ANTITRUST PARENS PATRIAE AMENDMENTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

H.R. 12528 and H.R. 12921

ANTITRUST PARENS PATRIAE AMENDMENTS

MARCH 18 AND 25, 1974

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ANTITRUST PARENS PATRIAE AMENDMENTS

MONDAY, MARCH 18, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:35 a.m., in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. [chairman of the subcommittee] presiding.

Present: Representatives Rodino, Seiberling, Mezvinsky, Hutchinson, and Dennis.

Also present: James F. Falco, counsel; and Franklin G. Polk, associate counsel.

Chairman RODINO. The Subcommittee on Monopolies and Commercial Law will come to order.

We are pleased to have this morning at the hearing on H.R. 12528 and H.R. 12921, Parens Patriae Antitrust Legislation, the Honorable Thomas E. Kauper, Assistant Attorney General of the Antitrust Division of the Department of Justice.

[The bills referred to, H.R. 12528 and H.R. 12921, follow:]

93D CONGRESS
2D SESSION

H. R. 12528

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 1974

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (15 U.S.C. 12), is amended by inserting immediately after section 4B the following new sections:

"SEC. 4C. (a) Any attorney general of a State may bring a civil action in the name of such State in the district

courts of the United States under section 4, or 16, or both, of this Act, and he shall be entitled to recover damages and secure other relief as provided in such sections—

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

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

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

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

"(2) shall distribute, allocate, or otherwise pay out of the fund so recovered either (A) in accordance

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

"SEC. 4D. (a) Whenever the Attorney General of the United States has brought an action under section 4A of this Act, and he has reason to believe that any State attorney general would be entitled to bring an action based substantially on the same cause of action, on behalf of the citizens of his State pursuant to section 4C of this Act and would probably lead to a substantial recovery of damages, he shall promptly so notify such State attorney general.

"(b) If, after the ninety-day period which begins on the date of the mailing of any notification under subsection (a) of this section, the State attorney general fails or declines to bring such an action, the Attorney General shall himself sue, in place of the State attorney general, and he shall thereafter be deemed parens patriae of the citizens of such State for the purposes of such action. Such action shall

be brought in the district in which the action under section 4A is pending and shall be consolidated therewith.

"(c) In actions brought under this section, section 4C (b) (1) shall apply with respect to proof of damages by the Attorney General. Subject to subsection (d) of this section, section 4C (b) (2) shall apply to any amounts paid to States pursuant to this subsection.

"(d) With respect to any recovery of damages under this section, the Attorney General shall pay or cause to be paid to the respective States, on behalf of whose citizens he has recovered such damages, a pro rata share of the total damages recovered, after deducting therefrom, on the basis of regulations prescribed by the Attorney General and approved by the Comptroller General of the United States, litigation expenses, including actual attorneys' fees and administrative costs. Any amounts so deducted shall be deposited in a special fund by the Attorney General, and, subject to an appropriation, used only for activities under this section.

"SEC. 4E. With respect to any federally funded State program affected by antitrust violations, any State shall be entitled to treble damages for the entire amount of overcharges or other damages sustained in connection with such a program. The Attorney General of the United States shall have the right to intervene in any such action to protect the

interests of the United States; and he shall have the power to sue on behalf of any State that fails or declines to bring such action within the ninety-day period which begins on the date of the mailing of notification from the Attorney General that he believes cause exists for bringing such action. The United States shall be entitled to secure reimbursement of its equitable share of any recovery of damages under this section, under such regulations as the respective Federal agencies responsible for such programs shall publish. The provisions of sections 4C(b) and 4D(c) and (d) of this Act shall apply to any action and damages recovered therein pursuant to this section.".

93D CONGRESS
2D SESSION

H. R. 12921

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 20, 1974

Mr. RODINO (for himself, Ms. JORDAN, Mr. MEZVINSKY, and Mr. SEIBERLING) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (15 U.S.C. 12), is amended by inserting immediately after section 4B the following new sections:

"SEC. 4C. (a) Any attorney general of a State may bring a civil action in the name of such State in the district

courts of the United States under section 4, or 16, or both, of this Act, and he shall be entitled to recover damages and secure other relief as provided in such sections—

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

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

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

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

"(2) shall distribute, allocate, or otherwise pay out of the fund so recovered either (A) in accordance

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

"SEC. 4D. (a) Whenever the Attorney General of the United States has brought an action under section 4A of this Act, and he has reason to believe that any State attorney general would be entitled to bring an action based substantially on the same cause of action, on behalf of the citizens of his State pursuant to section 4C of this Act and would probably lead to a substantial recovery of damages, he shall promptly so notify such State attorney general.

"(b) If, after the ninety-day period which begins on the date of the mailing of any notification under subsection (a) of this section, the State attorney general fails or declines to bring such an action, the Attorney General shall himself sue, in place of the State attorney general, and he shall thereafter be deemed parens patriae of the citizens of such State for the purposes of such action. Such action shall

be brought in the district in which the action under section 4A is pending and shall be consolidated therewith.

"(c) In actions brought under this section, section 4C (b) (1) shall apply with respect to proof of damages by the Attorney General. Subject to subsection (d) of this section, section 4C (b) (2) shall apply to any amounts paid to States pursuant to this subsection.

"(d) With respect to any recovery of damages under this section, the Attorney General shall pay or cause to be paid to the respective States, on behalf of whose citizens he has recovered such damages, a pro rata share of the total damages recovered, after deducting therefrom, on the basis of regulations prescribed by the Attorney General and approved by the Comptroller General of the United States, litigation expenses, including actual attorneys' fees and administrative costs. Any amounts so deducted shall be deposited in a special fund by the Attorney General, and, subject to an appropriation, used only for activities under this section.

"SEC. 4E. With respect to any federally funded State program affected by antitrust violations, any State shall be entitled to treble damages for the entire amount of overcharges or other damages sustained in connection with such a program. The Attorney General of the United States shall have the right to intervene in any such action to protect

the interests of the United States; and he shall have the power to sue on behalf of any State that fails or declines to bring such action within the ninety-day period which begins on the date of the mailing of notification from the Attorney General that he believes cause exists for bringing such action. The United States shall be entitled to secure reimbursement of its equitable share of any recovery of damages under this section, under such regulations as the respective Federal agencies responsible for such programs shall publish. The provisions of sections 4C(b) and 4D (c) and (d) of this Act shall apply to any action and damages recovered therein pursuant to this section."

Chairman RODINO. Before having Mr. Kauper make his statement, I would like to make some opening remarks and without objection have the rest of my statement inserted in the record.

I would like to point out that one of the principal issues that is raised squarely by the legislation before us during these hearings can be directly stated: Since the several States already have the right to sue as parens patriae to prevent or repair harm to a State's quasi-sovereign interests; and, since the States by virtue of Federal antitrust law can already sue in their proprietary capacities for treble damages caused by violations thereof like any person other than the United States itself; should the Federal antitrust laws be amended to allow States to sue as parens patriae on behalf of their citizens or for injuries to their own general economies?

I think this is a question that needs to be answered, and this legislation is directed to answer it in the affimative because we believe it is the appropriate thing to do and the timely thing to do. These bills that are before us do more, however, than confer increased standing for the States over individuals or aggregates of individuals. They systematically express a full course of legislative choice and action. Integrated provisions reflect exhaustive investigation of the basic problem; a thorough search of objectives and alternatives of solutions; and a comparison of these solutions in the light of their consequences in an analytic framework.

Thus, to make increased standing effective, the legislation addresses problems of proof of damages that also clearly need to be remedied; provides for apportionment and disbursement of funds recovered; facilitates coordination, communication, and cooperation among Federal and State antitrust enforcers; enacts self-funding mechanisms that not only seek to minimize costs in the traditional sense but also to eliminate costs to the public as a whole for expanded antitrust enforcement; and, provides opportunities to States not now available the seizing of which is left entirely to the unfettered discretion of the States severally.

The fundamental national legal, economic, and social policies expressed in the antitrust laws are premised on the belief that, "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress" for the Nation and for its businessmen, consumers, and, indeed, for all its citizens. Historically and necessarily the Attorney General of the United States has been of paramount importance in the execution of the antitrust laws. The legislation before us builds upon and updates these facts and expands and amplifies further aspects of his enforcement responsibilities. In attempting to deal with contemporary antitrust problems in the modern economy in light of present and foreseeable realities of the marketplace, therefore, this subcommittee's antitrust oversight responsibilities are inextricably called into play. Our "exclusive oversight." *Nat'l Cable Television Assn.* v. *United States*, No. 72-948 (U.S. Mar. 4, 1974), of antitrust enforcement is an important element of these hearings.

Antitrust policy generated internally at the Department of Justice is also of major concern. Responsiveness to changing circumstances is a key area. Both in the food and energy industries, previous historical

conditions of buyers' markets and excessive capacity have seemingly disappeared. Predictions for other industries, for example, metals, are identical. Has this dramatic change in the character of markets led to similar drastic changes in the planning and approaches to monopolistic and anticompetitive practices by the Antitrust Division? What plans of action exist and are being implemented with respect to the giant conglomerates that inquiries into the oil crisis establish as existing and possessive already of awesome private economic power?

The purposes of the legislation are to strengthen the antitrust laws; to strengthen the Antitrust Division; and to strengthen antitrust enforcement by public agencies. The recent shortages in foodstuffs and other commodities have disclosed other and new kinds of shortages: Shortages of enforcement personnel and actions; and, shortages of State and regional protection necessary to protect competition and consumers alike in these State and local markets.

We believe that this legislation is one that has been and will continue to be discussed, with considerable interest by many who feel that it is timely. However, I believe that with the testimony of the Assistant Attorney General of the Antitrust Division, this committee will certainly be in a better perspective to view all of its implications. Therefore, we welcome the Assistant Attorney General. Before making his statement, I will inquire of Mr. Hutchinson if he wants to make some remarks.

[The prepared statement of Chairman Rodino follows:]

OPENING STATEMENT OF HON. PETER W. RODINO, JR., CHAIRMAN, SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

One of the primary issues squarely raised by the legislation before us during these hearings can be directly stated: Since several States already have the right to sue as parens patriae to prevent or repair harm to a State's quasi-sovereign interests[1]; and, since the States by virtue of Federal antitrust law can already sue in their proprietary capacities for treble damages caused by violations thereof like any person other than the United States itself[2]; should the Federal antitrust laws be amended to allow States to sue as parens patriae on behalf of their citizens or for injuries to their own general economies?

H.R. 12528 and H.R. 12921 answer this in the affirmative. These bills do more, however, than confer increased standing for the States over individuals or aggregates of individuals. They systematically express a full course of legislative choice and action. Integrated provisions reflect exhaustive investigation of the basic problem; a thorough search of objectives and alternatives of solutions; and a comparison of these solutions in light of their consequences in an analytic framework.

Thus, to make increased standing effective, the legislation addresses problems of proof of damages that also clearly need to be remedied; provides for apportionment and disbursement of funds recovered; facilities coordination, communication, and cooperation among federal and state antitrust enforcers; enacts self-funding mechanisms that not only seek to minimize costs in the traditional sense but also to eliminate costs to the public as a whole for expanded antitrust enforcement; and, provides opportunities to States not now available the seizing of which is left entirely to the unfettered discretion of the States severally.

The specific need for this legislation was brought sharply into public focus recently by two cases in which the Federal appellate courts, in reversing Federal district courts in both instances, ruled that enabling legislation by the Congress is a necessary antecedent for expanded parens patriae suits by States. For lack of Federal legislation in this area, the State of Hawaii, in *Hawaii* v. *Standard*

[1] E.g. to remove restraints on the commercial flow of natural gas. *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923).
[2] E.g. as owners and operators of hospitals and schools. 15 U.S.C. sec. 15–15a.

Oil Co.,[3] was denied a forum to recover damages to its general economy and overcharges paid by its citizens allegedly resulting from a combination and conspiracy by oil companies to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products and from alleged oil company attempts to monopolize and actual monopolization of Hawaiian trade and commerce in refined petroleum products.

Similarly, the State of California, in *California* v. *Frito-Lay, Inc.*,[4] was unable to sue as protector of its citizens for alleged widespread price fixing of certain food products. Significantly, the Federal appellate court observed, "It would indeed appear that the State is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrents and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution."

The bills before us, then, can properly be classified as corrective legislation,[5] that enact suboptimizations rather than unrealistic panaceas. It would be incorrect, however, to assume that case law developments alone express the full need for the legislation. Although the Sherman Act passed in 1890 and the Clayton Act was enacted in 1914, it wasn't until 1941 that the Supreme Court ruled that the United States was not a "person" within the meaning of the Federal antitrust laws and could not, therefore, sue for damages.[6] Fourteen years passed before the Congress, in 1955, passed legislation that allowed the Federal Government to sue for damages caused by antitrust violations.[7] Significantly, the Congress allowed the Federal Government to sue only for actual damages because it believed that the United States needed no incentive like treble damages to bring antitrust suits and, moreover, the Federal Government had a duty to bring such suits. Our legislation retains the statutory incentives presently provided for the States in recognition of the need to provide added assistance to States in the light of contemporary legal, social, and economic conditions.

In expanding States' parens patriae powers under the Federal antitrust laws, the proposed legislation does more than cure the omission dating from 1890 to give due consideration to State abilities and dispositions to protect the free enterprise system since, as the Supreme Court itself acknowledged in the *Hawaii* case, "Every violation of the antitrust laws is a blow to the free enterprise system envisaged by Congress," and does more than take overdue account of the radical changes in size, number, and power of American businesses and in industrial structure. States have tried to use Federal antitrust laws in the food and oil industries. Fourteen years must not pass before the Congress gives States the assistance they obviously seek and need, and which the Federal courts have invited. Given the problem besetting the Nation today and those foreseeable for the remainder of this century, the costs of not seeking wider State participation in antitrust enforcement earlier have been very high. Indeed, they have been excessive—obviously needed alternatives and supplements have been unnecessarily sacrificed. In this sense, moreover, the bills can properly be viewed as oversight legislation, a traditional Judiciary Committee function.[8]

The national policies expressed in the antitrust laws are not new. They were formulated by the Congress 84 years ago. Public enforcers of the antitrust laws are the strategic forces designed by the Congress to enable these policies to be carried out. Posture planning for these strategic forces is both an executive and legislative responsibility that includes an examination of the constraints created by budget level, by technology, by opposing forces, and by the present posture of the strategic forces themselves. The Nation has a new Attorney General. Every opportunity will be provided to obtain his support for this proposal and his assistance in achieving the best finished legislative product as soon as possible and the efficient allocation of public antitrust enforcement resources. Criminal enforcement of the antitrust laws will remain with the Federal Government but how Federal resources are deployed presently and historically against "white collar crime" and "crime in the suites" will receive meticulous scrutiny.

The fundamental national legal, economic, and social policies expressed in the antitrust laws are premised on the belief that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the

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[3] 301 F. Supp. 982 (D. Hawaii 1969), rev'd 431 F. 2d 1282 (9th Cir. 1970, aff'd 405 US. 251 (1972).

[4] 333 F. Supp. 977 (C.D. Calif. 1971), rev'd 474 F. 2d 774 (9th Cir. 1973), cert. denied 412 U.S. 908 (1973).

[5] E. G. Morse, "Theories of Legislation," 14 DePaul L. Rev. 51, 63 (1964).

[6] *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941).

[7] See H. Rept. No. 422, 84th Cong., 1st Sess. (1955).

[8] Morse, supra note 5, at 66, 72.

lowest prices, the highest quality, and the greatest material progress" [9] for the Nation and for its businessmen, consumers, and, indeed, for all its citizens. Historically and necessarily the Attorney General of the United States has been of paramount importance in the execution of the antitrust laws. The legislation before us builds upon and updates these facts and expands and amplifies further aspects of his enforcement responsibilities. In attempting to deal with contemporary antitrust problems in the modern economy in light of present and foreseeable realities of the marketplace, therefore, this subcommittees' antitrust oversight responsibilities are inextricably called into play.

Antitrust policy generated internally at the Department of Justice is also of major concern. Responsiveness to changing circumstances is a key area. Both in the food and energy industries, previous historical conditions of buyers' markets and excessive capacity have seemingly disappeared. Predictions for other industries, for example, metals, are identical. Has this dramatic change in the character of markets led to similar drastic changes in the planning and approaches to monopolistic and anticompetitive practices by the Antitrust Division? What plans of action exist and are being implemented with respect to the giant conglomerates that inquiries into the oil crisis establish as existing and possessive already of awesome private economic power?

The purposes of the legislation are to strengthen the antitrust laws; to strengthen the Antitrust Division; and to strengthen antitrust enforcement by public agencies. The recent shortages in foodstuffs and other commodities have disclosed other and new kinds of shortages: Shortages of enforcement personnel and actions; and, shortages of State and regional protection necessary to protect competition and consumers alike in these State and local markets.

(SECTION-BY-SECTION ANALYSIS)

It has long been the policy of the antimonopoly antitrust laws of the United States to afford redress to the citizens of this country who have been injured by the illegal practices those laws forbid. Too frequently, however, this antitrust remedy is illusory, and the injured consumers of the Nation must suffer monopolistic wrongs for which they lack any practicable remedy. We are all familiar with the serious burdens our Federal courts face today, and the consequent delays that may postpone recovery of damages for many years. We are all also familiar with the great cost of antitrust litigation against corporate defendants of great wealth, who have the resources to employ skilled counsel who place every possible obstacle in the way of recovery and thus discourage any but the most resolute claimant. Consequently, unless the amount of a claim under the antitrust laws is very substantial, the cost of recovering it is so great that the wrong will be one without any remedy.

To some extent, the class action provisions of the Federal Rules of Civil Procedure permit the aggregation of claims so that the expense of litigation may be spread out over many claims, thus reducing the cost of litigating each one. But the class action remedy, as the Federal Rules of Civil Procedures now provide it, is far from adequate in the case of antitrust consumer class actions—particularly those brought by State attorneys general. Moreover, recent court decisions on class actions developed in nonantitrust cases have seriously limited the utility of this method of securing redress to injured consumers in antitrust suits. At the same time, these decisions have drastically limited the powers of the States to act on behalf of their citizens.

The bill I am introducing today will restore to the States the common law powers of the State attorney general which these decisions have eroded, so that the States may assume their proper role in protecting their own citizens. The bill also provides that the Federal Attorney General will assume the responsibility of protecting injured consumers, when State attorneys general are unable to do so, themselves.

This bill adds three new sections to the treble damages provisions of the Clayton Act, now contained in sections 4, 4A, and 4B of that act.

New section 4C of the Clayton Act authorizes the attorneys general of the various States to bring antitrust treble damage actions in each of the following circumstances:

First, the attorney general may sue as *parens patriae*, to recover for antitrust damages sustained by the citizens of his state. Although the attorney general had this power at common law, a recent decision of the U.S. Court of

[9] *No. Pac. Ry.* v. *United States*, 356 U.S. 1, 4 (1958).

Appeals for the Ninth Circuit holds that this common law power no longer exists. While acknowledging that the rejected efforts of the attorney general of California may be a worthy State aim, the court pointedly observed, "It would indeed appear that the State is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrents and the class action as a means of consumer protection. We disclaim any intent to discourage the State in its search for a solution." Nevertheless, the court held that the present statutory mechanism under the antitrust laws and class action laws does not permit the State to bring this type of action on behalf of its citizens. In effect, if a State is to be empowered to act in the fashion here sought, that authority must come not through judicial improvisation but by legislation and rulemaking. This bill therefore legitimates the type of action brought by the attorney general of California, but not allowed by the Federal courts.

Second, the bill would also permit the attorney general to sue on behalf of the State, to recover injuries to the general economy of the State. Although the State of Hawaii sought to recover for such damages in *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), the ninth circuit and then the Supreme Court refused to permit such recovery. They held that the present treble damage laws do not permit the attorney general of the State to sue and recover for such damages. This bill would reverse that decision and permit State attorneys general to bring such suits as that attempted by the attorney general of Hawaii.

Third, the bill would confirm the right of the State attorneys general to bring class actions on behalf of the citizens of their States. Some courts have allowed such actions on the ground that "it is difficult to imagine a better representative of the retail consumers within a State than the State's attorney general." Coordinated *Pretrial Proceedings in Antibiotic Antitrust Actions*, 333 F.2d 278 (S.D.N.Y. 1971). Other courts, however, have refused to permit such consumer class actions to be maintained. This bill would resolve this conflict in the courts and confirm the power of the State attorney general to bring consumer class actions on behalf of the citizens of his State.

Subsection (b) of new section 4C would streamline and expedite the proof of damages in actions brought by State attorneys general. One problem in cases of this type has been the insistence of some courts that each individual consumer claim be proved separately, on a purchase-by-purchase basis, instead of allowing total purchases by all the consumers within a State and total overcharges for all such purchases to be proved together. The result has been vastly and needlessly to multiply the expense of litigation. The proposed law would do away with this expensive and dilatory procedure. Instead, it would permit the courts to use reasonable statistical sampling methods and other equitable and expeditious methods of proving the amount of damages that are attributable to proved violations of law.

Subsection (b) would also permit the attorney general of each State to distribute the fund of damages recovered from antitrust violators on the basis of State law. In the case of individual claims that add up to a total large amount but each one of which is extremely small, the cost of paying out the fund may be excessive. In such a case, instead, it may be more appropriate that the funds recovered from the wrongdoer be applied by the State to a legitimate public purpose related to the wrong that gave rise to antitrust recovery in the first place. In some States, for example, such antitrust recovery from unlawful overcharges on drugs is to be utilized for state hospitals or other State medical programs. This procedure was explored, recently, in settlements of cases involving price fixing of certain drugs. This bill would permit each State to distribute or allocate recovery on a reasonable basis, subject to the requirements of procedural due process. That is, the State would be obliged to afford its citizens a reasonable opportunity to make individual claims for their share of the recovery, less litigation and administrative costs, before the State escheated the recovery or used it for some general public purpose. At least one court has already approved such a plan.

New section 4D would make the Attorney General of the United States responsible for supplementing and assisting the activities of the State attorneys general. First, the Attorney General is obliged to advise the States of the pendency of Government antitrust damage actions which might also furnish a vehicle for recovery by States. If the State attorney general is unable to bring a treble damage action on behalf of the citizens of his State, then the Federal Attorney General is obliged to do so, if he believes that bringing the action would lead to a substantial recovery of damages for the State. In this event, the

Attorney General of the United States will assume the role of *parens patriae* of those citizens who would not otherwise be represented by their State government. The Attorney General would use the same procedures as are prescribed for State attorneys general, and he would pay the recovery obtained to the respective States, for their distribution to their citizens or for appropriate public purposes determined by such States.

In bringing actions on behalf of the citizens of various States, the Attorney General would be permitted to offset the administrative costs of litigation against any recovery. This would be done pursuant to regulations approved by the Comptroller General of the United States, in order to assure equitable and sound accounting procedures. Any amounts so deducted are to be deposited by the Attorney General in a special fund and, subject to an appropriation, for use only for activities authorized in this new legislation. The legislation in this regard seeks to prevent unfair financial burdens from being imposed on the attorney general; to initiate a program of expanded antitrust enforcement that would pay its own way; and to provide incentives to the antitrust enforcers, both the Federal and State.

Sections 4E would deal with treble damage recoveries in respect to federally-funded state programs. The various State attorneys general would be permitted to bring treble damage actions for the entire amount of overcharges or other damages that were sustained in connection with the State-operated program. However, the United States would be entitled to secure equitable reimbursement, by administrative means, so that it too would be made whole for the antitrust violation. Moreover, the Attorney General of the United States would be authorized to intervene in any such action to protect the interests of the United States from being compromised, and, in appropriate circumstances, he would be permitted to sue on behalf of any State unable or otherwise failing to bring a suit in regard to a federally funded program adversely affected by antitrust violations.

Mr. HUTCHINSON. Mr. Chairman, I thank you. I have no prepared opening statement at these hearings. I have read Mr. Kauper's prepared statement with a great deal of interest, and I find it informative but I do not at this time desire to take any position at all upon this legislation, either for or against it.

I, apart from the merits of the bill itself, I think we should, or at least let me express my doubt about the urgency of the bill at the present time in view of the matter which is so predominantly before this Judiciary Committee at the present time and it seems to me as though we ought to be spending all of our time on that matter to get it over with, except for very urgent legislation which, as I say, Mr. Chairman, at this time I do not quite comprehend the urgency of this bill.

Chairman RODINO. Mr. Kauper.

TESTIMONY OF THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. KAUPER. Thank you, Mr. Chairman. I have, as you know, a rather lengthy statement, and I will, rather than trying to read all of it, read selected portions of it and try to keep you advised as to what page I am on, unless you prefer that I read the entire statement.

Chairman RODINO. No. We will have the statement inserted in the record and I am sure every member, if he has not read it, will read it.

Mr. KAUPER. Thank you, Mr. Chairman.

I am pleased to respond to the committee's invitation to testify on H.R. 12528, a bill to permit the several States to seek redress for their citizens and political subdivisions for damages suffered as a result of violations of the antitrust laws. H.R. 2528 would work major changes in this area.

This is a relatively short bill, as proposed legislation goes; its size, however, is no measure of its potential importance. The provisions of this bill, if enacted into law, would be likely to have a dramatic impact on State activity under the antitrust laws. The issues here are difficult as well as important; there are countervailing considerations which must be balanced before a reasoned judgment is possible.

Section 4 of the Clayton Act now provides that any person injured in his business or property as a result of a violation of the antitrust laws may bring an action to recover three times the damages suffered. Section 4 has been interpreted to include a State in the definition of person, and thus a State may clearly maintain an action in its proprietary capacity for any damages suffered. There seems no logical reason why a State could not also bring such an action, under rule 23 of the Federal Rules of Civil Procedure, as the representative of all persons similarly situated, and in fact the courts have generally allowed such actions where the other criteria of rule 23 are met.

There are, however, some questions whether this procedure, even if available, is sufficient to enable the States to protect their citizens from antitrust violations. As a result, States have in recent times turned to an alternative procedure that of suit in their historical role of parens patriae. Recent judicial decisions have, however, restricted the rights of States to bring such actions.

The States have attempted to move as parens patriae in two different ways. First they have sought to sue on behalf of all injured citizens of the State; second they have sought to recover damages to the general economy of the State. In *Hawaii* v. *Standard Oil* the Supreme Court held that section 4 of the Clayton Act did not authorize a State to sue for damages to the general economy of the State basically because such injury even if proven did not qualify as injury to its "business or property" as required by the statute. The court specifically did not rule on whether Hawaii could sue parens patriae on behalf of its injured citizens; such a claim had originally been made by Hawaii and dismissed by the district court but that issue was not before the Supreme Court for its review.

However 1 year later in *California* v. *Frito-Lay* the Ninth Circuit Court of Appeals held that a parens patriae action by California to recover damages sustained by its citizens while possibly desirable and perhaps even essential "if antitrust violations—of particular kinds—are to be rendered unprofitable and deterred" was not justified by the historical recognition of the parens patriae role of States in this country and thus could not be upheld in the absence of specific statutory authorization. The court of appeals however explicitly made no findings on the desirability of such an authorization, leaving that to the legislature "where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf."

H.R. 12528 seeks to remove these limitations on the ability of States to act in their role of parens patriae. The first provision of subparagraph (a)(1) of new section 4C would provide that a State could seek to recover damages sustained by its citizens in an action brought by the State as parens patriae. Such an action by the State would not be a class action as such, and would not be subject to rule 23 requirements.

We support the basic concept embodied in this provision of H.R. 12528. The alternatives are either no actions on behalf of individual consumers or actions brought as class actions under rule 23. While the provisions of rule 23 have yet to be authoritatively interpreted, there are indications that the rule 23 class action may not be the optional vehicle by which the primary purposes of section 4—affording a cause of action to others that will both supplement the enforcement activities of the Federal Government and serve as an additional deterrent against future antitrust violations—can be accomplished.

There can be no doubt that the treble damage remedy provides a strong deterrent, especially against price-fixing and other hardcore per se offenses. This damage remedy has been particularly effective in cases involving large purchases, for these plaintiffs are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the apparently inevitable costs of protracted and complex litigation. However, the remedy has been less effective in circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as 25 or 30 cents. There, records are not likely to be available, individual claims will be small, and the claimants less likely to have either the sophistication or resources necessary to prosecute their individual claims.

Rule 23 was seen by some as a possible answer to this problem. In fact, it has not provided to be the panacea sought by some for a variety of reasons. Foremost among these, in my opinion, is that it was not drafted for the purpose of facilitating the type of litigation we are here discussing. Rule 23 was intended to provide a method of consolidating multiple lawsuits, to make one case where there were many. In those situations involving multiple small claims, there are—in the absence of rule 23 or something similar—rather than many Federal cases, likely to be none. In fact, in those situations, rule 23 may encourage suits where otherwise none would be brought but, because the rule was not drafted with this type of litigation in mind, it is not surprising that various provisions of rule 23 have sometimes been interpreted in ways which hamper the maintenance of such actions.

I believe that there is a need for the availability of a method by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of citizen-consumers. Without such a procedure, those antitrust violations which have the broadest scope and, often, the most direct impact on consumers, would be the most likely to escape the penalty of the loss of illegally obtained profits. Those whose injuries were too small to bear the burden of complex litigation would have no effective access to the courts. As a result, the goal of deterrence sought by the Clayton Act would be frustrated in those situations where damages fall directly on small consumers or purchasers. It may be that rule 23 will yet prove to be an appropriate vehicle for the resolution of such claims. The Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin*, now pending, will provide a strong indication as to the future viability of rule 23 as a vehicle for antitrust class actions by consumers.

In the meantime, however, statutory grant of power to the States to bring actions as parens patriae on behalf of the State's citizens may be both desirable and useful. There are, however, several significant

issues which I believe must be carefully considered by this committee before it reaches that judgment.

The first is the question of potential duplicative recovery. It is clear that the possibility of duplicative recovery was one of the reasons for the court of appeals decision in *California* v. *Frito-Lay*.

If the Congress determines, as it could rationally do, that a State is an appropriate and adequate representative of consumer interests, it must also decide whether those represented in such an action should be individual consumers or all purchasers, including businesses, corporate and otherwise. I believe that such an action should be limited to individual consumers, since they would be most likely to not have the resources and potential claims to initiate their own actions. It would also seem that such actions should be undertaken by the States only when a substantial portion of their citizen-consumers are affected. This will have the dual purpose of limiting State actions under this legislation to those situations most likely to be difficult to maintain under existing procedures, and focusing State activity on the most widespread violations. It would also help to alleviate the double recovery problem.

Consideration must also be given to limiting duplicative litigation by the citizens of any State which has brought an action under this legislation. This could—and perhaps, to be workable, must—go so far as to prohibit all actions by represented consumers, and to provide that such consumers shall not be included in any broader action initiated or maintained by someone not represented by the State through such an action.

The second major question was the relationship with the statutory right of the States to bring an action as parens patriae and the provisions of rule 23. Rule 23 sought to deal with many issues which would also be raised by a parens patriae provision such as that contained in H.R. 12528.

H.R. 12528, by setting out standards for the resolution of these issues in the antitrust context, seeks to answer the potential questions without reference to rule 23.

Finally, this committee should consider whether, without a full reassessment of the treble damage provisions and their role in antitrust enforcement, actions such as those which would be authorized by H.R. 12528 should be available for violations of such antitrust statutes as section 7 of the Clayton Act—that is, the antimerger statute—and the Robinson-Patman Act. The notion that aggregated damage actions for violations of those statutes could be undertaken by a State for its consumers raises the possibility of a quantum jump in damage exposure which would be difficult to measure and which I am not convinced would be justifiable. In any event, it is a matter which deserves serious study.

Paragraph (b) of new section 4C is intended to remove the uncertainties as to the validity of certain methods of establishing and measuring damages in those cases initiated by States on behalf of injured citizens. On the merits, the standards suggested seem to us appropriate ones. There is little doubt that scientific methods of measuring damages through statistical sampling and other devices are available. In addition, at least in the context of Sherman Act violations, we see little merit in the proposition that one whose anti-

trust liability is established is entitled to retain the proceeds of his illegal acts, absent a definitive showing by each individual damaged of both that fact and the precise amount of injury. A person or corporation whose hardcore violation of the Sherman Act has been established is the equivalent of a thief; he has obtained money from persons that he had no right to take. The questions of whether that money should be denied him, and to whom it should go, seem separable and not necessarily dependent issues.

In an action where the State is representing its damaged citizens, the State would seem—as the bill provides—to be an appropriate receiver of the damages, subject to the rights of all damaged parties to claim their pro rata share. Finally, to the extent that any moneys recovered are not fully claimed by injured individuals, the use of the fund according to State law or pursuant to the doctrine of *cy pres* under the direction of the district court seems to me to be the most appropriate provision imaginable. The Department supports new section 4C(b).

Subparagraph (a)(2) of new section 4C would provide that a State can also bring an action as parens patriae for damages "to the general economy of that State or any political subdivision thereof." This provision seems clearly intended to respond to the Supreme Court decision in *Hawaii* v. *Standard Oil*.

H.R. 12528 would remove the statutory impediment to such suits discerned by the Court in that case. It would not, however, deal with what the court in Hawaii saw as the danger of duplicative recoveries inherent in the allowance of such an action. The only effective guard against such a possibility would be for the Congress to make clear, perhaps in legislative history, that damages recoverable by such an action should be limited to those arising from illegal actions shown to have adversely affected the State's economy or retarded its economic development in some way independent from or in addition to the damages suffered by consumers located within that State. In those situations where a State can show an interest independent from that of particular citizens, or perhaps in situations where damage to the general public which may not be individually compensable can be shown, the danger of duplicative recovery would be lessened or eliminated.

Even assuming that the potential for duplicative recovery can be ameliorated, I have serious reservations about the creation of this new right of action. Let me emphasize that I am now speaking only about the provision dealing with the general economy of the State.

Generally, I believe that provable damages resulting from an antitrust violation should be recoverable at law. The right of action created by subparagraph (a)(2), however, if broadly construed, could conceivably expand the antitrust damage exposure of individuals and companies in an almost unlimited fashion. Damages in such an action would seem to be inherently difficult to quantify and, depending on the scope given to the action by judicial interpretation, perhaps unforeseeable even by the most astute businessman. I have some problem with the spectre of massive recoveries based upon unquantifiable and perhaps totally unforeseeable damages multiplied by three. In addition, of course, if the worse would come to pass, the possibility would arise of damages on a scale, wholly unrelated to

the wrongdoer's gain, that would result in significant impairment to the viability of those firms from whom such damages were recovered. Such a result in itself could have anticompetitive consequences, since only the largest firms involved in a given violation might survive the financial pressure of such damage awards.

Let me turn now to new section 4D. Under this section the Attorney General once he has brought a damage action under section 4A of the Clayton Act would be required to notify any State which he "has reason to believe" would be entitled to bring a similar action—presumably under new section 4C of this bill—that "would probably lead to a substantial recovery of damages."

Once the Attorney General has made these difficult judgments, and following any notification, those States notified would have 90 days to decide whether they should file such an action. This would place a substantial burden on the States, since the complexity of such cases may well make the 90-day period wholly inadequate for proper analysis of their rights, responsibilities, and possibilities of success. This would be especially true for smaller States, with fewer resources available in State attorneys general offices.

Finally, should those States notified either fail or decline to bring such an action within that 90-day period, the Attorney General is directed to institute an action, as parens patriae, in place of the State. Such a requirement could create serious problems. The State may have declined to sue because it concluded there was not a sufficient legal basis for such an action, a conclusion not necessarily inconsistent with the Attorney General's previous finding that he had "reason to believe" the opposite. This provision, since it removes all discretion from the Attorney General, could very well require the institution of lawsuits which are not justified by any conclusion of probable liability or reasonable likelihood of success. In addition to the potential conflict between the Attorney General's duties under this proposed section and his inherent responsibilities as a lawyer and an officer of the court, this provision could result in increased pressure on an already overcrowded judicial system which is neither required nor, in the final analysis, warranted.

More importantly, even if those problems outlined above were either soluble or solved, new section 4D could place impossible burdens on an already undermanned Antitrust Division.

In addition, this procedure may well create disincentives for those States which do not now have substantial antitrust enforcement programs to implement such activities.

For these reasons, we oppose the inclusion of new section 4D in this legislation.

New section 4E would permit a State to recover treble damages for the entire amount of overcharges or other damages sustained in connection with any federally funded State program. The United States would be permitted to intervene in any such action to protect its interests in the fund in issue, and would be empowered to bring an action on behalf of any State which fails or declines to sue within 90 days of a notification from the United States that probable cause for such a State action exists. The United States would be entitled to claim reimbursement of its equitable share of any damages recovered by a State under this section. We assume the latter would be the Federal contribution, untrebled.

We believe that a State should have the right to recover treble damages for all injuries it suffers as a result of antitrust violations, regardless of how the State programs were funded. Such a position seems most consistent with the primary purpose of section 4—to create incentives for private actions. Such private actions are significant deterrents to future violations, and it should make no difference that a portion of funds which financed the injured program came from the Federal Government. This position is, incidentally, not inconsistent with section 4A of the act. Section 4A merely limits the United States to the recovery of actual damages, and implies no limitation on the rights of private parties [including States] to recover treble damages that is based on the source of funds or revenues with which the injured activity was financed.

