 490 U.S. 93, 98 n.3 (1989) (collecting state statutes that allow suits by indirect purchasers). In *ARC America*, the Court ruled that federal antitrust laws did not preempt state statutes circumventing *Illinois Brick*. See *id.* at 105-06.

118. H.R. Rep. No. 94-499, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2573.

The Committee feared that the harms of price fixing and other antitrust violations were inflationary, "undermining our economic system of free enterprise," and caused economic loss to many individual consumers.<sup>119</sup> The aggregate loss to "thousands or even millions of consumers" forced by antitrust conspiracies to pay excessive prices was presumed to be large,<sup>120</sup> but the injury caused to any individual consumer was likely to be fairly small, even after trebling.<sup>121</sup> Therefore, the Committee concluded that consumers were likely to have been harmed by antitrust violations but had little prospect of obtaining effective redress in the form of damages.<sup>122</sup> The antitrust laws would lose their deterrent power if relief was unavailable for those most harmed, and if the violators could retain their illegal gain.<sup>123</sup>

Indeed, Congress concluded that mere disgorgement of illegal profits was not a sufficient deterrent to illegal conspiracies.<sup>124</sup> The Committee observed that antitrust conspiracies had continued unabated since the enactment of the Sherman Act despite the availability of criminal prosecution and injunctive relief to government prosecutors, and treble damages and equitable relief to private parties.<sup>125</sup> Thus, Congress enacted the HSRA in response to its concerns about anti-competitive conspiracies and its recognition of the need to provide an effective remedy for those who had suffered small, albeit non-trivial, losses or injuries to their business or property.<sup>126</sup>

Aware of efforts made to expand the reach of common law *parens*

---

119. *Id.* at 3-4, reprinted in 1976 U.S.C.C.A.N. 2572, 2573. The Report observed that although the antitrust laws are traditionally understood to protect "competition, not competitors," see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), consumers are the ultimate victims of antitrust violations, and thus they benefit from more enforcement. See H.R. Rep. No. 94-499, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2573.

120. *Id.* at 4, reprinted in 1976 U.S.C.C.A.N. 2572, 2573.

121. See *id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2573-74. Antitrust plaintiffs are entitled to recover treble damages for injury to their business or property. See 15 U.S.C. § 15 (1994). A consumer suffers damage to his or her property, even if the consumer is not claiming harm to a business interest, if he or she has suffered monetary damage. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-39 (1979).

122. See H.R. Rep. No. 94-499, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2573-74.

123. See *id.* at 4-5, reprinted in 1976 U.S.C.C.A.N. 2572, 2573-74.

124. See *id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2573-74.

125. See *id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2573-74. Violation of the antitrust laws is a felony. See 15 U.S.C. §§ 1-2. The United States District Courts have jurisdiction to grant injunctive relief, see *id.* § 3, which may be sought by the government, see *id.* § 25, or private parties with standing to sue, see *id.* § 26.

126. See H.R. Rep. No. 94-499, at 4-5 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2573-74.

*patriae* to cover antitrust actions seeking damages on behalf of consumers,<sup>127</sup> Congress effectuated the remedy in the HSRA by authorizing state Attorneys General to bring *parens patriae* antitrust actions on behalf of consumers harmed by anti-competitive conspiracies.<sup>128</sup> The result would be redress for injured consumers, disgorgement of illegal profits from violators, deterrence of future violations of the law, and enhanced cooperation between the federal antitrust enforcement agencies and the states.<sup>129</sup> Congress justified delegation of this enforcement authority to state Attorneys General “because a primary duty of the State is to protect the health and welfare of its citizens.”<sup>130</sup>

Consequently, Congress designed the bill to solve the problem of unredressed harm suffered by large numbers of citizens as a result of antitrust conspiracies.

### B. *Application Of The Hart-Scott-Rodino Act*

The HSRA authorizes the Attorney General<sup>131</sup> of any state to bring

---

127. See, e.g., *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973). For a discussion of this case, see *supra* notes 94-108.

128. See H.R. Rep. No. 94-499, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2578 (“The thrust of the bill is to overturn *Frito-Lay* by allowing State Attorneys General to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under Rule 23.”). The HSRA was not, however, intended to change substantive antitrust doctrine or create new antitrust liability. See *id.* at 9, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2578-79. The House Report notes that the *parens patriae* bill was supported by the Justice Department, the acting Director of the Federal Trade Commission Bureau of Competition, and the National Association of Attorneys General. See *id.* at 8, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2578.

129. See *id.* at 5, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2574-75. Although section 4C of the Clayton Act explicitly authorizes state *parens patriae* actions only for damages, courts have included the ability to seek injunctive relief as part of the bundle of remedies that state Attorneys General may seek. See *In re Montgomery County Real Estate Antitrust Litig.*, 452 F. Supp. 54, 60 (D. Md. 1978). The enhanced federal-state cooperation was viewed as “[a]n extremely important benefit.” See H.R. Rep. No. 94-499, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2575.

130. *Id.* at 5, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2575. Indeed, the report views the elected status of most Attorneys General favorably because they will be “accountable” to their constituents. See *id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2575.

131. The Act does not, however, prohibit the state official from hiring private counsel to represent the state in these *parens patriae* actions, but it does bar any private counsel who was retained on a contingency fee based on the size of the monetary recovery. See 15 U.S.C. § 15g(1)(A) (1994); see also H.R. Rep. No. 94-499, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2579 (same). Private counsel may be hired on other contingent arrangements, but the court must approve any award of attorney’s fees to such lawyers. See 15 U.S.C. § 15g(1)(B); see also H.R. Rep. No. 94-499, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2579 (same). In its report, the

a civil antitrust action<sup>132</sup> for monetary damages<sup>133</sup> in the name of the state "as *parens patriae* on behalf of natural persons residing in such State"<sup>134</sup> for injury "to their property by reason of any violation of sections 1 to 7 of this title."<sup>135</sup> The procedural sections of the HSRA, which establish requirements with respect to proof of damages,<sup>136</sup> distribution of damages,<sup>137</sup> and notice,<sup>138</sup> are critical to render the

---

House committee recognized that private counsel "may be especially necessary and useful" to coordinate *parens patriae* actions brought by a number of states, but limited the use of contingency fees in order to "encourage[] [States] to develop their own in-house antitrust capability." *Id.*, at 10, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2579. This Congressional encouragement of state antitrust enforcement was not new. In 1976, Congress authorized up to \$10 million per year in grants to state attorneys general for antitrust enforcement. *See* Crime Control Act of 1976, Pub. L. No. 94-503, § 116, 90 Stat. 2407, 2415 (repealed 1979); *see also* Roger W. Stone, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine in Old Wine Skins*, 1979 J. Corp. L. 547, 591-96 (1979) (describing the "seed money" grant program for state enforcement of federal antitrust law).

132. The legislative history confirms that the bill created no new substantive liability. Instead, the bill was meant to "provide[] an alternative means to make practically available Federal remedies at law, previously denied, for the vindication of existing substantive claims." H.R. Rep. No. 94-499, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2578-79.

133. The "monetary relief" to which natural persons are entitled is equal to treble damages plus the cost of suit, including attorney's fees. *See* 15 U.S.C. § 15c(a)(2). The attorney's fees are to be determined by the court pursuant to 15 U.S.C. § 15c(d)(1). The court may also award interest, to be calculated from the date of service of the action and ending with the date of the judgment, or for a shorter time period if the court determines that a more limited time period would be just. *See id.* § 15c(a)(2). Finally, attorney's fees may be awarded to a "prevailing defendant" if the court finds that the Attorney General who brought the case "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* § 15c(d)(2).

134. *Id.* § 15c(a)(1). The term "natural persons" is intended to refer to citizens of the state; it excludes corporations, partnerships, sole proprietorships, and other business entities. *See* H.R. Rep. No. 94-499, at 9-10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2578-79. Congress recognized that some citizens might be in a better position to bring their own antitrust lawsuits than some small struggling businesses, but opted as a matter of policy to include citizens and to exclude all other potential plaintiffs. *See id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2579. The justification for this Congressional choice was that citizen-consumers are the ones "most in need of representation but presently unrepresented," and that businesses would ordinarily be able to take care of themselves. *Id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2579.

135. 15 U.S.C. § 15c(a)(1). *Parens patriae* actions include any antitrust violation except violations caused by an anticompetitive merger in violation of section 7 of the Clayton Act, *see id.* § 18, or unlawful price discrimination in violation of section 2 of the Clayton Act, *see id.* § 13; *see also* H.R. Rep. No. 94-499, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2579.

136. *See* 15 U.S.C. § 15d.

137. *See id.* § 15e.

138. *See id.* § 15c(b).

*parens patriae* power granted by the statute workable. Requiring the complaining state Attorney General to prove actual damages or give notice to every consumer represented in a *parens patriae* case would have made such cases as unworkable as the consumer class actions that had led to the enactment of the statute.<sup>139</sup> These sections represented a radical departure from class action suits, which typically required the class representative and class members to share common claims and interests.<sup>140</sup> Under the HSRA, however, the state entity that prosecutes a *parens patriae* antitrust action typically has no interest in the claim because it has suffered no direct antitrust damage, and often has separate interests from those on whose behalf the case was brought.<sup>141</sup>

The first significant modification to traditional antitrust actions concerns proof of damages.<sup>142</sup> The HSRA authorizes the plaintiff state Attorney General to estimate antitrust damages instead of proving the exact dollar amount of the injury<sup>143</sup> suffered by each individual person included within the *parens patriae* class.<sup>144</sup> This estimation may make use of statistical or other sampling methods so

---

139. See H.R. Rep. No. 94-499, at 11-15 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2581-85.

140. See Fed. R. Civ. P. 23(a); see also *General Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980) ("The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims."); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 3.13, at 3-76 (3d ed. Dec. 1992) ("Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.").

141. Despite liberalizing many of the traditional prerequisites to a class action suit, legislative history describes this section as "draw[ing] upon [the] established body of [existing] law" that mandates disgorgement of unlawful gains and permits plaintiffs to prove their damages by making reasonable estimates. See H.R. Rep. No. 94-499, at 13-14 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2583 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) and other cases).

