

1970

## The State-Consumer Antitrust Class Action

Rodney M. Confer

*University of Nebraska College of Law*, [rconfer@neb.rr.com](mailto:rconfer@neb.rr.com)

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

Rodney M. Confer, *The State-Consumer Antitrust Class Action*, 49 Neb. L. Rev. 840 (1970)

Available at: <https://digitalcommons.unl.edu/nlr/vol49/iss4/8>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

## THE STATE-CONSUMER ANTITRUST CLASS ACTION

### I. INTRODUCTION

The broad language of 15 U.S.C. section 15,<sup>1</sup> which allows any person injured by an antitrust violation to sue for treble damages, has been hailed as one of the most workable devices for deterring the antitrust violator.<sup>2</sup> This statute includes within the scope of its protection the end consumer injured<sup>3</sup> by an illegal overcharge.<sup>4</sup>

The claim of a single consumer is small in most antitrust suits,<sup>5</sup> and this factor, plus the financial strength of a large corporation, the complexity and duration of antitrust litigation, the specialization of the antitrust bar and the expense involved, clearly make a consumer class action advantageous.<sup>6</sup> In addition, the extensive

---

<sup>1</sup> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1964).

<sup>2</sup> "Today private lawsuits, except in the merger field, actually dominate the news of antitrust enforcement." Alioto, *The Economics of a Treble Damage Case*, 32 A.B.A. ANTITRUST L.J. 87 (1967).

<sup>3</sup> For an antitrust plaintiff to recover from the defendant his injury must have been "caused" by the violation. That is, the violation must have been directed at the plaintiff in the sense that the defendant should have realized that plaintiff would be injured. This is the so-called "target area" doctrine. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 364 (9th Cir. 1955); *Minnesota v. United States Steel Corp.*, 299 F. Supp. 596, 602 (D. Minn. 1969); Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 A.B.A. ANTITRUST L.J. 5, 17 (1967).

<sup>4</sup> *E.g.*, *Minnesota v. United States Steel Corp.*, 299 F. Supp. 596 (D. Minn. 1969); *Washington v. American Pipe & Constr. Co.*, 274 F. Supp. 961 (Multidistrict suit in 9th Cir. 1967). In these cases the states were end consumers of construction materials, but the principles would be the same for a private litigant.

<sup>5</sup> *E.g.*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 n.8 (2d Cir. 1968) (\$70 claim). Claims are frequently smaller.

<sup>6</sup> "Gone, once the class suit has commenced, is the protection which wealth has always given the defendant. In prior years if he couldn't starve out a determined treble damage plaintiff he could always buy him out later if the danger of multiple claims appeared to be significant." Donelan, *The Advantages and Disadvantages of a Class Suit Under New Rule 23, as Seen by the Treble Damage Plaintiff*, 32 A.B.A. ANTITRUST L.J. 264, 265 (1967).

amendment of the Federal Rules of Civil Procedure in 1966 made such class actions much more practicable.<sup>7</sup>

In the past, most consumers injured by antitrust violations have not been compensated. As the United States Supreme Court recently pointed out: "[U]ltimate consumers . . . have only a tiny stake in a lawsuit and little interest in attempting a class action."<sup>8</sup> Therefore, unless someone besides the consumer can recover from a violator, he can retain the illegal overcharge that he collects.

Many middlemen purchased large enough quantities to justify antitrust suits, but it was usually held that middlemen lacked standing to sue because they had "passed on" the overcharge to their customers, and consequently had suffered no loss.<sup>9</sup> Thus, neither consumer nor middleman recovered from the wrongdoer.<sup>10</sup> Since the relatively slight criminal sanctions of the antitrust laws<sup>11</sup> were the lone statutory deterrents, antitrust law violation was profitable. In order to remedy this situation, the Supreme Court in 1966 allowed a middleman who had paid a higher price because of an antitrust violation to recover treble damages from the defendant. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>12</sup> the Court deemed it irrelevant whether plaintiff had passed the overcharge on to his customers.<sup>13</sup>

---

<sup>7</sup> FED. R. CIV. P. 23(b) (3). Rule 23 is set out in the appendix, *infra*. For some conflicting views on how the new rule would affect the antitrust bar, expressed shortly after the amended rule went into effect see Symposium—"Amended Rule 23: Antitrust Class Actions?", 32 A.B.A. ANTITRUST L.J. 251 (1967).

<sup>8</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

<sup>9</sup> See, e.g., *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). The cases are collected in the Pollock articles, note 10 *infra*.

<sup>10</sup> The history of this trend is traced in Pollock, *Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183, 1191 (1968); and Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 A.B.A. ANTITRUST L.J. 5, 23 (1967).

<sup>11</sup> The \$5,000 fine was described by the late Mable Walker Willebrandt as "a kind of license fee to do business in America." Alioto, *The Economics of a Treble Damage Case*, 32 A.B.A. ANTITRUST L.J. 87 (1967). The fine is now \$50,000, still a paltry sum to a large corporation.

<sup>12</sup> 392 U.S. 481 (1968).