In your invitation to me to testify you also asked for a discussion of the manner in which the Antitrust Divison acquires, evaluates, and disseminates information concerning anticompetitive practices. Obviously, the Division receives information from varied sources, including a not insubstantial number of complaints from businessmen or consumers who feel they have been injured. The Division also develops and analyzes economic data, largely through its Office of Economic Policy, with the purpose of identifying those areas of the economy which show indications of interference with free market allocation or pricing functions. We frequently conduct informal investigations which rely on voluntary compliance with requests for information. The most commonly used investigatory tools, however, are the grand jury and the civil investigative demand as authorized by the Antitrust Civil Process Act.

The grand jury is an important investigatory tool, but its usefulness is limited to those situations in which we have reason to believe a criminal violation of the antitrust laws may have occurred. In fact, court decisions have made it clear that a grand jury cannot be purposely utilized to investigate and prepare a civil action. Thus, since the majority of our investigations and cases are civil cases, the grand jury is of limited value in many situations.

The CID, or civil investigative demand, is potentially a very useful investigatory tool. As it stands now, however, the CID is limited to the production of documents, and then only from persons under investigation. It cannot be used to compel testimony, nor can it be utilized against persons not under investigation, even if they may have information highly relevant to the investigation. At least one court decision has also raised doubts as to the propriety of using a CID when the investigation is centered on incipient conduct, such as a proposed merger.

The administration has approved legislation to be submitted to the Congress which would extend the Antitrust Civil Process Act (1) to cover persons (including natural persons) in addition to those under investigation, who may have information relevant to a particular antitrust investigation, and (2) to permit the service of written interrogatories and the taking of oral testimony. This proposal would also remove any doubt that CID's may issue to require information relating to incipient violations and specifically provide that evidence obtained through the use of CID's may be used in investigations and cases in addition to the specific investigations to which the CID relates and any case resulting therefrom.

No field of litigation involves facts more complex and records more extensive than are found in the Government's antitrust cases. The task of amassing the voluminous data essential to successful antitrust enforcement is of considerable magnitude. Insofar as it went, enactment in 1962 of the Antitrust Civil Process Act provided a signal benefit to the Government's civil investigations by authorizing production of relevant documents from corporations, associations, partnerships, or other legal entities not natural persons, under investigation. But the limitations on the scope of the demand have left the act far from meeting essential investigatory needs of the Department's Antitrust Division.

This proposal would simply make available to the Attorney General the same antitrust investigatory powers in civil investigations that he now has in criminal investigations, and provides him with authority similar to that of the Federal Trade Commission. Enlarged discovery would not only materially assist investigation of facts leading to decisions on the filing of civil actions, but will facilitate the reaching of decisions on whether to resort to grand jury proceedings.

Let me skip page 29, Mr. Chairman, which contains a discussion of the limitations on disclosure of material gathered by CID and grand jury process.

You also asked for a discussion of the Antitrust Division's plans to deal with shortage situations and the competitive problems that occasionally arise from such conditions. The Division is keenly aware of the shortage situations that exist in some areas of the economy, not only in oil but also in such diverse commodities as chemicals and paper. We have received a number of complaints which seem to relate to shortage conditions and we will continue to investigate any such complaints we receive. I should point out that many of the shortage situations we are facing today have been aggravated, if not created, by the existence of price controls. Without quarreling with the merits of a decision which, on balance, might favor controls over the price of certain commodities at certain times, there is no doubt that the existence of such controls can discourage production, encourage exports to noncontrol areas, or in other ways directly affect the availability of the product, sometimes to the point of shortage. The elimination of price controls is, of course, itself a step toward reducing shortages and the resultant temptation to use control over supply in times of shortage to gain unfair competitive advantages.

Finally, you asked about the applicability of merger law to energy conglomerates. The short answer, of course, is that section 7 of the Clayton Act is applicable to all corporations, whether conglomerate or not. Of course, the more diversified the companies, frequently the more difficult it is to show the probable lessening of competition that violates section 7. In fact, however, the Antitrust Division has been very active in the energy area, as has the FTC. For our part, there is currently pending in the Supreme Court a case involving the acquisition of United Electric Coal Co. by General Dynamics Corp., a consolidation involving two major coal producers. And I might add, Mr. Chairman, that the specific issue which is referred to in your inquiry concerning, I take it, whether there is a broader energy market, may be an issue in that case, which is under submission now.

The Department recently filed an action charging that various agreements between Texaco, Inc., and Coastal States Gas Producing Co. violated both section 1 of the Sherman Act and section 7; that case was concluded by the substantial abandonment of the challenged agreements.

These examples are merely illustrations of the activity of the Antitrust Division in the energy area. Of course, this activity extends beyond mergers and acquisitions. Our enforcement activity includes investigation and analysis of competitive issues involved in oil and natural gas pipelines, nuclear power, international activities, and domestic production, refining, and distribution of petroleum products.

It has become increasingly clear that the current energy shortage requires a coordinated antitrust enforcement effort. The oil industry is multinational in character, and decisions made in international markets may have substantial effects upon domestic markets. Strong relationships between the production of various sources of energy—natural gas, petroleum, fissionable materials—are also evident. For these reasons, the Antitrust Division is in the process of establishing an energy unit, charged with the investigation of possible antitrust violations in the energy industry, conducting grand jury proceedings, and preparing and trying antitrust cases. The work of the unit will be related solely to energy concerns, specifically those arising from the current energy shortage.

I hope, Mr. Chairman, this somewhat lengthy statement is responsive to your invitation, and I stand ready to answer any questions you might wish to put to me.

Thank you.

[The prepared statement of Hon. Thomas E. Kauper follows:]

STATEMENT OF THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

I am pleased to respond to the Committee's invitation to testify on H.R. 12528, a bill to permit the several States to seek redress for their citizens and political subdivisions for damages suffered as a result of violations of the antitrust laws. H.R. 12528 would work major changes in this area.

Broadly, H.R. 12528 would grant to the States the right, through their respective attorneys general, to sue for damages to citizens of that state as a result of antitrust violations, either through the device of a class action or in the role of *parens patriae*. H.R. 12528 would also have a major impact on the establishment and calculation of damages in any such action. The bill provides that, in such an action, the separate damages of each citizen need not be individually proven, but those of all citizens of a State can instead be aggregated, and that proof of damages may be made by various statistical or allocatory methods. The bill further provides for methods of distribution of any funds recovered.

H.R. 12528 also provides that a State may bring an action, again in the role of *parens patriae*, for damages from such violations to the "general economy" of the State.

Finally, H.R. 12528 contains two provisions directly involving the Attorney General of the United States. The first, contained in New Section 4D, provides that the Attorney General shall, in certain circumstances, notify the various States of the possibility that those States may have an action for damages arising from an antitrust violation. In the event of the failure of those States so notified to bring such an action within a certain time period, the Bill further provides that the Attorney General shall himself initiate such an action, as *parens patriae* for the citizens of that State. New Section 4D contains further provisions governing the measure of damages and the distribution of monies recovered in such suits brought by the Attorney General of the United States.

The second provision directly affecting federal interests is New Section 4E, which provides for recoveries by states with respect to federally funded State programs. The Attorney General is given the right to intervene in such actions, and also is given the power to initiate actions on behalf of States which do not do so under circumstances similar to those described above with respect to New Section 4D. Provision is also made for allocating any monies recovered in such an action.

This is a relatively short bill, as proposed legislation goes; its size, however, is no measure of its potential importance. The provisions of this bill, if enacted into law, would be likely to have a dramatic impact on State activity under the antitrust laws. The issues here are difficult as well as important; there are countervailing considerations which must be balanced before a reasoned judgment is possible.

Section 4 of the Clayton Act now provides that any person injured in his business or property as a result of a violation of the antitrust laws may bring an action to recover three times the damages suffered. Section 4 has been interpreted to include a State in the definition of "person," and thus a State may clearly maintain an action in its proprietary capacity for any damages suffered. There seems no logical reason why a State could not also bring such an action, under Rule 23 of the Federal Rules of Civil Procedure, as the representative of all persons similarly situated, and in fact the Courts have generally allowed such actions where the other criteria of Rule 23 are met.[1] Judge Sirica's recent decision in the *Ampicillin* litigation contains perhaps the most thorough exposition on this point.

There are, however, some questions whether this procedure, even if available, is sufficient to enable the States to protect their citizens from antitrust violations. As a result, States have in recent times turned to an alternative procedure, that of suit in their historical role of *parens patriae*. Recent judicial decisions have, however, limited the rights of States to bring such actions.

The States have attempted to move as *parens patriae* in two different ways. First, they have sought to sue on behalf of all injured citizens of the State; second, they have sought to recover damages to the general economy of the State. In *Hawaii* v. *Standard Oil*,[2] the Supreme Court held that Section 4 of the Clayton Act did not authorize a State to sue for damages to the "general economy" of the State, basically because such injury, even if proven, did not qualify as injury to its "business or property" as required by the statute. The Court specifically did not rule on whether Hawaii could sue, *parens patriae*, on behalf of its injured citizens; such a claim had originally been made by Hawaii and dismissed by the district court, but that issue was not before the Supreme Court for its review.

However, one year later in *California* v. *Frito-Lay*,[3] the Ninth Circuit Court of Appeals held that a *parens patriae* action by California to recover damages sustained by its citizens, while possibly desirable and perhaps even essential "if antitrust violations [of particular kinds] are to be rendered unprofitable and deterred" was not justified by the historical recognition of the *parens patriae* role of States in this country and thus could not be upheld in the absence of specific statutory authorization. The Court of Appeals, however, explicitly made no findings on the desirability such an authorization, leaving that to the legislature, "where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf."

H.R. 12528 seeks to remove these limitations on the ability of States to act in their role of *parens patriae*. The first provision of sub-paragraph (a)(1) of New Section 4C would provide that a State could seek to recover damages sustained by its citizens in an action brought by the State as *parens patriae*. Such an action by the State would not be a class action as such, and would not be subject to Rule 23 requirements.

We support the basic concept embodied in this provision of H.R. 12528. The alternatives are either no actions on behalf of individual consumers, or actions brought as class actions under Rule 23. While the provisions of Rule 23 have yet to be authoritatively interpreted,[4] there are indications that a Rule 23 class

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[1] In re *Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972), *aff'd sub nom.*, *State of Illinois* v. *Bristol-Myers Co.*, 470 F. 2d 1276 (D.r. Cir. 1972); In re *Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971).

[2] 405 U.S. 251 (1972).

[3] 474 F. 2d 774 (9th Cir. 1973).

[4] A case involving Rule 23 is, however, currently pending in the United States Supreme Court. *Eisen* v. *Carlisle & Jacquelin*, No. 73-203 (argued Feb. 25, 1974).

action may not be the optimal vehicle by which the primary purposes of Section 4—affording a cause of action to others that will both supplement the enforcement activities of the federal government and serve as an additional deterrent against future antitrust violations—can be accomplished.

Rule 23 is basically a procedural vehicle for the efficient and expeditious resolution of multiple claims. As described by the Advisory Committee which drafted the Rule, it was intended to provide

> "economies of effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results." Advisory Committee Notes, *Proposed Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 102–03 (1966).

Section 4 of the Clayton Act (along with Section 16), on the other hand, were intended at least in major part to provide incentives to what have been described as "private attorneys general" to bring actions in which they could recover treble damages. This legislation was intended to, and I am convinced does, serve as an additional and substantial deterrent to those contemplating activities which might violate the antitrust laws. It has always been my impression that the private action and treble damage provisions of the Clayton Act demonstrate the strength and depth of the national commitment to competition and a free marketplace.

There can be no doubt that the treble damage remedy provides a strong deterrent, especially against price-fixing and other hard-core *per se* offenses. This damage remedy has been particularly effective in cases involving large purchasers, for these plaintiffs are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the apparently inevitable costs of protracted and complex litigation. However, the remedy has been less effective in circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as 25 or 30 cents. There, records are not likely to be available, individual claims will be small, and the claimants less likely to have either the sophistication or resources necessary to prosecute their individual claims.

Rule 23 was seen by some as a possible answer to this problem. In fact, it has not proved to be the panacea sought by some for a variety of reasons. Foremost among these, in my opinion, is that it was not drafted for the purpose of facilitating the type of litigation we are here discussing. Rule 23 was intended to provide a method of consolidating multiple lawsuits, to make one case where there were many. In those situations involving multiple small claims, there are (in the absence of Rule 23 or something similar) rather than many federal cases likely to be none. In fact, in those situations, Rule 23 may encourage suits where otherwise none would be brought but, because the Rule was not drafted with this type of litigation in mind, it is not surprising that various provisions of Rule 23 have sometimes been interpreted in ways which hamper the maintenance of such actions.

I believe that there is a need for the availability of a method by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of citizen-consumers. Without such a procedure, those antitrust violations which have the broadest scope and, often, the most direct impact on consumers would be the most likely to escape the penalty of the loss of illegally-obtained profits. Those whose injuries were too small to bear the burden of complex litigation would have no effective access to the courts. As a result, the goal of deterrence sought by the Clayton Act would be frustrated in those situations where damages fell directly on small consumers or purchasers. It may be that Rule 23 will yet prove to be an appropriate vehicle for the resolution of such claims. The Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin*, now pending, will provide a strong indication as to the future viability of Rule 23 as a vehicle for antitrust class actions by consumers.

In the meantime, however, a statutory grant of power to the States to bring actions as *parens patriae* on behalf of the State's citizens may be both desirable and useful. There are, however, several significant issues which I believe must be carefully considered by this Committee before it reaches that judgment.

The first is the question of potential duplicative recovery. It is clear that the possibility of duplicative recovery was one of the reasons for the Court of

Appeals decision in *California* v. *Frito-Lay*. Should the Congress authorize a State to bring an action as *parens patriae* for damages suffered by its citizens, and some of those citizens seek independent recoveries, individually or by class action, the result could in effect be the doubling of already trebled damages. H.R. 12528 as currently drafted contains no provision to deal with this possibility. If the Congress determines, as it could rationally do, that a State is an appropriate and adequate representative of consumer interests, it must also decide whether those represented in such an action should be individual consumers or all purchasers, including businesses, corporate and otherwise. I believe that such an action should be limited to individual consumers, since they would be most likely to not have the resources and potential claims to initiate their own actions. It would also seem that such actions should be undertaken by the States only when a substantial portion of their citizen consumers are affected. This will have the dual purpose of limiting State actions under this legislation to those situations most likely to be difficult to maintain under existing procedures, and focusing State activity on the most widespread violations. It would also help to alleviate the double recovery problem.

Consideration must also be given to limiting duplicative litigation by the citizens of any State which has brought an action under this legislation. This could (and perhaps, to be workable, must) go so far as to prohibit all actions by represented consumers, and providing that such consumers shall not be included in any broader action initiated or maintained by someone not represented by the State through such an action.

It can be argued that an absolute prohibition—without a chance to opt out as is presently available in Rule 23 class action—would create due process problems. I agree that the issue is far from clear, but I think a responsible argument can be made that representation by a State of its citizens' interests, especially when those interests involve a large number of small, poorly-defined individual claims, is adequate representation of the sort which insures due process to individual claimants, especially where those individuals would have a right to present their claims against any fund eventually recovered by the State. Moreover, in the antitrust context, the private right of action afforded is a statutory right, and a statutory right which waives the ordinary jurisdictional amount requirement for access to the federal courts. Especially from an antitrust deterrence point of view, it is difficult to justify preserving the theoretical rights of a few people to bring individual actions if the result is the inhibition or total exclusion of the great bulk of claims and the resulting immunization, as a practical matter, of the wrongdoer and his illegal gains.

A second major question is the relationship between a statutory right of the States to bring an action as *parens patriae* and the provisions of Rule 23. Rule 23 sought to deal with many issues which would also be raised by a *parens patriae* provision such as that contained in H.R. 12528. In addition to the rights of absent parties which I have just discussed, the procedures by which claims should be handled, the methods by which damages could be established, and the subsequent uses to which unclaimed recoveries could be put are all issues very much alive in Rule 23 litigation today. H.R. 12528, by setting out standards for the resolution of these issues in the antitrust context, seeks to answer the potential questions without reference to Rule 23. This may be the only feasible method of dealing with these problems without becoming enmeshed in the full panoply of Rule 23 and its problems, but this issue, it seems to me, must be carefully considered by this Committee. The status of Rule 23 may well be something that should be the subject of future consideration by the Congress; the interface of Rule 23 with this proposed legislation, however, must be part of this Committee's study of H.R. 12528.

The second provision of paragraph (a) of New Section 4C, which would permit States to sue as representative of a class consisting of all of its damaged citizens, raises this issue directly. Except for whatever other provisions in this bill would apply to such an action, Rule 23 would apparently be applicable to any such action; this is the only provision of H.R. 12528 which appears directly to embody Rule 23. The interface between Rule 23 and this provision may well raise serious questions of interpretations, and thus create litigation opportunities, which could be avoided by deleting any reference to class actions or class representatives. The deletion of this language from subparagraph (a)(1) would, moreover, not seem to create any disadvantages, since the States would have the right to proceed in such situations as *parens patriae* in any event. In light of these facts, we would suggest that sub-paragraph (1) of New Section 4C(a) be amended

to delete the reference to class actions. The State would, of course, still be free to bring individual actions, or even class actions under the provisions of Rule 23, in its capacity as a purchaser of goods or services, a procedure which has been approved in a number of district courts to date and which I believe is not seriously questioned.

Finally, this Committee should consider whether, without a full reassessment of the treble damage provisions and their role in antitrust enforcement, actions such as those which would be authorized by H.R. 12528 should be available for violations of such antitrust statutes as Section 7 of the Clayton Act and the Robinson-Patman Act. The notion that aggregated damage actions for violations of those statutes could be undertaken by a State for its consumers raises the possibility of a quantum jump in damage exposure which would be difficult to measure and which I am not convinced would be justifiable. In any event, it is a matter which deserves serious study.

Let me turn now to paragraph (b), which deals with the measurement of damages. This is one area which has proven to be of difficulty in actions involving great numbers of small individual claims, which are the most likely kind of actions to be encouraged by New Section 4C(a)(1). There is considerable controversy today, in class action litigation and the literature arising therefrom, about the propriety of various methods of ascertaining the proper amount of damages to be recovered from one as to whom liability has been established.[5]

Paragraph (b) of New Section 4C is intended to remove the uncertainties as to the validity of certain methods of establishing and measuring damages in those cases initiated by States on behalf of injured citizens. On the merits, the standards suggested seem to us appropriate ones. There is little doubt that scientific methods of measuring damages through statistical sampling and other devices are available.[6] In addition, at least in the context of Sherman Act violations, we see little merit in the proposition that one whose antitrust liability is established is entitled to retain the proceeds of his illegal acts, absent a definitive showing by each individual damaged of both that fact and the precise amount of injury. A person or corporation whose hardcore violation of the Sherman Act has been established is the equivalent of a thief; he has obtained money from persons that he had no right to take. The questions of whether that money should be denied him, and to whom it should go, seem separable and not necessarily dependent issues. The argument that aggregated damage awards will allow damages to be awarded to those unwilling or unable to assert their claims is not compelling, especially if a major goal of such actions is deterrence. Moreover, who actually receives the money as a result of such an action is secondary to the main goal of depriving the wrongdoer from retaining the "pot of gold" resulting from his illegal acts. Assuming it can be adequately established that a certain amount of monies were received by an antitrust violator as a result of his violation, he should as a matter of policy be liable to a forfeiture of that amount and whatever incremental amount Congress may decide is appropriate, to the benefit of all parties injured. In an action where the State is representing its damaged citizens, the State would seem to be an appropriate receiver of the damages, subject to the rights of all damaged parties to claim their pro rata share.

I do think it is appropriate to emphasize one point. It would seem highly desirable, whether in a class action under Rule 23 or in a procedure such as the one envisioned in New Section 4C(a)(1) of this bill, that all citizens for the benefit of whom the State is acting have the opportunity to claim their share of recovered damages prior to any other use or disposition by the State, regardless of the presence or absence of specific State laws. To the extent that this is the intent of the bill, as I believe it is, it may be desirable to clarify subparagraph (b)(2) of New Section 4C accordingly.

Finally, to the extent that any monies recovered are not fully claimed by injured individuals, the use of the fund according to State law or pursuant to the doctrine of *cy pres* under the direction of the district court seems to me to be the most appropriate provision imaginable. The Department supports New Section 4C(b).

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[5] See, e.g., Handler, "Twenty-Fourth Annual Antitrust Review," 72 *Col. L. Rev.* 1, 34–42 (1972); Freeman, "Class Actions from the Plaintiffs' Viewpoint," 38 *J. Air L. Com.* 401 409–412 (1972).

[6] We recommend inserting the word "or" between "statistical" and "sampling" in this passage, since there may be other valid statistical methods besides sampling that could be used to estimate damages.

Sub-paragraph (a)(2) of New Section 4C would provide that a State can also bring an action as *parens patriae* for damages "to the general economy of that state or any political subdivision thereof." This provision seems clearly intended to respond to the Supreme Court decision in *Hawaii* v. *Standard Oil*. There, the Court held that Section 4 of the Clayton Act did not authorize a state to sue for such damages, basically because such injury, if proven, did not qualify as injury to its "business or property" as required by the statute.

H.R. 12528 would remove this statutory impediment. It would not, however, deal with what the Court in *Hawaii* saw as the danger of duplicative recoveries inherent in the allowance of such an action. The only effective guard against such a possibility would be for the Congress to make clear, perhaps in legislative history, that damages recoverable by such an action should be limited to those arising from illegal actions shown to have adversely affected the State's economy or retarded its economic development in some way independent from or in addition to the damage suffered by consumers located within that State. In those situations where a state can show an interest independent from that of particular citizens, or perhaps in situations where damage to the general public which may not be individually compensable can be shown, the danger of duplicative recovery would be lessened or eliminated.

Even assuming that the potential of duplicative recovery can be ameliorated, I have serious reservations about the creation of this new right of action. Generally, I believe that provable damages resulting from an antitrust violation should be recoverable at law. The right of action created by subparagraph (a)(2), however, if broadly construed, could conceivably expand the antitrust damage exposure of individuals and companies in an almost unlimited fashion. Damages in such an action would seem to be inherently difficult to quantify and, depending on the scope given to the action by judicial interpretation, perhaps unforeseeable even by the most astute businessman. I have some problem with the spectre of massive recoveries based upon unquantifiable and perhaps totally unforeseeable damages multiplied by three. In addition, of course, if the worse would come to pass, the possibility would arise of damages on a scale, wholly unrelated to the wrongdoer's gain, that would result in significant impairment to the viability of those firms from whom such damages were recovered. Such a result in itself could have anticompetitive consequences, since only the largest firms involved in a given violation might survive the financial pressure of such damage awards.

Let me turn now to New Section 4D. Under this section, the Attorney General, once he has brought a damage action under Section 4A of the Clayton Act, would be required to notify any State which he "has reason to believe" would be entitled to bring a similar action (presumably under New Section 4C of this bill) that "would probably lead to a substantial recovery of damages." Under such language, the Attorney General is asked to make judgments that will be very difficult, both as to the possibility of liability of the prospective defendants to the citizens of the several States and the substantiality of the potential recovery in such actions.

Once he has made these difficult judgments, and following any notification, those States notified would have 90 days to decide whether they should file such an action. This would place a substantial burden on the States, since the complexity of such cases may well make the 90-day period wholly inadequate for proper analysis of their rights, responsibilities and possibilities of success. This would be especially true for small States, with fewer resources available in State Attorneys General offices.

Finally, should those States notified either fail or decline to bring such an action within that 90-day period, the Attorney General is directed to institute an action, as *parens patriae*, in place of the State. Such a requirement could create serious problems. The State may have declined to sue because it concluded there was not a sufficient legal basis for such an action, a conclusion not necessarily inconsistent with the Attorney General's previous finding that he had "reason to believe" the opposite. This provision, since it removes all discretion from the Attorney General, could very well require the institution of law suits which are not justified by any conclusion of probable liability or reasonable likelihood of success. In addition to the potential conflict between the Attorney General's duties under this proposed section and his inherent responsibilities as a lawyer and an officer of the Court, this provision could result in increased pressure on an already overcrowded judicial system which is neither required nor, in the final analysis, warranted.

More importantly, even if those problems outlined above were either soluble or solved, New Section 4D could place impossible burdens on an already undermanned Antitrust Division. It is reasonable to presume that the combination of the short time period for State review and the strained legal resources of many States would result in a significant portion of such cases reverting to the Attorney General, who would be required by statute to institute suit. Even if all the affected States but one determined to bring suit, the Attorney General would still have to sue on behalf of that one State. This could create intolerable burdens, and it is conceivable that all or most of the Division's resources would have to be devoted to such cases, at the expense of criminal enforcement, actions against illegal mergers, and appearances before the various regulatory agencies.

In addition, this procedure may well create disincentives for those States which do not now have substantial antitrust enforcement programs to implement such activities. The fact that States can recover treble damages under the Clayton Act in effect permits them to operate an antitrust enforcement program at little or no cost to the taxpayer. Not only can the State recover its actual damages, but additional monies which it can use for more antitrust enforcement or, for that matter, other public purposes. We favor this approach, for it seems to us to assure that there will be more enforcement personnel in the field seeking out and prosecuting antitrust violators. In fact, this is one of the basic purposes underlying Section 4—to provide the incentive for additional enforcement of the antitrust laws other than by the Federal Government. This is a likely result of New Section 4C; New Section 4D could operate against that goal. For these reasons, we oppose the inclusion of New Section 4D in this legislation.

New Section 4E would permit a State to recover treble damages for the entire amount of overcharges of other damages sustained in connection with any federally-funded State program. The United States would be permitted to intervene in any such action to protect its interests in the fund in issue, and would be empowered to bring an action on behalf of any State which fails or declines to sue within 90 days of a notification from the United States that probable cause for such a State action exists.[7] The United States would be entitled to claim reimbursement of its equitable share of any damages recovered by a State under this Section. We assume the latter would be the federal contribution, untrebled.

The current state of the law on this point is unclear. It has been argued that allowing such recovery by States is in essence permitting treble damages for injury to the United States, a notion arguably inconsistent with Section 4A of the Clayton Act, which permits the United States to recover only actual damages resulting from antitrust violations. On the other hand, the fact that the State funded a portion of one of its programs with monies from the United States instead of from tax revenues or other sources does not change the fact that the damages suffered were suffered by the State.

We believe that a State should have the right to recover treble damages for all injuries suffered by a State as a result of antitrust violations, regardless of how the programs were funded. Such a position seems most consistent with the primary purpose of section 4—to create incentives for private actions. Such private actions are significant deterrents to future violations, and it should make no difference that a portion of the funds which financed the injured program come from the federal government. This position is, incidentally, not inconsistent with Section 4A. Section 4A merely limits the United States to the recovery of actual damages,[8] and implies no limitation on the rights of private parties (including States) to recover treble damages based on the source of funds or revenues with which the injured activity was financed.

While we support the inclusion of New Section 4E, we would suggest certain changes in language. First, we would suggest that it be expressly stated that, in those instances where the United States should initiate an action for a State under New Section 4E, the United States could recover for the State the same amount of damages that the State could if it sued. Second, we would suggest that the references to regulations be deleted, and replaced with a provision that pro-

[7] While the language of New Section 4E indicates that the United States would not be required to bring such an action, we think it should be expressly stated that the United States is under no obligation to exercise the power granted by New Section 4E. We would oppose, for many of the same reasons stated in our discussion of New Section 4D, any language which could be interpreted as requiring action by the United States should States decline or fail to bring their own suits.

[8] One issue that should be clarified is the effect, if any, that action taken under New Section 4E would have on the right of the United States to bring its own action based on a federal contribution to a State program.

vides for the reimbursement of the United States for its expenses, if any, in prosecuting an action under 4E, under the direction of the District Court.

In your invitation, you also asked for a discussion of the manner in which the Antitrust Division acquires, evaluates, and disseminates information concerning anticompetitive practices. Obviously, the Division receives information from varied sources, including a not insubstantial number of complaints from businessmen or consumers who feel they have been injured. The Division also develops and analyzes economic data, largely through its Office of Economic Policy, with the purpose of identifying those areas of the economy which show indications of interference with free market allocation or pricing functions. We frequently conduct informal investigations which rely on voluntary compliance with requests for information. The most commonly used investigatory tools, however, are the grand jury and the Civil Investigative Demand as authorized by the Antitrust Civil Process Act.

The grand jury is an important investigatory tool, but its usefulness is limited to those situations in which we have reason to believe a criminal violation of the antitrust laws may have occurred. In fact, court decisions have made it clear that a grand jury cannot be purposely utilized to investigate and prepare a civil action. Thus, since the majority of our investigations and cases are civil cases, the grand jury is of limited value in many situations.

The CID is potentially a very useful investigatory tool. As it stands now, however, the CID is limited to the production of documents, and then only from persons under investigation. It cannot be used to compel testimony, nor can it be utilized against persons not under investigation, even if they may have information highly relevant to the investigation. At least one court decision has also raised doubts as to the propriety of a CID when the investigation is centered on incipient conduct, such as a proposed merger.[9]

The Department has prepared legislation to be submitted to this Committee which would extend the coverage of the Antitrust Civil Process Act to (1) include persons (including natural persons) in addition to those under investigation, who may have information relevant to a particular antitrust investigation, and (2) to permit the service of written interrogatories and the taking of oral testimony. This proposal would also remove any doubt that CIDs may issue to require information relating to incipient violations and specifically provide that evidence obtained through the use of CIDs may be used in investigations and cases in addition to the specific investigations to which the CID relates and any case resulting therefrom.

No field of litigation involves facts more complex and records more extensive than are found in the Government's antitrust cases. The task of amassing the voluminous data essential to successful antitrust enforcement is of considerable magnitude. Insofar as it went, enactment in 1962 of the Antitrust Civil Process Act provided a signal benefit to the Government's civil investigations by authorizing production of relevant documents from corporations, associations, partnerships, or other legal entities not natural persons, under investigation. But the limitations on the scope of the Demand have left the Act far from meeting essential investigatory needs of the Department's Antitrust Division.

This proposal would simply make available to the Attorney General the same antitrust investigatory powers in civil investigations that he now has in criminal investigations, and provide him with authority similar to that of the Federal Trade Commission. Enlarged discovery would not only materially assist investigation of facts leading to decisions on the filing of civil actions, but will facilitate the reaching of decisions on whether to resort to grand jury proceedings.

Insofar as dissemination of information is concerned, the Department is frequently limited by both statutory and policy considerations on what kind of information may be disseminated. For example, the Federal Rules of Criminal Procedure, specifically Rule 6(e), expressly forbid the dissemination of information obtained by a grand jury in the course of its investigation other than in a subsequent judicial proceeding or by order of the Court. Similarly, the Antitrust Civil Process Act, 15 U.S.C. § 1313(c), restricts the availability of information obtained through the use of a Civil investigative Demand. Policy consideration argue against the announcement of pending investigations or access to investigatory files, especially when such announcements or access might in some way prejudice the conduct of the investigation, adversely affect the parties under investigation, or expose individuals or firms which provide information to the Division to harassment or reprisals.

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[9] *United States* v. *Union Oil Company of California*; 343 F. 2d 29 (9th Cir. 1965).

Where these restrictions are not applicable, the Department has been and remains willing to assist other public agencies to the greatest extent possible. This is especially so for state enforcement agencies. The Department makes every attempt to assist state antitrust agencies,[10] although the pressure on our resources undoubtedly limits our ability to provide as much help as either the State agencies or the Department would desire.

You also asked for a discussion of the Antitrust Division's plans to deal with shortage situations and the competitive problems that occasionally arise from such conditions. The Division is keenly aware of the shortage situations that exist in some areas of the economy, not only in oil but also in such diverse commodities as chemicals and paper. We have received a number of complaints which seem to relate to shortage conditions and we will continue to investigate any such complaints we receive. I should point out that many of the shortage situations we are facing today have been aggravated, if not created, by the existence of price controls. Without quarreling with the merits of a decision which on balance, might favor controls over the price of certain commodities at certain times, there is no doubt that the existence of such controls can discourage production, encourage exports to non-control areas, or in other ways directly affect the availability of the product, sometimes to the point of shortage. The elimination of price controls is a step toward reducing shortages and the resultant temptation to use control over supply in times of shortage to gain unfair competitive advantages.

Finally, you asked about the applicability of merger law to energy conglomerates. The short answer, of course, is that Section 7 of the Clayton Act is applicable to all corporations, whether conglomerate or not. Of course, the more diversified the companies, frequently the more difficult to show the probable lessening of competition that violates Section 7. In fact, however, the Antitrust Division has been very active in the energy area, as has the FTC. For our part, there is currently pending in the Supreme Court a case involving the acquisition of United Electric Coal Companies by General Dynamics Corporation, a consolidation involving two major coal procedures.[11] The Department recently filed an action charging that various agreements between Texaco, Inc., and Coastal States Gas Producing Company violated both Section 1 of the Sherman Act and Section 7; that case was concluded by the substantial abandonment of the challenged agreements.[12]

These examples are merely illustrations of the activity of the Antitrust Division in the energy area. Of course, this activity extends beyond mergers and acquisitions. Our enforcement activity includes investigation and analysis of competitive issues involved in oil and natural gas pipelines, nuclear power, international activities, and domestic production, refining, and distribution of petroleum products.

It has become increasingly clear that the current energy shortage requires a coordinated antitrust enforcement effort. The oil industry is multinational in character, and decisions made in international markets may have substantial effects upon domestic markets. Strong relationships between the production of various sources of energy—natural gas, petroleum, fissionable material—are also evident. For these reasons, the Antitrust Division is in the process of establishing an Energy Unit, charged with the investigation of possible antitrust violations in the energy industry, conducting grand jury proceedings and preparing and trying antitrust cases. The work of the Unit will be related solely to energy concerns, specifically those arising from the current energy shortage.

I hope this somewhat lengthy statement is responsive to your invitation, and I stand ready to answer any questions you might wish to ask.

Chairman RODINO. Thank you very much, Mr. Kauper. Your statement is certainly very helpful to the committee, and recognizes that this is breaking a new field and getting into a new area of which I am sure many of us will ask many questions. Notwithstanding the

[10] For example, within the past year we have filed briefs amicus curiae in support of state plaintiffs in a number of cases, including *In re Master Key Litigation*, 1973 CCH Trade Cases § 74, 680 (M.D. Conn. 1973); *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, Alaska* v. *Standard Oil Co. of California*, 1973 CCH Trade Cases § 74, 733 (C.A. 9, 1973), cert. denied 42 U.S.L.W. 3459, (U.S. Feb. 19, 1974); and *North Carolina* v. *Chas. Pfizer & Co., Inc.*, Civil Action No. 2287 (E.D.N.C. July 25, 1973).

[11] *United States* v. *General Dynamics Corp.*, No. 72–402 (argued December 5, 1973).

[12] *U.S.* v. *Texaco, Inc.*, 73 Civ. 2608 (S.D.N.Y., final judgment entered January 25, 1974).

fact that my colleague, whose judgment I always do respect, feels that the matter may not be urgent, nonetheless I do consider at this time there has got to be a beginning. I think that your statement clearly indicates the need for the legislation's availability to States, at least in some areas. This need, as has also been indicated, raises vital questions. I have been in communication with some of the attorneys general of different States, and they have indicated, although they do not quite completely support the legislation, their comments, that they are supportive in principle. I think it is vitally necessary that we explore this matter in order to determine what we should do in order to resolve the problem.

So I am happy to point out a statement which is in your prepared statement but which you did not read, on page 9: "Without such a procedure, those antitrust violations which have the broadest scope, and often, the most direct impact on consumers, would be the most likely to escape the penalty of the loss of illegally obtained profits."

It seems to me this certainly does direct itself to some of the areas that are of direct concern to us, and certainly of major concern to the consuming public that I think we ought to be able to deal with.

Of course, I wholeheartedly agree with that statement, and this is one of the reasons why we developed this legislation. With this beginning, we may be able to find that vehicle that will be the proper vehicle for us to undertake action to do equity and to do justice in some of these instances requiring congressional action.

Now, Mr. Kauper, on page 10 of your statement, you raise, and I quote: "The possibility of duplicative recovery," of which you say, "Should the Congress authorize a State to bring an action as parens patriae for damages suffered by its citizens, and some of those citizens seek independent recoveries, individually or by class action, the result could in effect be the doubling of already trebled damages."

Of course, you talk there about a possibility. I suppose we might agree that certainly all things are possible. The question is whether or not there isn't something that we should do about a situation like this even though this possibility might occur and whether or not we can deal with that possibility.

In the first instance, your possibility assumes a recovery by a State under the legislation we are considering, doesn't it?

Mr. KAUPER. I think that is correct; yes, sir.

Chairman RODINO. Would you say, Mr. Kauper, that there is anything that adds new law to accepted doctrine of res judicata and collateral estoppel?

Mr. KAUPER. No, Mr. Chairman, there is nothing in the bill which really addresses those issues. Obviously, the law remains as it now is on those issues.

I think that the question, however, may well remain as to the extent to which this action brought by the State would be viewed as having a binding effect on those citizens who are deemed to be represented.

I think that the possibility of conflict here, Mr. Chairman, that is, of possible double recovery, probably is not very real between an individual action by a consumer and such an action by the State. I don't think the former action is ever likely to be brought.

I believe that there are, however, as you know, rather strong incentives for the bringing of private class actions, and I think it is in that

field that there is a possibility, at least, that one might encounter the problem of duplicative recovery. Now, whether that could be handled under existing law, such as estoppel notions, through consolidation, or with a variety of other devices, is not clear. This is particularly true since the action here, and I am now speaking about the action by the State on behalf of its consumers, is not in and of itself governed by rule 23. I think the possibility exists, in other words, that some of the same kind of problems that the courts have struggled with in interpreting rule 23 could exist here. Obviously the bill simply leaves that issue for resolution under existing legal rules rather than addressing the issue directly itself.