142. The bill was not intended to increase the amount of damages a defendant may be required to pay after an adverse judgment. See *id.* at 9, reprinted in 1976 U.S.C.C.A.N. 2572, 2579 ("The establishment of an alternative remedy does not increase any defendant's liability. . . . The likelihood of a financial recovery against an antitrust violator, however, is significantly increased because H.R. 8532 creates an effective remedy where none existed before.").

143. Antitrust injury is a judicially created criteria for standing in antitrust cases. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). In addition to having ordinary standing to sue, the plaintiff must have been injured by anticompetitive conduct. See *id.* at 537-38; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (emphasis in original)).

144. See 15 U.S.C. § 15d (1994).

long as a reasonable method is used to estimate aggregate damages.<sup>145</sup> In authorizing estimation of damages, Congress recognized that there was no reasonable alternative to ensure that such cases could be pursued,<sup>146</sup> while also maintaining judicial efficiency.<sup>147</sup> Reasonable estimation of damages<sup>148</sup> was thought to be fair to antitrust defendants because the statute as a whole neither altered substantive antitrust law nor impinged on a defendant's other trial rights.<sup>149</sup> In addition, because antitrust violators have no right to retain any of their illegal overcharges,<sup>150</sup> Congress reasoned that estimation of damages was the best way to effectuate the legislative goals of compensating antitrust victims and requiring conspirators to disgorge all profits.<sup>151</sup>

Although the statutory scheme was intended to facilitate treble-damage actions, it also seeks to protect defendants from the risk of duplicative recovery. Pursuant to the statute, the court is required to "exclude" from a *parens patriae* damage award any sum that duplicates another award for the same injury.<sup>152</sup> In addition, since *parens patriae* actions must be brought on behalf of natural persons,

---

145. *See id.* The section specifically allows for proving and measuring damages "without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought." *Id.* Congress recognized that estimation of damages made the case simpler to prove and believed that estimation and aggregation of total damages, so long as they were not speculative, were "necessary because the proof of individual claims and amounts would be impracticable and virtually impossible." H.R. Rep. No. 94-499, at 14-15 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2584.

146. Congress anticipated that *parens patriae* actions would "normally be brought in instances where thousands or millions of consumers have been injured." *Id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2584. If damages could not be estimated in these cases, the *parens patriae* authority would be useless to secure monetary damages for injured consumers. Consumers do not usually keep records of all of their purchases, and sellers of small consumer products may not retain lists of their customers that could be used to reconstruct purchases in order to prove damages. *See id.* at 14-16, reprinted in 1976 U.S.C.C.A.N. 2572, 2583-86.

147. The Committee report observed that allowing estimation and aggregation of total damages is "necessary to avoid endless trials in which thousands or millions of individuals would have to appear to prove their individual claims and the amounts of their individual injuries." *Id.* at 15, reprinted in 1976 U.S.C.C.A.N. 2572, 2584.

148. Congress distinguished between speculative damages, which are forbidden, and reasonably estimated damages, which are permitted. *See id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2585.

149. *See id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2584-85.

150. *See id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2585 ("[A] defendant who has committed an antitrust violation has no right, constitutional or otherwise, to the retention of one penny of measurable illegal overcharges or other fruits of the violation.").

151. *See id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2583-85.

152. *See* 15 U.S.C. § 15c(a)(1) (1994).



no claims may be brought or damages recovered for businesses.<sup>153</sup> Finally, defendants may not be required to pay damages for any persons who have excluded themselves from the action.<sup>154</sup>

The notice and claim preclusion provisions of the statute are as creative as the section on estimation of damages.<sup>155</sup> These sections authorize the state Attorney General bringing a *parens patriae* antitrust action to proceed without obtaining authorization from the “natural persons” on whose behalf the case is brought.<sup>156</sup> The Act does not even require the state Attorney General to notify the consumers on whose behalf the action is brought at the commencement of the action.<sup>157</sup> The court may, however, order that the state Attorney General give notice “at such times, in such manner, and with such content as the court may direct.”<sup>158</sup> Generally, notice by publication<sup>159</sup> is presumed to be adequate and appropriate,<sup>160</sup> and “imaginative use of publication notice” will suffice in most *parens*

---

153. *See id.* But see Kenneth Babcock, Note, *Parens Patriae Suits by State Attorney Generals: An Effective Antitrust Remedy for Small Businesses*, 13 U.C. Davis L. Rev. 649, 663-91 (1980) (recommending that *parens patriae* actions should be expanded to allow actions on behalf of businesses). Although Babcock’s proposal was not adopted, a Connecticut statute authorizes the state Attorney General to bring antitrust actions on behalf of Connecticut business entities. *See Conn. Gen. Stat. Ann.* § 35-32 (West 1997); *see also id.* § 35-25 (defining “person” to include any “corporation, limited liability company, firm, partnership, incorporated and unincorporated association, or any other legal or commercial entity”).

154. *See* 15 U.S.C. § 15c(a)(1).

155. Congress indicated that the sections on notice and claim preclusion are complementary. *See* H.R. Rep. No. 94-499, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2581 (“Subsections 4C(c) and 4C(d) . . . are designed to protect the constitutional due process rights of each individual potential claimant and defendant.”). Thus, the statute protects both consumers and defendants by requiring notice and a right to be heard, and barring relitigation by consumers who did not opt out of the *parens patriae* action. *See id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2581.

156. *See* 15 U.S.C. § 15c; H.R. Rep. No. 94-499, at 11-13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2581-82. The legislative history suggests that the House contemplated the possibility that the federal courts would use the notice provision of the forum state. *See id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2581-82.

157. As a practical matter, citizens may receive actual notice from press releases or press conferences made by the attorney general bringing the action, or from subsequent news coverage about the case. Filings in federal court are public records, which are available for inspection by the public.

158. 15 U.S.C. § 15c(b)(1).

159. Congress recognized that “publication” should be construed broadly to include a variety of media, such as radio and television, in addition to print notices in newspapers. *See* H.R. Rep. No. 94-499, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2581.

160. *See id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2581. The court can order notice by other means if it determines that notice by publication “would deny due process of law to any person or persons.” 15 U.S.C. § 15c(b)(1).

*patriae* antitrust suits.<sup>161</sup> However, the statute also contains protective limitations on notice, including the requirement that the court approve all dismissals or settlements and approve notice to *parens patriae* group members.<sup>162</sup> Nevertheless, individual natural persons lack control over the conduct of a *parens patriae* case brought on their behalf.

Because *parens patriae* group<sup>163</sup> members are presumed to have had notice of the action and an opportunity to opt out of the litigation,<sup>164</sup> a judgment is conclusive on every person whom the state represents as *parens patriae*. In addition, any final judgment is *res judicata* unless the consumer has affirmatively opted out of the action.<sup>165</sup> Not only does this protect the consumers' constitutional right to be heard,<sup>166</sup> it also protects the antitrust defendant from duplicative suits.<sup>167</sup>

Congress wished to provide citizens with an indirect means of access to federal courts to allow vindication of their antitrust claims

---

161. H.R. Rep. No. 94-499, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2582.

162. *See* 15 U.S.C. § 15c(c). This provision was viewed as "an important safeguard for consumers in the event an attorney general seeks to terminate a *parens patriae* action by settlement." H.R. Rep. No. 94-499, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2583. The requirement of notice both protects consumers against "unjust or unfair settlements should their champion become fainthearted or inadequate" and promote "public confidence in the settlements of *parens patriae* cases by requiring court approval." *Id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2583.

163. State Attorneys General often refer to those persons on whose behalf the action is brought as the "*parens patriae* group." *See, e.g.*, *Missouri ex rel. Nixon v. United Tel. Co.*, No. Civ. 4414-CV-C-66BA, 1995 WL 792066, at \*5 (W.D. Mo. Nov. 15, 1995) (using "*parens patriae* group" interchangeably with the citizens on whose behalf the *parens patriae* action was brought); *New York v. Salem Sanitary Carting Corp.*, No. CV85-0208 (ILG), 1989 WL 165596, at \*1 (E.D.N.Y. Nov. 16, 1989) (same). This term will be used in an effort to distinguish a *parens patriae* case from a Rule 23 class action where those represented by the class representative are referred to as "class members." *See* Fed. R. Civ. P. 23 (referring to "class members" and "members of class").

164. To opt out of a *parens patriae* case, and to avoid the *res judicata* effect of a final judgment, a person must file notice with the district court excluding himself from the case within a certain time after the publication of notice. *See* 15 U.S.C. § 15c(b)(2).

165. *See id.* § 15c(b)(3). This provision is in the interest of consumers and defendants because it "provides protection for the potential claimant's interest in prosecuting his own action." H.R. Rep. No. 94-499, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2582. While protecting claimants, it also "safeguards the *res judicata* rights of defendants against claimants who fail to come forward and exclude themselves from the representational action," thus protecting the rights of a defendant in avoiding duplicative liability." *Id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2582.

166. *See* H.R. Rep. No. 94-499, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2581.

167. *See id.*, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2581.

and recovery of damages resulting from antitrust injuries.<sup>168</sup> Section 4E of the Clayton Act<sup>169</sup> addresses the distribution of damages, either to the consumers harmed by the antitrust violations or for other purposes. The court has discretion to authorize distribution of the funds or to deem them a civil penalty and order that they be deposited in the general funds of the state that brought the case.<sup>170</sup> However, any distribution process that the district court adopts must “afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.”<sup>171</sup> Congress expected that few consumers would actually claim their individual shares of the damage fund,<sup>172</sup> and that even after all consumer claims had been paid, it was likely that a substantial fund would remain.<sup>173</sup> In anticipation of the existence of such a remainder, Congress chose to allow courts to use their discretion to distribute the remainder “for some public purposes benefiting, as closely as possible, the class of injured persons.”<sup>174</sup>

Congress sought to facilitate *parens patriae* antitrust actions by mandating the disclosure of information related to the federal enforcement of antitrust conspiracies to the state Attorneys General authorized to bring such actions.<sup>175</sup> Specifically, the United States Attorney General is directed to provide written notice to his or her state counterparts concerning any federal antitrust action that might also give rise to a *parens patriae* action.<sup>176</sup> Upon request of the state

---

168. See *id.* at 9, reprinted in 1976 U.S.C.C.A.N. 2572, 2578-79. Summarizing the provisions of the House bill, which was subsequently adopted, the Report states that “[the bill] authorizes State Attorneys General to sue for damages on behalf of injured persons, subject to the other provisions of the bill, namely . . . the right of the individual to receive his appropriate share of any recovery.” *Id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2579.