Chairman RODINO. Well, I agree with what you state, on page 6, the parens patriae, "action would not be a class action as such and would not be subject to rule 23 requirements." In private actions, wouldn't defendants have available procedural protections and safeguards if they are defendants in a rule 23 private action?

Mr. KAUPER. I am not quite sure what you mean by that. You mean in the action authorized here?

Chairman RODINO. No, because we seek to authorize parens partiae actions, not private actions.

Mr. KAUPER. It is not clear that there are any such limitations here.

Now, it is true that if there is a separate rule 23 action, which is either pending or which might be brought subsequent to the filing of this action, that action is obviously subject to all of the safeguards of rule 23, yes.

Chairman RODINO. That is correct.

Well, there isn't anything new on the substantive law of damages, is there?

Mr. KAUPER. I think not, but I think you will probably get some argument on that, Mr. Chairman.

Chairman RODINO. I am glad to get your thinking and I always respect your opinion. You are speaking as the Assistant Attorney General in charge of the Antitrust Division, and I am glad we agree on this point.

Well, let me just ask one other, and this is something I think that is of oversight importance to us.

The investigative activity of the Antitrust Division is of major concern, and the Antitrust Civil Process Act of 1962, 15 USC 1312, provides and I quote—

> Whenever the Attorney General or the Assistant Attorney General in charge of the Antitrust Division . . . may, prior to the institution of a civil or criminal proceeding . . . issued in writing and cause to be served a CID, a civil investigative demand, requiring the production of material.

Am I stating that correctly?

Mr. KAUPER. Yes.

Chairman RODINO. In view of that legislation providing for either the Attorney General or the Assistant A.G. to issue CIDs, what requirements have been imposed by the Attorney General on the Assistant Attorney General's legislative authority to issue CIDs?

Mr. KAUPER. Do you mean are there guidelines or something of that sort? I think the way I would have to answer your question is I don't believe that there have been any such limitations imposed, at least none that I am aware of.

Chairman RODINO. You say there are no guidelines?

Mr. KAUPER. Certainly none that have been issued by the Attorney General that bind me that I am aware of.

That is, the normal practice on the issuance of CIDs is that it is largely a matter of issuing them when I am prepared to sign them.

Chairman RODINO. Were there any internal requirements regarding the CIDs and any guidelines at all before you sign them?

Mr. KAUPER. As a practical matter, Mr. Chairman, CIDs are approved by the Attorney General, but I have never had one turned down. Thus, I would not say there are any particular limitations on issuing them.

Chairman RODINO. Is it necessary for you to secure the approval of or clearance by the Attorney General before issuing CIDs?

Mr. KAUPER. It is a matter of practice: I don't think I would say it was necessary. That has been the customary practice, Mr. Chairman, but if you put it in terms of necessity, I do not believe that the statute requires approval and I am unaware of any regulations which require it.

Chairman RODINO. Do you know how long that practice has been in effect?

Mr. KAUPER. Well, I suspect it has been in effect since about the time the CID statute was enacted. I really don't go back that far; the statute has been in effect for some time, Mr. Chairman.

Chairman RODINO. Is there any length of time that is required or does this in any way bring about any delay in the issuance of CIDs?

Mr. KAUPER. I don't think it has worked any substantial delay in any case that I know of. It tends to be viewed, Mr. Chairman, as a means of keeping the Attorney General informed of activity and that really is its primary purpose. But I can't think of any case, and I speak now only of my own experience, because that is all that I really know about, where there has been any substantial delay as a result of that practice.

Chairman RODINO. Thank you very much. Mr. Hutchinson?

Mr. HUTCHINSON. Thank you.

Mr. Kauper, I appreciate your statement. As I stated in my opening remarks I have read it in full previously and I find it very informative and helpful. But I do have some questions.

To begin with, why is it necessary that we provide for these parens patriae cases in Federal court. Why could not a State by its own State law vest the jurisdiction in its own State courts to handle these kinds of cases, for the reason that obviously the parties are within the—they are reachable by the State. Obviously, the State is suing only on behalf of its own citizens. Damages, in other words, suffered are claimed to be suffered only within the State. Why is it necessary that we further burden our Federal court system with these suits, and perhaps you might be able to suggest how many such suits you envision might be started in the several district courts in the United States by the several States attorney general in a year?

Mr. KAUPER. Mr. Hutchinson, I am not really sure I can come up with a really intelligent estimate as to how many there might be. I think without experience with this it would be almost impossible to predict with any real degree of accuracy but let me turn to the

first part of your question. There are, I suppose, ways in which one might try to put an action of this sort into a State court as opposed to a Federal court. One could simply say to the State "This is your issue. If you want to do this it is your business. Pass a State law which permits it under your own State antitrust statute." But this bill does deal with a Federal cause of action—provided in the Clayton Act, and a State legislature would of course be powerless to change the contours of that Federal statute.

It seems to me the argument for putting it in Federal courts, while I recognize the arguments that you have made, rest in part on the idea that many of these violations will affect consumers in more than one State. While the bill does not address this question, I would assume that the contemplation would be that if more than one State were to file suit based on the same violation in Federal courts these matters could be consolidated. This would, presumably, be impossible if a number of separate suits are filed in different State courts, and I think you would run the risk of a very substantial number of independent actions proceeding separately alleging the same violation.

In addition, I think there may be some States which, operating under their own State law, might have some difficulty in matters such as attendance of witnesses and so on—problems that might not be present in the Federal courts.

But the basic idea here is, as I perceive it, to permit those actions to be consolidated in Federal court. I don't think you could do that if you proceeded by State action.

Mr. HUTCHINSON. But if the Attorney General of the State of New York and the Attorney General of the State of California and the Attorney General of the State of Texas or Michigan and so on, and under this bill, as I understand it, the Justice Department would be required to inform each and every one of those States that they might possibly have a cause of action, I think that is quite a burden upon him, but anyway, I am curious as to how you would presume that the State of Michigan, for instance, acting in its sovereign capacity as parens patriae, would feel that its case should be adjudicated out in New York State.

Mr. KAUPER. Well, I think what you will find is the probable handling of this through the multidistrict litigation panel's procedures. Obviously a State might prefer to have its case tried in its own district. On the other hand, through the consolidation with the prospect of a joint presentation and presumably a sharing of the load, you also are going to take something of the load off each of the State officers, which I am sure they will tend to view as desirable. This is what has happened in attempts so far to use rule 23 and I suspect the same thing would happen here.

Mr. HUTCHINSON. I believe you made the observation in your statement that it is quite possible that States would figure all they need to do is to wait a short period of time and then you do it for them. Isn't that right?

Mr. KAUPER. The bill seems to contemplate that. We do not support that provision in the bill, Mr. Hutchinson.

Mr. HUTCHISON. As you read the bill, is it your opinion that notice to those citizens which would be championed by a State in its suit does not require, the bill does not require any notice to the individual citizens who assume the damage?

Mr. KAUPER. That is the way I would read the bill, there is no notice required.

Mr. HUTCHINSON. Don't you think it should require notice? Do you see any due process problem here?

Mr. KAUPER. I do not—not in the maintenance of this action. I think that there may be a due-process-type of problem, although in my testimony I indicated I didn't think it was insuperable, to the extent that you are binding that citizen and precluding him from some other action. I think that is where you are more likely to encounter a due-process objection.

Mr. HUTCHINSON. Do you contemplate that this bill would preclude him from some other action?

Mr. KAUPER. Well, I think the bill essentially does not address the issue. That is the issue I raised in connection with double recovery.

Mr. HUTCHINSON. Yes.

Mr. KAUPER. The bill, as I indicated in my answer to the chairman, seems to leave that to existing legal rules as to what kind of binding effect there would be. I think it is quite clearly the purpose of the bill, that the State is not required to give notice to each individual consumer. This, of course, has been a major problem in rule 23 actions.

Mr. HUTCHINSON. You are suggesting perhaps that the bill could be improved if it clarified that question of the statute.

Mr. KAUPER. I think it would be useful if the bill addressed the question in relationship to other actions on behalf of consumers. It is admittedly a difficult thing to do.

Mr. HUTCHINSON. What kind of cases do you think will be brought under this bill other than, well one that is obvious to me, I suppose, is some manufacturer who is selling what he determines would be a price in violation of the antitrust laws, monopolistic price, and everybody in a particular State who bought goods for 35 cents which was only worth 30 cents could get a nickel back. But aside from that specific situation what other kind of cases can you envision?

Mr. KAUPER. Well, I would suspect, Mr. Hutchinson, that the most likely kind of case is the price-fixing situation, where the violation is reasonably clear, that is, the legal rules are quite clear although there obviously remains the question of proof. But I think what we are talking about here are actions involving consumers and consumer-type goods; furthermore, I would suspect that history, if it was any teacher, would indicate that cases would be brought concerning price fixing of milk, price fixing of bread, that kind of commodity. That is what one is likely to see, and keep in mind the bill refers to a measurement of damages in a way which, it seems to me, is itself most applicable to cases like price-fixing cases, and would facilitate primarily that kind of suit.

Mr. HUTCHINSON. How does the Robinson-Patman kind of case enter into this?

Mr. KAUPER. Well, we raised that issue and we have tried to think of the sort of situation in which a Robinson-Patman violation might become the basis for this sort of action. Presumably it would be through the allegation that one particular retailer from whom some customers are buying is paying a higher price than another retailer, to the detriment of the consumers who purchase from the former. That, it seems to me, is at least the most obvious kind of situation

in which this might be raised in this setting. We have some difficulties, as I think we indicated in the testimony, with the coverage of the bill extending to things like Robinson-Patman violations, which I don't think tend to be viewed as the same kind of relatively hard-core violation that we have when we are talking about price fixing.

Mr. HUTCHINSON. Mr. Kauper, do you envision this bill as, primarily as, a consumer complaint-type of suit, and I believe the bill refers to, uses the word "citizen" and so on. Does the word "citizen," as you understand it, is that broad enough in the law to include bills necessary entities like partnerships and corporations? I was, back when I was studying law with your father, I got the impression that a citizen had to be an individual person while a person in the law had to be a corporate entity and partnership and other kinds of entities.

Mr. KAUPER. Well, I think, Mr. Hutchinson, in different bills these words tend to be interpreted in somewhat different ways. I suspect here that the language of the bill is probably intended to include business entities. I don't know that for certain but I imagine that is the case, and I think it certainly can be read that way. I think that this is something, depending on how the Congress wants to resolve that issue, that should be clarified.

Chairman RODINO. I might say to the gentleman there is certainly no intent on the part of this person or of the legislation to exclude those entities, and "citizen" is used in that broad sense.

Mr. HUTCHINSON. Well, this is not a matter of argument but by way of amendment. As I say, perhaps the law probably, I would confess that no doubt the law, which has gotten away from me, but back in those days I thought there was a difference between a citizen and a person. I won't pursue any further, Mr. Chairman. I don't want to take too much of the time.

Chairman RODINO. Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman. I am sorry I wasn't able to be here while you were making your principal statement, Mr. Kauper. It is always a pleasure to hear you and I will read it with great care. I have been over it, and I have a couple of questions that I would like to ask about it.

I am intrigued with your suggestion on page 11 that perhaps the class of customers which the State would be authorized to sue in behalf of should be limited to "citizen consumers" because of the thought that businesses and corporations are in a position to protect themselves. And I just wondered to what extent there is a rational basis in our experience for supporting that conclusion?

Mr. KAUPER. Well, Mr. Seiberling, I think that obviously one could suggest that there may also be some categories of business enterprises, particularly very small business enterprises, local retailers for example, who may also have some difficulty maintaining an action. I don't think one can be categorical about that. It seems to me, however, that the rationale under which one authorizes a State to proceed may extend somewhat more to its own individual citizens than to its business enterprises. I realize that there is a very shadow line between an individual consumer and one who is, for example, buying to resell as a retailer. But, in terms of the kind of damages which are contemplated here, and the interest in keeping a fairly uniform type of action so that you don't get into questions of levels of damages and

relations in one action, for example, of retailers and consumers, there is a logic, it seems to me, for saying let's confine this at least in its first attempt to the consumer.

In addition to that, I think it is probably true that it would be somewhat easier for even small businesses, as opposed to individual consumers, to maintain class actions; that is, the class action requirements in such matters as notice, manageability, identity of interests, and so on, may be more easily met if you are dealing with small business concerns than if you are dealing with a group of consumers.

Mr. SEIBERLING. I think that is a logical approach to it. I must say that although I cosponsored this bill I have some unresolved misgivings about any type of action where you are representing a rather amorphous class. Having sat in on the defense side of many class actions against tire companies, I am not wholly enthusiastic about the class action approach. Really what we are saying is we are going to authorize the State to bring actions on behalf of the people of the State, and I guess it is certainly true that consumers as a class are the most likely ones not to be well represented. I think that you do make a very good point in this sense. I would like to pass on and let someone else take over at this time, Mr. Chairman.

Chairman RODINO. Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. Chairman, at the outset I would like to welcome Mr. Kauper, if that is the right word. I don't happen to be a friend of Mr. Kauper, but his father is a very distinguished professor at the University of Michigan, comes from my home city and is a personal friend of mine and I am happy to get acquainted with his distinguished son also.

I am completely uninformed and, therefore, completely openminded on the subject that is before us this morning. I might say in a general way I share my colleague from Michigan's point of view that this is not a matter of particular urgency but that does not mean that it may not have some merit.

Mr. Hutchinson raised an interesting question about a suit in State courts. As a somewhat related matter that occurred to me and the counsel while he was talking here, why would it not be possible for the State legislature to confer on their attorney general the right to sue in the Federal court, rather than our doing it?

Mr. KAUPER. Well, I think that probably most State legislatures have authorized their attorneys general to appear in Federal court but I do not believe that a State is going to be able to change the requirements which its attorney general has to satisfy under the Federal rules as a litigant in the Federal court by virtue of any amendment of a State law that was essentially authorizing legislation.

Mr. DENNIS. Why couldn't the State give him a right to bring the parens patriae type of suit in the Federal court?

Mr. KAUPER. Well, I think that the answer to that has to be that the Federal courts have, at least so far, held, as a matter of Federal law, that the States may not so proceed.

Now, obviously, a State could say that the attorney general is authorized to maintain such an action. First of all, insofar as this bill addresses an action alleging injury to the general economy of the State, it seems to me that such a State law would be totally ineffective because the bar to a Federal antitrust suit alleging that kind of damage

which the Supreme Court found in the Hawaii case was the specific language as to recoverable damages in the Clayton Act, which is the substantive Federal statute creating the cause of action.

Insofar as his ability to maintain a class action, I don't think that the Federal courts would permit the State attorney general, by virtue of State legislation, to use such State law in satisfaction of the requirements of Federal rule 23.

Mr. DENNIS. How about damages personally to a State which is, as I understand it the Department is in favor of.

Mr. KAUPER. That is why I would think you would have problems with rule 23. The only way it seems to me that his action would be recognized in terms both of the Federal statute and the Clayton Act itself, which talks about "damages sustained by him" would be to bring it in the form of a class action.

The Federal courts have not been willing to recognize the parens patriae role as such. Thus, the problem we are discussing boils down to this—I don't think the State, by a statute it enacts, is going to be able to change those rule 23 requirements.

Mr. DENNIS. All right. Thank you very much.

I notice on page 9 and 10 where you are talking about the division of damages suffered by the citizen consumer, you point out there is a decision pending which will provide a strong case as to the future viability of rule 23. I was wondering if, in view of that, whether it might not be sensible to wait, on legislation of this kind, to see what the court does.

Mr. KAUPER. Well, I think it is entirely possible, as my statement indicates, that there will be additional indications out of the *Eisen* case. As a practical matter, I don't think you are talking about a very substantial delay. Presumably that case will be decided by the Supreme Court before the end of the curernt term, which is not all that far away. But I think one also has to recognize that the Court's decision could turn on other issues and thus not provide that sort of indication. There is an issue in the *Eisen* case as to the appealability of the particular orders which are before the Court. Obviously, should the Court rest its decision on the fact that the orders are not appealable, that is going to be the end of the matter and such a decision isn't going to be any help to anybody in terms of interpretation of rule 23.

Yes; it certainly is true, Mr. Dennis, there is a possibility that there will be some further indication in the *Eisen* case as to how the rule 23 requirements are going to be interpreted. The case could result in a ruling which says we are going to interpret those requirements very stringently, with the result that this type of action is going to be very difficult to maintain indeed.

Mr. DENNIS. I was struck by what you said about section (a)(2), damages to the general economy of a State. It strikes me that is not only an exceedingly vague standard of damages which are provided, which I think are very difficult to show or establish but if you do do it with any success, drive some of these companies out of business, as you have suggested the possibility of, it seems to me you may wind up doing more damage to the general economy of the State than the case that you started to cure would have come to begin with.

Mr. KAUPER. I think that is a possibility. That item of damages, it seems to me, is unrelated to the possible gain which the company may

have itself obtained. I am not terribly concerned about the viability, if I may use that word, impact where you are talking about a measure of damages which is to some degree tied to what the company has gained from its wrong. It seems to me that if they go out of business as a result, that is the consequence of having pocketed some gain at an earlier time and of now having to pay it back.

I think, however, that the general economy provision could present that possibility. I think it is a concern that we have from time to time when very large damages are being assessed, particularly if it is an industrywide type violation and there are firms with differing abilities to meet judgments, and I think that the smaller firms can sometimes be disproportionately hurt.

Mr. DENNIS. That section, of course, is a separate section of the bill which could be omitted here and still get at the main thrust of this measure, would it not, which it seems to me is the individual consumer rather than this sort of thing.

Mr. KAUPER. Yes. Obviously, it could be deleted. Whether it gets to the main thrust of the bill I suppose depends on what the draftsmen of the bill thought the main thrust was.

Mr. DENNIS. I suppose that is right.

Mr. KAUPER. It does remove a provision in that sense.

Mr. DENNIS. At least the two provisions are certainly different, and could be separated; you are right it may be that is one of the main points of the bill, I don't know about that.

Well, I think I have no further questions except that I would like personally to subscribe to your adverse reflections, if that is a fair statement, about the price controls in passing that. It is time we got around to realizing that they are not very sound. Thank you very much.

Chairman RODINO. I would like to state at this time, Mr. Kauper, that while I don't know whether or not you read the statements that I feel are also pertinent to your dialog, I would like to join with you in, and agree with your statement, that I think they possibly reflect on some of the questions that have been asked. On page 7, I agree when you refer to rule 23, "such an action by the state would not be a class action as such, and would not be subject to rule 23 requirements." And then on page 6, your statement that "We support the basic concept embodying this provision of H.R. 12528. The alternatives are either no action on behalf of individual consumers, or action brought as class actions under rule 23" which I agree with you heartily there.

Mr. Mezvinsky.

Mr. MEZVINSKY. Thank you, Mr Chairman.

Mr. Kauper, I appreciate your testimony. I was interested in your comment regarding the new section 4D and you pointed out you are already undermanned and that it would be an intolerable burden upon you. What percent of the budget of Justice is allocated for antitrust enforcement?

Mr. KAUPER. The total budget—I hate to admit, Mr. Chairman, I do not have a figure on the total department budget.

Mr. MEZVINSKY. What about antitrust?

Mr. KAUPER. Well, the total antitrust budget at the moment, I think is about $13 million. We have, as you may know, asked for a fairly

substantial increase in the next fiscal year's appropriation, I think it is an additional 83 positions, which is now before the Appropriations Committee, and that, plus uncontrollable items, brings the figure somewhere in the neighborhood of $16 million.

Mr. MEZVINSKY. Now, you pointed out in your statement on pages 32 and 33, concerning the formation of a new energy unit in the Antitrust Division and it is charged with the investigation of possible violations on the energy industry. Are you going to go into the causes, investigate the causes of the shortage and the pricing thereof?

Mr. KAUPER. We will be examining that along with a number of other things, Mr. Mezvinsky. Obviously when we talk about a new unit, I should stress that in the past we have had a number of people within the Division who have been worrying about problems in the energy business for some time. However, I think traditionally these have been viewed as somewhat discrete, separate problems investigated through two or three different sections of the Antitrust Division, and what we are now trying to do is recognize, as I think we must, that they are no longer discrete and separable problems. They should all be brought into one unit with one common set of intelligence. That is our organizational purpose, and the goal is effectively to carry on the kind of inquiry you suggest as well as a number of others.

Mr. MEZVINSKY. Then I gather you will look into the problem of the elimination of potential competition among the energy conglomerates that have large oil companies as their key or nucleus member?

Mr. KAUPER. Yes.

Mr. MEZVINSKY. Will you also look at the interlocking directorates?

Mr. KAUPER. We are looking at interlocks right now, Mr. Mezvinsky.

Mr. MEZVINSKY. Now, on page 27 you indicate that the majority of your cases are civil.

Mr. KAUPER. Yes.

Mr. MEZVINSKY. You have been criticized in the past, I think, for bringing civil, not criminal actions where price fixing may be alleged. What are you doing in the area of criminal actions at this point.

Mr. KAUPER. I did not bring with me the statistics for the current year. We seem to, and I don't know whether it represents my character or something else, but the proportion of criminal cases is going up. I am not quite sure why. I think so far as price fixing is concerned, I have frequently stated my attitude, and I think it has been the attitude of others, that price fixing is a crime and it should be treated criminally. People engaging in that sort of activity, it seems to me, are criminals. It is not inappropriate that they be considered as possible jail candidates.

When one talks about price fixing I would put only one caveat on that. We, for example, will occasionally challenge price fixing in a regulated industry. Where there is some doubt, some very real doubt, as to what the legal rules are, the practices have been open, and they have been more or less sanctioned for some time, I have some real questions as to whether criminal sanctions are appropriate in that setting. But other than that I think price fixing is a crime and I believe we treat it as such.

Mr. MEZVINSKY. For the record, will you submit the kind of cases, you said you brought more cases under criminal——

Mr. KAUPER. I would be happy to submit for you, Mr. Mezvinsky, the cases we have filed in the past year or thereabouts, both civil and criminal, to give you some notion of what the relative proportions are.

[The information referred to follows:]

UNITED STATES DEPARTMENT OF JUSTICE,
Washington, D.C., April 23, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, House Judiciary Committee, House of Representatives, Washington, D.C.

Dear Mr. Chairman: During my testimony on H.R. 12528 on March 18, 1974, I was asked to submit a breakdown of Antitrust Division litigation within the recent past, with an indication of the proportion of criminal cases as opposed to civil actions. I have attached an analysis of cases filed, by fiscal years.

As I indicated to you during my testimony, I view price-fixing as a crime, and generally feel that where such activity is uncovered, the Division should take criminal action. There are, however, two general kinds of situations where this approach may not always be appropriate. The first are those situations involving regulated industries, where the activities have been open and public for a period of time, arguably with either the knowledge or approval of the regulatory authorities, and where these circumstances raise real questions as to the willfulness of a particular violation. The second is those situations where the Congress has granted a limited exemption from the antitrust laws and there is some reasonable question as to whether the challenged activities fall within that exemption, again raising a real question as to the willfulness of a violation. In such circumstances, the decision to bring criminal charges must take into consideration those factors and each decision must be made on the individual merits of each particular factual situation. With those two possible exceptions, my policy has been and will continue to be to seek indictments for price-fixing activity wherever the evidence was sufficient to warrant such action.

I hope this is responsive to your inquiry. I would be glad to provide any additional information you feel useful.

Sincerely yours,

THOMAS E. KAUPER,
Assistant Attorney General,
Antitrust Division.

COMPARATIVE ANALYSIS OF ANTITRUST CASES FILED BY FISCAL YEARS

	Fiscal year								
	1966	1967	1968	1969	1970	1971	1972	1973	July 1, 1973 to Dec. 31, 1973
Cases filed:									
Civil	32	36	40	39	54	52	72	42	16
Criminal	12	17	10	14	5	12	15	20	15
Total	44	53	50	53	59	64	87	62	31
Cases filed involving price fixing:									
Civil	14	26	9	10	15	14	31	19	5
Criminal	12	16	10	13	4	9	14	19	8
Total	26	42	19	23	19	23	45	38	13
Merger cases filed	14	7	20	26	15	24	19	16	7
Of which there were bank merger cases numbering	4	1	7	12	5	8	9	3	4
Monopolization cases filed:									
Civil	5	6	3	3	11	15	13	5	4
Criminal	0	0	1	2	0	2	1	1	3
Total	5	6	4	5	11	17	14	6	7
Individuals indicted	43	70	48	28	14	34	24	42	47

Mr. MEZVINSKY. I will certainly review your testimony again with great interest and I would urge you to beef up that Antitrust Division, and I certainly urge you to vigorously go forward with the energy unit you have proposed.

Mr. KAUPER. Thank you.

Mr. SEIBERLING. Mr. Chairman, could I use up a few more minutes of the time?

Chairman RODINO. Mr. Seiberling.

Mr. SEIBERLING. Going back to the question we discussed earlier, Mr. Kauper, you also recommended bringing the State actions only when a substantial portion of the citizen consumers are affected. I just wonder if that wouldn't make for endless wrangling as to when a substantial portion was affected. Wouldn't it be better to use the traditional concept of a substantial amount of commerce being involved or is that really what you had in mind anyway?

Mr. KAUPER. Well, I suppose one could put it that way. I think what my concern is that we have some kind of substantiality requirements, simply because it seems to me that it does provide, among other things, some direction to the States as to the kind of actions they should be focusing on; and it seems to me that may be a wise thing to do.

Mr. SEIBERLING. Do you feel that putting it in terms of a substantial amount of commerce involved would be possibly the way to solve that problem?

Mr. KAUPER. I think that might be one way to do it. I think one of the concerns I would have would be that, if I may go back to an earlier question, there may be some kind of wrongs done within a State affecting, let us suppose, consumers only in a particular area of the State where there may really be no need to go to Federal court where perhaps a State court action would be sufficient. I think one of the concerns we have here is that it be the kind of action which really is of substantial enough size and dimension that it really ought to be in the Federal courts and which can't really be handled as effectively in a State action.

If you are talking about an action within a State which affects a small number of consumers it may not be the widespread kind of violation where you have wrongs or damage flowing from the same thing in other States, where you really have a need to proceed in Federal court.

Now whether the States want to permit smaller kinds of actions seems to me to be their problem.

Mr. SEIBERLING. What you are saying is if it is too substantial the State shouldn't get into it but the Federal court——

Mr. KAUPER. No, I do not mean to suggest that. I was suggesting the States, through their own legislation in State court, might find in cases of smaller wrongs or smaller numbers of consumers affected that that could be effectively handled in the State court system.

Mr. SEIBERLING. Yes, under State law.

Mr. KAUPER. The more substantial cases have to be in Federal court.

Mr. SEIBERLING. Of course, what is substantial under our traditional concepts of antitrust enforcement is in terms of a "line of commerce in any section of the country" with substantial portions of commerce involved. We might have to redefine that for purposes of this type of litigation because if you had a small State like Rhode Island and you have

what might be a substantial amount of commerce in a particular line of commerce in that State but yet you wouldn't come under traditional Clayton Act concepts of being substantial in terms of the section of the country, might have to——

Mr. KAUPER. Well, you clearly wouldn't want a standard which ultimately turned out to be dependent on the size of the State.

Mr. SEIBERLING. Do we have a problem redefining substantiality if we went that route?

Mr. KAUPER. I would not think it would be all that difficult.

Mr. SEIBERLING. Thank you very much.

Mr. DENNIS. Mr. Chairman, may I ask a question?

Chairman RODINO. Mr. Dennis.

Mr. DENNIS. Mr. Kauper, on page 2 of the bill here in section (a) (1), it seems to talk about two types of actions in a way: "as parens patriae of the citizens of that State, with respect to damages personally sustained by such citizens, or, alternatively, if the court finds in its discretion that the interests of justice so require, as a representative member of the class consisting of the citizens of that State," do you regard the first one there as a class action or not? I wasn't sure.

Mr. KAUPER. No, I do not.

Mr. DENNIS. That is what I gathered from what you said here on page 6 of your statement. They are both actions parens patriae as I understand it; why do you say that is not a class actions?

Mr. KAUPER. Well, let's take the two parts. The second part clearly refers to a class action as such, and I assume what it is saying is that the State may proceed in accord with the provisions of rule 23. It seems to me that basically is the way one would interpet that. The first, however, simply says as parens patriae of citizens of that State. That to me means the way in which parens patriae has been pleaded in a number of cases in situations in which simply individuals States are suing. They are not there technically within the concept of rule 23 as litigants with an interest which is similar to the interest of others in the same circumstances: that is, as simply one of the parties wronged representing the others. It seems to me what the first portion is doing is giving the States an independent standing, and I think it is quite clear it is not intended to be in connection with rule 23.

Mr. DENNIS. Rule 23 would not apply in that instance.

Mr. KAUPER. I think that is right. I think it would not.

Mr. DENNIS. Now, when I was talking to you about the possibility of the State legislature authorizing the action in the Federal court, I may have misunderstood you, but I got the idea that one of the reasons you thought that was not feasible was because the Federal rule might apply, and that seemed to me to be a little inconsistent maybe with the position that it didn't apply, and that is why I am trying to get that cleared up.

Mr. KAUPER. No. Let me go back through this. I think what I was suggesting was that standing in Federal court to maintain a Federal antitrust action, is still going to be governed by Federal law. Under existing Federal standards, since there has been a rejection in large part of the parens patriae concept, the normal way to handle such claims on behalf of consumers would probably be to treat it as though it were a class action, and to try to apply the criteria of rule 23.

Mr. DENNIS. No, but you said it isn't a class action and shouldn't be so treated.

Mr. KAUPER. I agree, but I don't think by amendment of State law you are going to confer a parens patriae status which the Federal courts are going to recognize. If they are confronted with this sort of a suit, since there is no Federal provision recognizing this as a basis of standing for proceeding, the odds are that Federal courts would require that it be pleaded as a class action. At that point you would be into the rule 23 problem.

Mr. DENNIS. But you are saying the courts would say they would treat it as something that you say it is not, in fact.

Mr. KAUPER. No, I mean without this legislation. Let's suppose that, without this legislation, today a State passes a statute which authorized its attorney general to represent its citizens as parens patriae, and that suit is filed by the State in Federal court. Now, I think in essence the courts have assumed, in deciding both the *Hawaii* case and the *Frito-Lay* case, that the State attorney general was acting within State law in representing those consumers. Yet they said, "As a matter of Federal law, you do not have the requisite standing under section 4 of the Clayton Act"—that is, Federal law cannot be viewed as authorizing such a suit. I don't think you are going to change that without some change in the Federal standard. That is all I have tried to say.

Mr. DENNIS. Thank you.

Chairman RODINO. As a matter of fact, if I might interject, I think it is pertinent to point out in the State of California, in the *California* v. *Frito-Lay* case, that is the very problem that was addressed. The State pointed out it was unable to sue as protector of its citizens for alleged widespread price fixing in certain food products, and the Federal appellate court observed:

"It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the State in its search for a solution." And that is what that provision in section 1 addresses itself to.

Well, I want to thank you very much, Mr. Kauper, for you certainly indeed have been most helpful and, as I stated in my opening remarks, this certainly is not end-all legislation, but it is an effort to try to pinpoint the problem that I think many States have been confronted with. We seek solutions to it, and this is why we feel that your expertise in this area is helpful to us, and we appreciate your coming here and helping us develop this kind of thinking.

I do want to say that I have received statements in answer to invitations to appear here from the Attorney General of the State of New Jersey, the Honorable William F. Hyland, who addresses himself to the legislation under consideration, and supports the legislation while he himself states that there are areas that need to be looked at closely and some areas where he felt we ought to be more precise. He has offered some suggestions and amendments. And without objection, I am going to include his statement in the record at this point.

And the statement of the Attorney General of the State of Maine who also addresses himself to this legislation.

[The statements referred to follow:]

STATE OF NEW JERSEY,
DEPARTMENT OF LAW AND PUBLIC SAFETY,
DIVISION OF CRIMINAL JUSTICE, ANTITRUST SECTION,
March 6, 1974.

JAMES FALCO,
Subcommittee Counsel, House Subcommittee on Monopolies and Commercial Law, House Judiciary Committee, Rayburn House Office Building, Washington, D.C.

DEAR MR. FALCO: The February 5, 1974 edition of *Antitrust and Trade Regulation Reports*, No. 649, at A–11 and D–1, reported that Representative Rodino, Chairman of the House Judiciary Committee, has introduced a bill to amend the Clayton Act in order to permit *parens patriae* suits, enable recovery for antitrust injuries to the "general economy," and increase the antitrust responsibilities of the Attorney General of the United States. I note the similarity between Rep. Rodino's bill and a draft of a proposed statute by Senator Philip A. Hart, Chairman, Senate Antitrust and Monopoly Subcommittee. Sen. Hart requested commments on the draft proposal from the Attorney General of New Jersey. In response to that request, I forwarded a letter to Sen. Hart, September 13, 1973, representing the collective observations and recommendations of the Antitrust Section.

Our comments concerning Sen. Hart's bill are enclosed because, in general, they are equally applicable to Rep. Rodino's proposal. Although Rep. Rodino's and Sen. Hart's bills appear identical, there are slight modifications in Rep. Rodino's bill which require some clarification.

Regarding proposed Section 4D(a), Rep. Rodino's bill would include the language, "and would probably lead to a substantial recovery of damages. . . ." Sen. Hart's language is preferable because the quoted provision would be included in Section 4D(b), which is the provision detailing the assumption of a suit by the Attorney General of the United States. Section 4D(a) should be strictly a notice provision with simple standards, as Sen. Hart's proposal provides in his version of Section 4D(a). If antitrust enforcement is to be enhanced by statutorily mandated cooperation between the Attorney General of the United States, and the Attorneys General of the several States, then an uncomplicated notice provision is required, without the need for the Attorney General of the United States to determine whether, in the first instance, an action "would probably lead to a substantial recovery of damages. . . ." Thus, the language should be deleted from Section 4D(a) and included, if otherwise desirable, in Section 4D(b). The term "substantial recovery of damages" presents definitional problems, as well. *See* Letter to Senator Philip A. Hart, p. 5, enclosed.

Section 4D(c) of Rep. Rodino's bill is also an undesirable revision of the language in Section 4D(c) of Sen. Hart's proposal, which provided for the recovery of damages pursuant to Section 4C(b)(1) and "on a nationwide basis, or on the basis of any section of the country. . . ." If the Attorney General of the United States does bring an action as *parens patriae* for the citizens of more than one state, which realistically could be the case, then proof of damages, already difficult in antitrust cases, becomes additionally attenuated. It must be clear to all parties and the courts that, if necessary, recovery may be based upon methods pursuant to Section 4C(b)(1) and that provision of Sen. Hart's bill which provides for recovery, "on a nationwide basis, or on the basis of any section of the country. . . ."

It was unnecessary to provide for "actual attorney's fees" in Section 4D(b) of Rep. Rodino's bill. As long as "litigation expenses" and "administrative costs" are permitted, there is no need to provide for fees which reduce total recovered funds and settlement funds, and provide unnecessary enrichment. Admittedly, monies are needed to finance the increased responsibility of the Attorney General, *see* Letter to Senator Philip A. Hart, pp. 5 and 7, attached, but such monies should not be deducted from the recoveries of those the statute seeks to protect, *i.e.*, the citizens of the several States.

One point, discussed in the letter to Sen. Hart, at page 5, but worthy of reiteration, is the fact that the bills provide for notification to the state attorneys general only "(w)henever the Attorney General of the United States has brought an action under Section 4A" of the Clayton Act. Since so few United States actions are for damages, notification should be mandatory not only in actions by the United States for damages under Section 4A, but also for actions in which the United States is suing for equitable relief.

The bill by Rep. Rodino and the proposed amendment by Sen. Hart are desirable attempts to increase antitrust enforcement. But, unless the language of the bills are clarified and revised before passage, defendants will challenge the statute and encourage even more protracted antitrust cases, if that is conceivable. The language of the bill should be as precise and comprehensible as draftsmen can achieve, and the bill should insure the additional legal and investigational resources demanded by the increased statutory responsibility of the Attorney General of the United States.

Very truly yours,

WILLIAM F. HYLAND,
Attorney General of New Jersey.
By ELIAS ABELSON,
Deputy Attorney General.

Enclosure.

STATE OF NEW JERSEY,
DEPARTMENT OF LAW AND PUBLIC SAFETY,
DIVISION OF CRIMINAL JUSTICE, ANTITRUST SECTION,
Trenton, N.J., March 13, 1974.

HON. PETER W. RODINO,
Chairman, House Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE RODINO: I have received a copy of H.R. 12528 which seeks to amend the Clayton Antitrust Act in order to permit *parens patriae* suits, enable recovery for antitrust injuries to the "general economy," and increase the antitrust responsibilites of the Attorney General of the United States. I have carefully reviewed the Amendments with members of my staff, and it is our conclusion that the bill is a highly desirable attempt to accomplish its stated aims. However, the language of the bill should be as precise and comprehensible as draftsmen can achieve in order to avoid the twin pitfalls of more protracted antitrust cases, and conflicting judicial interpretation caused by statutory imprecision and vagueness. We would support the bill if the following suggestions are incorporated into the proposed act.

Apart from any specific comments or recommendations offered herein, any statute permitting damage actions for alleged antitrust violations confronts the murky area of the "pass-on" question. The critical issue of "passing on" in actions under Section 4 of the Clayton Act involves the right to sue of so-called "indirect" purchasers, "end-users," or persons more than one step removed from the manufacturer of a product. Generally, defendants in these type of cases assert that the holding of the Supreme Court in *Hanover Shoe, Inc. v. United States Machinery Corp.*, 392 U.S. 481 (1968), prevents all "indirect" purchasers from suing either, (a) because they lack "standing" as a matter of law due to their position in the distribution chain, or (b) because insurmountable and insuperable problems of proof preclude recovery on "remote" claims. *See e.g.*, Brief for Defendants in Support of Motion for Summary Judgment, *Master Key Antitrust Litigation* M.D.L. Docket No. 45 (All Cases) (D.Conn. 1973). In point of fact, the holding in *Hanover Shoe* simply concerned the proper scope of the "passing-on defense," not the question whether indirect purchasers, such as states and municipalities, may bring suit to prove that they suffered injury by having to pay inflated prices. The ability of governmental entities, consumers, and other purchasers to secure compensation for damages caused by antitrust violations, as well as the avowed deterrent effect of antitrust actions, will be drastically reduced and restricted if the courts conclude that the plain words of Section 4 ought to be limited to only first purchasers in the distribution chain. In a cogent and persuasive argument the Department of Justice concluded that Section 4 and the *Hanover Shoe* decision should not be read to limit purchasers in the distribution chain from proving damages. Brief for United States as Amicus Curiae, *Master Key Antitrust Litigation* M.D.L. Docket No. 45 (All Cases) (D. Conn. 1973). *See Boshes v. General Motors Corp.*, 68 C. 1454 (N.D. Ill. May 3, 1973); *Southern General Builders, Inc. v. Mall Industries, Inc.* 67–486–Civ. (S.D. Fla. 1972); *"Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine,"* 72 Colum. L. Rev. 394 (1972).

Recently, Judge Blumenfeld in the United States District Court for the District of Connecticut denied a motion for summary judgment by defendant manufacturers of master key systems. Hopefully, his clear and thoughtful opinion will be

followed in other districts. But we should not leave open important questions of antitrust policy when Congress has an opportunity to decide the issue.

The proposed amendments will not afford a practicable remedy for injured consumers unless there is express language in the statute resolving the pass-on issue. States, municipalities, and consumers purchase the great majority of products indirectly. Conceivably, Congress could grant the states the power to represent anyone at any time in antitrust actions, but even under such a proposal antitrust violators would not be effectively deterred unless the pass-on issue is eliminated. The remedy this amendment proposes is rendered "a snare and a mere delusion" unless the amendment clearly permits states and municipalities to sue without the specter of successful summary judgment motions by defendants lurking in the background. 51 *Cong. Rec.* 3150 (1890) (Senate Debates on Sherman Act).

Specifically, the preamble or introduction to the act should follow the language of Section 4 of the Clayton Act, so as to prevent the need for judicial interpretation of new language and to rely on a developed body of law. Under the same reasoning it is questionable whether the terms "citizens" or "political subdivisions" should be utilized. Rather the term "persons" is advised, thus incorporating the Clayton Act interpretation of the term. The introduction might read as follows:

> "An Act to permit the Attorneys General of the several states to sue for damages to secure redress to any person within their respective states who shall be injured by reason of anything forbidden in the antitrust laws."

A definitions section should be included to avoid misinterpretation. For example:

DEFINITIONS

(a) The term "any person" . . . . (incorporation of Clayton Act definition:)
(b) The term "injured" shall be construed to mean that anyone in the distribution chain of a product or service shall be afforded the opportunity to prove his injury and damages in any court of competent jurisdiction. This Act shall *not* be interpreted to limit recoveries to any one level, purchaser or group of purchasers in the distribution chain.

The clear-cut definition of "injured" enhances the potential effectiveness of the antitrust laws since it permits anyone who can prove an injury and damages to recover regardless of their position in the system of distribution and regardless of other recoveries flowing from the same violation. This provision eliminates the pass-on issue as a major hindrance to state and federal antitrust enforcement. Naturally, the term "citizens" must be consistently replaced throughout all provisions of the amendments to comport with the recommendations, *supra*.

The language of Section 4C(a) (2) must be reworded. The term "damages" is a word of art and should not be confused with an "*injury*" to the general economy for which damages or other appropriate relief may then be awarded, or decreed. Thus, the provision should read as follows:

> Sec. 4C(a) "(2) Respecting injury to the general economy of their respective states."

There is no need for the term *parens patriae* in Section 4C(a) (2) because Section 4C(a) grants to the Attorneys General the right to sue. Unless the language is altered your proposal would read:

> Sec. 4C(a) ". . . entitled to recover *damages* . . . provided in such sections—
> (2) As *parens patriae, respecting damages* to the general economy . . . ." (emphasis added).

Such language would be redundant and inaccurate as to both the nature of "*parens patriae*" and "damages". The major questions in granting a procedural right to sue for an injury to the general economy are how to determine the injury, as well as how to measure damages. The measure of damages for Section 4C(a) (1) is provided in Section 4C(b) (1) and (2) but unfortunately no standards are provided to measure damages for an injury to the general economy. If "general economy" is being used to reflect an injury to individuals in *toto*, then any recovery under Section 4C(a) (1) as provided in 4C(b) (1), would be an equivalent compensation. If injury to the "general economy" is intended to recompense the state for an injury to the relevant market *qua* market, then attention must be given to the matter of proof of such an injury.

Proof of injury under the latter definition of the term could entail an economic structural analysis of the relevant geographic and product markets, as well as extensive economic proofs. Such proofs often rely on economic theorems capable

of being challenged by defendants with counterveiling theorems equally as impressive as those asserted by plaintiffs. One means of avoiding an economic quagmire is merely to declare that proof of an antitrust violation under Section 4C(a) (1) is *conclusive proof* of an injury to the general economy. Naturally, the definitions section of the act should include a sweeping definition of "relevant market" obtained from Supreme Court opinions, if the provision for injury to the general economy is expanded to reflect a separate injury to the market, as contrasted wih an injury to individual purchasers. Under this theory, an injury to the general economy would then be in addition to recoveries by the State or individuals under Section 4C(a) (1).

Once the nature of the injury is defined, remedies for the injury must be legislatively created. Obtaining damages pursuant to the "general economy" provision will be extremely difficult since there is no standard for measuring damages. The provision must include language measuring monetary damages, (*e.g.* damages could be computed upon a set percentage of the total Federal, State, or individual recoveries) or granting to the courts the power to fashion any relief appropriate to remedy the anticompetitive effects of the violations. Perhaps this leads to an economic structural analysis, but it is more efficient as well as effective to leave to the courts and parties involved the incidentals of structuring appropriate relief than to waste them, money and effort in attempting to *initially* prove, by economic analysis, there was an injury in fact. Of course, any settlements among the parties could result in both monetary damages as well as other relief for the injury to the general economy. The courts would then be vested with the power to review relief at the request of any of the parties, whether it be under final decree or settlement.

Undoubtedly, questions will arise regarding the *pro rata* distribution to individuals proving an injury and damages. For example, if a resident of the State X is injured by A & B Corporations, and then the resident moves to State Y, which state does the resident look to for recovery? The language of the proposed act could require the courts to deal with specific questions as they arise, consistent with the policies expressed in the act. But how far does the individual's right to sue extend? Does an action by the Attorney General of the United States, after appropriate notice to the State, cut off the individual's right to bring an independent action? Is notice required for all individuals so as to bar all individual suits upon the commencement of the federal action? What about the effects of collateral estoppel or res judicata? The most equitable resolution to these issues would be to permit all individuals to sue at any time, subject of course to the limitations period, and then consolidate the actions with the federal and state actions pursuant to the Rules for Multidistrict Litigation or the Federal Rules of Civil Procedure. This would permit the court to adjudicate individual claims and provide for any *pro rata* shares by way of set-off as to the individual claims.

Realistically, the provisions relating to the duties of the Attorney General of the United States will cause strong opposition to the amendments from the Deparment of Justice because of the increased responsibility. The proposal does not appear to furnish administrative expenses to provide for the initial costs of manpower, notifications, additional suits, reports, and miscellaneous expenses. Some opposition could be removed by adequately providing for these maiden outlays.

The provisions relating to the Attorney General of the United States present troublesome, but not unmanageable problems. Why is notification mandatory *only* in actions in which the United States is suing for damages? Since so few United States actions are for damages, notification should be mandatory for actions in which the United States is suing for *equitable relief*, as well.

Regarding proposed Section 4D(a), the language, "and would probably lead to a substantial recovery of damages," should be deleted and included, if otherwise desirable, in Section 4D(b), which is the provision detailing the assumption of a suit by the Attorney General of the United States. Section 4D(a) should be strictly a notice provision with simple standards. If antitrust enforcement is to be enhanced by statutorily mandated cooperation between the Attorney General of the United States, and the Attorneys General of the several States, then an uncomplicated notice provision is required, without the need for the Attorney General of the United States to determine whether, in the first instance, an action "would probably lead to a substantial recovery of damages . . . ." The term "sustantial recovery of damages" will present definitional and practical problems also. Does this term refer to the potential aggregate damages, or damages respecting individual states. Conceivably, if corporate conspirators were operating in, *e.g.* eight states, the aggregate amount of damages could be substantial, but indi-

vidual states might not reach the requisite level of substantiality. Thus, the language of Section 4D(b) must be further refined to reflect *aggregate* damages.

Unfortunately, the amendments do not accord to the States any discretion to bring a State action beyond the ninety-day period without the Attorney General of the United States first commencing an action at the end of this period. The State may have on-going investigations, or desire a broader, or more comprehensive action than the United States suit and would prefer to sue at a different and perhaps more advantageous time. In balancing the underlying theory of this provision (*i.e.*, to protect consumers by means of a federal action in the face of state inaction) against the discretionary powers of the State, it would be advisable to include a provision permitting the State not to sue within and beyond the ninety days *only* if the State furnishes notice of its intentions to the Attorney General within ninety days. The State should then be allotted a reasonable time in which to sue beyond the ninety days before the Attorney General assumes the responsibility of suit. There should be language permitting the State to assume the burdens of the litigation from the Attorney General at any point in the litigation. Since the State bears the most direct responsibiliy for is citizens, at the State's discretion, the State should be granted the right to assume the suit. Naturally, all antitrust suits against the same defendants would be consolidated for purposes of efficiency in adjudication.

Another important failing of the provision regarding notice to the States and the assumption of the suit by the Attorney General of the United States is the complete lack of statutory language which would require the Attorney General to divulge sufficient investigational and legal information concerning particular cases. Unless States obtain such information any State action will be subject to dismissal for failure to state or prove a claim. There must be coordination of information if antitrust enforcement is to be improved.

Administrative problems arise as a result of recoveries by way of settlement or trial verdict. If the Attorney of the United States sues without the State intervening or assuming the suit, is the Attorney General responsible for the distribution of the monies to the State and consumers? Which federal agency or body would be responsible for notice to consumers, the determination of valid claims and the distribution of monies? Additional questions arise if the last sentence in Section 4D(c) is interpreted to mean that the States receive the monies recovered by the Attorney General and the States distribute the monies pursuant to Section 4C(b)(2). If the State is to receive the monies recovered by the Attorney General, then the language of Section 4D(b) must be altered to reflect an action by the Attorney General not as "*parens patriae* of the citizens of such State" but rather as *parens patriae* of the state, with Section 4C(b)(2) a mandate to the State for the method of distribution. If the State is responsible for the notice, determination of claims and distribution of monies, the State will be faced with enormous administrative problems. The problem is not money but time, manpower, appeals, etc. One possible solution is the appointment of a special master to administer the recoveries, with the master's fee limited to a percentage of the recovery. This would free the limited resources of most state antitrust sections for state antitrust matters without bearing the burden of numerous recovery complaints and claims directed at the sections.

Section 4D(c) is also undesirable because it does not provide for a reasonably efficient computation of damages when the Attorney General of the United States brings as action as *parens patriae* for the citizens of more than one State, or on behalf of more than one State. Proof of damages, already difficult in antitrust cases, becomes additionally attenuated unless, the bill provides for recovery of damages pursuant to Section 4C(b)(1) and also, *e.g.*, "on a nationwide basis, of any section of the country." It must be clear to all parties and the courts that, if necessary, recovery may be based upon methods designed to alleviate technical and administrative problems.

The language in the Section 4D(b) as to "consolidation" would be clarified to reflect the procedures previously established under the Rules for Multidistrict Litigation, 28 U.S.C. § 1407. If the Attorney General of the United States sues pursuant to the proposed statute, interim reports to the states should be issued on the progress of the litigation.

It was unnecessary to provide for "actual attorney's fees" in Section 4D(d) of the bill. As long as "litigation expenses" and "administrative costs" are permitted, there is no need to provide for fees which reduce total recovered funds and settlement funds, and provide unnecessary enrichment. Admittedly, monies are needed to finance the increased responsibility of the Attorney General, but

such monies should not be deducted from the recoveries of those the statute seeks to protect, *i.e.*, the citizens of the several States.

Since many settlements and verdicts may include future review of the defendants practices, the question of funds for compliance programs may arise. If the Department of Justice compliance program allocations are insufficient to meet the increased administrative functions, additional funds be provided. One possible way to avoid staunch opposition to the provisions relating to the Attorney General of the United States is to remove all the affirmative duties of the Attorney General except the notice provisions. Although a *parens patriae* enabling statute would survive, an underlying policy of the act would be removed, *i.e.*, federal vindication of individual losses from antitrust violations. The Congress must balance this loss against the concepts of federalism and the potential dilution of other Department of Justice enforcement activities as a result of the added responsibilities under the proposed act. We must emphasize the critical importance of the pass-on issue to effective antitrust enforcement. These amendments will remain impotent if the passion issue is decided adversely to states and government entities because of their position in the distribution chain.

We direct your attention to the New Jersey Antitrust Act wherein the Attorney General is granted three options to strengthen antitrust enforcement. The Attorney General may (1) "sue on behalf of the State or any of its political subdivisions or public agencies." (2) direct the political subdivisions or public agency to bring an antitrust action, or (3) grant permission to a political subdivision or public agency to bring an antitrust action to recover damages under the State act or comparable provisions of Federal law, N.J.S.A. 56:9-12(b). Thus, no Federal Rule 23 class action motion is required in an action by the State on behalf of itself and governmental entities for antitrust violations because the municipalities are subject to Legislative direction. Since the municipalities are creatures of the State, and are merely considered agencies or departments of the State, the State may choose when, and on whose behalf the State will sue. *See Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *Trenton v. New Jersey*, 262 U.S. 182,186–87 (1923); *Jersey City v. Martin*, 126 N.J.L. 353 (E & A 1941).

None of the comments or criticisms presented herein should be construed to signify opposition to the proposed act by the State of New Jersey. Rather, the underlying premise of the act is a provocative and necessary step to increase the efficiency of antitrust enforcement, but the act must be devoid of any foreseeable interpretive difficulties.

We hope our comments will aid you and the Committee on the Judiciary in your inquiry regarding H.R. 12528. If we can be of any further assistance please notify us.

Very truly yours,

WILLIAM F. HYLAND,
Attorney General.
By ELIAS ABELSON,
Deputy Attorney General.

STATE OF MAINE,
DEPARTMENT OF THE ATTORNEY GENERAL,
Augusta, Maine, March 8, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, Commitee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. RODINO: This is to advise you of my support for H.R. 12528, "A bill to permit the attorneys general of the several states to secure redress to the citizens and political subdivisions of their states for damages and injuries sustained by reasons of unlawful restraints and monopolies.

The recent settlement of the antibiotic antitrust cases illustrates the importance of confirming the Attorney General's traditional role as legal representative of the public interest, free of the doubts raised by conflicting judicial opinion. The redress ultimately obtained for the consuming public in that case would not, as a practical matter, have been possible without the kind of representative litigation this bill would allow. As a result of that settlement, the State of Maine will be able to support a drug education program that otherwise would have required the use of tax revenues.

It is hard for me to imagine more appropriate representatives of the general public than the attorneys general of the several states. Unlike private counsel,

they indisputably can have only one interest in the litigation, protecting the public they serve. It should be remembered, moreover, that the litigation contemplated by H.R. 12528 would seek only to recover moneys wrongfully taken from the public and the economy of the state through unlawful trade practices.

I strongly urge the Committee to report this bill favorably and work for its early passage.

Yours very truly,

JON A. LUND,
Attorney General.

Mr. DENNIS. Mr. Chairman, can I ask the gentleman one more question?

Chairman RODINO. I would merely like to announce that the subcommittee will meet again on Monday, next, the 25th, to hear several attorneys general and we will meet at 10:30 in the morning.

Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. Kauper, I wanted to come back to one point. Did I understand you correctly that with respect to section 4D in the bill you felt that it ought to be changed to give the State attorneys general some discretion as to whether or not he would bring an action which apparently in that particularly limited class of case if the attorney general brought a suit under section 4A, the State attorney general is left no discretion at all really, as I read it.

Mr. KAUPER. Quite to the contrary, Mr. Dennis, our objection is quite different. It is that the Attorney General of the United States is not left with any discretion.

Mr. DENNIS. Well, neither one of them are, it seems to me, and if the Attorney General of the United States brings a suit and notifies the attorney general of the State, then the attorney general of the State has got to sue whether he wants to or not or that will be taken over by the Attorney General of the United States.

Mr. KAUPER. I think it is clearly the intention of the statute that one or the other is going to bring the suit, yes, that is true. I think our objection goes to the provision that the Attorney General of the United States be required to bring the action. I suppose that if you had a requirement that the State attorneys general otherwise themselves must bring the action they probably would have the same problem.

Mr. DENNIS. Well, I think your point is well taken, but I am not sure why the State attorney general should be forced to bring the action either if he doesn't want to.

Mr. KAUPER. Well, it seems to me that whoever is going to bring the action has to have the normal kind of discretion that you would expect in a legal officer assessing a filing of a case.

Mr. DENNIS. That is my point. Thank you.

Mr. KAUPER. OK.

Chairman RODINO. I want to thank you very much, Mr. Kauper.

Mr. KAUPER. Thank you very much, Mr. Chairman.

Chairman RODINO. The meeting stands adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned, to reconvene on Monday, March 25, 1974, at 10:30 a.m.]

ANTITRUST PARENS PATRIAE AMENDMENTS

MONDAY, MARCH 25, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:35 a.m., in room 2141, Rayburn House Office Building, Hon. John F. Seiberling, presiding.

Present: Representatives Seiberling, Jordan, Mezvinsky, Hutchinson, McClory, and Sandman.

Also present: James F. Falco, counsel; Franklin G. Polk, associate counsel.

Mr. SEIBERLING. The Subcommittee on Monopolies and Commercial Law is now in session.

We are very gratified this morning to have with us as our first witness the Honorable Andrew P. Miller, attorney general of the State of Virginia, and chairman of the Antitrust Committee of the National Association of Attorneys General. Mr. Miller, welcome to this session of the subcommittee on the hearings on H.R. 12528 and H.R. 12921, the parens patriae antitrust bills.

Mr. Hutchinson, do you have anything you would like to add?

Mr. HUTCHINSON. No, Mr. Chairman. I have nothing further except to join in your welcome of Mr. Miller, and I am sure we will be interested in his testimony.

Mr. SEIBERLING. Thank you.

Mr. Miller, you may proceed. Would you like to introduce the people with you at some point in your testimony?

Mr. MILLER. Yes, sir, I will.

[The prepared statement of Hon. Andrew P. Miller follows:]

STATEMENT OF ANDREW P. MILLER, ATTORNEY GENERAL OF VIRGINIA, CHAIRMAN OF ANTITRUST COMMITTEE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. Chairman and Members of the Committee: I am pleased to appear today to testify on H.R. 12528, a bill which will achieve (1) enhanced protection for consumers in this country, and (2) a strong deterrence to antitrust violators.

I appear not only as Attorney General of the Commonwealth of Virginia, but also as Chairman of the Antitrust Committee of the National Association of Attorneys General. H.R. 12528 will have significant effect on the enforcement role of both the States and the federal government. It drew the immediate attention of the Association and of the various Attorneys General. Some have corresponded directly with this Committee as to their views and other comments have been coordinated through my Office. I present for the Committee's consideration statements on behalf of the Attorneys General of Oregon, Colorado, and Alabama indicating their individual views concerning the proposed legislation. Other states, such as New Jersey, California, and New York, have submitted comments directly to the Committee. Still others are present today to

express to the Committee their endorsement of the Bill, as well as to answer any questions Committee members may direct. My comments correlate the respective views of the various States and reflect the position of the National Association of Attorneys General.

Unfortunately, for the great majority of States, realization of the impact of antitrust violations did not come to light until recent years. Since that time, however, there has been a marked increase shown in the States' capability to deter violations of the antitrust laws. A major example is *In re Antibiotic Antitrust Actions*. Numerous States, including the Commonwealth of Virginia, have created programs of their own for effective antitrust enforcement. The States have also taken the initiative in seeking, with the Department of Justice, Antitrust Division, the establishment of cooperative methods for the deterrence of antitrust violations. In some instances, for example, *Fleet Discount* and *Ampicillin* antitrust litigation, action by the States was the impetus for federal action. Through innovation, the States have had a major impact on the subject matter as well as the remedial scope of antitrust enforcement.

H.R. 12528 provides incentive for greater cooperation and innovation by the States and the Department of Justice. The bill allows the States, through their respective Attorneys General, to bring both injunctive and damage actions on behalf of (1) citizens of the various States, and (2) on behalf of the general economy of the State and its political subdivisions. [Section 4C(a)(1)(2).] The bill further strengthens remedial and consequently deterrent aspects of antitrust enforcement, in its provisions for the manner of measuring and distributing damages. [Section 4C(b)(1)(2).]

Let me comment now on the three sections in question. These are Sections 4C, 4D, and 4E.

Section 4C(a) strengthens the traditional concept of *parens patriae* and by definition clarifies some confusion the term has caused in the past. The ability to effectively deter antitrust violations through the application of the *parens patriae* doctrine, was significantly diminished by the Supreme Court's decision in *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251 (1972). There, the State of Hawaii sought treble damage recovery for an injury to its general economy, allegedly attributable to a violation of the antitrust laws. The Court, sustaining a motion to dismiss, rejected the claim for damages. Subsequently, the Ninth Circuit Court of Appeals in *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (1973), *cert. den.* 412 U.S. 908 (1973), struck down a somewhat different concept of *parens patriae* when it refused to allow the State of California to seek recovery for injury to its citizen consumers for alleged antitrust violations in the Potato Chip Industry. This bill reverses both cases.

As noted by the State of California, it is vital that damages be recovered in a *parens patriae* action such as that as existed in *Frito-Lay*. It is also vital that a state, damaged in its general economy, recover for such injuries.

I am advised, by economists, that ascertainment of the fact of damage can be established and distinguished for both concepts of *parens patriae*. It is logical that if "x" dollars are taken from each citizen of a state as a result of antitrust violations, that those dollars do not flow into the general economy of such state. There can and should, therefore, be a recovery to (1) the State for injury to its overall general economy and (2) damages to citizen consumers for injuries they have sustained.

In *Hawaii*, there was no opportunity to demonstrate, in a court of law, that both types of damages could be ascertained and distinguished. It was presumed, or better stated, feared, that there would be duplicative recovery.

Gentlemen, we do not advocate that there should be duplicative recovery. The fact remains that there is no reason at all why an individual who causes damages by his actions should not be made to pay for such damage. We do not, therefore, endorse or agree with the comments by the Department of Justice that this bill creates serious difficulties with the possibility of potential duplicative major questions as the relationship of *parens patriae* and the class action provisions of Rule 23 of the Federal Rules of Civil Procedure. District Court Judges, such as Judge Wyatt in the *Antibiotics* litigation, have been quite innovative in exercising equitable powers inherent in the courts once harm and liability have been demonstrated. The attempt by the Department to raise numerous due process and notice problems is misleading. Even under Rule 23 there is never a rigid formula as to the type notice that must be given. The Supreme Court has recognized that notice requirements will vary with circumstances and conditions. Rule 23 similarly allows for such flexibility by

using such terms as "the best notice practicable under the circumstances," or requiring individual notice identification "through reasonable effort." I know of no reason why the courts should not continue to possess such flexibility. In short, the National Association of Attorneys General supports Section 4C(a). It is not felt that there is merit to the potential problems raised by various other speakers.

I would make, however, two comments applicable to Section 4C(a).

First, as noted by others, the word "citizens" could cause some confusion. Recommendations have been made that the word "person" be substituted. This would allow for consistency since such term is defined in Section 4. We feel this is a valid recommendation.

Second, numerous occasions can arise where there is a need to bring an action on behalf of not only citizens, but political subdivisions of the state as well. Consequently, it is recommended that a subparagraph 3 be inserted allowing the Attorney General to bring an action "as representative of a class consisting of political subdivisions of that State." With appropriate changes in Section 4C(b), the measurement of damage provisions could be utilized and the aggregate damages sustained by political subdivisions may be recovered.

(There are some technical changes that are recommended in addition to the substantive changes which I will address myself to; for the convenience of the Committee, I have attached a redraft of the bill incorporating both types of proposed revision.)

Section 4C(b) provides for the measurement and distribution of damages. It clarifies the so-called "fluid class recovery" concept. It does nothing more than allow recovery of provable damages resulting from antitrust violations. Comments made by the Department of Justice regarding "unquantifiable and perhaps totally unforseeable damages multiplied by three," are, we believe, without merit. Traditionally, there has always been a distinction drawn between the fact of damage and the amount of damage. One must prove the fact of damage. It does not appear that it is the intent of Section 4C(b) to alter this substantive law. Once, however, the fact of damage is established, the amount of damage can be demonstrated, though such amount is uncertain. As stated in *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555 (1931):

> "Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based on mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of damages; but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount."

Let me turn now to Section 4D(a). This provides that whenever the Attorney General of the United States brings an action under section 4A, he must notify the various Attorneys General of the States if he has reason to believe such action would probably lead to a substantial recovery of damages on behalf of the citizens of that State. Cooperative efforts between the States and the Antitrust Division have been sought and implemented in some cases. We favor this section which would aid in closer cooperation. It is limited, however, to notification only when a damage action is instituted by the Attorney General. We see no reason why such notification, with the resultant cooperative efforts inherent, should not also be required in injunctive actions. To this regard, we do recommend, therefore, that the reference to Section 4A be deleted.

Section 4D(b) provides that following any notification the state notified would have ninety days to decide whether it would file an action. If it declines or fails to institute suit within the ninety-day period, the Attorney General, as directed by the bill, would institute an action "in place of the State attorney general" and as "*parens patriae* of the citizens of such State for the purposes of such action." We are not inclined to believe that the notification process of Section 4D(a) would be burdensome. We must agree, however, with the remarks of the Department of Justice's Antitrust Division that the provisions of Section 4D(b) could create serious problems.

Effective antitrust enforcement through cooperative efforts of the States' Attorneys General and the Department of Justice is now coming to the forefront. Any antitrust litigation is time consuming and quite expensive. Decisions regard-

ing the filing of a suit must be carefully considered. This provision, for automatic filing of suit on behalf of various States, will most assuredly result in increased pressures on already overcrowded judicial dockets. It will, as you have been told, place further burdens on an already undermanned Antitrust Division. As pointed out earlier in my remarks, states have had a major impact on the subject matter of antitrust enforcement. Either individually or through cooperative efforts, the States have attacked those violations having a direct, significant, major impact. For example, notwithstanding that a grand jury investigation in the cast iron pipe industry was aborted, the States have been active in the *Cast Iron Pipe Antitrust Litigation*. Unmanageable situations could arise if, as contemplated by Section 4D(b), there would be an automatic filing of time consuming and expensive antitrust litigation once a ninety day period had passed.

In addition, Section 4D(b) could create, unfortunately, an atmosphere which would defeat the main objective of Section 4C; that of "adding 50 more strings to the antitrust bow." California and New York have well staffed and trained antitrust divisions in the Attorney General's office. Virginia and many other States are now in the process of either enacting effective antitrust laws or instituting responsive programs in this area. There are some states, however, which at present have neither the staff nor financial resources to establish and maintain a credible enforcement effort. Section 4D would, I believe, create an actual disincentive for such states to implement antitrust enforcement on their own. We recommend Section 4D(b) not be enacted.

Let me turn lastly to Section 4E. This section permits States to recover treble damages for the entire amount of overchanges or other damages sustained in connection with any federally-funded State program. This section accomplishes two objectives which have long been sought after. First, it insures that States have a right to recover treble damages for all injuries suffered, regardless of how various programs were funded. Second, it clarifies the measure of damages that the United States is entitled to, when any antitust action involves a State program that is federally-funded.

There should, however, be some further refinement in the phraseology of this provision. It is suggested that, rather than allow the United States to secure reimbursement "under such regulations as the respective federal agencies responsible for such programs shall publish," the United States be entitled to secure reimbursement of its equitable share of any recovery for damages "to be measured in terms of its previous contribution to the state program."

For the same reason that we opposed Section 4D(b), we must oppose that provision in Section 4E allowing the Attorney General to institute suit on behalf of the State if it fails to bring any such action itself within a ninety-day period.

Aside from my negative comments regarding the provisions allowing the Attorney General to sue in place of State Attorneys General, I want to emphasize our Association's endorsement of the thrust of H.R. 12528. With cooperative effort and with the tools, both procedural and remedial, that this bill provides, effective enforcement and deterrence of antitrust violations will be enhanced. As reflected in comments by others, the bill creates unique opportunities for balanced and comprehensive law enforcement. It encourages greater state innovation and participation. It provides needed protection for consumers and will lead to a general strengthening of the overall competitive economy of the United States.

I appreciate the opportunity to appear before you and will be happy to respond to any questions that you may wish to ask.

SUGGESTED REVISIONS TO TEXT OF H.R. 12528 (NEW MATERIAL IS ITALICIZED; MATERIAL TO BE DELETED IS ENCLOSED IN BRACKETS)

"SEC. 4C. (a) Any attorney general of a State may bring a civil action in the name of such State in the district courts of the United States under section 4 or 16, or both, of this Act, and [he] *such State* shall be entitled to recover damages and secure other relief as provided in such sections—

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

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

"(3) *on behalf of any or all political subdivisions of that State with respect to damages sustained by such political subdivisions.*

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

"(1) may recover the aggregate damages sustained *by the persons or political subdivisions on whose behalf the State sues*, [the citizens of that State,] without separately proving the individual claims of each such *person or political subdivision;* [citizen;] and [his] proof of such damages *shall* [may] be based on *any or all of the following:* statistical *or* sampling methods, the pro rata allocation of *illegal overcharges* [excess profits] to sales occurring within the State, or such other reasonable system of estimating aggregate damages as the court in its discretion may permit; and

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

SEC. 4D. [(a)] Whenever the Attorney General of the United States has brought an action under [section 4A of] this Act, and he has reason to believe that any State attorney general would be entitled to bring an action based substantially on the same cause of action [, on behalf of the citizens of his State] pursuant to section 4C of this Act [and would probably lead to a substantial recovery of damages], he shall promptly so notify such State attorney general.

[Omit subsections (b)–(d)]

SEC. 4E. With respect to any federally funded State program affected by antitrust violations, any State shall be entitled to treble damages for the entire amount of overcharges of other damages sustained in connection with such a program. [The Attorney General of the United States * * *.] The United States shall be entitled to secure reimbursement of its equitable share of any recovery of damages under this section, *to be measured in terms of its previous contribution to the State program.* [under such regulations as the respective Federal agencies responsible for such programs shall publish.] The provisions of section[s] 14C(b) [and 4D (c) and (d)] of this Act shall apply to any action and damages recovered therein pursuant to this section.

TESTIMONY OF HON. ANDREW P. MILLER, ATTORNEY GENERAL OF VIRGINIA, CHAIRMAN, ANTITRUST COMMITTEE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ACCOMPANIED BY GERALD J. DOWLING, ASSISTANT ATTORNEY GENERAL OF CONNECTICUT; JOHN DESIDERIO, ASSISTANT ATTORNEY GENERAL OF NEW YORK; C. RAYMOND MARVIN, ASSISTANT ATTORNEY GENERAL OF OHIO, CHIEF, ANTITRUST SECTION; AND ANTHONY JOSEPH, ASSISTANT ATTORNEY GENERAL OF CALIFORNIA

Mr. MILLER. I am pleased to appear today to testify on H.R. 12528, a bill which will achieve in the opinion of the Antitrust Committee of the National Association of Attorneys General (1) enhanced protection for consumers in this country, and (2) a strong deterrence to antitrust violators.

I wish to commend the committee for its interest in this area of the law.

I appear not only as attorney general of the Commonwealth of Virginia, but also as chairman of the Antitrust Committee of the National Association of Attorneys General. In our view, H.R. 12528 will have significant effect on the enforcement role of both the States and the Federal Government. It drew the immediate attention of the association and of the various attorneys general. Some States have corresponded directly with this committee as to their views and other comments have been coordinated through my office.

I wish to present for the committee's consideration at this time statements on behalf of the attorneys general of Oregon, Colorado, and Alabama indicating their individual views concerning the proposed legislation. Copies of the statements have been filed with the committee counsel, and I would ask that they be made a part of the record.

Mr. SEIBERLING. Without objection, it will be so ordered.

[The documents referred to follow:]

THE STATE OF COLORADO,
DEPARTMENT OF LAW,
OFFICE OF THE STATE SOLICITOR GENERAL,
Denver, Colo., February 26, 1974.

Hon. ANDREW P. MILLER,
Attorney General of Virginia,
Supreme Court, Library Building,
Richmond, Va.

DEAR GENERAL MILLER: It is my understanding that you propose to testify before the appropriate committee of the Congress in favor of House of Representatives Bill 12528 to permit the attorneys general of the several states to secure redress to the citizens and political subdivisions of their state for damages and injuries sustained by reason of unlawful restraints of trade and monopoly practices.

Unfortunately I find it impossible to leave Denver at this time to come and testify personally in favor of this bill. While there are provisions contained in sections 4D(b) and the remainder of the bill which could be considered to be a stronger than necessary pre-emption of states' rights, it is my feeling that the bill as a whole deserves passage and would provide a real remedy where none now exists. Nevertheless I would be in favor of passage of the bill even if it were to stop at the end of section 4D(a) which appears on line 17 of page 3 of the printed draft bill although I would prefer that the bill passed in its entirety.

We have discovered from a number of recent situations in our state that there is a real and absolute need for the attorney general of the state to sue as parens patriae for the citizens of his state and to recover damages in the ways suggested in the bill.

It is my hope and desire that when you appear to testify on behalf of HR 12528 you will present this letter to the Committee and indicate my support for the bill as well as my regrets for being unable to appear personally.

With best personal good wishes, I remain

Sincerely yours

JOHN P. MOORE,
Attorney General.

STATEMENT OF LEE JOHNSON, ATTORNEY GENERAL OF OREGON IN SUPPORT OF H.R. 12528

I appear not just as the Attorney General for the State of Oregon, but as a lawyer with considerable antitrust experience. I was a trial attorney for two (2) years with the Antitrust Division of the United States Department of Justice and represented both plaintiffs and defendants in antitrust litigation while engaged in ten (10) years of private practice prior to becoming Attorney General.

I believe states are fully capable of carrying on effective antitrust litigation to recover damages to the state and its citizens as a result of antitrust violations. To the best of my knowledge, many of the larger states such as New York and California have antitrust divisions. Oregon is the only small state that has

an antitrust division and the other small states could create divisions just as Oregon has done.

Ours has been a paying program. Since begun we have spent $495,446.05 in enforcing the program, and have received $2,266,945.03 in recoveries. Since creating an antitrust division in 1969, we have had, in addition to myself, one other experienced antitrust attorney on our staff, antitrust para-professionals, and numerous trial attorneys capable of handling complex antitrust litigation with the guidance of our chief antitrust counsel.

We support new Section 4C of the Clayton Act. Actions for damages by the state as *perens patria* for damages to the citizens of the state have received mixed support by the courts. The United States Court of Appeals for the Ninth Circuit has held, at least twice, that this power, although previously recognized in common law, no longer exists. *California v. Frito-Lay, Inc.*, 1973 Trade cases 73, 364; *In re Multidistrict Vehicle Air Pollution M.D.L., No. 31*, 481 F2d 122, 131 (9th Cir 1973). On the other hand, Judge Lord reached a contrary decision in the drug cases. 333 F Supp 278, 288 (SD NY 1971). HB 12528 would clear up this confusion.

At first blush, subsection 2 provides for the recovery by the state of damages to the state's general economy and may seem like a wide-open avenue for windfall recovery and thus would meet serious objections from various segments of industry. It is our view that recovery on these grounds would not be wide open, but rather would require very clear and explicit proof by the state, probably through the use of expert economic testimony. There are certain types of antitrust violations which can have a very detrimental effect upon the state's economy and the citizens thereof. For example, it has been alleged that the existing gasoline shortage was the result of illegal collusion by members of the oil industry. I wish to make it clear that we are not necessarily making any such assertion, but assume that such an allegation was in fact true. There is little question that the gasoline shortage has had a grave effect on Oregon's economy. The state's second industry, tourism has suffered tremendous losses, and likewise there are many other persons who have lost their jobs as a result of the energy shortage. It would seem only appropriate that in such a case the state should be able to recover for this kind of economic damage.

We support class actions by the state. It is a perfect way to protect consumers. Likewise, the provisions of subsection (b) allowing for aggregate damages to the state for damages to its citizens and disbursement of recovered funds to those citizens by the state are desirable. We do not disagree substantially with the court in the *Eisen* case. *Eisen v. Carlisle & Jacquelin*, 479 F2d 1005 (2d Cir 1973). We see no reason why one individual should receive a windfall under a "fluid recovery" theory. Conversely, it is not equitable for a company to receive a windfall because of the inability to locate all of the injured citizens. HB 12528 would solve this dilemma by allowing the state to recover the damages, and either directly reimburse the injured citizens or put the money into a state program that would indirectly benefit the injured citizens commensurate with their injury. If Congress thinks this latter provision is too broad as presently written, we recommend that it be changed to *require* that the state use the recovered damages in a state program beneficial to the injured citizens.