169. See 15 U.S.C. § 15e.

170. See 15 U.S.C. § 15e(1)-(2).

171. *Id.* § 15e.

172. “[R]arely, if ever, will all potential claimants actually come forward to secure their share of the recovery.” H.R. Rep. No. 94-499, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2585.

173. The clear Congressional preference was for distribution of damages to consumers who had paid illegal overcharges. “Once this claims procedure has run its course, § 4E [adopted as amended as 15 U.S.C. § 15e] commits the disbursement of the undistributed portion of the fund, which will often be substantial, to the discretion of the court.” *Id.*, reprinted in U.S.C.C.A.N. 2572, 2585 (emphasis added).

174. *Id.*, reprinted in U.S.C.C.A.N. 2572, 2585. Congress cited with favor the “highly imaginative” *cy pres* distributions in prior cases. *Id.*, reprinted in U.S.C.C.A.N. 2572, 2585.

175. With this section, Congress sought to promote cooperation among federal and state antitrust enforcement agencies. It also saw *parens patriae* cases “as a major aspect of antitrust enforcement. . . .” *Id.* at 17, reprinted in 1976 U.S.C.C.A.N. 2572, 2586.

176. See 15 U.S.C. § 15f(a). The United States Department of Justice currently has appointed an attorney, who formerly served as an Assistant Attorney General with

official, the federal antitrust enforcement agency is also required to provide all files and investigative materials permitted by law to be disclosed.<sup>177</sup>

### C. *Superiority Of Parens Patriae Actions*

In passing the HSRA, Congress deemed class actions brought pursuant to Rule 23 of the Federal Rules of Civil Procedure to be an inadequate remedy for consumers harmed by antitrust conspiracies.<sup>178</sup> Congress was cognizant of the hostile reception<sup>179</sup> that large consumer classes with relatively small individual claims faced in federal courts.<sup>180</sup> By the early 1970s, federal courts had found a number of such class

the state of Virginia, with the responsibility for federal-state relations, communication, and cooperation. *See Arizona Dental Plan Settles Federal, State Conspiracy Charges*, 67 Antitrust & Trade Reg. Rep. (BNA) 277 (Sept. 1, 1994).

177. *See* 15 U.S.C. § 15f(b). This section "reflects the committee's desire that the Federal Government cooperate fully with State antitrust enforcers." H.R. Rep. No. 94-499, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2587. The Committee believed that improved cooperation among antitrust enforcement agencies at all levels of government should be encouraged, and antitrust enforcement efforts should be coordinated. *See id.*, *reprinted in* U.S.C.C.A.N. 2572, 2587. Grand jury materials are not permitted to be disclosed except as provided by the Federal Rule of Criminal Procedure 6(e). Rule 6(e) allows disclosure to state Attorneys General upon a demonstration of particularized need. *See Illinois v. Abbott & Assocs.*, 460 U.S. 557, 567 (1983) ("The scope of [the court's] authority has been delineated in a series of cases setting forth the standard of 'particularized need.'").

178. *See, e.g., City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 74 (D.N.J. 1971) (rejecting a proposed class of all citizens in a three-state area who had purchased retail gasoline between 1955 and 1965). In *American Oil*, the court stated:

By any reasonable standard, it is difficult for this Court to believe that Rule 23, as presently written, was intended to reach the overly broad non-governmental class sought to be represented by Philadelphia-New Jersey in the pending actions. This is not to say that guilty conspirators should not be compelled to disgorge their ill-gotten gains. The solution to the problem, however, lies not in imposing an increased burden on the federal courts over and above that which may or should normally be expected of judges in the discharge of their judicial duties, but rather in having the antitrust laws or rules amended to alleviate the problem of manageability inherent in class actions wherein millions of members of the consuming public are involved.

*Id.* at 74.

179. *See, e.g., id.* (rejecting a proposed class of all citizens in a three-state area who had purchased retail gasoline between 1955 and 1965 and expressing incredulity at the idea that Congress intended litigants to bring such broad class actions under Rule 23). Rather than certifying what it perceived to be a class that was inherently unmanageable because of its size, the court in *American Oil* called upon Congress to legislate a solution by either amending the antitrust laws or the Federal Rules of Civil Procedure. *See id.*; *see also California v. Frito-Lay, Inc.*, 474 F.2d 774, 777 (9th Cir. 1973) (same).

180. *See* H.R. Rep. No. 94-499, at 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2576-77 (discussing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and other class action decisions).

actions to be unmanageable and improper for class treatment because they were unduly complicated to litigate.<sup>181</sup> The Committee was also skeptical about the likelihood of consumer antitrust class actions<sup>182</sup> because consumers rarely buy enough of any consumer good to have an incentive to invest the time and money in a lawsuit.<sup>183</sup> Even if a consumer decides to sue, she will have difficulty in proving damages because, in general, few consumers keep receipts for small purchases.<sup>184</sup> Finally, the Committee found that the expense and difficulty of giving notice to all class members as required by Rule 23 would effectively eliminate such class actions as a remedy for consumers in antitrust cases.<sup>185</sup>

Subsequent to the HSRA's enactment, there have been occasions in which two or more antitrust suits, one a *parens patriae* action and the others a consumer class action alleging similar antitrust harm against the same defendants, have been filed almost simultaneously. Because of the bar against duplicative damage awards<sup>186</sup> and concerns regarding judicial efficiency, courts must decide which of the two or more antitrust actions should be allowed to proceed after merger and consolidation.<sup>187</sup> When confronted with the choice, courts generally

---

181. See *id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2576 (citing *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973) (dismissing class action because it was deemed to be unmanageable); *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319, 321 (S.D.N.Y. 1970) (same)). These problems concerning litigation included insuring proper notice, difficult evidentiary issues related to proof of damages, and distribution of damages at the end of a successful class action. See *id.*, reprinted in U.S.C.C.A.N. 2572, 2576.

182. See *id.* at 7, reprinted in 1976 U.S.C.C.A.N. 2572, 2577 ("Individual suits and class actions have worked far better for business entities than for consumers injured by antitrust violations.").

183. See *id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2577. Consumers also have less access to attorneys and investigators. See *id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2577.

184. See *id.*, reprinted in 1976 U.S.C.C.A.N. 2572, 2577.

185. The Report focused on the then-recently decided case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), in which the Supreme Court held that individual notice must be given to all identifiable class members regardless of the cost. The cost of personal notice to large consumer classes would exceed any possible recovery for the class action plaintiff and thus effectively foreclose Rule 23 consumer class action antitrust cases. See H.R. Rep. No. 94-499, at 6-8 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2576-77.

186. See 15 U.S.C. § 15c(a)(1) (1994).

187. See, e.g., *Pennsylvania v. Budget Fuel Oil Co.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988) (discussing consolidation of a consumer class action and *parens patriae* action under Federal Rule of Civil Procedure 42(a)); cf. *In re Montgomery County Real Estate Antitrust Litig.*, No. B-77-513, 1988 WL 125789, at \*2 (D. Md. July 17, 1988) (refusing to extend a Rule 23 class to include *parens patriae* group members for the purposes of settlement because it was not demonstrably superior to a *parens patriae* action).

have respected Congress's intentions,<sup>188</sup> concluding that statutory *parens patriae* actions brought by the state Attorney General on behalf of the natural-person citizens of the state are superior to class actions brought under Rule 23.<sup>189</sup> It is necessary to permit the litigation of only one type of action because allowing both a class action and a statutory *parens patriae* action to proceed would "result in dual, and in [some] case[s] conflicting, representation of this group by both the private plaintiffs and the Attorney General."<sup>190</sup>

Courts have found that the state official is the natural representative of the citizens of the state.<sup>191</sup> In some of these decisions, courts have considered the state Attorney General's lack of pecuniary interest, contradistinguished from consumer class action suits brought by private counsel, to be a relevant factor in choosing the *parens patriae* action over class actions.<sup>192</sup> In such cases, courts have invariably described Attorneys General as superior.<sup>193</sup> In addition, the pace of Rule 23 class action litigation and the pace of distributions of any damage awards obtained proceed more slowly than in *parens patriae* actions.<sup>194</sup> Allowing both a consumer class action and a statutory *parens patriae* case to proceed would be "an

---

188. See 122 Cong. Rec. 30,868, at 30,879 (1976); see also H.R. Rep. No. 94-499, at 6-8 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2578 (discussing the federal courts' expansion of the states' power to bring suit on behalf of its citizens'). Chairman Peter Rodino explained that the bill did not include the Rule 23 requirements that the claims be typical, manageable, etc., "for this bill represents the legislative conclusion that the State's attorney general is the best representative conceivable for the State's consumers—as the courts have repeatedly recognized." 122 Cong. Rec. at 30,879.

189. See *Budget Fuel*, 122 F.R.D. at 185; *Montgomery County Real Estate*, 1988 WL 125789, at \*2.

190. *Montgomery County Real Estate*, 1988 WL 125789, at \*1. The court found that allowing both to proceed would be "both legally impermissible and factually undesirable." *Id.*

191. See H.R. Rep. No. 94-499, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2575 (commenting that the state Attorney General's primary duty is to protect the health and welfare of the state's citizens).