An example of such programs that these funds could be used for is the State of Oregon's present consumer protection program which is administered by my staff and enforces the Oregon Defective Trade Practices Act. Likewise my office is seeking legislation which would basically provide for a state antitrust law comparable to the Sherman & Clayton Acts. The U.S. Department of Justice has for several years encouraged states to launch into such programs in order to supplement their efforts in trying to preserve competition in our economy. The principal legislative resistance to such a program in Oregon has been the lack of funding. If we could use the surplus damages recovered from class action antitrust suits for funding a state criminal antitrust program, then I think we could have sufficient resources to effectively police the economy in this state.

We agree with Section 4E providing for the state as the proper party to sue in a federally funded state program. We think the states have shown a lot of initiative in suing for damages under the antitrust laws. Our lawsuits against the oil companies for alleged antitrust violations in the marketing of asphalt, against the drug companies and against the gypsum board companies, were prompted by nothing but our own initiative. It might be argued that the award for treble damages is not appropriate where the state is bringing an action for damages to itself or to programs which are in part or in whole federally funded. We think the treble damages provision, however, does give the state

more incentive to use initiative in bringing these cases and recovering for both the state and the federal government. On the other hand, there is possibly merit to the argument that the state should not recover treble damages where they are simply riding into court on the coattails of an already secured judgment by the U.S. Department of Justice Antitrust Division and relying on that judgment for establishing liability. In such cases the only issue which the state must address itself to is to prove its damages. We would not object to an amendment to HB 12528 which provided that in those cases where the state was merely riding on the coattails of a judgment already secured by the Federal Government that it would only be entitled to actual damages plus provisions that the court could in its discretion award punitive damages.

We object to all of the provisions of 4D whereby the United States Attorney General is required to inform the states, and after ninety (90) days inactivity by the state, sue on behalf of the state. We do not need the information since numerous sources (not the least of which is the antitrust division of the United States Department of Justice) already supply it to us. Requiring the United States Attorney General to sue on behalf of the state, in our opinion, would saddle that already overworked office with an additional obligation. The U.S. Department of Justice Antitrust Division and the Federal Trade Commission already have a heavy responsibility for preserving competition in our national economy, requiring them in addition to enforce the provisions of section 4D could undermine that effort and for that reason we believe section 4D would be a mistake.

I believe HB 12528 is very much needed legislation. It will provide the states with the resources and capacity to support the Federal Government's efforts to enforce the antitrust law and preserve a free economy.

STATEMENT BY WILLIAM J. BAXLEY, ATTORNEY GENERAL OF THE STATE OF ALABAMA

Mr. Chairman and other distinguished members of the Committee on the Judiciary:

I. GENERALLY

As Attorney General of the State of Alabama, and in the interest of the people of Alabama, I strongly support legislation which would permit the individual State Attorneys General to bring civil damage actions under the federal antitrust laws on behalf of the State and on behalf of the individual citizens of the State, as provided by Section 4C of H.R. 12528.

However, I strongly oppose legislation which would direct or permit the Attorney General of the United States to supplant the State Attorneys General by bringing antitrust civil damage actions on behalf of citizens of a State, as provided by Section 4D(b), (c) and (d) of H.R. 12528.

Similarly, I oppose legislation which would permit the Attorney General of the United States to supplant the State Attorneys General by bringing antitrust civil damage actions on behalf of a State, as provided by Section 4E of H.R. 12528.

II. FAVOR STATE ATTORNEYS GENERAL ACTION

As the law now stands, State Attorneys General are virtually powerless or at best severely limited in their ability to protect their citizens from the damage caused by monopolistic and unfair competitive business activities. They cannot now bring actions on behalf of their citizens under the federal antitrust laws. Neither may they, in many cases, realistically bring actions under their State laws. The State antitrust laws in the State of Alabama, for example, are inadequate and unused. Attempts to persuade the State legislature to pass more comprehensive and effective antitrust legislation have been unsuccessful. The State, thus, has no means of correcting the inequities caused by monopolistic and unfair business practices.

The citizens of the State, however, look to the State Attorney General for protection and correction of such injustices. The nation's larger corporations may look to the United States Department of Justice or to their private attorneys for antitrust action, but the small businessman and the average citizen looks to the State Attorney General, and rightfully so. The State Attorneys General are elected by the people of the various states for the purpose of being "the people's lawyer" and they are charged with the duty of protecting the citizens from illegal and unfair practices of all kinds.

Under present law the average citizen must rely upon "class actions" in which they are represented by self-appointed "private attorneys general" whose primary interest is obtaining a large legal fee. Certainly, the State Attorneys General are more interested in the welfare of the individual citizen and will more properly represent the citizen. He has been elected for just that purpose, and unlike the so-called "private attorneys general", he is accountable to the citizens for his performance.

Given the authority to do so, the State Attorneys General can adequately represent the State and its citizens in federal antitrust actions. Some of the states already have competent, active antitrust departments. Others have the existing personnel and potential for developing such departments but have been deterred from doing so because of lack of authority to litigate under the existing law. Each State could rapidly develop antitrust litigation capability and could provide great service to its citizens while relieving the burden on the Antitrust Division of the United States Justice Department.

The State Attorneys General should be given the authority to protect their states and their citizens under the federal antitrust laws.

III. OPPOSE SUPPLANTING STATE ATTORNEYS GENERAL BY UNITED STATES ATTORNEY GENERAL

For the same reasons that the State Attorneys General should be given power to represent the State and its individual citizens, the State Attorneys General should not be supplanted by the United States Attorney General. The State Attorneys General are most knowledgeable about conditions within their individual states and are in the best position to represent their State and their citizens. The citizens expect their State Attorney General to represent them and their State Attorney General is directly accountable to them.

There are many considerations to be made in determining whether to initiate an antitrust civil damage action, when to initiate such an action and how such action should be initiated, framed and conducted. In many cases attorneys of equal competence will disagree as to the conclusions to be drawn from these considerations. However, the State Attorneys General are in the best position to make knowledgeable judgments of this nature on behalf of their states and on behalf of the citizens of their states. Their judgments on these matters should be respected and they should not be second-guessed and overruled by the Attorney General of the United States. Neither should they be rushed to make a premature decision on whether to initiate an action nor should they be required to bring such an action within an unreasonably short time period.

Sections 4D and 4E of H.R. 12528 do impose unreasonable requirements upon the State Attorneys General and authorize the Attorney General of the United States to supplant a State Attorney General if the State Attorney General is unable to act within the very restrictive ninety-day period provided or if the State Attorney General declines to act because it is his judgment that such action would not be in the interest of the State or its citizens. While I would approve of legislation which would permit the Attorney General of the United States to bring civil damage actions on behalf of the citizens of a State upon request by the State Attorney General, I vigorously oppose permitting such actions without the approval of the State Attorney General. Sections 4D and 4E would ignore the judgments of the State Attorneys General as to how best to protect the interests of their states and their citizens. They would substitute the judgment of the Attorney General of the United States for the judgment of the State Attorneys General with respect to how to best protect the interests of the individual states and their citizens. Also, they would greatly reduce the time period within which the Attorneys General may bring actions on behalf of their states by effectively imposing upon them a ninety-day statute of limitations. Consequently, it is my opinion that these provisions would weaken antitrust law enforcement and protections of states' and citizens' interests rather than strengthening such enforcement and protection.

In summary, I urge this Committee to approve legislation, such as Section 4C of H.R. 12528, which would permit State Attorneys General to bring antitrust civil damage actions on behalf of the states and their citizens and I urge this Committee to disapprove legislation, such as Sections 4D and 4E of H.R. 12528, which would permit the Attorney General of the United States to bring such actions on behalf of the individual states and their citizens without the approval of the State Attorneys General.

Mr. MILLER. Other States, such as New Jersey, California, and New York, have submitted comments directly to the committee. A number are present today to express to the committee their endorsement of the bill, as well as to answer any questions committee members may direct.

At this point, I would like to present to the committee Mr. Gerard Dowling of Connecticut, the gentleman on my right. I also wish to present Mr. Raymond Marvin of Ohio, the gentleman on my left. We also have Mr. John Desiderio of New York, who is the gentleman on my immediate left. Finally, we have Mr. Anthony Joseph of California, the gentleman on my immediate right.

Other States are represented by assistant attorneys general seated behind this table.

My comments correlate the respective views of the various States and reflect the position of the National Association of Attorneys General. If it pleases the committee, I would like to make certain introductory remarks, at which time the gentlemen I introduced will speak very briefly in regard to their concerns, and then we will be available to answer any questions which members of the committee might have.

Unfortunately, for the great majority of States, realization of the impact of antitrust violations did not come to light until recent years. Since that time, however, there has been a marked increase shown in the State's capability to deter violations of the antitrust laws. A major example is *In re Antibiotic Antitrust Actions.*

Numerous States, including the Commonwealth of Virginia, have created programs of their own for effective antitrust enforcement. The States have also taken the initiative in seeking, with the Department of Justice, Antitrust Division, the establishment of cooperative methods for the deterrence of antitrust violations. In some instances, for example, *Fleet Discount* and *Ampicillin* antitrust litigation, action by the States was the impetus for Federal action. Through innovation, the States have had a major impact on the subject matter as well as the remedial scope of antitrust enforcement.

In our view, H.R. 12528 provides incentive for greater cooperation and innovation by the States and the Department of Justice. The bill allows the States, through their respective attorneys general, to bring both injunctive and damage actions on behalf of (1) citizens of the various States, and (2) on behalf of the general economy of the State and its political subdivisions, section 4C(a)(1)(2). The bill further strengthens remedial and consequently deterrent aspects of antitrust enforcement, in its provisions for the manner of measuring and distributing damages, section 4C(b)(1)(2).

Let me comment now on the three sections in question. These are sections 4C, 4D, and 4E.

Section 4C(a) strengthens the traditional concept of parens patriae and by definition clarifies some confusion the term has caused in the past. The ability to effectively deter antitrust violations through the application of the parens patriae doctrine, was significantly diminished by the Supreme Court's decision in *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251 (1972). There, the State of Hawaii sought treble damage recovery for an injury to its general economy, allegedly attributable to a violation of the antitrust laws. The courts, sustaining a motion to dismiss, rejected the claim for damages.

Subsequently, the Ninth Circuit Court of Appeals in *California* v. *Frito-Lay, Inc.* (474 F. 2d 774 (1973), cert. den. 412 U.S. 908 (1973)), struck down a somewhat different concept of parens patriae when it refused to allow the State of California to seek recovery for injury to its citizen consumers for alleged antitrust violations in the potato chip industry. This bill reverses both cases.

As noted by the State of California, it is vital that damages be recovered in a parens patriae action such as that as existed in Frito-Lay. It is also vital that a State, damaged in its general economy, recover for such injuries.

I am advised, by economists, that ascertainment of the fact of damage can be established and distinguished for both concepts of parens patriae. It is logical that, if x dollars are taken from each citizen of a State as a result of antitrust violations, that those dollars do not flow into the general economy of such State. There can and should, therefore, be a recovery to (1) the State for injury to its overall general economy and (2) damages to citizen consumers for injuries they have sustained.

In *Hawaii*, there was no opportunity to demonstrate, in a court of law, that both types of damages could be ascertained and distinguished. It was presumed, or better stated, feared, that there would be duplicative recovery.

Obviously, we do not advocate there should be such duplicate recovery. The fact remains there is no reason why an individual who causes damages by his actions should not be made to pay for such damages. We do not, therefore, endorse or agree with the comments by the Department of Justice that this bill creates serious difficulties with the possibility of potential duplicative recovery.

Nor do we agree that the bill creates major questions as to the relationship of parens patriae and the class action provisions of rule 23 of the Federal Rules of Civil Procedure. District court judges, such as Judge Wyatt in the *Antibiotics* litigation, have been quite innovative in exercising equitable powers inherent in the courts once harm and liability have been demonstrated.

The attempt by the Department to raise numerous due process and notice problems is misleading. Even under rule 23 there is never a rigid formula as to the type notice that must be given. The Supreme Court has recognized that notice requirements will vary with circumstances and conditions.

Rule 23 similarly allows for such flexibility, by using such terms as "the best notice practicable under the circumstances," or requiring individual notice identification "through reasonable effort." I know of no reason why the courts should not continue to possess such flexibility.

In short, the National Association of Attorneys General supports section 4C(a). It is not felt that there is merit to the potential problems raised by various other speakers.

I would make, however, two comments applicable to section 4C(a).

First, as noted by others, the word "citizens" could cause some confusion. Recommendations have been made that the word "person" be substituted. This would allow for consistency since such term is defined in section 4. We feel this is a valid recommendation.

Second, numerous occasions can arise where there is a need to bring an action on behalf of not only citizens, but political subdivisions of the State as well. Consequently, it is recommended that a subparagraph 3 be inserted allowing the Attorney General to bring an action "on behalf of any or all political subdivisions of that State with respect to damages sustained by such political subdivisions."

With appropriate changes in section 4C(b), the measurement of damage provisions could be utilized and the aggregate damages sustained by political subdivisions may be recovered.

There are some technical changes that are recommended in addition to the substantive changes which I will address myself to; for the convenience of the committee, I have attached a redraft of the bill incorporating both types of proposed revision. Mr. Chairman, copies of this proposed redraft have been delivered to the committee counsel for distribution, and I ask that they be made a part of the record of this proceeding.

Mr. SEIBERLING. Without objection, that will be so ordered.

[The document referred to follows:]

SUGGESTED REVISIONS TO TEXT OF H.R. 12528 (NEW MATERIAL IS ITALICIZED; MATERIAL TO BE DELETED IS ENCLOSED IN BRACKETS)

"SEC. 4C. (a) Any Attorney general of a State may bring a civil action in the name of such State in the district courts of the United States under section 4 or 16, or both, of this Act, and [he] *such State* shall be entitled to recover damages and secure other relief as provided in such sections—

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

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

"(3) *on behalf of any or all political subdivisions of that State with respect to damages sustained by such political subdivisions.*

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

"(1) may recover the aggregate damages sustained *by the persons or political subdivisions on whose behalf the State sues*, [the citizens of that State,] without separately proving the individual claims of each such *person or political subdivision;* [citizen;] and [his] proof of such damages *shall* [may] be based on *any or all of the following:* statistical *or* sampling methods, the pro rata allocation of *illegal overcharges* [excess profits] to sales occurring within the State, or such other reasonable system of estimating aggregate damages as the court in its discretion may permit; and

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

SEC. 4D.[(a)] Whenever the Attorney General of the United States has brought an action under [section 4A of] this Act, and he has reason to believe that any State attorney general would be entitled to bring an action based substantially on the same cause of action [, on behalf of the citizens of his State] pursuant to section 4C of this Act [and would probably lead to a substantial recovery of damages], he shall peomptly so sotify such State attoeney general.

[Omit subsections (b)–(d)]

SEC. 4E. With respect to any federally funded State program affected by antitrust violations, any State shall be entitled to treble damages for the entire amount of overcharges or other damages sustained in connection with such a program. [The Attorney General of the United States * * *.] The United States shall be entitled to secure reimbursement of its equitable share of any recovery of damages under this section, *to be measured in terms of its previous contribution to the State program.* [under such regulations as the respective Federal agencies responsible for such programs shall publish.] The provisions of section[s] 4C(b) [and 4D(c) and (d)] of this Act shall apply to any action and damages recovered therein pursuant to this section.

Mr. MILLER. Section 4C(b) provides for the measurement and distribution of damages. It clarifies the so-called fluid class recovery concept. It does nothing more than allow recovery of provable damages resulting from antitrust violation. Comments made by the Department of Justice regarding "unquantifiable and perhaps totally unforeseeable damages multiplied by three" are, we believe, without merit.

Traditionally, there has always been a distinction drawn between the fact of damage and the amount of damage. One must prove the fact of damage. It does not appear that it is the intent of section 4C(b) to alter this substantive law. Once, however, the fact of damage is established, the amount of damage can be demonstrated, though such amount is uncertain.

As stated in *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555 (1931):

> Nor can we accept the view of that court that the verdict of the jury, insofar as it includes damages for the first item, cannot stand because it was based on mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of damages; but there was none as to the fact of damage, and there is a clear distinction between the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount.

Let me turn now to section 4D(a). This provides that whenever the Attorney General of the United States brings an action under section 4A, he must notify the various attorneys general of the States if he has reason to believe such action would probably lead to a substantial recovery of damages on behalf of the citizens of that State. Cooperative efforts between the States and the Antitrust Division have been sought and implemented in some cases. We favor this section that would aid in closer cooperation. It is limited, however, to notification only when a damage action is instituted by the Attorney General. We see no reason why such notification, with the resultant cooperative efforts inherent, should not also be required in injunctive actions. To this regard, we do recommend, therefore, that the reference to section 4A be deleted.

Section 4D(b) provides that following any notification, the State notified would have 90 days to decide whether it would file an action. If it declines or fails to institute suit within the 90-day period, the Atorney General, as directed by the bill, would institute an action "in place of the State attorney general" and as "parens patriae of the citizens of such State for the purposes of such action."

We are not inclined to believe that the notification process of section 4D(a) would be burdensome. We must agree, however, with the re-

marks of the Department of Justice's Antitrust Division that the provisions of section 4D(b) could create serious problems.

Effective antitrust enforcement through cooperative efforts of the States' attorneys general and the Department of Justice is now coming to the forefront. Any antitrust litigation is time consuming and quite expensive. Decisions regarding the filing of a suit must be carefully considered. This provision, for automatic filing of suit on behalf of various States, will most assuredly result in increased pressures on already overcrowded judicial dockets. It will, as you have been told, place further burdens on an already undermanned Antitrust Division.

As pointed out earlier in my remarks, States have had a major impact on the subject matter of antitrust enforcement. Either individually or through cooperative efforts, the States have attacked those violations having a direct, significant, major impact. For example, notwithstanding that a grand jury investigation in the cast-iron pipe industry was aborted, the States have been active in the cast-iron pipe antitrust litigation. Unmanageable situations could arise if, as contemplated by section 4D(b), there would be an automatic filing of time-consuming and expensive antitrust litigation once a 90-day period had passed.

In addition, section 4D(b) could create, unfortunately, an atmosphere which, in our view, would defeat the main objective of section 4C; that of "adding 50 more strings to the antitrust bow." California and New York have well staffed and trained antitrust divisions in the Attorney General's office. Virginia and many other States are now in the process of either enacting effective antitrust laws or instituting responsive programs in this area.

There are some States, however, which at present have neither the staff nor financial resources to establish and maintain a credible enforcement effort. Section 4D would, I believe, create an actual disincentive for such States to implement antitrust enforcement on their own. We recommend section 4D(b) not be enacted.

Let me turn lastly to section 4E. This section permits States to recover treble damages for the entire amount of overcharges or other damages sustained in connection with any federally funded State program.

This section accomplishes two objectives which have long been sought after. First, it insures that States have a right to recover treble damages for all injuries suffered, regardless of how various programs were funded. Second, it clarifies the measure of damages that the United States is entitled to, when any antitrust action involves a State program that is federally funded.

There should, however, be some further refinement in the phraseology of this provision. It is suggested that, rather than allow the United States to secure reimbursement "under such regulations as the respective Federal agencies responsible for such programs shall publish," the United States be entitled to secure reimbursement of its equitable share of any recovery for damages "to be measured in terms of its previous contribution to the State program."

For the same reason that we opposed section 4D(b), we must oppose that provision in section 4E allowing the Attorney General to institute suit on behalf of the State if it fails to bring any such action itself within a 90-day period.

Aside from my negative comments regarding the provisions allowing the Attorney General to sue in place of State attorneys general, I want to emphasize our association's endorsement of the thrust of H.R. 12528. With cooperative effort and with the tools, both procedural and remedial, that this bill provides, effective enforcement and deterrence of antitrust violations will be enhanced. As reflected in comments by others, the bill creates unique opportunities for balanced and comprehensive law enforcement.

It encourages greater State innovation and participation. It provides needed protection for consumers and will lead to a general strengthening of the overall competitive economy of the United States.

I appreciate the opportunity to appear before you and will be happy to respond to any questions that you may wish to ask. I will do that after the other gentlemen, who are present with me at the table, have made brief comments.

If it please the committee, I would like to call on Mr. Gerard Dowling of Connecticut to make his presentation.

Mr. SEIBERLING. Thank you, Mr. Miller.

You may proceed, Mr. Dowling.

Mr. DOWLING. Mr. Chairman, and members of the committee, I appear on behalf of Attorney General Killian of Connecticut, who wishes me to express his regrets that he is unable to be here this morning. He had wished to appear at a prior time, and has a commitment that he cannot break.

I have and would like to present to the committee on behalf of Attorney General Killian a written statement at the conclusion of my remarks.

Mr. SEIBERLING. Without objection, so ordered.

Mr. DOWLING. Thank you, Mr. Chairman. I would then briefly like to read an oral statement by Attorney General Killian as follows: "As attorney general of the State of Connecticut, I want to register my strong support of Chairman Rodino's bill, H.R. 12528. This bill would give every State attorney general the authority to protect our citizens from monopoly price gouging.

This authority is especially demanded by the monopoly pricing practices which have been encouraged by the response of the Federal Government to the energy crisis. In effect, the national administration appears to have handed the oil industry an unlimited license to devise its own solution to the energy crisis, and this solution clearly will include skyrocketing gasoline, fuel oil, natural gas, and coal prices.

Chairman Rodino's bill will clearly establish the right of State attorneys general to recover damages sustained by individual citizens because of monopolistic or anticompetitive practices. This right has been greatly restricted by recent Federal court decisions.

In my written testimony, I considered in some detail the legal background and arguments in favor of Chairman Rodino's bill. I want to stress in this statement how relevant the Rodino bill is to effective State action to protect all of our citizens from the consequences of the energy crisis.

I have long contended that the present energy emergency situation is in large part the result of decades of monopolistic practices by the major integrated oil companies. The Arab oil boycott appears near an end, but blackmail, albeit at the hands of an American corporation

rather than Arab potentates, will continue unabated unless strong antitrust action is pursued in this country.

Unfortunately the U.S. Department of Justice has shown no willingness to tackle the giant oil companies. This means the States, with their vastly more limited resources, must attempt to do what the Federal Department of Justice has so long refused to do.

That is why I filed a major Federal antitrust suit last July. In that suit, we seek to claim damages on behalf of individual consumers of our State. But in order to effect this recovery, we must overcome the Federal court decisions cited in my written testimony.

We can, of course, recover the damages for losses suffered by the State itself or its political subdivisions, but if our antitrust enforcement powers are to have real teeth, and if we as representatives of all of our citizens, are to be able truly to protect their interests, then this bill is a must. At long last we are entering an age of effective consumer advocacy.

The Rodino bill will allow State attorneys general to act as representatives of the consumers of a State to assure that the protection intended by the antitrust laws is afforded them.

Individual consumers lack the resources to attack these huge monopolies on their own. Few consumer groups have the wherewithal to finance an antitrust suit, which is a particularly costly and protracted type of litigation.

It is the purpose of Government to represent people and to protect them, and to see to their interests. H.R. 12528 will serve this purpose and put real teeth into antitrust enforcement.

As attorney general of Connecticut, I have joined with many Federal antitrust actions seeking the recovery of damages for individual consumers as well as for the State and its subdivisions. In these Federal multidistrict antitrust suits, we have recovered well in excess of $1 million, over $800,000 in the *Antibiotic* case alone. But these recoveries have been effected by the court settlements of very complicated litigations, and the courts are increasingly reluctant to oversee the complex details of the formula for distribution of damages to individual consumers.

The U.S. Court of Appeals from the Ninth circuit in the *Frito-Lay* case last year urged upon the Congress precisely the kind of legislative action embodied in the Rodino bill.

I urge the Judiciary Committee and the Congress of the United States to take up the invitation extended by the courts to act and act effectively to insure all our citizens a remedy they are now denied. I respectfully urge the prompt enactment of H.R. 12528."

That concludes attorney general Killian's remarks. I for myself would only like to add that Connecticut fully subscribes to and supports the position on the bill as presented by General Miller.

[The prepared statement of Attorney General Robert K. Killian follows:]

STATEMENT OF ATTORNEY GENERAL ROBERT K. KILLIAN OF CONNECTICUT

It is becoming increasingly clear that the Federal Courts are presented with a dilemma when they encounter consumer actions wherein the potential number of members in the class may be in the millions.

On the one hand, if the Court certifies the consumers of a state as a class, it may very well impose an intolerable burden on those opposing the class.

On the other hand, if the Court refuses to certify the consumers as a class, it effectively and totally denies relief, as a practical matter, to those injured.

As a general premise, when the administrative complexities and problems of class manageability become impractical to the point of frustrating the entire legal proceeding, then the class will not be certified. Failure to certify a large consumer class, due to administrative problems, vitiates the intent and purpose of Rule 23 "Class Actions" of the Federal Rules of Civil Procedure.

Theoretically, the intent and purpose of Rule 23 is to allow numerous small claimants, unable to protect their rights through separate suits, the advantage of a class action judgment without the burden of actually participating. The *Manual for Complex Litigation*, Sec. 1.45, citing the U.S. Supreme Court decision *Hawaii v. Standard Oil Co.*, 405 U.S. 251, conclusively states that "According to the weight of recent decision, this right of the small claimant to benefit without alone bearing the otherwise prohibitive cost of litigation is the *most important procedural right secured* by Rule 23." (emphasis added)

If administrative difficulties have the effect of preventing class certification by the Courts, then it must follow that the greater the number of people injured by one violating the law, the less chance the transgressor has of being sued by that class. The sad result is that the citizen-consumer is left without a remedy against those who would monopolize the marketplace.

H.R. 12528 provides an alternative to the class action by allowing a state to recover for the antitrust wrongs perpetrated on its consumers. In substance this would shift the responsibility for devising plans for equitable compensation to consumers from the federal courts to the state.

The difficulties courts encounter in administering relief when there is a consumer class involve giving proper notice, identifying the members of a class and calculating damages to each member. This bill would remove these issues from litigation by allowing the state to recover aggregate damages to its citizens and then apportion pro rata shares.

The states engaged in such a distribution in the *Drug Cases*, 314 F. Supp. 710 (S.D.N.Y.) *affirmed* 440 F. 2d 1079 (2nd Cir. 1971) where without any major obstacle one hundred million dollars was distributed. The problem of a private class representative holding the residue of an aggregate recovery has troubled many courts, see e.g. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2nd Cir. 1973). This is resolved when the State Attorney General takes control of this fund. Yet consumer classes which have been denied an opportunity to prove they have been victims of predatory practices include six million odd-lot purchasers of securities, *Eisen v. Carlisle & Jacquelin, supra;* purchasers of bread within a city, *Hackett v. General Host Corp.*, 455 F.2d 618 (3rd Cir.) *cert. denied*, 407 U.S. 925 (1972); purchasers of eggs within the United States, *United Egg Producers v. Bauer International Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970); purchasers of gasoline within particular states, *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971), *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii 1969), *affirmed on other grounds*, 405 U.S. 251, 256n. 6 (1972).

Whether the consumer can recover under Rule 23 depends on unpredictable judicial discretion under that rule

It is evident that an alternative to the class action in consumer actions is necessary if citizens are to have a reliable redress for damages and injuries sustained by them in the marketplace. Both Hawaii and California have recently attempted an alternative by bringing actions as "parens patriae" to recover damages for injuries to the states' individual citizen-consumers, and to the state's general economy. "Parens Patriae" is of historic origin and refers to a king's power as guardian of persons under legal disability to act for themselves. When the Union was formed, the states reserved this power to themselves. Although the courts allow a state injunctive relief under Clayton Sec. 16 when suing as "parens patriae," they have rejected attempts by Hawaii and California as "parens patriae" to recover for injuries to the states' individual citizens-consumers, and to the state's general economy.

Judges unsure of their administrative capacities would have Congress create a less burdensome solution to the problem of over-charged consumers than the class action.

The U.S. Court of Appeals, Ninth Circuit, in *California v. Frito-Lay*, 474 F. 2d 774 (1973) held that the State as "parens patriae" could not sue and recover treble damages on behalf of its citizens-consumers. The court, however, offered judicial guidance for a legislative solution by the following:

> "The state most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged

are to be rendered unprofitable and deterred . . . However, if the state is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but *by legislation and rulemaking* . . ." p. 777 (emphasis added)

The U.S. Court of Appeals, Second Circuit, also suggested a legislative solution in the *Eisen Case, supra:*

"Rule 23 furnishes no satisfactory solution in situations where immense numbers of consumers have been mulcted in various ways by illegal charges . . . The problem is really one for solution by Congress . . ."

The thrust of these opinions is clear. The United States Congress must act positively in accordance with proposed H.R. 12528. This type of legislation will protect the rights of our citizen-consumer, as well as enhance the state's powers in protecting the general economy from monopolization.

STATE OF CONNECTICUT,
ATTORNEY GENERAL'S OFFICE,
Hartford, April 8, 1974.

Re H.R. 12528, 93d Congress 2d Session.

JAMES F. FALCO, *Esquire,*
Counsel, House Judiciary Committee,
Rayburn HOB, Washington, D.C.

DEAR SIR: Presently pending in the Federal District Courts are various cases that are awaiting class certification under Rule 23 of the Federal Rules of Civil Procedure. A few of these are antitrust actions brought by States' Attorneys General with potential class members numbering in the millions. Conceivably, none of these classes will be certified; not for lack of statutory violations, and consequent damage to consumers, but rather, because the courts feel that classes of such great size are administratively unmanageable. This result vitiates the policy that generated Rule 23, and is unwittingly supportive of the antitrust violator by, in effect, fostering anti-competitive activity by those who serve or transact business with large numbers of consumers.

H.R. 12528 will go far to cure this inequity in representative law suits commenced after the proposed legislation is enacted. I believe, however, that H.R. 12528 should be amended by specifically stating that the legislation be given retroactive application at least to the extent of those class actions presently pending, and awaiting certification.

If H.R. 12528 is given retroactive effect the states' attorneys general need then only amend their complaints to include a count "*Parens Patriae*". Upon acceptance by the Court, this count would be effective from the date of the original complaint, and would remove the necessity of a new complaint being filed and served, with the consequent statute of limitation considerations. More importantly, it would more efficiently provide competent representation to millions of this country's consumers who have been victimized by antitrust violations.

Retroactive operation is uniquely fitting for legislation such as H.R. 12528. It will withstand the objections to retroactive legislation *viz.* want of notice, lack of knowledge of past conditions, and that such laws disturb feelings of security in past transactions. None of these are valid objections in that defendants are presently on notice as to the allegations filed. A new cause of action has not been created, but rather, what has been provided is viable, efficient access to the Federal Courts allowing redress from antitrust violations.

Defendants should receive little consideration if they argue that they participated in antitrust violations affecting millions of consumers because they felt the unmanageability of the class would render them immune from prosecution. This is certainly not the type of interest that should be protected. H.R. 12528 is curative legislation and it fulfills and secures rather than frustrates and defeats reasonable expectations. Retroactivity, furthermore would not violate contractual obligations, take property without due process nor interfere with judicial matters.

To be given retroactive operation, however: the statute must specifically contain language to that effect. 2 *Sutherland Statutory Construction* § 41.04 at page 252 (4th Ed. 1973) states the following:

"Retrospective operation is not favored by the courts, however; and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application."

Case law indicates that the courts would apply H.R. 12528 retroactively if that intent is expressly stated in the statute. Civil laws retroactively adding to the means of *enforcing existing obligations* are valid. Remedial legislation is valid provided vested rights are not disturbed nor contractual obligations impaired. (See *U.S. v. Village Corp.*, 298 F2d 816 (CA 4th 1962); *U.S. v. Perry*, 431 F2d. 1020, (CA 9th 1970). Simply stated, if retroactive application is intended, reasonable, and not measurably unfair, it will be given effect.

In summary, statutes relating to procedure apply to pending as well as future procedings. However, the intent of the legislature must be clear to justify retroactive application of a procedural statute. (See *Chovan v. duPont*, 217 F. Supp. 808, (ED Mich 1963); *Simonson v. International Bank*, 14 NY 2d 281 (1964)). The primary influence of this statute is in the public rather than private interests, and retroactive application will coincide and enhance standing public policy.

Very truly yours,

ROBERT K. KILLIAN,
Attorney General.
By GERALD J. DOWLING,
Assistant Attorney General.

Mr. SEIBERLING. Thank you. We appreciate your remarks and those of your attorney general.

Mr. MILLER. The next speaker will be Mr. Marvin of Ohio.

Mr. SEIBERLING. Let me simply say that as a Representative of the State of Ohio, I am particularly gratified that it has sent Mr. Marvin here today to give the remarks of our attorney general, who was not able to be here though he hoped to be.

Thank you.

Mr. MILLER. I would concur in the chairman's observation that Ohio is well represented here today.

Mr. MARVIN. Congressman Seiberling, Attorney General Miller, thank you for those introductory remarks. The attorney general is unable to accept your invitation to appear here.

Ohio Attorney General William J. Brown is unable to accept your invitation to appear personally here today to present his views concerning H.R. 12912, commonly referred to as the parens patriae bill, cosponsored by Congressmen Rodino, Jordan, Mezvinsky and Seiberling. General Brown has asked that I relay to you, and especially to you, Mr. Seiberling, his gratitude for this kind invitation.

With your prior consent, he has asked that I present his views and those of the antitrust section of the Ohio attorney general's office on the bill. This testimony states our firm endorsement of the bill, the reason therefor and attempts to identify certain problems which may exist.

At the outset it is worthwhile to observe that the fundamental principles upon which the antitrust laws are based are among the most widely shared values in this Nation. People who agree on nothing else believe in honest and vigorous economic competition. So we start from the point that fair and vigorous antitrust enforcement commands support as no other important societal policy.

Although some have debated whether the Federal enforcement agencies have been sufficiently vigorous over the last several decades, there is no debate as to State enforcement because there has been relatively little such enforcement. That situation is changing rapidly across the country.

The bill seeks to solve problems encountered by State attorneys general in antitrust enforcement. Two of the problems were recently iden-

tified in the opinions of the United States Supreme Court in *Hawaii* v. *Standard Oil*, 405 U.S. 251 (1972) and of the ninth circuit in *California* v. *Frito-Lay*, 474 F. 2d 774 (9th Cir. 1973) cert, denied 412 U.S. 908 (1973).

In *Hawaii*, the Supreme Court held that a State may not sue for damages for an injury to its general economy caused by a violation of the antitrust laws. The Court's holding was not based upon constitutional principle, but upon its interpretation of what the Congress intended by enactment of section 4 of the Clayton Act.

An entirely different question was present in *Frito-Lay* because there California was seeking redress for injury to its citizen-consumers not to its general economy. The ninth circuit held that California had no standing under parens patriae theory to claim those monetary damages, again, for the reason that Congress did not intend section 4 of the Clayton Act to confer this authority.

These decisions have placed 50 States in what we believe to be an awkward position. Assume, for example, that a State attorney general has evidence of two antitrust violations. The first is a price fix of a product purchased, we might call it a shelf product, occasionally by many end consumers for less than a dollar. The second is a concerted boycott by members of an industry which drives a company out of business, drives it into bankruptcy, and requires its employees to find other employment.

Hawaii and Frito-Lay render a state attorney general impotent to redress the injuries suffered by the State or its citizens. Some persons have said that nothing is lost thereby, since alternative remedies exist in the opportunity for individual citizens to commence a class action in the price fix case, and in the ruined company's private cause of action in the boycott case. But neither point is necessarily valid in practical terms.

Whether the price fix case would ever come to court depends more on chance, on whether the claimants, who may have been injured only to the extent of a few dollars, or their attorneys have the sophistication, psychic energy and the money to carry them through long and lean years of uncertain and complex litigation. Besides, if the trial judge does permit a citizen to sue on behalf of his fellow citizens under rule 23, it is basically on the theory that the antitrust laws and rule 23 permit him to act as a "private attorney general." Why, then, should not the real attorney general be authorized to do so?

In the case of the concerted boycott, there is no remedy for the dollars paid in unemployment compensation, welfare, reemployment services, or for the tax revenue lost from a going business and employed citizens, each being elements of injury to the State's general economy.

And in both cases, there are undesirable side effects: These persons who fleeced the public are permitted to pocket the fruits of their illegal conspiracy; an injury has been sustained for which there is no legal redress; and the citizens' legitimate expectations of vigorous law enforcement remain unfulfilled.

Ohio believes as a matter of policy that such results are untenable. We believe that the problems identified by these two cases should be corrected legislatively and we endorse the principal elements of this bill intended to change these results.

The bill also addresses a third problem hindering effective antitrust enforcement: the unduly high standards of proof for damages in class action cases. It is frequently argued by the defense bar that a strict class action approach requires evidence establishing the precise claim of each class member. In the assumed hypothetical where millions of person in a State may be injured only to the extent of a few dollars, such a strict class action approach cannot result in recovering from the defendants all of their ill-gotten gains.

Thus, a principal purpose of parens patriae theory is to take the case beyond the strictures of a pure class action and to allow a more generalized recovery upon more generalized proof of damages.

New section 4C(b)(1) in both parens patriae and class representative cases involving damages sustained by the citizens allows the State to prove those damages with evidence based upon statistical sampling methods and relieves the State from the sometimes impossible burden of providing individual transaction data.

Ohio applauds this clarification of the emerging principle of allowing the Federal courts liberally to construe the requirements of proof in cases involving massive antitrust violations affecting large numbers of consumers.

Thus, legislative attention to these three problems of damages to the general economy, standing of the State attorneys general to prosecute consumer claims, and proof of damages sustained by consumers, can significantly improve the competitive vitality of the American economy by substantially enhancing the environment for antitrust enforcement.

It is not necessary here to trace the history of the parens patriae concept since that has been accomplished by other witnesses and is also concisely stated in the Hawaii opinion at 405 U.S. 255–259. We would like to offer some observations about several practical problems raised by the bill in its present form, which in the opinion of our office may stimulate test litigation over the course of the years to come.

First, new section 4C(a)(1) provides as follows:

> Any Attorney General of a state may bring a civil action in the name of such state in the district courts of the United States under Section 4, or 16, or both, of this Act, and he shall be entitled to recover damages and secure other relief as provided in such sections.
>
> (1) as parens patriae of the citizens of that state, with respect to damages personally sustained by such citizens, or, alternatively, if the court finds in its discretion that the interests of justice so require, as a representative member of the class consisting of the citizens of that state, who have been personally damaged;

Thus this section deals directly with two of the three problems set forth at the beginning of this testimony. It empowers an attorney general to commence suit to recover damages sustained personally by the State's citizens, but in mutually exclusive ways: Either as parens patriae or as a class representative.

We perceive no reason for limiting the action to one or another, especially since the theories do not cover the same ground. A class action approach may prove inadequate in a given case.

We believe that an attorney general should be able to proceed at least initially under both theories. To foreclose him from keeping both options open, as the present language does, may seriously hamper a State's case.

Second, if an attorney general proceeds under new section 4C(a)(1) as parens patriae, there may be a constitutional issue raised by a citizen that his claim is being expropriated by the State government. The question raised is whether the citizens who have personally sustained damages are constitutionally required to be notified of the commencement of such suit and to be given an opportunity to exclude themselves.

While this point may introduce an unwelcome wrinkle in a welcome theory, we believe that there is an answer. A responsible argument can be made that due process is afforded in that (a) the bill gives individual claimants an opportunity to present a claim against any fund recovered and (b) the bill does nothing but add to present rights, thereby leaving the individual citizen with, first, his private right of action, second, an opportunity to assert a class action, and third, now, to allow his claim to be pressed by the State attorney general as well.

Thus, we believe the constitutional argument, which may be raised by the defense bar if the Congress does pass this bill, and although they are interesting to constitutional lawyers, can be met and there is no defect to constitutional analysis to the language as presently phrased.

Third, another major question left open is whether the provisions of rule 23 apply to the second provision of paragraph (a) of 4C, which would authorize a State attorney general to sue as representative of a class consisting of all of its damaged citizens.

A companion question is raised by the requirement that the court make an affirmative finding—and presumably that a State attorney general make an affirmative showing—that "the interests of justice so require" prior to the attorney general being allowed to proceed as class representative. At first reading of the statute, it appears that rule 23 standards are deemed to be met by an attorney general. But on close analysis, it is not at all clear whether the trial court must find the prerequisites of rule 23 present in the case or, on the other hand, may simply decide based upon "the interests of justice."

In the latter event, what elements are included in the standard, "interest of justice"? How can such a vague finding be reviewed by an appellate court? In any event, skillful defense counsel will surely raise the argument that Congress did not intend to waive rule 23 prerequisites unless your intention to do so, if in fact that is your intention, is manifestly expressed.

We suggest that if it is the intent of the committee to provide State attorneys general freer access to the courts as class representatives, then the section under consideration should be amended to allow for this explicitly. There is justification for so relaxing the rule 23 prerequisites on the theory that a State attorney general is an ideal class representative of a large number of consumers.

The eminent group of jurists comprising the multidistrict panel supports this view, for in the Manual for Complex Litigation a State attorney general is referred to as a "natural" class representative section 1.44, CCH ed. 1973. This concept has also been approved in contested litigation. See In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 267, S.D.N.Y., 1971, at 269.

In fact, Judge Inzer Wyatt, in related pretrial proceedings of the antibiotic antitrust cases said that it is hard to conceive of a more appropriate class representative of retail consumers than a State attorney general, 333 F.2d at 278.

Fourth, one of the principal reasons that State attorneys general are not more active in the developing and emerging field of antitrust enforcement is that it is expensive to operate an adequately staffed and equipped office of prosecuting antitrust attorneys. Financing of law enforcement generally is a continuing problem but in the context of antitrust, a solution is within reach.

The attorney's fee provision of the Clayton Act has made private enforcement possible. Other than the exceptional case where large damages are suffered by a large business, private enforcement would not happen without the attorney's fee provision.

If it is the intent of the Congress to simulate expanded antitrust enforcement at the State level, as H.R. 12921 would do, then the financing mechanism of attorney's fee should be fully employed. The courts have awarded State attorneys general attorney's fees in section 4 cases, but to shore up and preserve that situation it may be advisable to add the words "including attorney's fees" after the word "costs" in line 7 of page 3 of the bill.

Fifth: New section 4D has attracted considerable testimony of a critical nature. I would say here basically Ohio supports the position that section 4D is not entirely necessary, and General Miller has testified on that point.

To sum up this testimony, although this testimony intentionally avoided an abstract or theoretical elaboration of the practical issues raised, we would be glad to consult further with the committee staff on such points if it is desired.

Our purpose in presenting this testimony today is to urge its passage, and to give you our view of interpretative problems it may encounter at the trial court level. Attorney General Brown appreciates this committee's interest in antitrust enforcement problems at the State level and the committee's time in hearing his testimony and the testimony of his fellow attorneys general.

Again Attorney General Brown thanks you for your invitation, Congressman Seiberling, to present these views.

Mr. SEIBERLING. Thank you, Mr. Marvin, for a very well thought out and a very practical statement, and some very good suggestions.

Mr. MILLER. Mr. Desiderio.

Mr. DESIDERIO. Mr. Chairman, and members of the committee, I am here today on behalf of Attorney General Lefkowitz of the State of New York, and he wishes me to thank the committee for this opportunity to present the views of the State of New York on H.R. 12528.

The attorney general has prepared a comprehensive written statement, which comments on the provisions of that bill, and I ask the permission of the Chair to file the copies of that written statement for your printed record.

I will make brief oral remarks, which are based on the comments in that statement.

Mr. SEIBERLING. Without objection, so ordered.

[The prepared statement of Attorney General Louis Lefkowitz follows:]

STATEMENT OF LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK

I wish to thank the Committee for this opportunity to comment on the amendments to the Clayton Act that are proposed in H.R. 12528. I have headed the New York Attorney General's Office continually since 1957. Over the years, therefore, I have had a rare opportunity to observe my office develop broad

experience in the field of antitrust enforcement. The experience which my office has gained during that long period of time serves as the basis for my comments here today.

The proposed Bill, as I understand it, would permit a state attorney general to maintain civil antitrust actions in the federal courts as *parens patriae*, to recover damages and other relief, both for injuries personally sustained by citizens of the state and also for injuries to the general economy of the state or its political subdivisions. The Bill would also establish procedures for the recovery of aggregate damages in such cases. In my opinion, such legislation is desirable to insure the continued effective enforcement of antitrust policy in this country.

In this statement, I will first set forth the basis for the interest of the State of New York in the proposed legislation; secondly, I will explain why New York considers it very important that legislation of this kind be enacted; and thirdly, I will make a few comments about some specific points in the Bill.

First of all, I wish to make it very clear that the State of New York does have a very substantial interest in seeing legislation of this kind enacted. This interest is based on New York's record of vigorous antitrust enforcement during the past twenty years under both state and federal law.

New York's own antitrust enforcement statute, the Donnelly Act,[1] was first enacted in 1899[2] and has been in force, therefore, for almost as long as the Sherman Act itself. The existence of a State antitrust law, as supplement to federal enforcement, has made it possible for the New York Attorney General to promote the competitive free enterprise system, on an intra-state basis, within New York's own local manufacturing, distribution, retail, and service trades. The efforts made by the New York Attorney General's Office in traditional antitrust enforcement activities well known. These efforts continue unabated to the present day—always with a single objective in mind: to protect the public from the effects of anticompetitive monopolistic practices.

In the last decade, the New York Attorney General's Office has also brought several actions in the federal courts, under the provisions of Section 4 and 16 of the Clayton Act, to recover treble damages and injunctive relief on account of violations of the federal antitrust laws. These actions have been brought not only on behalf of the State in its proprietary capacity, but also, whenever appropriate, on behalf of subordinate governmental entities and the individual citizens of the State.

In just the last six years, the number and complexity of these actions has increased substantially, and the importance of such litigation, to the State and its citizens, has grown proportionally greater. To maintain this increasingly more important and complex form of litigation, a special unit of the Attorney General's staff has been designated by me to handle the State's federal antitrust litigation.

New York has a number of such actions presently pending and, in this regard, is actively participating in the following consolidated federal multidistrict proceedings: the *Ampicillin* Litigation,[3] the *Cast-Iron Pipe* Litigation,[4] the *Governmental Auto Fleet Sales* Litigation,[5] the *Master Key* Litigation,[6] and the *Multidistrict Vehicle Air Pollution* Litigation.[7] Over the years, my office has also participated in a number of similar actions in which substantial settlements have been achieved on behalf of the State, its political subdivisions, and its citizens.

Our experience in these cases shows that the traditional antitrust enforcement role of the State, through its Attorney General, has clearly taken on a whole new dimension. The Attorney General is no longer limited to simply prosecuting and enjoining antitrust violations. He also has a positive role to play in actually obtaining compensation for the victims of these violations. In the complex society in which we live, the Attorney General is often the one individual in the State who can best fulfill the need that exists to obtain such compensation for *both* subordinate governmental entities *and* individual citizens.

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[1] New York State General Business Law, § 340 (McKinney's 1968).

[2] *See* New York State Bar Association, Report of the Special Committee To Study The New York Antitrust Laws (1957).

[3] *State of New York* v. *Bristol-Myers Company, et al.*, Civil Action No. 2964–70 (D.D.C.).

[4] *State of New York* v. *American Cast Iron Pipe Company, et al.*, C.A. 71–1071 (N.D. Ala.).

[5] *State of New York* v. *General Motors Corporation, et al.*, 71 C. 2072 (N.D. Ill.).

[6] *State of New York* v. *Emhart Corporation, et al.*, Civil Action 14.236 (D. Conn.).

[7] *State of New York* v. *Automobile Manufacturers Association, Inc., et al.*, No. 70–1137–R (C.D. Cal.).

In bringing such actions, New York and its sister states have demonstrated that the socalled "private" enforcement weapon of the Clayton Act can be most effectively utilized by state public officials. A treble damage action by a state attorney general, on behalf of subordinate governmental entities and individual citizens, is indeed a potent weapon, and it is the only means available that is truly equal to the task of dealing with monopolistic practices that cause widespread injury. The real threat that is posed thereby to potential antitrust violators makes it possible, at long last, to deter anticompetitive conduct which may affect thousands, or even millions, of potential victims.

The active role, which all state attorneys general have played in federal treble damage litigation over the last ten years, is a direct result of the success that was achieved in the early 1960's in the electrical equipment conspiracy cases.[8] Those cases graphically demonstrated the full potential of Clayton Act litigation as a means by which local governmental entities could more effectively deal with broadscale monopolistic practices.

The electrical cases clearly showed, under extraordinary procedural circumstances, the practical benefits that all governmental entities might hope to achieve through such litigation in appropriate actions. Nevertheless, truly effective enforcement, on behalf of large classes of governmental entities and individual citizen consumers, was only made possible, for the first time, as a result of two very important subsequent procedural developments. I speak, of course, of the procedural changes brought about by the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure and by the enactment of the federal Multidistrict Litigation Statute.[9]

Amended Rule 23 has greatly facilitated the efforts of state attorneys general to secure redress on behalf of the subordinate governmental entities in any state. Certifications of statewide governmental class actions have occurred in several cases. While defendants will still fight hard to prevent it, the certification of a statewide governmental class action is now practically automatic in any given case.

In addition, the Multidistrict Litigation Statute has made it possible for several separate statewide class actions to be concentrated in a single forum at the same time. In such instances, counsel for the various states have been able to join in common cause and pool their resources. The ability of the states to join forces in this manner has made it possible for them to more effectively conduct the often lengthy, voluminous far-flung, tedious, and very necessary, pretrial discovery programs that are usual in these cases. This opportunity for consolidated and coordinated effort by the states has tended to equalize the respective abilities of large corporate defendants and of governmental antitrust victims to carry on protracted, complex, and expensive legal proceedings.

From the point of view of state attorneys general, these have been welcome and important developments. The procedural changes have indeed enabled many states to achieve significant recoveries in recent years. Nevertheless, the necessity for proceeding on a case by case basis has made it difficult for states to effectively exercise all of the rights they claim on behalf of their citizens and political subdivisions.

It is clear that statewide governmental Clayton Act litigation does have the potential for being a meaningful deterrent to the broadscale monopolistic practices of large and powerful corporations. However, that potential will never be fully achieved until it is firmly established that a state may recover total aggregate damages for *all* of the injuries inflicted on its citizens or economy by reason of an antitrust violation.

Amended Rule 23 has been a step forward in this direction, but it has not guaranteed the ability of a state to assert this right in every case. Some courts have indeed allowed states to represent classes of individual citizens,[10] but others have not permitted states to do so, either as class representative[11] or as *parens patriae*.[12] Furthermore, the Supreme Court, in the case of *Hawaii* v. *Standard Oil*,[13]

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[8] For a full summary of the factual and legal history of the electrical case litigation, see Bane, *The Electrical Equipment Conspiracies*, Federal Legal Publications (1973).

[9] 28 U.S.C. § 1407.

[10] *See, e.g., In re Coordinated Pretrial Proceedings In Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971); *In re Ampicillin Antitrust Litigation*, 555 F.R.D. 269 (D.D.C. 1972).

[11] *See, e.g., Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971).

[12] *See, e.g., California* v. *Frito-Lay, Inc.*, 474 F. 2d 774 (9th Cir.), *cert. denied*, 93 S. Ct. 2291 (1973).

[13] 405 U.S. 251 (1972).

denied the right of a state to recover antitrust damages for injuries to its general economy. Following upon that opinion, the Ninth Circuit Court of Appeals has also denied the right of a state to recover antitrust damages for any injuries not relate to commercial ventures or enterprises.[14]

In addition to these setbacks, amended Rule 23 has itself been under attack on many legal fronts. Some courts have consciously sought to limit the scope of the Rule. They have done so, in some cases, due to a failure to perceive the proper relationship of the class action procedure to the substantive issues,[15] and in other cases out of fear that a "too liberal" interpretation of the Rule would result in serious manageability problems and an overburdening of the federal judiciary.[16]

Moreover, the members of the antitrust defense bar have also been very active, both in and out of the courtroom, in their efforts to emasculate the truly representative character and function of the class action procedure.[17] Their efforts have been aimed at convincing both bench and bar alike that actions on behalf of large classes are always inherently unmanageable. They continually assert that proof of liability in such cases is impossible without first obtaining detailed transitional evidence from each and every one of hundreds, or thousands, or even millions, of potential class members. Because such a task, in their view, would be overwhelmingly unmanageable, they argue that a large consumer-type class action can never be properly maintained. Such arguments have received serious consideration in a number of court decisions.[18]

In view of these circumstances, it now appears that state attorneys general can only attain their major Clayton Act litigation objectives through the legislative process. I therefore support the amendments proposed in H.R. 12528. If Clayton Act litigation is to properly fulfill its function and be an effective supplement to United States Government antitrust enforcement efforts, it is essential that this Bill be enacted into law.

With respect to the Bill's specific provisions, I offer the following comments for your consideration:

Paragraph (a)(1) of proposed New Section 4C would authorize a state attorney general to act as *parens patriae* on behalf of the citizens of the state "with respect to damages personally sustained by such citizens." Alternatively, this section would also permit the state attorney general to represent a "class consisting of the citizens of the state, who have been personally damaged." These alternative provisions are important because they appear to confirm the right of the state attorney general to act in a representative capacity under all circumstances, without regard to purely technical requirements. This means that, even when a state is not similarly situated with those whom it would represent (as would be required for the maintenance of a proper class action under Rule 23), the state attorney general may still seek redress on behalf of the injured parties. This is particularly important in cases where the injury suffered by individual citizens may have been small and there is no other champion who can adequately protect their interests.

I would hope, however, that the word "citizens", as used in Paragraph (a)(1) is intended as well to include political subdivisions of the state. While Rule 23 does make it possible for a state to represent political subdivisions within the framework of a class action, it is just as important, for the state attorney general to act as *parens patriae* "with respect to damages personally sustained" by political subdivisions, as it is for him to act as *parens patriae* on behalf of other citizens. If, in fact, there is no intention to exclude the possibility of maintaining *parens patriae* or class actions on behalf of political subdivisions under Paragraph (a)(1), then it may be advisable to make that fact clear in the Bill by inserting the phrase "or political subdivisions" wherever the word "citizens" appears. I submit that such clarification might help to avoid future litigation over the exact meaning of the paragraph.

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[14] *In re Multidistrict Vehicle Air Pollution*, M.D.L. No. 31, 481 F. 2d 122 (9th Cir. 1973).

[15] *See, e.g., City and County of Denver* v. *American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971).

[16] *See generally Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir.), *cert. granted*, 42 U.S.L.W. 3226 (October 1973) (*Eisen* III).

[17] *See, e.g.*, American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972); *see also* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review*, 71 Colum. L. Rev. 1 (1971).

[18] *See, e.g., Eisen* v. *Carlisle & Jacquelin* (Eisen III), *supra* n. 16; *Boshes* v. *General Motors Corporation*, 17 F.R. Serv. 2d 296 (N.D. Ill. May 3, 1973).

For instance, it could be argued that, as presently drafted, Paragraph (b)(1), which relates to recovery of aggregate damages, would not apply to *parens patriae* or class actions maintained on behalf of political subdivisions. This is because Paragraph (b)(1), as presently drafted, allows recovery of aggregate damages only in actions maintained on behalf of "citizens" under Paragraph (a)(1). The exact meaning of the word "citizens" is therefore very important. It should be emphasized in this regard, that there is no conceivable reason why aggregate damages should not be recoverable in actions which a state might bring on behalf of its political subdivisions, as distinguished from those brought on behalf of individual citizens.

The provisions of Paragraph (b)(1) concerning the recovery of aggregate damages are extremely important. As previously noted, the real deterrent threat of state governmental treble damage antitrust litigation lies in being able to recover the total damages suffered by the whole class of governmental entities and by the whole citizenry during the entire period of an antitrust conspiracy. It is obvious, however, that not every governmental agency, political subdivision, or individual citizen, is going to be able to produce detailed proof of damages inflicted over a ten, twenty, or perhaps even a thirty year period. When proof of damages is limited solely to the claims of those citizens or political subdivisions that are actually able to produce first-hand evidence of their damage, then the total amount of adjudged liability may not adequately reflect the total injury that has been inflicted. In this situation, defendants may determine that the deterrent effect of treble damage litigation is not great enough to prevent future recurrent violations, and they may actually retain the greater part of their unlawful gains.

In this respect, it is important to remember that antitrust violators have actually extracted money from their victims in an unlawful manner. They should not be permitted to retain the bulk of their illegal gains simply because individuals are unable to come forward with complete damage information.

This does not mean that the states are necessarily going to reap any "windfall" recoveries. The underlying violation still must be proven in every case. However, once the violation *is* proven, an adjudication has taken place that, in effect, identifies the profits of a conspiracy as contraband that should not be retained by the violator. The provision for recovery of aggregate damages is therefore highly appropriate.

Paragraph (a)(2) which permits recovery with respect to damages to the general economy of the state, or a political subdivision thereof, is also important. Such a provision is important because it will enable a state to recover antitrust damages for injuries that are not related solely to commercial ventures or enterprises. In the modern world, the sophisticated monopolistic practices of giant corporations often produce severe injurious effects that are not necessarily inflicted in the course of direct commercial dealings with the conspirators. Such forms of injury, while traceable to anticompetitive conduct, have not been viewed by the courts as the kind of injury that the antitrust laws were intended to protect.[19] There is a need, therefore, to insure that every injury which results from an antitrust violation can in fact be compensated. This provision, in my view, will make such recovery possible.

With respect to the provisions of proposed New Sections 4D and 4E, I will just say that I am sure all state attorneys general would welcome the chance for increased coordination of their own antitrust enforcement efforts with those of the federal government. Such coordination, coupled with the provisions for *parens patriae* representation and recovery of aggregate damages, would make nationwide governmental multi-class lawsuits a truly formidable weapon in the arsenal of antitrust enforcement.

Mr. DESIDERIO. In the last decade the New York Attorney General's office has brought several actions in the Federal courts to recover treble damages and injunctive relief on account of violations of the Federal antitrust laws. These actions have been brought not only on behalf of the State in its proprietary capacity but also whenever appropriate on behalf of subordinate governmental entities and the individual citizens of the State.

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[19] *See, e.g., In re Multidistrict Vehicle Air Pollution*, M.D.L. No. 31, 481 F. 2d 122 (9th Cir. 1973) *and In re Multidistrict Vehicle Air Pollution*, M.D.L. No. 31, 1973-2 Trade Cases ¶ 74,819 (C.D. Cal. 1973).

Our experience in these cases shows that the traditional antitrust enforcement role of the State has clearly taken on a whole new dimension. The attorney general is no longer limited to simply prosecuting and enjoining antitrust violations. He also has a positive role to play in actually obtaining compensation for the victims of these violations.

In the complex society in which we live, the attorney general is often the one individual in the State who can best fulfill the need that exists to obtain such compensation for both subordinate governmental entities and individual citizens.

A treble damage action by a State attorney general on behalf of political subdivisions and individual citizens can be a potent weapon and is the only means available that is truly equal to the task of dealing with monopolistic practices that cause widespread injury.

It is clear, therefore, that statewide governmental Clayton Act litigation has the potential for being a meaningful deterrent to the broad-scale monopolistic practices of large and powerful corporations.

However, that potential will never be fully achieved until it is firmly established that a State may recover total aggregate damages for all of the injuries inflicted on its citizens or economy by reason of antitrust violations.

Amended rule 23 of the Federal Rules of Civil Procedure has been a step forward in this direction, but it has not guaranteed the ability of a State to assert this right in every case. While some courts have allowed States to represent classes of individual citizens, others have not permitted States to do so either as class representatives or as parens patriae.

Furthermore, the Supreme Court has denied the right of a State to recover antitrust damages for injuries to its general economy, and the Ninth Circuit Court of Appeals has denied the right of a State to recover antitrust damages for any injuries not related to commercial ventures or enterprises.

In addition to these setbacks, amended rule 23 has itself been under attack on many legal fronts. The members of the antitrust defense bar have been very active, both in and out of the courtroom, in attempting to emasculate the truly representative character and function of the class action procedure. Their efforts have been aimed at convincing both bench and bar alike that actions on behalf of large classes are always inherently unmanageable.

They continuously assert that proof of liability in such cases is impossible without first obtaining detailed transactional evidence from each and every one of hundreds or thousands, or possibly even millions, of potential class members. Because such a task in their view would be overwhelmingly unmanageable, they argue that a large consumer-type class action can never be properly maintained.

Such arguments have received serious consideration in a number of court decisions. In view of these circumstances, it now appears that State attorneys general can only obtain their major Clayton Act litigation objectives through the legislative process.

Therefore, the attorney general of the State of New York supports the amendments proposed in H.R. 12528.

If Clayton Act litigation is to properly fulfill its function and be an effective supplement to U.S. Government antitrust enforcement efforts, it is essential that a bill of this kind be enacted into law.

With respect to the bill's specific provisions, the State of New York generally agrees with those comments made by Attorney General Miller and by the other States who are represented here today.

Thank you very much.

Mr. SEIBERLING. Thank you very much, Mr. Desiderio.

Without objection, your full statement will be printed in the record at the appropriate place.

Did I understand that you had a lengthier statement?

Mr. DESIDERIO. Yes.

Mr. SEIBERLING. Thank you.

Mr. MILLER. Mr. Joseph.

Mr. JOSEPH. I am Anthony Joseph, an assistant attorney general of the State of California. We also have a rather lengthy statement, which we would like to place in the record. I do not want to burden the committee with reading it at this time.

Mr. SEIBERLING. Without objection, so ordered.

[The prepared statement of Attorney General Evelle J. Younger follows:]

STATEMENT OF EVELLE J. YOUNGER, ATTORNEY GENERAL OF CALIFORNIA

In recent years, state Attorney General, acting on behalf of their citizens, have shown increasing interest and capability in initiating lawsuits seeking damages and injunctive relief for violations of the antitrust laws. When suing in their proprietary capacities states have not encountered procedural difficulties. There is no question, for example, that a state can recover as damages overpayments for purchases it made as a result of a price-fixing conspiracy. When states have attempted to broaden these lawsuits, however, they have too often encountered a judicial barrier. California has been keenly interested in the *parens patriae* issue. We have filed an *amicus curiae* brief in the United States Court of Appeals for the Ninth Circuit in *Hawaii* v. *Standard Oil Co. of California*. Our complaints in the plumbing fixtures, motor vehicle air pollution, ampicillin, broad spectrum antibiotics, and snack foods litigation have included *parens patriae* causes of action. In the latter case we petitioned for a writ of *certiorari* in the Supreme Court. Innovative efforts to obtain otherwise unrecoverable illegal profits retained by an antitrust violator have been thwarted by judicial interpretation of the present antitrust scheme. It is this unfortunate situation that Chairman Rodino's bill, HR 12921, seeks to rectify.

In overall concept, HR 12921 would restore to state Attorneys General their common law powers to act as *parens patriae* on behalf of their citizens, power that has recently been eroded by court decision. Before discussing those decisions, the consequent need for remedial legislation, and the bill itself, it would be helpful to explore the origins and development of *parens patriae*.

In early English common law, idiots, incompetents and infants were *non sui juris*, unable to represent themselves. As the feudal system developed, the King retained certain powers and duties, known as the "royal prerogative," and the legal doctrine of *parens patriae* (literally "father of the country") was developed. This doctrine provided that the King, through his attorney general, could represent all persons *non sui juris*. See *Attorney General* v. *Dublin (Mayor of)*, 1 Bligh N.S. 312 (1827), 4 Eng. Rep. 888 (1901); *Shaftsburg (Earl of)* v. *Shaftsburg*, Gilb, Rep. 172 (1725), 25 Eng. Rep. 121 (1903). For example, Blackstone refers to the King or his representative as "the general guardian of all infants, idiots and lunatics," and as the superintendent of "all charitable uses in the kingdom." 3W. Blackstone, Commentaries 47–48 (E. Christian, ed. 1794). "In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the States." *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251, 257 (1972).

The nature and scope of *parens patriae* has been greatly expanded in this country beyond its original common law confines. This expansion is reflected in a line of cases developed in the early nineteen-hundreds wherein States made use of the doctrine to obtain relief from such problems as air and water pollution and diversion of waters.[1] The nexus in all these cases is that a large num-

[1] *See, e.g., issouri* v. *Illinois*, 180 U.S. 208 (1901); *Kansas* v. *Colorado*, 206 U.S. 46 (1907); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *New York* v. *New Jersey*, 256 U.S. 296 (1921).

ber of a state's citizens were injured—or threatened with injury—and the injured mass of citizens was unable to protect its own interests because of the magnitude of the problem. Such suits were permitted even though the persons represented were not technically *non sui juris*, and even though there was no direct injury to any proprietary interest of the state.

The Supreme Court had occasion to consider the applicability of *parens patriae* to relief from antitrust violation in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945). There, the state sought to invoke the original jurisdiction of the Court to remedy a conspiracy by several railroads to fix rates on the transportation of goods to and from Georgia. In discussing the propriety of suing *parens patriae* under the antitrust laws, the Supreme Court stated:

> "[W]e find no indication that when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, parens patriae, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts." *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. at 447.

Georgia was allowed to file its complaint seeking both damages and injunctive relief. She was in fact denied damages, but only because such recovery might be an illegal rebate, as the railroads' rates had been approved by the Interstate Commerce Commission.

Over the years, then, the judicial eye has looked favorably on the doctrine of *parens patriae*. From the sovereign representing the individual incompetent, it developed to the point that states could represent their citizens and presumably protect their economies injured by violations of the antitrust law. It was quite a blow, therefore, when two recent decisions clouded prospects for the future use of the doctrine in the antitrust context.

The first case was *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251 (1972). There, Hawaii sought treble damage recovery for injury to its general economy allegedly attributable to a violation of the antitrust laws. The Supreme Court, in reversing the trial court, held that such an injury was not compensable under § 4 of the Clayton Act, 15 U.S.C. § 15. Although the Court did not expressly foreclose future use of the *parens patriae* doctrine, by deciding that injury to a state's general economy was not an injury to its "business or property," a requirement of § 4, the ability of a state to recover antitrust damages in other than its proprietary capacity or as a class representative was severely limited.

In the wake of *Hawaii* came *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973). The State alleged a conspiracy to fix and maintain prices of snack foods in violation of the Sherman Act, 15 U.S.C. § 1. We sued in our proprietary capacity as purchaser, as class representative, and as *parens patriae*. The District Court, as in *Hawaii*, denied defendants' motion to dismiss the *parens patriae* cause of action. The United States Court of Appeals for the Ninth Circuit disagreed. It recognized that it was faced with a completely different question than that presented in *Hawaii*. Recovery was sought for injury to California's citizen-consumers, not for injury to its general economy. Although the Court admitted this "may be a worthy state aim," it held that to permit this application of common law *parens patriae* would ignore the safeguards that have been developed in rule and legislation concerning class actions. The Court of Appeals said that:

> "The state most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred. It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on anti-trust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution.
>
> "However, if the state is to be impowered to act in the fashion here sought we feel that *authority must come not through judicial improvisation but by legislation and rule making. . . .*" 474 F.2d at 777. (Emphasis added).

The legislation under consideration today would give the Ninth Circuit the authority it was looking for. It would fill an important gap in the enforcement of the anti-trust laws. A closer look at the facts and circumstances of the snack food case reveals an all too common state of affairs and clearly demonstrates the need for this legislation.

California had evidence that the price of potato chips, corn chips and similar products was illegally fixed pursuant to a conspiracy by a great many

manufacturers. Potato chips are usually sold in small quantities and at low prices. Unlike the purchase of an automobile, or even a few gallons of gasoline, the consumer would seldom, if ever, keep a receipt of the purchase of potato chips. Indeed, in the case of snack foods the purchases are often made by children. Whenever these ingredients are present—low cost consumer products, whose price is affected by an antitrust violation, purchased in small quantities by consumers who seldom keep receipts—the violators are rewarded with large profits without fear of punishment.

It is apparent that the individual consumer will be hard-pressed to bring his own antitrust suit even in the unlikely event he could prove his pennyworth of damage. The time and expense involved in antitrust litigation is well known.

The Supreme Court in *Hawaii* and the Ninth Circuit in *Frito-Lay* suggested that class actions provide the solution to the consumers' dilemma. At best, however, a class action is only a partial solution. Practically speaking, the amount of claims proven by class members will be small compared to the total damages inflicted by antitrust violators upon consumers and compared with the illegal profits they obtained. To the extent that millions of class members cannot or will not prove their claims the violators will retain their illegal profits. They will have committed the "perfect crime."

Violations of the antitrust laws are difficult enough to detect. With this type of "white collar crime" there are no fingerprints or dead bodies. Violators are usually sophisticated. They conceal their transgressions in a web of complex business transactions and relationships to be discovered, if at all, somewhere within the reams of documents they neglected to destroy. Once evidence of a violation is obtained and proven, often after years of investigation and legal maneuvering, it is unthinkable that the antitrust law permits the perpetrator to keep a large part of his ill-gotten gains.

HR 12921, if passed, would go a long way towards a remedy of this situation. It would amend § 4 of the Clayton Act to specifically permit a state Attorney General acting *parens patriae* to recover treble damages either on behalf of his citizens or for injury to the state's economy. It would, in effect, overrule *Hawaii* and *Frito-Lay*. There are, however, some portions of the bill which in our opinion require clarification.

First, Section 4C(a)(1) as drafted would empower the State Attorney General to represent his citizens either as *parens patriae*, or, alternatively, as class representative. These two types of representative lawsuits should not be mutually exclusive. Procedures that have been developed under the class action rules are useful and necessary, but as has already been mentioned, do not provide for complete recovery of illegally obtained profits. As California envisioned in *Frito-Lay*, *parens patriae* recovery may begin when class action recovery ends. In other words, *parens patriae* can be used in its "pure" form, or as a supplement to a class action depending on the facts of a particular case and a determination by the trial court as to which procedure is the most appropriate for that case. In the latter instance, as a class action supplement, *parens patriae* will insure complete recovery by the state for its citizens, who cannot or do not prove their claims as class members. We therefore recommend that Section 4C(a)(1) be amended to permit a state Attorney General the flexibility to bring *parens patriae* and class actions concurrently in the proper case.

Second, Section 4D as drafted is unclear regarding the amount of damages to be awarded. Under that section, the Attorney General of the United States is obligated to bring a *parens patriae* action in place of the state Attorney General if the latter fails or declines to do so. Section 4D makes reference to actions already brought by the U.S. Attorney General under Section 4A, which grants only actual (i.e. "single") damages to the United States. Should a state Attorney General bring action under the new Section 4C he clearly can obtain treble damages. What then is the measure of damages the U.S. Attorney General can obtain for a state under Section 4D as drafted?

The staff analysis to H.R. 12921 does spell out the intent of Section 4D:

> "If the State Attorney General is unable to bring a *treble* damage action on behalf of the citizens of his State, then the Federal Attorney General is obliged to do so. . . .". (Emphasis added).

As drafted, though, there is room for doubt as to the measure of damages. We suggest that language be added to Section 4D(a) to the effect that damages recovered pursuant thereto be the same as if the state Attorney General were acting under Section 4C, *i.e.*, treble damages.

Third, we recommend that the 90-day period within which the state Attorney General may act pursuant to notice from the U.S. Attorney General under Section 4D(a) be extended considerably. It is unclear what the effect of failure to file within the time limit would be. For example, could a state intervene after the U.S. Attorney General had brought an action pursuant to Section 4D(a)? Many states may wish to await the filing of a bill of particulars by the federal government, the completion of discovery, or even the completion of a federal criminal or civil action before determining whether to enter into antitrust litigation. Such litigation is expensive and decisions regarding filing must be carefully considered.

Fourth, Section 4E indicates that under federally funded state programs affected by antitrust violations, the United States shall be entitled to secure reimbursement of its "equitable share" of any recovery. The state would be entitled to treble damages. It is unclear from the bill whether the United States' equitable share of the recovery would likewise be trebled. The staff analysis seems to contemplate that the United States would receive reimbursement of the proportionate amount actually spent in the federally funded program, with the states retaining the remaining damages, trebled. We feel it would be desirable to clarify this point.

Fifth, Section 4C(b) deals with proof and recovery of damages in both *parens patriae* and class action proceedings brought under Section 4C(a). Apparently the intent of this section is to clarify and legitimize the so-called "fluid class recovery." In our opinion, however, the term "excess profits" is imprecise. We would recommend that the use of statistical sampling methods and the pro rata allocation of illegal overcharge to sales occurring within the State as a means of proving total citizen damage be clearly made mandatory by amending Section 4C(b) to read:

> "(b) In any action under paragraph (a)(1) of this section, the attorney general of a State—
>
> "(1) May recover the aggregate damages sustained by the citizens of that State, without separately proving the individual claims of each such citizen; and he shall be able to prove such damages by means of statistical sampling methods, or the pro rata allocation of illegal overcharges to sales occurring within the State; further he may prove aggregate damages by any other reasonable system of estimating aggregate damages as the court in its discretion may permit;. . ."

Apart from these specific points which we feel require clarification or change, we again would emphasize our hearty endorsement of the concepts of HR 12021. State Attorneys' General can provide a vital supplement to the Department of Justice's Antitrust Division and the Federal Trade Commission in the enforcemen of the antitrust laws. The bill would provide a unique opportunity for balanced and more complete law enforcement by encouraging greater state innovation and participation. It would achieve important new protection for consumers and the stronger deterrence to antitrust violators. Attorney General Younger anxiously awaits this authority to act on behalf of California citizens *parens patriae*.

Mr. JOSEPH. Attorney General Younger has asked me to appear on his behalf today. He is out of the country at this time, and therefore cannot personally appear himself, and he regrets that.

I would say in reference to our prepared statement that on pages 8 through 12 we discuss the bill and some of the problems that we see with it. Generally those comments are set forth and considered in the bill as redrafted by the Antitrust Subcommittee of the National Association of Attorneys General and we support the amendments of the Antitrust Subcommittee which have been filed with this committee by Attorney General Miller.

California has pursued parens patriae cases of action vigorously. We have included such a cause of action in antitrust cases involving plumbing fixtures, ampicillin, motor vehicle air pollution devices, broad spectrum antibiotics and snack foods.

It is our belief that parens patriae judgments are an absolute necessity if we are to deter antitrust violations aimed at consumers. In the Frito-Lay case we recognized that if liability were found and indi-

vidual consumers were compelled to prove their damages, there would be only a small portion of the illegal funds obtained by the defendants returned to consumers.

In essence the problem is that receipts are not kept of individual consumer purchases. If the courts are going to compel the proof of damages through the existence of receipts, which the defense bar has continuously contended, there will be no giving up of the illegal funds, which leads to two problems.