192. See *Budget Fuel*, 122 F.R.D. at 186. The court pointed out that "[a]ny monies recovered on behalf of the consumer class should be used to pay consumer claims and not additional plaintiffs' attorneys' fees and costs." *Id.* Ordinarily, however, government lawyers in statutory *parens patriae* cases are compensated. First, they are paid by the state from tax dollars. Every dollar spent bringing one case cannot be used to bring another case, thus there is an opportunity cost. In addition, settlements in statutory *parens patriae* cases include costs and fees.

193. See *id.* (stating that statutory *parens patriae* does not "negate" class actions, but when the state Attorney General has "exercised his authority" under the statute, there is no need for an additional representative).

194. See *id.* at 185-86 (noting that class actions require court certification, and observing that the state was already in the process of negotiating a settlement agreement and stating that allowing additional counsel would delay the case).

affront to justice and a wasteful exercise in duplicity.”<sup>195</sup> Because a choice must be made between the private antitrust class action and the government *parens patriae* action to avoid the risk of duplicative recovery, the governmental action invariably has been found superior.<sup>196</sup>

Private antitrust actions, like other civil actions in federal court, may be brought individually or as class actions under Rule 23 of the Federal Rules of Civil Procedure.<sup>197</sup> In addition to the requirements of Rule 23(a), the class must satisfy the requirements of Rule 23(b)(1)<sup>198</sup> or (2)<sup>199</sup> or (3).<sup>200</sup> Private antitrust actions are classic examples of cases that are appropriate for certification as class actions because conspiracies typically affect numerous persons who can vindicate their interests in a class action. However, large, sprawling class actions are subject to the criticisms that class members lack control over information about their case and that the primary beneficiaries of damage awards or settlements are lawyers, while class members receive small monetary benefits.<sup>201</sup>

In comparison with class action suits, settlement of *parens patriae* antitrust actions are simpler. This fact is highlighted by *Amchem Products, Inc. v. Windsor*,<sup>202</sup> which involved the class certification of a

---

195. *Montgomery County Real Estate*, 1988 WL 125789, at \*2. The court described the possible conflict between two competing cases to be “utter chaos combined with the unseemly prospect of two distinct representatives vying for members to join their respective groups.” *Id.* In addition, the notices necessary to make the situation clear to consumers would be “the very essence of confusion.” *Id.*

196. *See, e.g., Budget Fuel*, 122 F.R.D. at 186 (holding that where the state and a putative class representative seek to represent the same group of consumers, “the *parens patriae* action is superior to that of a private class action.”).

197. The basic prerequisites to a class action are numerosity of plaintiffs, common questions of law and fact among the plaintiffs, typicality of the representative plaintiff’s injury, and fair and adequate representation of the plaintiff class. *See Fed. R. Civ. P. 23(a)*.

198. A class can be maintained under this section if it appears that separate actions would create the risk of inconsistent decisions, which would subject the opponent to “incompatible standards of conduct.” Fed. R. Civ. P. 23(b)(1)(A). Alternatively, this section authorizes class certification if it appears that individual actions would prejudice potential class members because a single action would effectively dispose of their interests or limit their ability to protect their interests. *See id.*

199. A class can be maintained under this section if injunctive or declaratory relief on a class-wide basis is appropriate because the opponent to the class has acted, or failed to act, with respect to all members of the class.

200. This is the most common type of class action for damages. In addition to the requirements of Rule 23(a), the court must also determine that a class is “superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

201. *See* 1 Newberg & Conte, *supra* note 140, §§ 5.23–5.35 (explaining various disadvantages that plaintiffs often encounter in class action suits).

202. 521 U.S. 591 (1997).

settlement class consisting of “hundreds of thousands, perhaps millions” of putative class members.<sup>203</sup> The Court found that the parties never intended to litigate because the complaint, answer, proposed settlement agreement, and motion for certification were filed on a single day.<sup>204</sup> The Supreme Court, in a unanimous decision,<sup>205</sup> affirmed the Court of Appeals decision decertifying the class. Justice Ginsburg, writing for the Court, found that “class action practice has become ever more ‘adventuresome’ as a means of coping with claims too numerous to secure their ‘just, speedy, and inexpensive determination’ one by one.”<sup>206</sup> In reviewing the requirements of Rule 23, the Court noted that the putative class was more “sprawling” than others known to the Court.<sup>207</sup> The Court found that common issues did not predominate over diverse ones in such a massive class, that the class representative was not adequate because the class was comprised of diverse subclasses with different goals and interests, and that the representative did not appreciate the responsibilities of a class representative. The Court held that the case was inappropriate for class treatment, noting that Rule 23 “cannot carry the large load [that] . . . class counsel[] and the district court heaped upon it.”<sup>208</sup>

The HSRA amended the Clayton Act not only to allow states to

---

203. *Id.* at 597.

204. *See id.* at 601-02. Because the issue involved a settlement, Rule 23(e), which concerns the settlement of class actions, controlled. This section provides that a “class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” Fed. R. Civ. P. 23(e). The Court found that Rule 23(e) is “an additional requirement, not a superseding direction,” *Amchem*, 521 U.S. at 621, which overlays the prerequisites of Rule 23(a) and (b) but that “[s]ettlement is relevant to a class certification.” *Id.* at 619. Consideration of the requirements of section (e) “protects unnamed class members ‘from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise.’” *Id.* at 623 (quoting 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1797, at 340-41 (2d ed. 1986)).

205. Justice O’Connor did not participate. *See id.* at 596.

206. *Id.* at 617-18 (quoting Fed. R. Civ. P. 1 and citing Jack Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (1995); William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 *Cornell L. Rev.* 837 (1995)). Some of the *parens patriae* actions described in part three have involved tens of thousands, perhaps more, consumers.

207. *Id.* at 624.

208. *Id.* at 629. The Court concluded that “[a]s this case exemplifies, the rulemakers’ prescriptions for class actions may be endangered by ‘those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste.’” *Id.* (quoting Charles Alan Wright, *Law of Federal Courts* 508 (5th ed. 1994)).



bring antitrust suits in a *parens patriae* capacity, but also to facilitate such actions by making notice to *parens patriae* group members and proof of damages easier to accomplish. The amendments also provided district courts great discretion in deciding how to distribute the funds obtained pursuant to a *parens patriae* action. Part III examines some of the methods that the district courts have used to distribute such funds.

### III. EFFECTIVE METHODS OF DISTRIBUTING DAMAGE AWARDS FROM PARENS PATRIAE ACTIONS

A common problem that courts must resolve in statutory *parens patriae* cases is the distribution of damages or, more typically, settlement funds.<sup>209</sup> While the HSRA gives the court vast discretion to approve distribution of the fund, courts must be guided by the underlying justifications for the statute: facilitation of antitrust litigation to benefit consumers; disgorgement of ill-gotten gains; and deterrence.<sup>210</sup> The goals of disgorgement and deterrence may be satisfied by the extraction from the defendant of a sufficiently high fine regardless of how the fine is used. However, the goal of making consumers whole is best met by returning what was extracted from them. The problem for courts is that, while automobile and real estate purchasers typically keep records of their purchases, many cases involve inexpensive goods such as milk and articles of clothing for which consumers rarely retain records.<sup>211</sup> Another problem for courts in these cases is that individual damages, if they can be proved at all, are likely to be relatively small, even after trebling. Facing proposed settlements in such cases, courts have turned to an alternate method of distributing damage or settlement funds: *cy pres* distributions.

#### A. *The Cy Pres Doctrine*

The *cy pres* doctrine originated as a "judicial saving device applicable to charities which enable[d] the court, when it [was] impossible, impractical or illegal to effectuate the precise intention of the donor, to direct the application of the property to a charitable purpose as near as possible to the precise objective of the donor . . . ."<sup>212</sup> After initial rejection, the doctrine was broadly

---

209. See, e.g., *California v. Levi-Strauss & Co.*, 715 P.2d 564, 570 (Cal. 1986) (explaining the difficulties in distributing damages from consumer class actions).

210. See *supra* notes 116-30 and accompanying text discussing the legislative history of the statute.

211. See H.R. Rep. No. 94-499, at 15 (1976), *reprinted in* 1976 U.S.C.A.N. 2572, 2584. For examples of these see *supra* notes 15, 17-20 and cases cited therein.

212. Edith L. Fisch et al., *Charities and Charitable Foundations* 413-14 (1974). The doctrine originated as "a remedial device which courts use[d] to prevent a charitable

accepted by the late 1800s, but its use was limited to charitable trusts.<sup>213</sup> The leading case interpreting the doctrine arose in the context of a constitutional challenge to the distribution plan of a particular charitable trust, and required the court to decide whether the trust could be reformed while still fulfilling the intent of the testator.<sup>214</sup> Although allowing a *cy pres* distribution of a charitable trust is an efficient use of the trust funds,<sup>215</sup> the paramount consideration is the intent of the trustor.<sup>216</sup> Today, nearly all

---

trust's failure by applying a trust's income or assets to an alternative charitable object." Matthew Perkins, Note, *The Cy Pres Doctrine in the 1980's: The Case for Charitable Favoritism*, 10 Prob. L.J. 163, 163 (1990). In his Note, Perkins describes the history of the doctrine and its origins:

The term '*cy pres*' appears to derive from the Norman-French term '*cy pres comme possible*,' meaning 'as near as possible.' *Cy pres* is a rule of construction which courts employ to carry out the spirit of a trust's terms when literal application of such terms is not feasible. Rather than have a trust fail and the trust's assets revert back to the testator's successors in interest, courts apply the trust's funds '*cy pres*' or 'as near as possible,' so that benefits from the trust may continue and the testator's intent may be approximately honored.

*Id.* at 165 (footnotes omitted).