One, there is no deterrent; the second problem is there is no return to the consumer who was injured.

I think that this thought was best summed up by Judge Real, the trial judge in the potato chip litigation, who upheld the parens patriae cause of action. He indicated:

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

California agrees with Judge Real. We commend the authors for their introduction of H.R. 12921. It is most important and most necessary litigation.

The court of appeals in Frito-Lay recognized the deterrent effect and consumer protection benefits of parens patriae. That court suggested that legislation was the route to empowering the States to bring such actions.

The attorney general of California wholeheartedly supports the concepts of this legislation. Once enacted you may be sure we will make the fullest use of this important power in order to protect our consumers, and to deter anticompetitive activity.

We look forward to your questions and end our statement at this time in order to have the greatest amount of time for questioning.

Mr. SEIBERLING. Thank you very much, Mr. Joseph.

Mr. JOSEPH. Apparently, we are considering at this time H.R. 12528, and I think I referred to H.R. 12921.

Mr. SEIBERLING. They are both the same.

Mr. JOSEPH. That is my understanding.

Mr. SEIBERLING. All right. If you gentlemen have finished your statements then we will have some questions. I have some myself.

First of all for Mr. Miller, of course most States already have antitrust laws. Why should not this be a problem that we leave to the State legislatures to handle by deciding what powers they want to give to their State governments to represent the citizens of the States under the State antitrust laws?

Mr. MILLER. I would view the two as complementary. I think you do have a constitutional issue here in terms of a State elected official being imposed with a duty by Federal law. However, an attorney general of a State, being a State officer, obviously is also bound by State law. If in fact there were a State law to that effect that an attorney general could not institute an action of this sort, clearly such a suit would not be instituted.

The difficulty which many of the States have is that the antitrust laws in those States are not as well defined as a result of the precedent of past court decisions, as the Sherman and the Clayton Acts. Con-

sequently what the bill does, and I think this is a most desirable goal, is to spell out with respect to the Federal law what, in fact, an attorney general can accomplish by use of Federal law.

Consequently, if you review the State law and the Federal law as complementary, I think it is clear that the attorney general of any State should have the power to act under both laws.

Mr. SEIBERLING. Thank you.

Do any of your associates want to comment on that?

Mr. MILLER. Mr. Joseph, I think, representing California, is perhaps in a position to comment, because after all, the *Frito-Lay* case in California was brought under Federal law by the attorney general of that State; yet, California is perhaps one of the most advanced States in this country with respect to having an effective State antitrust enforcement program.

Mr. JOSEPH. Mr. Chairman, maybe a brief comment. I have real doubts as to whether the inclusion in the State antitrust law of a parens patriae cause of action would solve the problem in that a great deal of the litigation in which the State of California and most of the other States are involved is Federal litigation consolidated through the multidistrict panels. This consolidation has been useful to the States. It allows us to maximize our abilities. We all operate under limited budgets. We can operate better where we bring our cases together through the multidistrict panel. It also has the benefit of not overburdening the court system.

In terms of your question, the logical choice has been to file Federal litigation. And I think that the amendments are needed in the Federal law. The amendment in the State law would be useful, and it is something that each of our States would want to consider, but we cannot feasibly use our State laws in major treble damage litigation. We file under the Federal act.

Mr. SEIBERLING. Well, is what we are saying that the growth of interstate business has reached the point where a single State's law cannot adequately cope with the situation?

Mr. JOSEPH. Do you want to answer?

Mr. MILLER. It depends upon what you define as "the situation." Very clearly there may be localized violations of antitrust law within the boundaries of a single State. In those instances, for instance in Virginia at its last session of the general assembly, the legislature did enact a new antitrust law, which is a model act.

However, as Mr. Joseph has just pointed out, in instances where you have the multi-State effect of a violation of the antitrust statutes, there frequently are significant advantages of instituting suits in the Federal system. This is what the various attorneys general wish to take advantage of, and can take advantage if this bill is enacted.

Mr. SEIBERLING. Do you feel this bill would actually help reduce the complications and bring into manageability multi-State litigation? I am thinking of the electrical cases, for example, where you had a multiplicity of municipalities as well as private consumers suing, whereas this bill would reduce the number of plaintiffs to perhaps a more manageable size if the States had brought actions in place of all of those individual plaintiffs.

Do you foresee that as a possible benefit of this legislation?

Mr. MILLER. I do, sir, and I think Mr. Desiderio would like to address himself to that point.

Mr. DESIDERIO. I think, Mr. Chairman, that the bill would do that. The ability of the States to sue in the Federal courts, especially under the types of provisions that are provided here, enable the States to take advantage of the Federal Rules of Evidence. So that these cases are handled on a uniform basis then.

With the provisions for aggregate damages that are called for in this bill, it would very greatly reduce the complications that arise in the cases that we have seen to date.

I think basically—this goes to what I said before. I think that the ability to prove the aggregate damages without having to drag into the courtroom every single consumer in the State, I would think that would very definitely help the cause of effective antitrust enforcement.

Now, if the States were to pursue this on their own individual basis, under their own statutes, they might be able to do the same thing in a State court; but when you have a nationwide conspiracy where basically you are proving the same facts, it makes it much more efficient and effective to do it all in one forum. And I think that is really what we are trying to do.

Mr. SEIBERLING. Thank you.

We are going to proceed under the 5-minute rule, and I have just used up my 5 minutes, so I will recognize Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

I want to certainly attest to the fine quality of the testimony which we have received here this morning. We appreciate your active participation in this hearing.

I have been in touch with Attorney General William J. Scott of the State of Illinois, and I have a feeling that he shares in general the views that you have presented in support of this legislation; he being a very active attorney general of my State particularly in the area of consumer fraud.

We are confronted constantly with the problems of granting more and more jurisdiction to our Federal courts, and burdening the Federal courts, and increasing the number of judges, and subjects of that kind. That is why, although I do realize the importance of uniformity in application of such a statute as this, if enacted I am wondering if it could not be uniformly applied in accordance with the provisions of the law, but granting jurisdiction to the State courts instead of requiring that you bring the action in the Federal courts.

Now, a violation of a Federal law normally is enforceable in the State courts, as I understand it. Is there any reason why either you should not have the States and the Federal jurisdiction with equal jurisdiction, or you should not be directed to initiate and to institute the action in the State courts?

Would you want to respond to that?

Mr. MILLER. Mr. Joseph would respond, and then perhaps some of the others of us will follow up on it.

Mr. JOSEPH. Well, it is my understanding that you cannot bring antitrust actions under the Federal antitrust law in State courts. We do have the opportunity to bring antitrust actions under our State antitrust laws in the State courts. And a parens patriae action might be useful in the connection.

But what we are asking for today would have to be brought through the Federal courts. It is required by law.

Mr. MCCLORY. Is there some constitutional impediment?

Mr. JOSEPH. I believe there is. I am sorry I do not have all of the necessary background to develop that, but it is my understanding—well, I know that the antitrust laws themselves call for use in the Federal courts, and I think it may be found somewhere in the Constitution to that effect, but I am not sure.

Mr. MCCLORY. My counsel indicates that there are no constitutional impediments.

Mr. JOSEPH. All right. Well, I was not certain of that, and I could not refer you to a specific section in that regard. But the laws themselves do call for Federal court administration.

And I might say if we are considering that subject matter, that the Federal courts have become highly knowledgeable, and these are very difficult cases. These are the most complex cases presently before the courts.

I think that removing such cases from the Federal courts in order to improve judicial administration and returning them to the State courts would be a step backwards.

Mr. DENNIS. Would the gentleman yield?

Mr. MCCLORY. Yes.

Mr. DENNIS. While we are on that general subject I have been wondering about another facet of that. As I understand it under rule 17 normally capacity to sue in the Federal court is determined by the law of the State. I am wondering why you gentlemen could not induce your State assemblies to pass laws to give you a right to bring this type of action in the Federal courts, but by State legislation?

Mr. MCCLORY. Would the gentleman yield?

Mr. SEIBERLING. Well, let the gentleman respond.

Mr. DENNIS. At least, particularly in the *Frito-Lay* type of case, the class action type of action.

Mr. MILLER. Well, I think in the first place there is no State legislature that——

Mr. DENNIS. Go ahead. I did not mean to interrupt you, Mr. Miller. It is really my mistake, I guess, but is not *Frito-Lay* strictly the class action type of case, but I think that is the type of case I am referring to, nevertheless. Go ahead.

Mr. MILLER. State legislature cannot give jurisdiction to the Federal courts in terms of passing a law which would be enforced in the Federal courts.

In terms of the role of the attorneys general, in Virginia, as in many other States, there is a common law background to our law, and consequently, as attorney general of Virginia, I have common law powers to bring suit parens patriae. The difficulty which is addressed by this legislation is the fact that that concept of parens patriae had been so circumscribed in the *Hawaii* case and in the *Frito-Lay* case that the effectiveness of achieving the desired result has been severely hampered, as indicated in our previous testimony.

What this bill would do would be to restore to full dignity the common law concept of an attorney general of the State instituting action on behalf of the citizens of the State as parens patriae, or on behalf of the State for damage to its economy as parens patriae.

Now, I do want to emphasize one point, which I think is very important, and that is when one has a case of the complexity of say

the *Frito-Lay* case, very frankly there are not many State court judges who have the background to adequately cope with the problems that such a case raises.

You have the expertise developed among certain judges, and by no means all, in the Federal system, and this is the necessity for the type of flexibility which this legislation would provide.

Mr. Joseph?

Mr. DENNIS. Thank you.

Mr. MCCLORY. I have one other question. One of you just testified a few moments ago about the difficulty of making distribution to consumers where there was no receipt involved, and indicated that under this legislation that difficulty would be overcome.

I assume that what you mean is that there would be a different means of distributing the amounts recovered and thereby getting it back to the consumer? In other words, under this legislation there would be no way of determining the consumer, the original purchaser that is, any better than at present. Is that not true?

Mr. MILLER. Mr. Joseph will respond to that question, sir. He has had quite a bit of experience with trying to devise a solution to this very problem you raised.

Mr. JOSEPH. The question of proof of damages is addressed directly by this bill, and we have suggested amendments to that section. It would be section 4C(b)(1). It is on page 2 of the NAAC's amendments.

What this bill does is to allow the use of methods of proving overall damages, which Federal courts have already adopted, and which the multidistrict litigation panel has set forth, and in effect supported in its manual.

We have indicated that we think that rather than a discretionary decision to be made by the trial court, as under the present bill, that the bill should be amended so that the trial court is required to use one or all of the following: a statistical or sampling method, a pro-rata allocation of illegal overchanges, or leave it to the court's discretion as to some other substitute that will provide for the recovery of total damages.

And once the total damages are found, that is we know that the sales to the State of California by a certain group of defendants was $1 million, once we have a way of proving that through any one of these devices, then we have determined how much the defendants should have taken away from them, trebled. Now the problem at the second level becomes how do we distribute the so-collected damages. And there the question of receipts comes up.

The most desirable way of proving individual purchases is through receipts. If you have a charge account, if it is a high dollar amount item, then people may be able to prove what they have purchased. If you do not have receipts, you will still have the same problem of proving individual damages under this bill, but you have now separated the ill-gotten gains from the violator. That is the point.

Now the deterrent has taken affect. The protection of the consumer and the return to him of illegally obtained funds will have to be addressed by courts who have been innovative. The courts have been creative in addressing these problems—in the distribution of antitrust recoveries; they have been very innovative. Once the fund is created,

the distribution of it can be handled because you have then removed the defendants from the litigation.

Now, all of this assumes, and I think this has to be remembered, violation. We are not talking about a case where it is "iffy." We have concluded that there is a violation, and that has been proven. Now, we are to the damages part of the litigation. We have proven the total damages by one of the devices that are set forth in your legislation, and then we go to the distribution. The defendants are gone—they are no longer concerned.

Now, the court and counsel work together on this. They have to take care of the due process considerations. Your bill quite wisely calls for an opportunity for all potentially injured individuals to have an opportunity to file a claim, and the claim could be based on any kind of proof.

It is possible in the potato chip case, for example, that the court will determine that a family of four in the State of California typically purchases *x* amount of potato chips, and then distribute the settlement funds pro rata on that basis.

But what I am saying is, we have taken away that ill-gotten gain. That is the most important thing this bill does.

Mr. SEIBERLING. The time has expired. I recognize the gentlewoman from Texas.

Ms. JORDAN. Mr. Miller, I have a little difficulty understanding why you object strongly to the 90-day provision which would trigger the U.S. Attorney General bringing action in lieu of the State attorney general. Now, I do not question that you are an active and viable attorney general, but there are some attorneys general that do not always respond quickly on behalf of the consumer.

We can take the example, which was mentioned by the gentleman from Connecticut about oil and the energy crisis and the necessity, perhaps, to bring some action on behalf of the consumer against some anticompetitive practices of major oil companies.

Taking that example, and then envision a place like Texas with oil flowing en masse underground. Can you see that attorney general being vigilant—and I am not just discussing and asking you to comment on the Texas attorney general—but in that situation where the economic interest of the State is so heavily weighted on the side of oil and the oil industry, can you see the consumer having a quick, adequate, and effective action filed on his behalf by an attorney general who might be subject to some private and parochial pressures?

Mr. MILLER. I think——

Ms. JORDAN. And that was put as diplomatically as I could.

Mr. MILLER. Ms. Jordan, I know nothing about Texas politics, so I would not comment on the role of attorney general Hill with respect to the type of problem you are addressing yourself to, although I might add I have been very impressed by his activities in the consumer fraud area.

I think the answer is this. One basically has to have some faith in the political process. If in fact the attorneys general of the other 49 States have instituted litigation on behalf of the citizens of those States, and Texas stands alone with no suit having been instituted, I would think it would be very, very difficult the next time the attorney general stood up for election to explain why he did not recover $1 mil-

lion or whatever in fact was the actual damage trebled on behalf of the citizens of that State in his role as attorney general.

However, I think that there are other problems involved, some of which we have attempted to address ourselves to in the course of the prepared testimony. Very briefly, the Antitrust Division of the Department of Justice at the present time is significantly undermanned, and as a consequence, the allocation of manpower itself seems to me to be an important consideration. And whereas here we are attempting to have antitrust enforcement activity which complements each other at the Federal level and the State level, it seems to me it is highly desirable to indicate the sphere of activity which is properly the role of a State attorney, and the sphere of activity which is properly the role of the Attorney General of the United States.

In addition to that, I have serious reservations about a 90-day provision, or a 120-day provision, or any other day provision which might be written into it on the grounds that antitrust actions are very complicated technical matters. The Attorney General of the United States is under section 4D(a). As it presently reads in the bill, he would notify a State attorney general if he thought that there might be the probability of recovery of substantial damages. This is not to say that there would be.

Now, I think it would be almost impossible for a State attorney general within 90 days to complete an investigation and reach his own determination as to whether or not that probability in fact exists and suits should be brought. Consequently I think that in terms of State antitrust activity one should put the finger where it ought to belong, and that is on the State attorney general to carry out his responsibilities under this act.

There is so much antitrust activity at the State and at the national level that the Antitrust Division of the Department of Justice should be involved in or is involved in that I think that a division of labor in this regard would be highly desirable.

Ms. JORDAN. Do you think that the Attorney General of the United States would ever give notice of the possibility of antitrust action if it was a frivolous suit, a frivolous kind of action? Would he not render that notification on the basis of some hard evidence in this own hands?

Mr. MILLER. I think you raise a very interesting point, Ms. Jordan, because although we are not addressing that point in this legislation because there are so many problems in this area, and we are trying to take one step at a time, there are very significant obstacles at the present time, as you are well aware, in obtaining information from the Department of Justice in terms of its investigations.

Now, what might well happen under this bill would be a simple letter of notification from the Attorney General of the United States to a State attorney general, that in fact he thinks there is the probability of recovery of damages. At that point, the State attorney general would have to undertake an investigation on his own.

Very frankly, there is no way that one can start from scratch in a complicated antitrust suit and complete the investigation and make the type of decision referred to in this bill, and decide whether to bring a suit or not within that 90-day period of time.

Each case has to be handled on its own. In some instance, conceivably, it might be done within the 90 days, but in other instances it

might take 1 year or more of thorough investigation before such a decision could be made.

Ms. JORDAN. Counsel has just reminded me, Mr. Miller, that there might be some problems of the statute of limitations if we did not have some 90-day limit for actions to be filed. That is one problem. And the State could start the proceedings with a discovery device and change its mind later, couldn't it?

Is that not a possibility?

Mr. MILLER. Ms. Jordan, I am going to ask Mr. Joseph to respond to that.

Ms. JORDAN. All right.

Mr. JOSEPH. Let me respond to the first part because I do not understand the 90-day statute of limitation position that counsel raises, and perhaps we could discuss it at some other time. But the statute of limitations under the antitrust laws is until 1 year after completion of Federal litigation. That is a very useful and important provision.

And that provision is, I believe, supported by the idea that until the Federal Government has moved quite some distance with its litigation, the States are in a difficult position as to where they should go.

In the *Automobile Fleet Sales* case it took quite a number of months for the bill of particulars to be prepared after the filing of the case. The bill of particulars is a very useful device to the States, and to anybody concerned with that particular case, but even the bill of particulars and the complaint are really not enough for a State to judge whether it should be involved in an antitrust suit. They have to deal with their own purchasing agents, the purchasing agents in the cities, the counties, and the special districts. It is really quite a difficult and long decision on the filing of antitrust suits by States.

Plus—and I do not want to belabor the point with our limited staffs a commitment to antitrust litigation, that is a single suit, is probably a 4- to 8-year commitment. And while we are working on that suit, we cannot work on others that might arise in that area.

So we commit 20 or 30 or 40 percent of our total resources to the filing of a single case. It is a very important decision. I do not think it can possibly be made in 90 days under normal circumstances.

There may be a case or two where we could reach such a decision in 90 days, but under normal circumstances, we could not. And I am sorry, but I have forgotten the second half of your question, and I did want to respond to it.

Ms. JORDAN. I think you did respond to it comprehensively in the response you gave, and I think I am out of time.

Mr. SEIBERLING. In pursuing the philosophy of the equal rights amendment, Ms. Jordan, I have to say the gentlewoman's time has expired.

Mr. Dennis?

Mr. DENNIS. Thank you, Mr. Chairman.

Going back just briefly to the point I raised before, rule 17 of the Rules of Civil Procedure dealing with capacity to sue in the Federal court says: "Capacity to sue or be sued shall be determined by the law of the State in which the district court is held."

Now, I am not talking about State legislation. I do not mean to increase the jurisdiction of the Federal court. What I am suggesting is that the Commonwealth of Virginia or the State of Ohio might pass a statute in effect saying, we hereby have just in the Common-

wealth or in the State of Ohio the right to sue parens patriae for damages suffered by our individual citizens; and if they did that, which I suppose they could do, why could not the State then go into Federal court on the basis of rule 17?

You would not be increasing the jurisdiction of the court at all. The jurisdiction is there. It says; "capacity to sue here is determined by the law of the State," and now you would say, "and the law of our State gives us the exact right to bring this kind of a suit."

In *Frito-Lay* they said the law did not give them that. But what I am suggesting is that you give it to yourself. Why could not you do it by State law, and then under the rule you could come into Federal court if you wanted to?

Mr. MILLER. I think we are confusing two things here, and that is the capacity to sue, to begin with, and the right to recover damages. Taking the *Hawaii* case, for example, there the attorney general——

Mr. DENNIS. I am saying you give yourselves the right to bring the type of suit where you recover damages.

Mr. MILLER. Well, I think the question of whether you recover damages is a question of Federal law, and that is why we are here today.

As I said earlier, there was no way in the world the attorney general of any State could institute any suit unless he was authorized to do so under Federal law. We are not talking about giving him the opportunity to do that under State law. That is something between him and his Governor and his legislature. But what we are talking about here is the right of the State acting through its attorney general to recover damages parens patriae for injuries to the general economy of the State, or for damages to individual citizens of the State.

Now, that is a matter of Federal law, and that was the whole problem with respect to the *Hawaii* case.

Mr. DENNIS. Well, I thought, and I am not any expert on this subject in any way, but I thought the *Frito-Lay* case recognized the common law right of suit, which had been recognized before, but they said the common law was not broad enough to cover damages for individual citizens.

Now, what I am suggesting is that if you give yourself that right by your own local law expanded on the common law, or whatever you want to call it, maybe they could decide the case that way.

Mr. MILLER. Well, I think the distinction here is between the capacity to sue and one's rights with respect to appropriate remedies after suit has been instituted. Since the *Frito-Lay* case was a California case, I would be glad to have Mr. Joseph comment on it.

Mr. DENNIS. I am sure he knows more than I do.

Mr. MILLER. And than I do.

Mr. JOSEPH. This point is something I would like to consider more, Mr. Dennis, and if we could address the committee by letter later?

But let me just say, and I will be as brief as I can on the point, that if you are correct and the State law can provide us with parens patriae power, then that might be useful for some States to do, and it should be considered. I am not sure it can, but we should consider it.

Even if that is so, I would think it would be quite useful for the Clayton Act to provide all States with parens patriae power. I think this would be more efficient in multidistrict litigation, which is the name of the game in antitrust these days. We should all have the

ability to collect these damages, and it can be provided by Congress, and it is important that it be provided by Congress because, after all, the antitrust laws are particularly in the Federal sphere.

Rule 23 was created by the Federal Government. We do operate under that. The concepts of mass representation have come primarily through the Federal system.

Now, that is not to say that we would not argue the rule 17 procedure, and Mr. Dennis, you may have helped us greatly, by your point. I do want to take a closer look at California law in this regard as to parens patriae. However, I cannot believe we are this far down the road, and I may be admitting an error here, but this far down the road with all of our reliance on Federal law, and then we will discover that possibly our State laws provide us with a power that we did not realize.

But it is possible, and I think we should consider it.

Mr. DENNIS. I do not know the answer either. I am just throwing it out. I thank you for your answer.

Mr. SEIBERLING. The time of the gentleman has expired.

Mr. DENNIS. The gentleman at the end of the table wanted to say something though.

Mr. DOWLING. Only briefly. Mr. Dennis, the question has come up of the authority of the State attorney general initially to bring an action. There is in a 44 Federal rules decision—559, 557—and I cannot remember the case, but it was *Illinois* v. *Harper. Row* 301 F. Supp. 484, 495—wherein the court stated if the action is brought properly under Federal 23(c), then the ability of the attorney general in the State law is unimportant; the Federal law will control.

Therefore, I would respectfully suggest that it is the parens patriae, the Federal law, again that must control. So it is not a question of initially having the right to bring a suit. It is a question of being under the Federal law and [that] controls.

Mr. SEIBERLING. If I may comment, I believe that is the thrust of the *Hawaii* suit also.

Mr. DENNIS. If I might comment also? I think you are right, but I think the *Hawaii* decision and the *Frito-Lay* decision are two different situations, and I am not sure that what I said might apply in the *Frito-Lay* case.

Mr. SEIBERLING. Thank you.

The gentleman from Iowa?

Mr. MEZVINSKY. Thank you. I want to say that I appreciate your testimony, and I do have several points that I want to ask and I can get an answer from whomever wants to answer them.

One is I am concerned that one of the arguments against the legislation is that we have a tough time with antitrust enforcement already on the Federal level with the budget. The Assistant Attorney General pointed out that he was understaffed and did not have enough funds, and was requesting more money.

Then I hear from you today about the problem of lack of funds and staffs. You are indicating that you all ought to have the ability to collect damages, and you want to be a partner in this antitrust action, which I do commend.

Really what I am concerned about is from every one of your States, first, what percentage of your budget is directed toward antitrust

enforcement; and second, do you think you are really equipped to have additional enforcement powers if this bill becomes law?

Mr. MILLER. If there is an implication that the States are not moving very strongly in this direction, I think that implication is not borne out by the records of the States in the last several years. I would be delighted to have each of the gentlemen here respond.

The interest of States generally, Congressman, in the antitrust area in the last several years has increased very significantly. To give you an example of the type of activity which the national association has been engaged in, there has been a series of conferences held here in Washington with the Department of Justice and the Federal Trade Commission to develop a better liaison between the Federal agencies and their respective offices of State attorneys general.

In addition to that we have devised a model State antitrust act, which differs in some respects from the Uniform Act which has been endorsed by the American Bar Association in Houston in its meeting in February. But nonetheless, there is a very strong effort being made to bring State antitrust laws up to date.

As far as State activitity in this field, due to the successful institution of litigation in such fields as tetracycline, the case I referred to in my written testimony, in the last few years State legislatures are recognizing that, in fact, the States can successfully act in the antitrust field. What we are trying to do here today is move us another step forward in that effort.

Obviously, as far as each State is concerned, there are variations in staff and the amount of budget, but with the authority under newly adopted State antitrust laws and the the authority contained in this act, I think the States will be in a position to play a vigorous role in the antitrust enforcement field.

Mr. Dowling, do you want me to respond?

Mr. MEZVINSKY. Maybe you can comment about each State. I would be interested in knowing what percentage of your budget is for antitrust enforcement.

Mr. DOWLING. I cannot directly answer that question. I can only say in Connecticut, that Connecticut is presently participating in some 20 plus multidistrict antitrust suits including *Gypsum Wall Board*, the *Master Key* litigation, the *Cast Iron Pipe*, and I think all of the rest. And for a small State, I think that is significant.

Mr. JOSEPH. I do not know what percentage of our total budget is appropriated for antitrust. I regret to say I cannot answer that, but we are spending close to half a million dollars a year on antitrust enforcement, and I think it is well spent.

We have recovered in the last, approximately 8 years, $60 million, much of which has gone to consumers in our State. Almost the entire remainder of which has gone to governmental entities. We are quite proud of our record.

But to go to your basic question, I think that antitrust litigation will be easier and more effective after the enactment of this legislation than it is now. We will not face many of the motions and much of the appellate proceedings which we now face in every antitrust case we file. The defendants are going to have one of their delaying actions removed by the enactment of this legislation. So it can only help, and help greatly.

Mr. SEIBERLING. The time of the gentleman has expired.

Mr. Sandman?

Mr. SANDMAN. No questions.

Mr. SEIBERLING. Well, did the gentleman from Iowa want to continue then?

Mr. MEZVINSKY. Yes, sir. I wanted to add I am a cosponsor of the bill, so I believe in the legislation. But I am concerned as to how we argue that position, and I thank you for that.

I might also just ask in the same light, in view of wanting to be a partner in the antitrust action, do you think the Federal Government has been vigorous enough in antitrust enforcement? Is that why the States should set about and come in and do its job? Do you care to comment on that?

Mr. MILLER. I think that in response to your question, Congressman, those of us here—and I speak for the national association in this regard—do feel that in order to have vigorous operation of antitrust programs in this country it is necessary to have any available programs at both the Federal and State level. When, in fact, you have antitrust violations, which are national in scope, it is clear to me that the Antitrust Division of the Department of Justice should give top priority to those types of violations.

However, as far as the States are concerned, there are many violations which take place wholly within the confines of a single State or a limited geographic area, like two or three or four States in a given section of the country; and that type of case, it would seem to me, a State attorney general is in an excellent position to cope with that.

Consequently, I see the two programs not as competing, one with the other, but instead complementing each other. This, I think, is what a strong Federal system is all about. The States have not been as vigorous in this area in the past as they should have been.

With respect to the Antitrust Division of the Department of Justice, it is interesting that the FTC is moving out in many areas in which one would have thought that the Antitrust Division of the Department of Justice would move. All of these efforts are hopefully going to lead to a competitive economy and to the benefit of the American consumers, whether they be individual citizens or business entities which are purchasing in the marketplace.

Mr. MEZVINSKY. Did any of the States request from LEAA any funds for antitrust enforcement?

Mr. MILLER. I cannot give you the number of States which have made applications to LEAA and have had such grant applications approved, but there are a significant number of States which have antitrust programs funded through LEAA funds.

Mr. SEIBERLING. I am afraid we may have the buzzer sounding any minute. I would just like to ask a couple of questions on my own, and then turn it over to any of the others for questions.

Mr. Kauper, when he appeared before us, made the suggestion that the bill requires a substantial portion of the citizen consumers to be affected as a condition to the State bringing a parens patriae suit. I made the countersuggestion that a substantial amount of commerce be affected within the State.

Have you any comments on either of those propositions? The idea is to avoid duplicative recovery or frivolous or trivial litigation.

Mr. MILLER. I, of course, did not hear Mr. Kauper's oral testimony. As to whether he was suggesting that a State attorney would bring frivolous antitrust actions, if he did so, that would surprise me.

But I think to answer your question, Congressman, the parens patriae concept in my view is not limited to a substantial effect statewide in terms of the numbers of people involved. You might have, for instance, antitrust activity relating to a single county or a single citizen within the State, but nonetheless a significant anticompetitive effect in the jurisdiction.

Mr. SEIBERLING. Would you therefore support a requirement that a substantial amount of commerce be involved?

Mr. MILLER. In my view to use the word "substantial" before "commerce" would simply open up another issue in the litigation, which would have to be litigated ad nauseum. And frankly if, in fact, there has been damage because of the anticompetitive effect, it seems to me that that should not be qualified by substantial. That is a type of word which antitrust lawyers can discuss for years.

But I think from the practical standpoint of the resolution of a case, unless there has been some type of significant effect, the case is not going to get into the Attorney General's office.

Mr. SEIBERLING. Yes. One other question, and I think maybe Mr. Marvin might particularly want to address himself to this. We have been talking about the oil companies and the FTC action. Do you feel that this legislation would help in handling the oil question as a matter of antitrust litigation?

Mr. MARVIN. Are you referring, when you mentioned the FTC action, to the *Exxon* case?

Mr. SEIBERLING. Well, the case against the eight largest oil companies. I guess that is the *Exxon* case.

Mr. MARVIN. Yes, Mr. Chairman. I do not see any effect on that particular case. This legislation would apply to a State attorney general's interest in the oil industry generally and to violations by this industry within his particular State.

Mr. SEIBERLING. Well, what I was suggesting was not the case but the fact situation out of which the case arises. Would not this be helpful in handling that kind of situation?

Mr. MARVIN. Absolutely. It certainly would. I believe that is the exact intent of the legislation at least as it appears to us.

Mr. SEIBERLING. I called on you, Mr. Marvin, because, as I recall it, the State of Ohio suggested a cooperative effort amongst the 50 States to try to re-enforce the FTC of supplement or take advantage of the FTC proceedings.

Mr. MARVIN. Yes, sir. General Miller may have a report on that; we have made that suggestion to the association's committee represented here today.

Mr. MILLER. There is an ongoing discussion between the FTC and the Antitrust Committee of the National Association of Attorneys General in regard to that case. This is apart from this bill entirely.

The Bureau of Competition of the Federal Trade Commission is substantially underfunded in terms of the responsibility imposed upon it, and consequently our discussions have been directed at the type of information which might be available from the several States to the FTC to assist the FCT in the prosecution of that suit.

Mr. SEIBERLING. Thank you.

Ms. Jordan, do you have any further questions?

Ms. JORDAN. Mr. Miller, I do not fully understand the necessity for changing the bill in the particular of allowing the Attorney General to sue on behalf of political subdivisions.

Now, is there language in the bill which would prevent the Attorney General from doing that, and that is the reason why you want it to add political subdivisions?

Mr. MILLER. The answer is that in the original bill there is reference—and let me quote it—it states: Parens patriae with respect to damages to the general economy of that State or any political subdivision thereof. We have serious question as to whether or not the concept of parens patriae applies to the political subdivisions of the State, and consequently we felt it highly desirable to set forth in a separate subsection the fact that the Attorney General could bring suit on behalf of the State and its political subdivisions. And you would not get into the question as to whether or not that was an appropriate parens patriae move by the Attorney General.

The English common law tradition would not indicate that the parens patriae concept is so inclusive as to bring within it the political subdivisions of the State itself. It is directed at individuals who are citizens of the State, and perhaps for general damages to the economy.

But because of that technical point, Ms. Jordan, we thought it advisable to spell it out in the proposed amendment.

Ms. JORDAN. No further questions.

Mr. SEIBERLING. Mr. Falco, any questions?

Mr. FALCO. General Miller, perhaps just a question or two to clarify. Do not we first have to distinguish those areas you discuss in cooperation with the Justice Department by way of where they developed the theory, and then they essentially count on the States to get active or not as they choose, for example, in the real estate price fixing cases. We normally think real estate is an intrastate type of activity. We assume the States, if interested, will pursue them like some have done.

Is that one area where we have to consider where there is already cooperation?

Mr. MILLER. No question about that. To use the example which you have just alluded to, it is obvious that the Antitrust Division of the Department of Justice simply is not equipped to bring a suit in every State with respect to real estate commissions, if that is an issue in the particular State.

Consequently that is peculiarly within the preserves of the State attorney general.

Mr. FALCO. And also we could say cost of legal fees under ABA fee schedules, for example?

Mr. MILLER. I think my comments would be equally applicable to that.

Mr. FALCO. Is it not true also that there are areas where the Attorney General has chosen not to institute new theory or new types of cases, which has lead directly to shortages of protection for the local and regional and State interests, which by mandating his becoming involved, would create new areas for the States to become involved in and eliminate these kinds of shortages?

For example, is not this exactly being discussed in the law reviews right now, that is, the failure of Federal authorities to enter into

antitrust activities in the large suburban shopping centers in which systematically large merchandisers are boycotting and excluding the small competitors? And I think since Columbia Law Review has been touching on this subject lately. Maybe the gentleman from New York might want to chip in.

Mr. DESIDERIO. Well, I am not sure that I can adequately answer that question.

Mr. FALCO. Mr. Marvin, do you have any comment?

Mr. MARVIN. I do have an experience to share with you, Mr. Falco. In Ohio we did bring an action recently under our State antitrust law against a shopping center, against the landlord and two lessees; one of the lessees had such a restrictive covenant that in effect said there could be no other dress shops in the same price range.

I might say that there is not now a developed state of the law on the issue and no case has been litigated by either of the Federal agencies, however, the FTC does have several shopping center cases going and there have been some consent decrees.

But I think the point you are making is that we cannot rely upon just the two Federal agencies to develop new vistas and new inroads into development of antitrust law, and that if you do add additional States to it, that increases the likelihood that public interest developments will occur more rapidly.

Mr. MILLER. If I might just add to that. That is why the attorneys general feel that the provisions of section 4D(a) are so important, and that is that if, in fact, the Attorney General of the United States does have information, it would be helpful if he were to be required to notify the State attorney general in question that there is a violation which he is aware of. And consequently, the attorney general would then be advised to proceed.

Mr. SEIBERLING. Mr. Polk, any questions?

Mr. POLK. Yes.

Atttorney General Miller, could you explain in greater depth the reason why you suggested that change in the language from "citizens" to "person?"

Mr. MILLER. The answer is that "person" is already defined in the act. Putting in the word "citizens" creates a new word, which would have to be interpreted by the courts. And consequently, it was felt that if persons were used instead, it would be highly desirable in avoiding litigation over that particular point as to the meaning of the act.

Mr. POLK. Well, would the term "citizens" include corporations?

Mr. MILLER. "Persons" does. "Citizens," as far as I am concerned, does. That was a housekeeping amendment in order to bring it into conformity with the definition section of the act.

Mr. POLK. So you intended no substantive change?

Mr. MILLER. That is correct.

Mr. POLK. Thank you.

Mr. SEIBERLING. One last question.

Mr. FALCO. One last question, gentlemen. Mr. Marvin, it is true, is it not, that a primary purpose for the famous 1966 amendments to rule 23 was to enact techniques providing mass recovery for mass injuries inflicted by modern mass production operations?

Mr. MARVIN. Did you address that question to me?

Mr. FALCO. Yes.

Mr. MARVIN. Yes.

Mr. FALCO. Do you want me to repeat it?

Is not it true the primary purpose—well, you heard the question, and you agree?

Mr. MARVIN. Yes.

Mr. FALCO. Is not therefore the judicially developed requirement of proof of individualized injury contradictory of a major premise of rule 23 as amended; namely, that a corporation that violates the antitrust laws necessarily contemplates widespread and generalized economic injury, for which this judicial doctrine now prevents general recovery?

Mr. MARVIN. That is the position which, as a representative of the public interest, I would assert. However, the bar on the other side of the table will vigorously argue that is not true, and in fact, that issue is the subject of extensive legislation.

Mr. FALCO. "The bar on the other side of the table," for clarification of the record purposes, by that you mean the defense bar of the antitrust speciality?

Mr. MARVIN. That is correct.

Mr. SEIBERLING. Thank you.

Gentleman, the hearing of the Subcommittee on Monopolies and Commercial Law is now adjourned subject to the call of the Chair.

[Whereupon, at 12:30 p.m., the subcommittee recessed subject to the call of the Chair.]

CORRESPONDENCE

[The following letters were received subsequent to the termination of the hearings:]

HENRY KANE,
220 PARK PLAZA WEST,
10700 SW. BEAVERTON HIGHWAY,
Beaverton, Oreg., March 19, 1974.

Re H.R. 12528, relating to Attorney General antitrust actions.

Hon. PETER W. RODINO,
Chairman, House Judiciary Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: This letter is written from the bias of a plaintiff's antitrust attorney who between 1965 and 1969 headed the Antitrust Division of the State of Oregon Department of Justice.

I support the principle and contents of H.R. 12528 and believe that the measure is needed and is in the public interest.

Fears have been expressed that the measure, if enacted, would result in a flood of antitrust litigation.

My observation and experience leads me to believe that any such fears are ill-founded.

Budget and staff limitations, plus problems of expense and proof will combine to eliminate most, if not all, possible litigation that is ill-founded or vexatious.

This point was made in H. Kane, "The 'Bounty Hunter' Objection to Antitrust Litigation," 9 Duquesne L.R. 466, 487 (1971):

"Although some defense attorneys may believe that the states are entirely too active in prosecuting treble damage actions, a number of meritorious cases have not been filed for lack of funds, manpower and related reasons. This observation can be tested by comparing the number of states that filed suit in various national conspiracy actions with the number that theoretically could have filed suit."

In the event of hearings I would be happy to appear and submit a prepared statement in support of the bill.

Very truly yours,

HENRY KANE.

SOUTHERN METHODIST UNIVERSITY,
SCHOOL OF LAW,
Dallas, Tex., March 26, 1974.

HON. PETER W. RODINO,
Chairman, Committee on the Judiciary, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your kind invitation to submit a statement in regard to H.R. 12528 and 12921.

I have for several years supported, and continue to support, the notion that the States should have standing to sue on behalf of citizens who are unable to sue on behalf of themselves, where such suits would further legitimate state interests. See Cogan, *Parens Patriae Suits: The Role of the State*, 166 N.Y.L.J. no. 95, p. 1, col 4–5 (November 17, 1971) Few would doubt that in enforcement of the antitrust laws the States have strong and rightful interests to further. Accordingly, I believe this "corrective legislation," to use your words, Mr. Chairman, to overrule the decision of the Court of Appeals in *California v. Frito-Lay*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973), is clearly necessary.

But although you label this legislation as merely "corrective," I believe it is more important than that, Mr. Chairman. For, since writing the above piece,

I have become convinced that there are many instances where—notwithstanding the ability of citizens to sue—it would be preferable to have the States sue, if they so chose and vigorously so did. I am, in the main, referring to the very large class action, whose defects can be avoided by the *parens patriae* actions which this legislation encourages.

As the Committee is well aware, the very large class action raises serious jurisprudential issues. Where a class of tens of thousands, if not millions, might be affected by a decision, we are at the very least concerned that the class be fairly and adequately represented. But more than that we are concerned too—particularly in the area of antitrust—that responsible economic decisions are made by the class representative. For, quite obviously, the representative of thousands and millions wields much power (whether in litigation or, more probably, in settlement), not only with regard to the members of his class, but also with regard to the enterprises and practices under attack.

One response to these concerns has been to require notice to the class so that members might choose whether and by whom they wished to be represented. Another response has been to allow attractive fees for counsel so that attorneys might choose to actively represent minority members of the class. These responses, each quite proper, have their limits in the very large class action, where they raise concerns of their own. Should the expense of notice and administration in such cases exceed the amount of claims,[1] we should be concerned. Should the prime beneficiary of the class action be counsel himself, we should again be concerned.[2]

I am hopeful that this legislation will help meet these concerns. Although as *parens patriae* the States need not be members of the classes they purport to represent, with respect to the fairness and adequacy of their representation, "it is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general." *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 280 (S.D. N.Y. 1971). Equally, with respect to the responsibleness of economic decisions, it is difficult to imagine, at least on the regional level, a representative more responsible than the state itself, through its attorney general and other officers. Furthermore, the cost of notice (to the extent still required) and of administration should be greatly reduced; a state can notify its citizens and administer their funds far more cheaply (it is to be hoped) than can private litigants. And finally, it is likely that an attorney general's fee statement will be more modest than the private practitioner's.

In view of the advantages that *parens patriae* actions have over class actions, I am somewhat troubled by Section 4C(a)(1), to the extent that it permits district courts to treat actions under 4C as class actions. I am troubled generally by statutes which refer, even indirectly, to rules of practice. More particularly—since I assume that the purpose of alternative class action treatment is to take advantage of the existing framework of F.R. Civ P. 23—I am troubled by the possibility that district courts might deem each of the provisions of Rule 23 applicable to *parens patriae* actions, which should not be the case. Rather than make an indirect reference to Rule 23, I would allow the Advisory Committee on Civil Rules to fashion a new rule to deal with such actions, which of course would be subject to the approval of the Congress. Accordingly, I would suggest that Section 4C(a) be amended to read as follows:

"Any attorney general of a State [, as *parens patriae* of the citizens of that State,] [3] may bring a civil action in the name of such State in the district courts of the United States under section 4, or 16, or both of this Act, and he shall be entitled to recover damages and secure other relief as provided in such sections for—

(1) injury to the business or property of such citizens; or

(2) injury to the general economy of the State or any political subdivision thereof."

In addition, to the extent that recovery by the States under subsection (2) might, under some theories, duplicate recovery under subsection (1), I would add the following provision to the end of Section 4C(a)(2):

", to the extent not recovered under subsection (1) hereof."

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[1] The Court will soon indicate how often this is likely to occur. Eisen v. Carlisle & Jacquelin, *cert. granted*, 414 U.S. 908 (1973).

[2] *E.g.*, City of Detroit v. Grinnell Corp., No. 73-1311 (2d Cir. March 13, 1974).

[3] I do not believe a reference to *parens patriae* is necessary to support this legislation and therefore would omit it.

I appreciate the opportunity of submitting this statement in support of H.R. 12528 and 12921.

Respectfully yours,

NEIL H. COGAN,
Assistant Professor of Law

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., March 27, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Honorable Warren Spannaus, the Attorney General for the State of Minnesota, has written you with regard to H.R. 12528, amendments to the federal antitrust laws to permit state attorneys general to commence consumer antitrust class actions.

Mr. Spannaus wrote in favor of this legislation and suggested two changes he believes important for the effectiveness of this legislation. First, he believes citizens should be able to "opt out" of the class of citizens represented by a state attorney general if they so desire. Second, Mr. Spannaus believes that specific provisions should be made allowing state attorneys general to deduct attorney's fees from any recovery from an action.

Your careful consideration of the views expressed in Mr. Spannaus' letter would be greatly appreciated.

With kindest regards, I am

Sincerely yours,

ALBERT H. QUIE,
Member of Congress.

STATE OF MINNESOTA,
OFFICE OF THE ATTORNEY GENERAL,
St. Paul, Minn., March 13, 1974.

Re H.R. 12528, 93d Congress, second session—Amendments to the Federal antitrust laws to permit State attorneys general to commence consumer antitrust class actions.

Hon. PETER RODINO,
House of Representatives,
Room 2266 Rayburn Building, Washington, D.C.

DEAR REPRESENTATIVE RODINO: I have received a copy of H.R. 12528, which you introduced in the House Judiciary Committee on February 4, 1974. That bill authorizes state attorneys general to commence consumer class actions under Section 4 of the Clayton Act.

I have long been concerned with the effective enforcement of our state and federal antitrust laws because their continued vitality is surely essential to the long term health of the American economy. Since the treble damage provisions of Section 4 of the Clayton Act are one of the mainstays of enforcement of our antitrust laws, I believe that legislation designed to facilitate the commencement of justified treble damage actions is desirable.

I therefore believe your bill is an important step towards securing better and more effective enforcement of our antitrust laws.

I have several concerns with the bill, however, and would like to bring them to your attention directly.

First, I believe that the bill should provide a mechanism such as that of Federal Rule of Civil Procedure 23(c) whereby citizens could "opt-out" of a class of citizens represented by a state attorney general if they desired to. If citizens desire to litigate their claims themselves, or as a part of another class action represented by a private attorney, they should have the option to do so, even though, I suspect, that option would be very infrequently exercised. I believe that the addition of an "opt-out" provision is necessary to affirm the right of the individual citizen to conduct his private affairs as he sees fit.

Second, and a matter of significant concern, is what I believe to be a drafting problem in the present bill.

Section 4C (b) (2) provides that a state attorney general:

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

(Emphasis added.) Whereas, Section 4D (d), which relates to actions by the United States Attorney General, provides:

"With respect to any recovery of damages under this section the Attorney General [of the United States] shall pay or cause to be paid to the respective States, on behalf of whose citizens he has recovered such damages, a pro-rata share of the total damages recovered, *after deducting therefrom*, on the basis of regulations prescribed by the Attorney General and approved by the Comptroller General of the United States, *litigation expenses including actual attorney's fees and administrative costs*. Any amounts so deducted shall be deposited in a special fund by the Attorney General, and subject to an appropriation, used only for activities under this section."

(Emphasis added.) As can be seen from the highlighted language above, the United States Attorney General is expressly authorized to deduct attorney's fees from any recovery. However, state attorneys general are not expressly authorized to deduct attorneys' fees. While I am sure that this omission is an inadvertent one, I fear that it might cause some courts to conclude from it that it was Congress' intention to not permit state attorneys general to deduct attorneys' fees from any recoveries realized in actions. This omission should be corrected prior to passage of the bill by the addition of an express provision allowing state Attorneys General to deduct attorneys' fees from any recovery. As I am sure you are aware, antitrust divisions of state attorney general offices are often understaffed and are often lacking in experienced antitrust trial personnel. Therefore, it is common for state attorneys general to employ experienced private antitrust attorneys to assist the state in commencing and waging major antitrust suits. The expenses of waging a suit, including the expenses of such outside counsel, should be deducted from any recovery. I do not believe that that expense should be borne by the general taxpayers of the state.

Once again, I believe that your bill is an important step towards more effective enforcement of our antitrust laws. If you desire additional comments regarding my views on the bill, or if I can be of any assistance to you, please do not hesitate to contact me.

Very truly yours,

WARREN SPANNAUS,
Attorney General,
State of Minnesota.

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS,
DEPARTMENT OF THE ATTORNEY GENERAL,
PROVIDENCE COUNTY COURTHOUSE,
Providence, March 28, 1974.

Re H.R. 12528, 93d Congress, second session—Amendments to the Federal Antitrust laws to permit State attorneys general to commence consumer antitrust class actions.

Hon. PETER RODINO,
House of Representatives, Room 2266 Rayburn Building,
Washington, D.C.

DEAR REPRESENTATIVE RODINO: I have recently examined a copy of H.R. 12528 which is now pending before your Honorable Committee. That bill would authorize State attorneys general to bring consumer class actions for the benefit of individual citizens of their respective states under Section 4 of the Clayton Act. I strongly support the principle embodied in that bill. I agree that Congressional enactment to fill the hiatus left by the decision of the United States Supreme Court in the case of *Hawaii vs. Standard Oil* (1972) 405 US 251 is absolutely essential to spread the benefits of antitrust legislation to the widest possible extent among the people of our states.

Suggestions have been made that the proposed legislation be modified to avoid the consequences of duplicative damages. On the one hand it is proposed that a mechanism be devised for individuals to opt out of the action commenced on their behalf by the attorney general of the state, to manage their own lawsuit,

and thereby to collect their own damages to the extent that they are entitled to damages. It is also suggested that the right of action by a state for damages to the "general economy of that state or any political subdivision thereof" be limited to those situations where a state can show an interest independent from that of particular citizens or where the damages to the general public in the state may not be computed on an individual basis.

As to the first proposition, it seems to me that only those consumers whose damages exceed a reasonable minimum amount ought to be permitted to opt out of the State attorney general's action and to manage his own claim. An important consideration in this instance ought to be to relieve the United States District Court of the burden of managing the complaints of numerous plaintiffs with economically insignificant individual damage claims. As to the second proposition, I submit that the courts themselves can frame rules to avoid duplication of damages, if the statutory language plainly states that the damages recoverable under subparagraph (a) (2) of Section 4C are exclusive of the particular damages attributable to the specific members of a consumer class.

Let me conclude by joining all the other endorsers of this important advance in antitrust legislation.

Respectfully yours,

RICHARD J. ISRAEL,
Attorney General.

STATE OF MONTANA,
OFFICE OF THE ATTORNEY GENERAL,
Helena, April 2, 1974.

Re H.R. 12528, 93d Congress, second session—Amendments to the Federal antitrust laws to permit State attorneys general to commence consumer antitrust class actions.

Hon. PETER RODINO,
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE RODINO: I am in receipt of a copy of the letter that the Honorable Warren Spannus, Attorney General for the State of Minnesota, sent to you dated March 13, 1974, concerning the above-referenced matter.

I would like to express my concern and support for the proposed amendments to the Federal Antitrust Laws to permit state attorneys general to commence consumer antitrust cases actions. In this regard I would like to add my endorsement to the comments and suggested changes proposed by Attorney General Spannus in his correspondence to you. It is absolutely vital to the effectiveness of the proposed legislation that state attorneys general be specifically authorized to recover their costs in actions involving antitrust litigation.

Therefore, I urge you and the Congress to give respectful consideration to the proposals offered by Attorney General Spannus.

Very truly yours,

ROBERT L. WOODAHL,
Attorney General,
State of Montana.

STATE OF VERMONT,
OFFICE OF THE ATTORNEY GENERAL,
Montpelier, April 8, 1974.

Re H.R. 12528, 93d Congress, second session—Amendments to the Federal antitrust laws to permit State attorneys general to commence consumer antitrust class actions.

Hon. PETER RODINO,
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE RODINO: A copy of General Spannaus' letter of March 20, 1974 to you concerning the bill referred to above was sent to this office for our comments.

After reviewing the same, we would join with the Attorney General of the State of Minnesota in urging the passage of that legislation with the changes suggested by General Spannaus.

Very truly yours,

KIMBERLY B. CHENEY,
Attorney General,
State of Vermont.

STATE OF HAWAII,
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE CAPITOL,
Honolulu, Hawaii, April 15, 1974.

Re: H.R. 12528, 93d Congress, second session—Amendments to the Federal antitrust laws to permit State attorneys general to commence consumer antitrust class actions.

Hon. PETER RODINO,
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE RODINO: I have received a copy of H.R. 12528, which you introduced in the House Judiciary Committee on February 4, 1974. That bill would authorize state attorneys general to commence consumer class actions under Section 4 of the Clayton Act.

As you well know, the Attorney General of the State of Hawaii in *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251 (1972) was denied the right to represent the State as parens patriae. In attempting to remedy what I believe to be a "loophole" in the law, our office has made attempts to have state legislation passed and we have testified through our representatives in the National Association of Attorneys General before your committee in March.

May I reiterate at this time that our office fully supports the bill you have introduced in the House. I feel that such legislation is necessary if the attorneys general of each state are to truly provide representation which the consumers need in this complex area of the law.

I do, however, wish to express some concern over Section 4C(b)(2) of your bill which provides that a state attorney general:

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

This section is in conflict with Section 4D(d) of your bill and leaves me with the impression that the states will not be able to include attorneys' fees in their litigation costs.

It has been our experience that very often the State must hire outside counsel to assist the State in commencing and litigating major antitrust cases. The states should be allowed to deduct attorneys' fees just as the United States Attorney in Section 4D(d) in your bill.

Very truly yours,

GEORGE PAI,
Attorney General.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., April 16, 1974.

Hon. PETER RODINO,
Chairman, House Judiciary Committee,
2137 Rayburn Building

DEAR PETER: I am writing to express my support for legislation which you've introduced which would give state attorneys general the authority to commence consumer antitrust class actions under Section 4 of the Clayton Act, H.R. 12528.

The effective enforcement of our state and federal antitrust laws is essential to the long-term health of the American economy. Since the treble damage provisions of Section 4 of the Clayton Act are one of the mainstays of enforcement, I believe that legislation designed to facilitate the commencement of justified treble damage actions is desirable.

This avenue of redress in the district courts of the United States for citizens and political subdivisions of the States, for damages incurred by unlawful monopolies will go a long way toward creating an equilibrium for the consumer.

I commend your Committee for proceeding with hearings so diligently, and

I'm hopeful that action will continue to be expeditious to ensure enaction of this important consumer protection legislation this session.

Best wishes.

Sincerely,

DONALD M. FRASER.

THE ATTORNEY GENERAL OF TEXAS,
Austin, Tex., April 25, 1974.

Re H.R. 12528.

Hon. PETER RODINO,
House of Representatives,
Room 2266 Rayburn Building,
Washington, D.C.

DEAR REPRESENTATIVE RODINO: Let me take this opportunity to commend you for introducing the much needed legislation allowing States' Attorneys General to act in "parens patriae" in class action lawsuits brought pursuant to Section 4 of the Clayton Act.

In this regard, I would like to suggest that perhaps Section 4C(b)(2) be amended to allow State Attorneys General to deduct litigation expenses, including "actual attorneys fees" and administrative costs. We feel that such an amendment would allow the Attorney General to recover the money expended on prosecuting antitrust cases without unduly penalizing the taxpayers who are the source of the state appropriations which fund the operation of our office.

With kindest regards,

Sincerely,

JOHN L. HILL,
Attorney General of Texas.

THE DISTRICT OF COLUMBIA,
Washington, D.C., May 16, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: The Government of the District of Columbia has for report H.R. 12528, a bill "To permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies."

H.R. 12528 would confer upon State attorneys general powers under the Federal antitrust laws that are virtually identical to those presently possessed by the Attorney General of the United States. Under the bill, State attorneys general would be empowered to sue for damages to citizens of their respective States as a result of antitrust violations either through the device of a class action or in the role of *parens patriae.*

Unless otherwise specifically provided by statute, the District of Columbia is not deemed to be a "State". The omission of any reference to the District of Columbia in H.R. 12528 means, therefore, that the District of Columbia would not be included among those jurisdictions which would benefit from the enactment of this legislation; nor would the District Government be granted the right afforded to the States to bring civil actions as *parens patriae* on behalf of the citizens of their States for damages personally sustained or for damages to the general economies of the States. Inasmuch as citizens of the District of Columbia may suffer economic loss or detriment on account of unlawful restraints and monopolies to the same extent as the citizens of the several States, the District Government strongly recommends that H.R. 12528 be amended to include the District of Columbia within its coverage and to permit the Corporation Counsel of the District of Columbia to have the same standing as the attorneys general of the several States to sue for damages arising from antitrust violations.

Accordingly, the District Government recommends that H.R. 12528 be amended by adding the following new section after section 4E:

"Sec. 4F. As used in this Act, the term 'State' shall include the District of Columbia, and the term 'attorney general of a State' shall include the Corporation Counsel of the District of Columbia."

We urge the favorable consideration by the Congress of our proposed amendment and the enactment as so amended of H.R. 12528.

Sincerely yours,

WALTER E. WASHINGTON,
Mayor-Commissioner.

OFFICE OF THE ATTORNEY GENERAL,
STATE CAPITOL,
Phoenix, Ariz., May 28, 1974.

Re H.R. 12528.

Hon. PETER W. RODINO, Jr.,
Chairman, Judiciary Committee,
U.S. House of Representatives,
Washington, D.C.

DEAR CHAIRMAN RODINO: During my tenure as Attorney General, Arizona has participated in several antitrust cases in which it would have been desirable to secure direct redress for economic injuries suffered by citizens and governmental entities as a result of the conduct of antitrust law violators. As you are aware, limitations in existing legal doctrine severely limit a state's ability to obtain such redress.

We have reviewed H.R. 12528 and believe its passage would be of great benefit to state antitrust enforcement activities.

A substantial amount of Arizona's antitrust litigation has been handled for the past five years by Mark I. Harrison, who has served as one of a few Special Counsel representing the Arizona Attorney General in the antitrust field. Mr. Harrison is especially cognizant of the matters dealt with in H.R. 12528 as he reviewed for this office the amicus brief submitted by several states in *Hawaii* v. *Standard Oil*, 405 U.S. 251 (1972).

I would deeply appreciate it if you would have your staff people keep Mr. Harrison informed on a current basis of all significant developments affecting the progress of H.R. 12528. In addition, I would be happy to have Mr. Harrison appear on behalf of this office to testify in support of H.R. 12528 if and when hearings are held in connection with the bill.

Very truly yours,

GARY K. NELSON,
The Attorney General.

ATTORNEY GENERAL OF MISSOURI,
Jefferson City, July 11, 1974.

Hon. PETER W. RODINO,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN RODINO: Your subcommittee has been hearing testimony and receiving written comments on the antitrust "Parens Patriae" bill, H.R. 12528, which you introduced in February. I would like to express my strong support for the basic thrust of the bill, but I believe that the provision allowing for recovery for "damages to the general economy" of the state should be deleted.

The idea of authorizing a state attorney general to bring an antitrust treble damage suit on behalf of all the citizens of his state is a sound one. Many consumer goods are sold on a mass basis to millions of people, and antitrust violations connected with these products have a major economic impact. In most cases, however, no one has an economic stake big enough to justify his own lawsuit, and few people could substantiate their purchases to prove damages in the event a class action suit was brought. Further, the *Eisen* decision of the Supreme Court has made the consumer class action unavailable to all but the most wealthy representative plaintiffs. If the private treble damage action is to be an effective deterrent to antitrust violations by sellers of consumer goods, someone must have the power to sue on behalf of all citizens of a state and collect damages computed on a statewide basis. The logical person to serve in this role is the state attorney general, and therefore I urge your subcommittee to give this bill a favorable report.

The one questionable provision in this bill is Section 4C(a)(2) of the bill, which allows recovery for "damages to the general economy" of a state. The language is so broad that it would expand permissible claims for relief far beyond tradi-

tional concepts of antitrust damages. For example, the complaint in *Hawaii* v. *Standard Oil*, 405 U.S. 251 (1972), the case which gave rise to this section, asked damages for injuries resulting, *inter alia*, from increased taxes, restricted opportunity in manufacturing and shipping, incomplete utilization of the state's natural wealth, and arrested development of the state's economy. To paraphrase Shakespeare, this bill would allow Richard III to sue a conspiracy of horse sellers for the loss of a kindom, trebled. The section places a tremendous and unforeseeable burden on antitrust violators which would, if enforced literally, simply bankrupt all but the wealthiest corporations. Considering that most suits are already settled for much less than the three times direct damages presently allowed, I believe this section represents an unnecessary and unwarranted extension of antitrust law principles.

Therefore, I urge your subcommittee to delete this single subsection and thereby strengthen an outstanding piece of legislation, and then to recommend the adoption of this bill by the Congress.

I would appreciate your entering this letter into the record of the subcommittee's consideration of H.R. 12528.

Very truly yours,

JOHN C. DANFORTH,
Attorney General.

STATE OF SOUTH DAKOTA,
OFFICE OF ATTORNEY GENERAL,
Pierre, July 31, 1974.

Re H.R. 12528—A bill to permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the State of South Dakota, I write to endorse specifically the testimony in support of this Bill given by Attorney General Miller of Virginia, on March 25, 1974, as chairman of the Antitrust Committee of the National Association of Attorneys General.

My State is in the process of setting up an active division within the Office of the Attorney General on its own behalf and on behalf of its political subdivisions and individual residents. I believe that your Bill will be of great importance in eliminating artificial procedural obstacles to the effectiveness of such public interest litigation. The subsidiary modification proposed by General Miller will, in my opinion, strengthen the basic purpose of the Bill and facilitate effective cooperation between federal and state authorities.

I urge that the Bill be enacted with those modifications.

Very truly yours,

SAM SCHAUNAMAN,
Assistant Attorney General.

THE STATE OF WISCONSIN,
DEPARTMENT OF JUSTICE,
Madison, July 31, 1974.

Re H.R. 12528—A bill to permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. RODINO: As Attorney General of the State of Wisconsin, I concur specifically with the testimony in support of H.R. 12528 given on March 25, 1974, by the Chairman of the Antitrust Committee of the National Association of Attorneys General, Virginia Attorney General Andrew P. Miller.

Wisconsin actively enforces all antitrust laws. State antitrust statutes are aggressively enforced through criminal prosecutions as well as various civil proceedings. Similarly Wisconsin is a frequent antitrust litigant under the

federal laws in its own behalf and on behalf of its political subdivisions and individual residents. Because of Wisconsin's strong interest in the enforcement of antitrust laws, I believe there is a very great need for your "parens patriae" bill. Several recent court cases greatly emphasize this need. Such a law will certainly aid the concept of civil enforcement of the antitrust laws and will close a gap that sometimes presently allows the antitrust violator to enjoy the profits of his wrong doing.

For these reasons, I support your bill together with the slight modifications suggested by General Miller.

Sincerely yours,

ROBERT W. WARREN,
Attorney General.

DEPARTMENT OF JUSTICE,
STATE CAPITOL BUILDING,
Des Moines, Iowa, August 1, 1974.

Re H.R. 12528—A bill to permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: As Attorney General for the State of Iowa, I urge your support of H.R. 12528 but specifically endorse the changes recommended by Attorney General Andrew Miller of Virginia in hearings held March 25, 1974 as Chairman of the Antitrust Committee of the National Association of Attorney's General.

We have, in Iowa, a Special Prosecutions Unit which handles antitrust litigation, but we are seriously hampered by an antiquated statute and case law. We have been active in the area on our own behalf, on behalf of political subdivisions and on behalf of individual consumers. I believe that H.R. 12528 would be most helpful to us and to other states' Attorneys General in eliminating the existing artificial procedural barriers which impede this public interest litigation. However, I support the modifications proposed by General Miller relating to inclusive language for political subdivisions and substituting the word "person" for "citizen" in Section 4; providing for notice of States Attorneys General in both damage and injunctive cases; eliminating the requirement that the U.S. Attorney General institute action within ninety days after notification to the State; and modifying the recovery section in terms of federal agencies. These suggestions are important to the basic purpose of the bill and are necessary to facilitate state-federal cooperation in this vital area.

I urge that the bill be enacted with those modifications as quickly as possible.

Very truly yours,

RICHARD C. TURNER,
Attorney General of Iowa.

DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL,
Jackson, Miss., August 5, 1974.

Re H.R. 12528—A bill to permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the State of Mississippi, I write to endorse specifically the testimony in support of this Bill given by Attorney General Miller of Virginia on March 25, 1974, as Chairman of the Antitrust Committee on the National Association of Attorneys General.

My State has been an active antitrust litigant on its own behalf and on be-

half of its political subdivisions and individual residents. I believe that your Bill will be of great importance in eliminating artificial procedural obstacles to the effectiveness proposed by General Miller will, in my opinion, strengthen the basic purpose of the Bill and facilitate effective cooperation between federal and State authorities.

I urge that the Bill be enacted with those modifications.

Yours very truly,

A. F. SUMMER,
Attorney General.

STATE OF FLORIDA,
DEPARTMENT OF LEGAL AFFAIRS,
OFFICE OF THE ATTORNEY GENERAL,
THE CAPITOL,
Tallahassee, Fla., August 5, 1974.

Re H.R. 12528—A bill to permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Hon. PETER W. RODINO, JR.,
Chairman, Subcommittee on Monopolies and Commercial Law,
Committee on the Judiciary,
House of Representatives,
Washington, D.C.

Dear Mr. Chairman: On behalf of the State of Florida, I write to endorse testimony in support of this bill given by Attorney General Andrew Miller of Virginia on March 25, 1974, as Chairman of the Antitrust Committee of the National Association of Attorneys General.

My State has been an active antitrust litigant on its own behalf and on behalf of its political subdivisions and individual consumers. Your Bill will go far toward eliminating artificial procedural obstacles to effective public interest litigation.

Modifications proposed by General Miller will, in my opinion, strengthen the basic purpose of the Bill, and facilitate effective cooperation between Federal and State authorities.

I urge that the Bill be enacted with those modifications.

Very truly yours,

ROBERT L. SHEVIN,
Attorney General.

ATTORNEY GENERAL,
SUPREME COURT BUILDING,
Nashville, Tenn., August 6, 1974.

Re H.R. 12528—A bill to permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law,
Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the State of Tennessee, I write to endorse specifically the testimony in support of this bill given by Attorney General Miller of Virginia on March 25, 1974, as Chairman of the Antitrust Committee of the National Association of Attorneys General.

My State has been an active antitrust litigant on its own behalf and on behalf of its political subdivisions and individual residents. I believe that your bill will be of great importance in eliminating artificial procedural obstacles to the effectiveness of such pubic interest litigation. The subsidiary modifications proposed by General Miller will, in my opinion, strengthen the basic purpose

of the Bill and facilitate effective cooperation between federal and State authorities.

I urge that the bill be enacted with those modifications.

Very truly yours,

C. HAYES COONEY,
Deputy Attorney General.

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE ATTORNEY GENERAL,
Frankfort, August 8, 1974.

Re H.R. 12528—A bill to permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the State of Kentucky, I write to endorse specifically the testimony in support of this Bill given by Attorney General Miller of Virginia on March 25, 1974, as Chairman of the Antitrust Committee of the National Association of Attorneys General.

My State has been an active antitrust litigant on its own behalf and on behalf of its political subdivisions and individual residents. I believe that your Bill will be of great importance in eliminating artificial procedural obstacles to the effectiveness of such public interest litigation. The subsidiary modifications proposed by General Miller will, in my opinion, strengthen the basic purpose of the Bill and facilitate effective cooperation between federal and State authorities.

I urge that the Bill be enacted with those modifications.

Sincerely,

ED W. HANCOCK.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., August 9, 1974.

Hon. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed is a letter which I received from the Honorable Jim Guy Tucker, Attorney General of the State of Arkansas, in support of your bill, H.R. 12528, which is pending before the Subcommittee on Monopolies and Commercial Law.

I assured the Attorney General that I would be happy to forward his letter to the Committee for inclusion in the record.

Best personal regards,

Sincerely,

RAY THORNTON, *Member of Congress.*

STATE OF ARKANSAS,
OFFICE OF THE ATTORNEY GENERAL,
JUSTICE BUILDING,
Little Rock, April 15, 1974.

Hon. RAY THORNTON,
U.S. House of Representatives,
Washington, D.C.

DEAR RAY: The "Rodino Bill", H.R. 12528, currently pending before the Judiciary Committee, of which you are a member, proposes amendments to the Clayton Antitrust Act which would provide great incentives to state Attorneys General to bring actions in the antitrust area and would greatly facilitate the possibilities of substantial recovery for citizens of Arkansas.

While certain substantive amendments have been recommended by other state Attorneys General (see, e.g., testimony of the Honorable Andrew P. Miller, Attorney General of Virginia and Chairman of the Antitrust Committee of the National Association of Attorneys General before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, March 25, 1974), I believe the thrust of this bill to be entirely sound and needed. These amendments are on the whole, well thought out and adequate responses to the problems created by the cases of *Hawaii* vs. *Standard Oil Company of California*, 405 U.S. 251 (1972), and *California* vs. *Frito-Lay, Inc.*, 474 F. 2d 774 (9th Cir. 1973).

I agree with the remarks of General Miller, referred to above, concerning the detrimental affects of allowing state Attorneys General only ninety days following notification by the United States Attorney General that a probable antitrust action exists in his state in which to decide whether to bring the action himself or to stand aside and allow the United States Attorney General's Office to bring the action.

I would appreciate your careful consideration of this bill and hope that you can give it your support. I believe it would be a great benefit not only to the citizens of the State of Arkansas but also to the citizens of the other forty-nine states.

It is my understanding that the Senate Antitrust and Monopoly Sub-Committee, Chaired by Senator Philip A. Hart, has considered a draft of a statute similar to the "Rodino Bill".

Sincerely yours,

JIM GUY TUCKER.

STATE OF NEVADA,
OFFICE OF THE ATTORNEY GENERAL,
SUPREME COURT BUILDING,
Carson City, August 19, 1974.

Re H.R. 12528—The parens patriae bill.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The State of Nevada has been an active participant in a number of multistate antitrust litigation, on its own behalf and on behalf of its various political subdivisions. In my opinion, the *Parens Patriae* Bill will be of enormous assistance to the state in seeking redress for antitrust violations perpetrated upon both the state and its citizens. In particular, I favor those provisions of the Bill which will enable the state to bring an action not only on behalf of its governmental agencies, but also on behalf of the citizens of the state.

Up until now, the State of Nevada has brought, or joined, its antitrust actions on behalf of governmental agencies. Like many other states, we felt that the state simply did not have the authority to bring action on behalf of its individual citizens. The *Parens Patriae* Bill will rectify this situation. In my opinion, this will be a change for the better as it will enable the state to bring actions on behalf of citizens who ordinarily would be unable to seek redress in their own behalf for violations of the law perpetrated on them.

As a member of the Antitrust Committee of the National Association of Attorneys General, I have worked closely with its chairman, Attorney General Miller of Virginia, in considering and discussing the *Parens Patriae* Bill. Accordingly, I specifically endorsed the testimony in support of the *Parens Patriae* Bill given by Attorney General Miller on March 25, 1974, before your committee. The modifications which he presented to you at that time are, in my opinion, to the best interest of the citizens of our various states.

Accordingly, I urge that H.R. 12528 be enacted with the modifications suggested by the Antitrust Committee of the National Association of Attorneys General.

Sincerely,

ROBERT LIST,
Attorney General.

STATE OF ALASKA,
OFFICE OF THE ATTORNEY GENERAL,
POUCH K—STATE CAPITOL,
Juneau, August 20, 1974.

Re H. R. 12528, 93d Congress, second session—amendments to the Federal antitrust laws to permit State attorneys general to commence antitrust actions as parens patriae of the citizens of their States.

HON. PETER RODINO,
House of Representatives, Room 2266, Rayburn Building, Washington, D.C.

DEAR REPRESENTATIVE RODINO: I wish to state my support for H.R. 12528, a bill to grant each state attorney general the authority to secure redress in federal courts as parens patriae for damage to the citizens and economy of his state resulting from violations of the federal antitrust laws.

I am very concerned with the ability of each state to protect its citizens and general economy from the damaging effects of unlawful restraints of trade. This bill provides a long-needed tool to make the antitrust laws more responsive to present economic realities.

The average citizen is hard-pressed to recover damages suffered from violations of antitrust laws. His loss is generally small in comparison to the expense of litigating an antitrust action. However, when viewed in the aggregate, the total damage experienced by the citizens of a state or by the general economy of a state from a significant antitrust violation is large and would be the basis for a feasible action. The state is the logical party to seek recovery in such cases. Under this bill, any state could provide its individual citizens and its general economy with relief which might not otherwise be practically available or possible under the law of the individual state.

Further, the ability of each state's attorney general to seek such redress would be a strong deterrent to future antitrust violations, and the healthy competition necessary to the functioning of our free enterprise system would be encouraged.

While supporting the main thrust of this bill, I would also urge the inclusion of the revisions suggested by the Honorable Andrew P. Miller in his testimony before the Subcommittee on Monopolies and Commercial Law on March 25, 1974. These revisions are necessary to make the bill a viable, effective tool.

In conclusion, with the aforementioned revisions, I view H.R. 12528 as a valuable source of increased protection for the citizens, economy, and free enterprise system of this country and of my state.

Please feel free to contact me if you need any further comments or have any questions.

Sincerely,

NORMAN C. GORSUCH,
Attorney General.

STATE OF LOUISIANA,
DEPARTMENT OF JUSTICE,
2-3-4 LOYOLA BUILDING,
New Orleans, September 5, 1974.

Re H.R. 12528—A Bill to permit the attorneys general of the several States to secure redress to the citizens and political subdivisions of their States for damages and injuries sustained by reason of unlawful restraints and monopolies.

HON. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the State of Louisiana, I am taking this opportunity to endorse specifically the testimony in support of the captioned Bill, which was given by Attorney General Miller of Virginia on March 25, 1974, in his capacity as Chairman of the Antitrust Committee of the National Association of Attorneys General. Present at that hearing were Messrs. John R. Flowers, Jr., and Peter Everett, IV, Assistant Attorneys General, who represented me.

Louisiana has been an active antitrust litigant on its own behalf and on behalf of its political subdivisions and individual residents for a number of years. We have carefully studied your Bill, and are of the opinion that it will be of great importance in eliminating artificial procedural obstacles to the effectiveness of public interest litigation in the antitrust field.

There are some technical changes which were recommended in addition to the substantive changes to which General Miller addressed himself, and these were attached, for the convenience of the Committee, to a redraft of the Bill incorporating both substantive and procedural suggested revisions. In that connection, the State of Louisiana is specifically, although by no means exclusively, interested in the provision of Section 4D(b) of H.R. 12528, which provides, in essence, that if an individual state declines to take action or fails to institute suit within ninety days of being notified by the Attorney General of the United States, the Attorney General, as directed by the Bill as drawn by your Sub-Committee, would institute an action "in place of the State Attorney General" and as "*parens patriae* of the citizens of such State for the purposes of such action." We do not believe that the notification process of Section 4D(a) would be burdensome; however, Louisiana agrees with the remarks of the Department of Justice's Antitrust Division that the provisions of Section 4D(b) could create serious problems.

It is my opinion that the subsidiary modifications proposed by General Miller will strengthen the basic purpose of the Bill, and facilitate effective cooperation between Federal and State authorities.

As Attorney General of the State of Louisiana, I strongly urge that the Bill be enacted, with the modifications proposed by Attorney General Miller of Virginia, acting as spokesman for the Antitrust Committee of the National Association of Attorneys General, in testifying before the Sub-Committee on Monopolies and Commercial Law on March 25, 1974.

Yours very truly,

WILLIAM J. GUSTE, Jr.,
Attorney General,
State of Louisiana.

THE COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE HOUSE,
Boston, September 9, 1974.

HON. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I write to endorse specifically the testimony in support of H.R. 12528 given by Attorney General Miller of Virginia on March 25, 1974, as Chairman of the Antitrust Committee of the National Association of Attorneys General.

As Attorney General of Massachusetts for more than five and one-half years, I have represented the Commonwealth and some of its state agencies in antitrust litigation. I believe H.R. 12528 will be of great importance in increasing the representation which my office can give to the consumers of the Commonwealth in such litigation.

Furthermore, I believe that the modifications proposed by General Miller will strengthen the basic purpose of the Bill and facilitate effective cooperation between Federal and State authorities.

I urge that H.R. 12528 be enacted with the adoption of General Miller's modifications.

Very truly yours,

ROBERT H. QUINN,
President, National Association
of Attorneys General.

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