213. See Perkins, *supra* note 212, at 166-67.

214. See *Evans v. Abney*, 396 U.S. 435, 437 (1970). In 1911, Senator Augustus O. Bacon devised land to the city of Macon, Georgia, after the death of his wife and daughters, to be used as a public park for whites only. See *id.* at 436. In a prior decision concerning the trust, the Supreme Court had held that the park could not continue to be segregated. See *Evans v. Newton*, 382 U.S. 296, 302 (1966). The Georgia Supreme Court then decided that because the grantor's intent was impossible to fulfill, the trust failed and the property would revert to the other heirs. See *Abney*, 396 U.S. at 436. The case returned to the Supreme Court when the dissolution of the trust was challenged as a violation of the Fourteenth Amendment. See *id.* at 437. Petitioners, African-American citizens of Macon argued that the Court should apply the *cy pres* doctrine to eliminate the racially restrictive clause from the will and allow the trust to continue operating, albeit now open to all races. See *id.* at 439.

215. See Richard Posner, *Economic Analysis of Law* 509 (4th ed. 1992) ("A policy of rigid adherence to the letter of the donative instrument is likely to frustrate both the donor's purposes and the efficient use of resources."). Posner suggests that rather than dissolve a charitable trust, courts prefer authorizing the trust's administrators to apply the corpus to "a related (*cy pres*) purpose within the general scope of the donor's intent [if] continued enforcement of conditions in a charitable gift is no longer economically feasible, because of illegality . . . or opportunity costs." *Id.* at 510.

216. For example, the Georgia trial court found that Senator Bacon's intent included separation of races, and therefore the *cy pres* doctrine could not be applied in a way that would conflict with the testator's intent. See *Abney*, 396 U.S. at 442. In upholding that conclusion, the Supreme Court pointed out that it is up to the individual states to determine whether and how to apply their individual state *cy pres* rules. See *id.* at 447 ("Nothing we have said here prevents a state court from applying its *cy pres* rule in a case where the Georgia court, for example, might not apply its rule."). Justice Douglas, dissenting, thought that the testator's intent was to give the land to the city for "some municipal use." *Id.* at 448. Reforming the terms of the trust

jurisdictions apply the doctrine, derived from statutory or judicial rule, in a broad variety of cases not limited to charitable trusts.<sup>217</sup>

In actions on behalf of a very large number of class members, especially if each has a relatively small claim, excess funds typically remain after the distribution of any settlement or judgment because class members remain unidentified, unidentifiable, or simply fail to seek their share of the fund.<sup>218</sup> Sometimes funds remain undistributed because the costs of distribution outweigh the individual share to which each *parens patriae* group member is entitled.<sup>219</sup> The court with jurisdiction over such an action must choose among a number of alternatives to distribute the residual funds. These alternatives include: (1) distributing the remainder of the fund among the class members who filed claims;<sup>220</sup> (2) returning the remainder of the fund to the defendants;<sup>221</sup> or (3) using an equitable distribution method, such as *cy pres*.<sup>222</sup>

The first option is inequitable because class members who have already been fully compensated for their injury have no legitimate claim on any remainder; such a distribution would result in a windfall for those who have already collected their share of damages.<sup>223</sup> If the

---

to allow all races to be admitted both fulfills the testator's intent of creating a park while complying with the mandates of the Constitution. *See id.* at 449.

217. *See id.* at 167. In particular, the *cy pres* method of distribution has been adopted by some courts attempting to dispose of funds not distributed to individual claimants who were class members in a successful class action suit. *See* 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1784 (2d ed. 1986).

218. *See* Kevin M. Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything!*, *Judges' J.*, Summer 1996, at 19, 19. Statutory *parens patriae* antitrust actions, involving thousands of consumers who have purchased a low-cost retail product, will often provide an opportunity for creative distribution of a large fund. *See, e.g.,* *New York v. Reebok Int'l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996) (holding that the settlement proceeds should be used by the states or nonprofit organizations to support recreational activities).

219. *See* Forde, *supra* note 218, at 19.

220. *See id.* at 20; Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 *Santa Clara L. Rev.* 747, 765 (1988).

221. *See* Forde, *supra* note 218, at 23. Most courts have rejected this as an option. *See, e.g.,* *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2d Cir. 1977) (denying distribution of unclaimed damages to next-best class and ordering reversion of unclaimed funds to defendants), *aff'd* 739 F.2d 730 (2d Cir. 1984); *Friar v. Vanguard Holding Corp.*, 509 N.Y.S.2d 374, 376 (App. Div. 1986) (stating that unclaimed funds should be delivered to the state comptroller as abandoned property).

222. *See* Herbert Newberg, *Newberg on Class Actions* § 4620, at 84, § 7572, at 93 (1977).

223. *See* *Van Gemert*, 553 F.2d at 816; *California v. Levi Strauss & Co.*, 715 P.2d 564, 573 (Cal. 1986) (observing that such a distribution would not benefit absent class members and that it would create a windfall distribution to those who had already been compensated for their injuries).

settlement agreement does not provide for the return of any excess funds to the defendants, then the second option is also inappropriate. Return of any remainder to defendants would defeat the goals of disgorgement and deterrence by allowing defendants to retain their ill-gotten gains simply because those class members entitled to be recompensed failed to seek their share. Equitable or *cy pres* theories of distribution, however, avoid the inequities of overcompensation of certain class members and under-punishment of defendants by distributing all or part of any fund to some beneficial purpose approved by the court.<sup>224</sup> These equitable remedies are thus preferable to the other two methods.

When applying equitable distribution in class actions, courts recognize that class action suits not only allow class members to recover damages, they also benefit class members "by terminating unlawful conduct, deterring similar conduct in the future, forcing the wrongdoer to surrender unlawful profits, and distributing those profits in such a way as to benefit the class members."<sup>225</sup> But application of the *cy pres* theory on the remainder of a fund is less persuasive when individual, identifiable class members have been less than fully compensated for their injuries. The justifying theory for distributing the entire fund for a *cy pres* purpose is that the cost of distribution to individual class members or *parens patriae* group members is high and the amount to be recovered is relatively small.<sup>226</sup> Therefore, unless the cost of distribution are overly burdensome, it is preferable to distribute settlement funds directly to consumers rather than to put the entire fund to a related use that will only indirectly benefit those who were injured by the violation alleged.

The *cy pres* doctrine has been applied in cases other than those involving charitable trusts, including antitrust class actions in which a fund remains after distribution to the members of the class.<sup>227</sup> Following the original theory of the *cy pres* doctrine—putting the property to the next best use—courts may authorize distribution of unclaimed funds to a *cy pres* purpose.<sup>228</sup> Thus, the *cy pres* distribution can confer at least an indirect benefit on consumer members of the *parens patriae* group and serve the goals of the antitrust laws.

*Cy pres* distribution is unobjectionable "where unclaimed funds remain following distribution of the class fund to individual class members" because all class members theoretically had an opportunity

---

224. See *Van Gemert v. Boeing, Co.*, 739 F.2d 730, 737 (2d Cir. 1984) (describing equitable remedies as being a "special blend of what is necessary, what is fair, and what is workable" (quotation omitted)).

225. Newberg, *supra* note 222, § 7572, at 93 (footnote omitted).

226. See Newberg & Conte, *supra* note 140, § 11.20, at 11-26 to 11-29.

227. See, e.g., *infra* notes 240-51 and accompanying text.

228. See Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 *Hastings L.J.* 729, 730 (1987).

to claim their share of the fund.<sup>229</sup> When funds remain after legitimate efforts to distribute them to rightful claimants, courts have broad discretion in ordering the distribution of a remainder fund,<sup>230</sup> which may be very large.<sup>231</sup> The options, which can be applied alone or in some combination, include ordering the defendant to reduce future prices on its products until the total lost profits equal the amount of unclaimed funds.<sup>232</sup> This option, however, is subject to criticism because class members must continue buying from the defendant to recover their refund. An unintended effect of this remedy is to give the antitrust violator an overall advantage in the marketplace because the artificially low prices increase its sales.<sup>233</sup> This would violate the pro-competitive norms of the antitrust laws. In addition, when price rollbacks involve retail products, it is difficult to police the rollback because retailers, not manufacturers, set prices.<sup>234</sup> The court can also allow the unclaimed funds to escheat to the state.<sup>235</sup> The objection to this distribution choice is that escheatment to the state spreads benefits to all state residents rather than to the group of consumers harmed by the violation.<sup>236</sup> Finally, the court may order the

---

229. *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 605 (D.N.J. 1994).

230. *See id.* If the fund is created by settlement agreement, rather than by a verdict, the parties may decide among themselves how to deal with any funds remaining after notice, claim, and distribution to all claiming class members. The same reasoning applies to the remainder in a fund after distribution to citizens represented in a *parens patriae* action.

231. The remainder after distribution in the consumer class action *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 728 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971), was \$37 million of a \$100 million settlement. The remainder in *In re Corrugated Container Antitrust Litigation* was approximately \$1.1 million from a fund of more than \$500 million, *see Residual Funds from Box Settlement Will Be Distributed to 9 Organizations*, 53 Antitrust & Trade Reg. Rep. (BNA) 711 (Nov. 5, 1987), and the remainder in *In re Folding Carton Antitrust Litigation* was approximately \$6 million from a fund of approximately \$200 million. *See* 881 F.2d 494, 496 (7th Cir. 1989). In *Van Gamert v. Boeing*, 739 F.2d 730, 733 (2d Cir. 1984), more than \$2.7 million remained undistributed after all known claims had been satisfied.

232. *See, e.g., In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1255 (7th Cir. 1984); *Colson v. Hilton Hotels, Corp.*, 59 F.R.D. 324, 326 (N.D. Ill. 1972) (escheating funds to the state).

233. *See Hillebrand & Torrence, supra* note 220, at 764; Anna L. Durand, Note, *An Economic Analysis of Fluid Class Recovery Mechanisms*, 34 Stan. L. Rev. 173, 186-201 (1981); *see also California v. Levi Strauss & Co.*, 715 P.2d 564, 572 (Cal. 1986) (discussing why a price rollback is not appropriate in non-monopoly markets because it is more likely to benefit the defendant and disadvantage its competitors).

234. *See Levi Strauss*, 715 P.2d at 572.

235. This option was considered and rejected in *Levi Strauss, Id.* at 572.

236. *See id.* at 575. Moreover, the court specifically noted that the escheat statute "was not intended to limit the equitable discretion of the courts in managing private consumer class actions." *Id.* at 574; *see also Durand, supra* note 233, at 180 (explaining how distribution of funds to the government enhances the disparity between the class benefited and the class harmed); Forde, *supra* note 218, at 19-20 (explaining that

distribution of the unclaimed funds to charities or other institutions that the court believes will benefit absent members of the class.<sup>237</sup>

The *cy pres* distribution to existing charities or to a trust fund has much to recommend it,<sup>238</sup> and many courts have approved of such *cy pres* distributions of unclaimed funds.<sup>239</sup> The *Corrugated Container*

nothing changes the authority of a court to order equitable remedies); Hillebrand & Torrence, *supra* note 220, at 765 (noting that escheat should be used only as a last resort). Allowing residual funds to escheat, however, might enable the government to provide some benefit to consumers who failed to file claims. This procedure would also be inexpensive to administer because the government agencies to manage the fund already exist, thus preserving a substantial portion of the fund for the public. See *Levi Strauss*, 715 P.2d at 572, 576.

237. See Forde, *supra* note 218, at 21; Hillebrand & Torrence, *supra* note 220, at 766-73; Durand, *supra* note 233, at 179-80. Forde points out that these distributions have been made "apparently without regard to state or federal escheat statutes." Forde, *supra* note 218, at 20; see also *Van Gamert v. Boeing*, 739 F.2d 730, 735-36 (2d Cir. 1984) (holding that the federal escheat statute "[does] not control when a court fashions a plan for distributing unclaimed funds").

238. Creation of a trust fund "allows the court to create a flexible, equitable remedy." Forde, *supra* note 218, at 20. Discussing *cy pres* in class actions, one commentator stated:

While the use of a *cy pres* distribution remains controversial and unsettled in an adjudicated class action context, courts are not in disagreement that *cy pres* distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds. Thus, even in circuits that have ruled that *cy pres* or fluid class recovery distributions are not valid in contested adjudications, these distributions have obtained a stamp of approval as part of a class settlement.

Newberg & Conte, *supra* note 140, § 11.20, at 11-26 to 11-27 (footnote omitted).

239. See, e.g., *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 458 (D.C. Cir. 1996) (approving *cy pres* distributions of unclaimed funds remaining after distribution to class members); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 183-85 (2d Cir. 1987) (approving the use of a portion of the settlement fund to provide programs for the class as a whole); *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 409 (11th Cir. 1986) (finding no objection to the use of fluid recovery system); *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491, 499 (W.D. Ark. 1994) (allowing the use of funds to establish a scholarship fund); *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 479 (N.D. Ill. 1993) (permitting use of funds for public interest purposes); *Pray v. Lockheed Aircraft Corp.*, 644 F. Supp. 1289, 1303 (D.D.C. 1986) (distributing funds to nonparty charitable organizations); see also Forde, *supra* note 218, at 21-23 (listing 25 antitrust cases where courts have applied a *cy pres* distribution). *But see*, *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (approving generally of *cy pres* theory as permissible but rejecting the district court's plan as not adequately aiding absent class members). Examples of cases where *cy pres* distributions have been rejected include: *In re Matzo Food Products Litigation*, 156 F.R.D. 600, 605 (D.N.J. 1994) (rejecting proposal that entire settlement fund be distributed to charities); *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254 (7th Cir. 1984) (ordering, on appeal, \$6 million fund escheated to federal government to be held for claimants, but not disapproving *cy pres* distributions in appropriate cases).

*Antitrust Litigation*<sup>240</sup> is one example of a *cy pres* distribution of a large fund that remained after damage distributions to class members.<sup>241</sup> The case was the result of the consolidation of fifty-one private antitrust actions originally filed in federal district courts throughout the country.<sup>242</sup> In total, settlements substantially exceeding \$500 million, including interest, were reached before, during, and after trial.<sup>243</sup> After more than \$529,000 was distributed to members of the plaintiff classes who had filed valid claims and some \$54,922,000 was paid in professional and administrative expenses, about \$990,000 remained in residual funds.<sup>244</sup> The court raised the issue of disposition of the residual fund on its own motion and numerous entities claimed the fund.<sup>245</sup> In considering a *cy pres* distribution, the court stated that it was "attempting to steer a course which protects the rights of all parties, costs no more than is necessary, and produces as accurate and expeditious a result as can be

---

240. 447 F. Supp. 468 (J.P.M.D.L. 1978), 80 F.R.D. 244 (S.D. Tex. 1978). The private actions followed federal indictments returned by a grand jury in the Southern District of Texas in 1978, charging 14 corporations and 26 individuals with price fixing involving corrugated containers in a geographic area east of the Rocky Mountains. See *Corrugated Container*, 447 F. Supp. at 471 n.3.

241. See *Residual Funds from Box Settlement Will Be Distributed to 9 Organizations*, 53 Antitrust & Trade Reg. Rep. (BNA) 711 (Nov. 5, 1987).

242. All of the actions were transferred to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1407 (1994) for consolidated pretrial proceedings. The original cases had been filed as class actions naming a class of purchasers of corrugated containers and sheets, and two subclasses. The classes were certified, there was some pretrial discovery, and the cases proceeded. See *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921, 923 (J.P.M.D.L. 1977).

243. Before the criminal trial, twenty-four defendants named in the civil actions entered into settlements, which were found to be fair, reasonable, and adequate by the Fifth Circuit. See *In re Corrugated Container Antitrust Litig.*, 556 F. Supp. 1117, 1124-25 (S.D. Tex. 1982). Settlements were reached with eight other defendants after the criminal acquittals. See *id.* at 1127. Two more settlements were reached during the civil trial. See *id.* at 1125. These settlements equaled more than \$298 million. See *id.* at 1124. The only remaining defendant proceeded to trial and was found liable for price fixing. See *id.* at 1125. Ultimately, that defendant also settled, agreeing to pay \$45 million. See *id.* at 1126. The total settlement amount was thus more than \$365 million, which the court found exceeded the actual damages. See *id.* Additional settlements were reached with ten more firms for \$21,619,377. See *id.* One defendant reached separate settlement agreements with the two subclasses for \$2,490,000 for the Container Purchaser subclass and \$435,000 for the Sheet Plant subclass. See *id.* at 1127-28. In all, the total settlements including interest amounted to over \$500,000,000. See *id.* at 1125.

244. See *Residual Funds from Box Settlement Will Be Distributed to 9 Organizations*, 53 Antitrust & Trade Reg. Rep. (BNA) 711 (Nov. 5, 1987).

245. Claimants to the residual fund included class members, universities, trade associations, and a group of state Attorneys General. See *Residual Funds from Box Settlement Will Be Distributed to 9 Organizations*, 53 Antitrust & Trade Reg. Rep. (BNA) 711 (Nov. 5, 1987).

found.”<sup>246</sup>

Other *cy pres* distributions of remainder funds have been ordered in antitrust class actions alleging price fixing of consumer products as diverse as pharmaceuticals,<sup>247</sup> clothing,<sup>248</sup> and food products.<sup>249</sup> The equitable distributions in these cases were clearly the most appropriate use of the funds to indirectly benefit those class members who failed to claim their share of the damages, either because they could not be located or they lacked the records, if any, required to reasonably document their claims.

The residual funds resulting from class action or statutory *parens patriae* antitrust litigation or settlements have been used to fund antitrust enforcement by state Attorneys General in a number of

---

246. *In re Corrugated Container Antitrust Litigation*, MDL No. 310, 1981 WL 2020, at \*3 (S.D. Tex. Jan. 27, 1981) (denying permission to conduct discovery of absent class members). A distribution to a variety of charitable and non-profit organizations was ultimately ordered. *See Residual Funds from Box Settlement Will Be Distributed to 9 Organizations*, 53 *Antitrust & Trade Reg. Rep.* (BNA) 711 (Nov. 5, 1987) (distributing the balance of remainder to four Texas law schools, the law schools at the University of Pennsylvania and Stanford University, the National Association of Attorneys General, the Packaging Education Foundation, and the International Corrugated Packaging Foundation).

247. In *Alabama v. Chas. Pfizer & Co.*, 68 Civ. 1099 (M 19-93), 1972 WL 664, (S.D.N.Y. Dec. 5, 1972), the court approved settlements of several classes, including governmental entities and consumers, stating that “[a]ny sum remaining from the \$661,522 after all payments to consumers will, as noted previously, be used for public purposes in Alabama [and the other plaintiff states]; this will be to the benefit of all consumers there.” *Id.* at \*3.

248. In *California v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986), the California Attorney General brought a class action on behalf of the state and consumers against Levi Strauss for overcharging on jeans during the 1970s. *See id.* at 565. The case was settled, allocating approximately \$9.3 million for consumers who had purchased jeans, at up to \$2 per pair. *See id.* at 565, 567. Notices were mailed to 8.6 million households, and by the deadline for filing claims, consumers had filed 1.4 million claims for 37 million pairs of jeans. *See id.* at 568-69. Approximately \$1.5 million of the settlement fund was spent on the distribution plan, including the notice and processing of more than \$1 million in claims. *See id.* at 569-70.

In selecting a *cy pres* distribution, the court recognized that *cy pres* distributions may be “essential to ensure that the policies of disgorgement or deterrence are realized.” *Id.* at 570-71. The court further noted the unfairness of allowing defendants to keep the fruits of a conspiracy because they harmed many people in small amounts rather than fewer people for larger sums. *See id.* The *cy pres* process described by the court required three steps: (1) payment of the entire damages amount into a settlement fund; (2) proof of claims by class members and distribution of individual damages; and (3) distribution of any remainder according to equitable principles. *See id.* at 571.

249. *See, e.g., In re Chicken Antitrust Litig.*, 560 F. Supp. 943, 957, 998 (N.D. Ga. 1979) (ordering that the residual fund be distributed to the states for public food-related purposes or for antitrust enforcement).



cases.<sup>250</sup> More recent *parens patriae* cases have used the *cy pres* doctrine to put the funds remaining after individual distributions to a use that seeks to benefit those persons for whose benefit the case was brought, but who failed to file individual claims.<sup>251</sup>

Courts have extended the theory even further in some recent statutory *parens patriae* antitrust actions, ordering the distribution of the entire settlement fund to a *cy pres* purpose, thus foreclosing the opportunity of consumers, for whose benefit the action was brought, to recover their actual damages.<sup>252</sup> The concerns that this expansion presents, and the cases in which it should be properly utilized, are considered in the case studies below.

### B. Leading Cases Implementing Complete *Cy Pres* Distributions

In situations involving numerous consumer purchases of relatively inexpensive goods, courts often apply *cy pres* principles to distribute the entire corpus of the antitrust settlement. Distributions of this sort do not go directly to the injured citizens represented by the state as *parens patriae*, but to a public purpose designed to benefit those consumers indirectly.<sup>253</sup> This equitable distribution method is both practical and reasonable in situations involving vast numbers of consumers who have bought relatively inexpensive products. The

---

250. See, e.g., *Tennessee ex rel. Charles W. Burson v. Pet Inc.*, No. 3-93-0477, 1993 WL 330646, at \*2 (M.D. Tenn. 1993) (approving a settlement in which the Attorney General had the right to use \$75,000 from the settlement fund to pay for its future antitrust enforcement activities); *In re Mid-Atlantic Toyota Antitrust Litig.*, 585 F. Supp. 1553, 1557 (D. Md. 1984) ("Any rebate [from the residual funds] due to certain Dealer defendants who made reduced contributions will be paid to the Attorney General's office for antitrust enforcement purposes."); see also, e.g., *Colorado v. Airline Tariff Publ'g Co.*, Civ. A. No. 94-2429, 1995 WL 792070, at \*8 (D.D.C. May 10, 1995) (approving settlement in which residual amounts of an administration fund would be distributed for "public antitrust enforcement purposes"); *New York v. Nintendo of America, Inc.*, 771 F. Supp. 676, 679 (S.D.N.Y. 1991) (approving settlement provision which requires the defendant to pay \$3 million to Attorneys General for, among other purposes, future antitrust enforcement).

251. See, e.g., *Court Approves Toy Importer's Settlement of State's Vertical Price Fixing Charges*, 70 Antitrust & Trade Reg. Rep. (BNA) 37 (Jan. 18, 1996) (discussing court approval of Pennsylvania's plan in *Pennsylvania v. Playmobile USA, Inc.* to distribute restitution to claimants and dedicate the remainder, if any, to a *cy pres* public purpose). In *Playmobile*, fewer than 100 consumers filed claims on the \$275,000 settlement fund. The remainder of the fund, after payment of claims, costs, and fees, amounted to more than \$200,000. Pennsylvania selected the charitable organizations and foundations, which provide services to children, that received distributions from the settlement fund. See *id.*

252. See *infra* notes 253-74 and accompanying text.

253. See generally *New York v. Reebok Int'l Ltd.*, 903 F. Supp. 532, 537 (S.D.N.Y. 1995), *aff'd* 96 F.3d 44 (2d Cir. 1996); *New York v. Keds Corp.*, No. 93 Civ. 6708 (CSH), 1994 WL 97201, at \*3 (S.D.N.Y. Mar. 21, 1994); *New York v. Dairylea Coop.*, No. 81 Civ. 1891 (RO), 1985 WL 1825, at \*2 (S.D.N.Y. Jun. 26, 1985).

difficulty, if not sheer impossibility, of notifying all purchasers of an item such as milk, for example, are obvious. Moreover, there is a distinct risk of fraudulent claims because few consumers retain receipts for inexpensive items and therefore most claims could not be investigated or verified. Finally, direct claims distribution is not without significant costs, including the costs of distributing or publishing notices, reviewing claims, and writing checks. The cost of directly reimbursing consumers for their antitrust damages could well exceed the refund, even trebled. Cases alleging price fixing involving milk and tennis shoes provide useful examples of these points and demonstrate the flexible nature of *cy pres* distributions.

In 1994, all fifty states and the District of Columbia filed the first coordinated statutory *parens patriae* actions alleging price fixing on casual footwear. The parties entered into settlement agreements, which required the defendant to pay a total of \$7.2 million, \$5.7 of which was to be distributed to charities in lieu of distribution to consumers and injunctive relief.<sup>254</sup> The court found that the settlement was "fair, reasonable and adequate," and particularly noted that only 210 consumers opted out of the settlement while the defendant sold more than five million pairs of shoes during the relevant time period.<sup>255</sup> The court found that the plaintiff's proposed *cy pres* distribution was "pragmatic and sensible in the circumstances" because the overcharges alleged amounted to between \$1.00 and \$1.25 on each pair of shoes purchased. In addition, the court found that the cost of identifying and notifying the purchasers of their opportunity to make a claim would "to the extent successful at all . . . wipe out any economic benefit of the settlements. The game, in short, would not be worth the candle."<sup>256</sup>

Similarly, a year later in *New York v. Reebok International, Ltd.*, the court approved a \$9.5 million settlement in a *parens patriae* suit filed by 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands alleging price fixing on footwear produced by Reebok and Rockport.<sup>257</sup> As in *Keds*, the agreement provided that the entire fund, after deduction of costs and fees, would be dedicated to public purposes instead of providing restitution to affected consumers.<sup>258</sup> The participating states had the option of taking their share, based on population, in the defendants' products or as a monetary payment to

---

254. See *Keds*, 1994 WL 97201, at \*1. The agreement approved by the court provided that the funds be allocated to each state based upon its share of the national population. Each state could select one or more charities from a list of five agencies or select another "so long as the sponsored program benefits women aged 15 to 44" who represented most of the purchasers of the products. *Id.*

255. *Id.* at \*3.

256. *Id.*

257. See *Reebok*, 903 F. Supp. at 534.

258. See *id.* at 537.

be distributed to “public and non-profit and/or charitable organizations with express conditions ensuring that the funds will be used for various athletic facilities, equipment, or services.”<sup>259</sup>

In considering the *cy pres* method of distribution, the court weighed the likely benefit of direct consumer restitution against the substantial costs and found the costs excessive and the benefits slight.<sup>260</sup> Moreover, the court found that the risk of fraudulent claims weighed heavily against individual restitution because few consumers had maintained sufficient receipts to prove their claims.<sup>261</sup> The court concluded that “[t]he distribution method here serves the general public interest, the interests of the plaintiffs and the consumers, and the public interests of disgorgement and deterrence.”<sup>262</sup> Affirming both the settlement and the distribution plan on appeal, the Second Circuit found that it would be “impractical” to provide individual restitution “among the multitude of unidentified possible claimants.”<sup>263</sup> and that the effort was not required. The Second Circuit found:

Section 15e [of 15 U.S.C.] provides that the settlement proceeds shall be distributed in such manner as the district court in its discretion may authorize, subject to the requirement that the procedure adopted affords each beneficiary a “reasonable opportunity” to secure his appropriate portion of the “net monetary relief.” Because of the unlikelihood of there being any significant “net monetary relief” for individual claimants if an attempt were made to distribute the settlement proceeds among them, the district court did not err in approving distributions to the States and non-profit entities to be used in providing and improving athletic equipment and facilities and related uses, areas in which Reebok equipment plays a substantial role. Distribution in this manner is not without judicial precedent.<sup>264</sup>

---

259. *Id.* at 534. The proposed distribution plans were submitted to the court as part of the States’ motion for approval of the settlement. The court described the plans of New York, which planned to divide its \$560,857 share among 58 organizations, and of California, which planned to distribute its \$360,000 share to numerous school and public athletic programs. *See id.*

260. *See id.* at 537. The Court noted that a report of an economic expert in favor of the settlement estimated that more than 1.3 million pairs of shoes were sold during the relevant time period and that overcharges amounted to less than \$4 per pair of shoes. Another expert estimated that it would cost \$2.47 per claim to process claims and mail out refund checks. *See id.* at 534.

261. *See id.* at 537.

262. *Id.* Rejecting objections to the distribution plan that urged the court to require individual refunds, the court found that “any effort at individual refunds—which would not only be impractical but would be consumed in the costs of its own administration” would not be a fair, reasonable, and adequate settlement. *Id.* at 538.

263. *New York v. Reebok Int’l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996).

264. *Id.* at 49 (citing the *Keds* and *Dairylea* cases as precedent).

The first such expansive use of *cy pres* distribution in a statutory *parens patriae* case occurred in *New York v. Dairylea Cooperative, Inc.*,<sup>265</sup> where the state represented approximately 4.4 million citizens of eleven counties and alleged that prices of milk had been illegally fixed.<sup>266</sup> The affected population was fairly mobile, and the court found that it had changed between 36% and 50% between the beginning of the alleged conspiracy in 1967 and its conclusion in 1981.<sup>267</sup> Although the defendant milk wholesalers settled for the significant sum of \$6.1 million, the court estimated that equal division of the settlement fund among the *parens patriae* group would have given each household only \$1.50 or each resident \$.50, assuming that distribution of the funds were cost-free.<sup>268</sup> Distributing the fund would not have been free, the court found, estimating that it would cost at least \$2.5 million.<sup>269</sup> After considering its options, the court elected to distribute the entire settlement amount among schools in an eleven-county area "to be used solely for nutrition-related purposes or programs that would not otherwise be funded."<sup>270</sup>

The court considered but rejected New York's proposal to print \$0.25 coupons on milk cartons and to allow consumers to redeem them for any brand of milk. According to the court, printing coupons would have skewed the competitive market, was expensive, and might have led the public to conclude that defendants who had not settled the case were guilty.<sup>271</sup> In addition, the coupons could not have been targeted effectively to those consumers who had overpaid in the past. The proposal instead would have effectively subsidized future milk drinkers.<sup>272</sup> Although each of these objections probably could have been overcome or mitigated, the court feared that the expense would be too great. The court also found that allowing consumers to claim their share of the fund would have proven unworkable.<sup>273</sup> Because the available fund was relatively small and the number of possible consumer claimants was quite large, the court concluded that after subtracting distribution costs, consumers would have received little or nothing. Thus, confronted with a set of unappealing choices in

---

265. 547 F. Supp. 306 (S.D.N.Y. 1982) (declining to approve the proposed settlement and rejecting proposed distribution by coupon).

266. See *New York v. Dairylea Coop.*, No. 81 Civ. 1891 (RO), 1985 WL 1825, at \*1 (S.D.N.Y. Jun. 26, 1985).

267. See *id.* at \*2.

268. See *id.* at \*1.

269. See *id.*

270. *Id.*

271. See *id.*

272. See *New York v. Dairylea Coop.*, 547 F. Supp. 306, 308 (S.D.N.Y. 1982); see also Durand, *supra* note 233, at 181-86 (critiquing restitution, in the form of coupons to consumers, for economic harm).

273. See *New York v. Dairylea Coop.*, No. 81 Civ. 1891 (RO), 1985 WL 1825, at \*1 (S.D.N.Y. Jun. 26, 1985).

distribution procedure, the court opted to deny all individual claimants an opportunity to apply for shares in the settlement fund. Instead, the court ordered that the entire fund "be dedicated to the population in a manner that will contribute to the general welfare essentially for the benefit of all."<sup>274</sup>

These three cases have important characteristics in common. First, the products involved were all relatively low-cost consumer items, purchased relatively frequently and without warranty, thus preventing consumers from registering and allowing the producer to maintain a master list of purchasers that could be used to verify claims. Second, the number of purchasers was very large, numbering in the millions. Third, the *cy pres* distribution was narrowly targeted to benefit those who were harmed by the alleged conspiracies: the funds were directed to charitable agencies with the goal of aiding persons who would likely fit the profile of purchasers of the particular product. Finally, the courts ordered public notice of the proposed settlements and distribution plans, and then reviewed any objections and the overall reasonableness of the *cy pres* distributions.

Cases that do not share these characteristics are not proper for expansive *cy pres* distribution after a successful *parens patriae* action. Instead, courts should consider some sort of distribution procedure which might allow harmed consumers to benefit more directly from the proceeds of an antitrust settlement.

### C. *An Alternative Proposal*

Recent *parens patriae* cases have applied entire settlement funds to a charitable purpose that attempts indirectly to benefit consumers harmed by the alleged conspiracies rather than attempting to distribute the funds directly to consumers through a notice and claims process. Creative distribution plans can, however, allow consumers to obtain restitution directly and should be favored in cases where the benefits exceed the costs.

In one such creative alternate distribution, a state distributed coupons to grocery store customers in an effort to provide direct rather than indirect *cy pres* benefit.<sup>275</sup> In this action, a grocery store chain and ten manufacturers of grocery products were alleged to have conspired to reduce the number of discount coupons available to consumers in western New York. Without admitting liability, the defendants agreed to settle before trial and agreed to injunctive relief and payment of \$4.2 million in the form of coupons published in western New York newspapers. Importantly, the coupons could be

---

274. *Id.* at \*2.

275. See *In re Western New York Coupon Litig.*, No. 97 CV-0707 A(M), Final Judgment, at 5-8 (W.D.N.Y. Mar. 18, 1997) (approving parties' settlement agreement).

used in any store that sold grocery products<sup>276</sup> and could be redeemed for any products.<sup>277</sup> This distribution plan avoids the usual objection to coupons: they must be used to buy products of the defendants, and thus the settlement ultimately benefits the defendants.<sup>278</sup> Like the distribution plan rejected in *Dairyalea Cooperative*, the *Western New York* plan was both over and under-inclusive in that some consumers had undoubtedly moved, died, or did not use coupons and would not benefit, while new residents could share the benefit of the settlement on future grocery purchases even though they had been harmed. However, the conspiracy was alleged to have occurred between 1995 and 1997, and the coupons were distributed during 1997. The temporal proximity of the alleged conspiracy and the coupon distribution alleviates much of the concern about over and under-inclusiveness of the remedy. Because consumers could use the restitutionary coupons in any store and on any product, the problematic market-skewing effect and unwarranted benefit to defendants was avoided.

The combination of a liberal exercise of *parens patriae* authority with the option of equitable distribution of funds satisfies the legislative goals of opening courthouse doors to consumers in antitrust actions and providing them with direct restitution or indirect benefits. Courts have favored the streamlined process of statutory *parens patriae* actions over class actions. Thus, state enforcement agencies have important power to both represent their state consumers in antitrust actions and, with court approval, to distribute the funds resulting from judgment or settlement directly to consumers or indirectly to charitable organizations of their choice.

It must be acknowledged that the statutory *parens patriae* actions, which were intended to avoid the limitations of class actions, lack some of the Rule 23 checks of exercise of discretion by the class representative. First, a private class representative must be a member of the class and thus can be expected to share the concerns of the individual class members, while the state representative in a *parens*

---

276. Only one grocery store, Wegmans Food Markets, Inc., was named as a defendant. Consumers could use their coupons in all other grocery stores, mini-markets, and chain retailers, such as Wal-Mart, that sell grocery items.

277. The following ten manufacturers were named as defendants: Clorox Co., Colgate-Palmolive Co., Conopco, Inc. (named as a defendant for the alleged conduct of its division Lever Brothers Co.), The Dial Corp., DowBrands, Inc., James River Paper Co., Inc., S.C. Johnson & Sons, Inc., The Pillsbury Co., The Proctor & Gamble Co., and Reckett & Colman, Inc. Consumers could use the coupons to buy any grocery products, including those not manufactured by the defendants. Coupons could not be used to buy cigarettes and alcohol. See *Manufacturers Will Pay \$4.2 Million to Consumers to Settle Conspiracy Claims*, 73 *Antitrust & Trade Reg. Rep.* (BNA) 293 (Sept. 18, 1997).

278. See *supra* notes 232-33 and accompanying text.

*patriae* case may not be in the same position. This problem is mitigated because State Attorneys General are elected in most states, thus they are subject to the control of the very consumer-voters whom they represent in *parens patriae* actions. Second, the state Attorney General is eligible for attorney's fees. The fee actually requested and approved by the court may be less than a private fee,<sup>279</sup> or may be waived altogether.<sup>280</sup> There is nothing that requires this result, however, because states may hire private counsel to represent them in antitrust cases.<sup>281</sup>

In approving distribution plans in statutory *parens patriae* actions, courts should be mindful of the goals underlying the statute. Direct restitution aimed at returning value to consumers is preferable when it is "worth the candle" and fraud can be prevented. The equitable option of a *cy pres* distribution to a charitable organization may be a more efficient and effective way to indirectly benefit consumers and check fraud in other situations. Courts are advised to employ the following four-factor test in reviewing distribution plans: (1) whether the class of consumers is large and difficult to identify because, for example, neither consumers nor producers maintain records of purchasers; (2) whether the product is relatively inexpensive and frequently purchased; (3) whether a creative alternative is viable to return value directly to consumers without promoting fraudulent claims or benefiting the defendant;<sup>282</sup> and (4) whether the costs of any effort at direct restitution exceed the likely benefit.

---

279. See, for example, a Maryland district court opinion in which the court stated that it could not "overlook the governmental nature of these *parens patriae* suits in which the primary concern of the Attorneys General is the protection of and compensation for the States' resident consumers, rather than insuring a fee for themselves." *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456, 470 (D. Md. 1987).

280. See, e.g., *New York v. Salem Sanitary Carting Corp.*, CV-85-0208 (ILG), Order, Doc. No. 144, at 5 (E.D.N.Y. Sept. 25, 1989) (granting preliminary approval of the settlement and ordering notice). The order states: "[t]he Attorney General has waived any claim for costs, expenses or disbursements incurred to date." *Id.* Following preliminary approval, costs and expenses including the cost of giving notice and distributing the settlement fund, would be reimbursed.

281. Nothing in the antitrust laws prohibits a state from retaining private counsel to represent it in a *parens patriae* case. See 15 U.S.C. §§ 15c-15h (1994). The antitrust laws prohibit the employment of private counsel employed on a contingency fee based on a percentage of any award or settlement. See *id.* § 15g(1). Fees to private counsel retained in any other contingency fee arrangement must be approved by the court. See *id.* § 15g(1)(B).

282. A coupon refund that requires consumers to purchase products from a defendant or a mandated price roll-back would benefit the defendant by increasing its sales at the expense of competitors.

## CONCLUSION

Expansive application of *cy pres* distributions in *parens patriae* antitrust actions brought on behalf of a state-wide or national group of consumers can serve the laudable legislative goal of opening courts to consumers in antitrust cases. Moreover, use of a *cy pres* remedy for the entire corpus of a settlement or damages fund may serve, in effect, as a civil penalty that is likely a stronger deterrent than injunctive relief alone and is obtained under a civil burden of proof of a preponderance of the evidence. Criminal remedies, which are not available to state officials to enforce federal law, offer greater deterrence, but with a correspondingly higher burden of proof.

While statutory *parens patriae* actions are procedural devices that are based upon a class action model, they also borrow from the principles of common law *parens patriae* actions. Under section 4C of the Clayton Act, a state's *parens patriae* action resembles a class action in that the state acts as the representative plaintiff of a group that has been harmed by the defendants. Also, like class members, the *parens patriae* group cannot participate in the litigation and is bound by the rules of *res judicata*. Implicit in the easing of Rule 23's restrictive due process requirements is the understanding that states will vigorously prosecute an antitrust action on behalf of its citizens and that the state will act solely in their interest. Thus, a *cy pres* method of distribution for the sum of any monetary award obtained by state Attorneys General is wholly appropriate and in harmony with Congress's goal of offering the consumer some redress to antitrust injuries. Therefore, *cy pres* distribution of an entire fund should be applied thoughtfully in cases that satisfy the four-part test recommended above in order to provide the best available benefit, albeit indirect, to consumers at the most efficient cost.