<sup>13</sup> *Id.* at 489. A lower court decision in *Hanover*, 185 F. Supp. 826 (M.D. Pa. 1960), was the first case to reject the "passing-on" defense. Pollock, *Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183, 1196 (1968); Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 A.B.A. ANTITRUST L.J. 5, 26 (1967).

Although the deterrent effect of the antitrust laws is ensured under *Hanover* by allowing the violator to be sued for treble damages, the injured consumer is still not likely to be compensated for his loss, while the middleman can recover for an overcharge which may not have injured him.<sup>14</sup> Moreover, if the consumer could recover from the antitrust violator for the overcharge passed on to him, then theoretically the defendant might have to pay twice, since the middleman can also recover regardless of whether he passed the overcharge on to his customers.

An effective alternative would be to allow a state to sue on behalf of its resident consumers. Such a suit would compensate consumers and middlemen as their claims merit, protect defendants from multiple liability and deter future antitrust violations.<sup>15</sup> The remainder of this comment examines the state suit as a means to provide redress for small but numerous consumer claims.

<sup>14</sup> In fact, the middleman may recover four times the original overcharge: treble damages from the defendant plus the amount he passed on to the consumer.

<sup>15</sup> Presently only the last of these objectives is accomplished. An injunction would accomplish none of them.

At this point it is well to limit the scope of this comment. (1) The consumer antitrust class action has been thoroughly analyzed elsewhere. *E.g.*, Starrs, *The Consumer Class Action*, 49 B.U.L. REV. 211, 407 (1969); Note, *The Use of Federal Rule 23 in Private Antitrust Enforcement*, 20 SYR. L. REV. 949 (1969); Note, *Damages in Class Actions: Determination and Allocation*, 10 B.C. IND. & COM. L. REV. 615 (1969). This comment attempts to deal only with the unique aspects of a suit brought by the state as representative of the consumer. (2) For the purposes of this comment the antitrust defendant is guilty of price fixing or monopolization in a consumer good industry, and the consumers have, to some extent, been injured by a resulting overcharge. (3) Since it is believed that the action can be brought without any new legislation, it is not extensively considered herein. Nevertheless, new legislation both federal and state, cannot be completely ignored.

Federal legislation which would give a *nolo contendere* plea the same effect as a plea of guilty in subsequent civil litigation, and which would negate the questionable I.R.S. ruling which allows defendants to deduct treble damage awards they pay as an "ordinary and necessary" business expense (thus reducing the deterrent effect of private suits) has been proposed by Senator Phillip A. Hart (D. Mich.). Hart, *Change Antitrust Laws to Increase Private Suits*, TRIAL 45 (Feb./Mar., 1968). Congress might also restrict the application of *Hanover's* rejection of the passing-on defense to cases in which consumer suits were not brought, thereby preserving the deterrent effect of the private suit by the middleman, while precluding multiple liability.

State legislation which would set up standards for determining when a suit would be brought would prevent interest groups from inducing the state to bring suits which the consumers could bring themselves, or which leave more serious wrongs uncorrected. New state agencies might be created for distribution of consumer awards, or provisions made for existing agencies to handle this function.

## II. THE STATE-CONSUMER ANTITRUST SUIT

In the past, a few states' Attorneys General have filed antitrust suits on behalf of injured consumers in their states, but have not received favorable judgments. In *Oklahoma ex rel. Phillips v. American Book Co.*,<sup>16</sup> the state attempted to sue for its own claim and on behalf of the parents of Oklahoma school children for overcharges on school books, but since neither Oklahoma statutes nor judicial decisions gave the state authority to sue for such relief it was held the action could not be maintained. The case apparently has never been followed on this point. Likewise, *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*<sup>17</sup> is inapposite. There, public utilities were allegedly overcharged for heavy electrical equipment. Illinois was denied leave to intervene on behalf of the utilities' customers on the ground that their injuries were not proximately caused by the alleged violations. The case would be different if there were an overcharge for consumer goods; in that instance the violator should know the consumer would be injured.<sup>18</sup>

Notwithstanding these cases, the state-consumer action has enjoyed a recent surge of popularity.<sup>19</sup> The suits have been brought by the state as *parens patriae*,<sup>20</sup> or the state has sued for its own damages and as representative of the state's injured consumer class.<sup>21</sup>

### A. THE STATE AS PARENS PATRIAE

In *Georgia v. Pennsylvania Railroad*<sup>22</sup> twenty railroads were enjoined from fixing railroad rates in a manner that discriminated against Georgia. The state also sought damages as the proprietor of a state-owned railroad and as *parens patriae*, for damage to its economy. The Court said:

---

<sup>16</sup> 144 F.2d 585 (10th Cir. 1944).

<sup>17</sup> 315 F.2d 564 (7th Cir. 1963).

<sup>18</sup> Causation is discussed in note 3 *supra*.

<sup>19</sup> No recent reported decisions have been discovered as of this writing. Access to materials from *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, Civil No. 41773 (E.D. Pa. Sept. 24, 1969) [hereinafter cited as Plumbing Fixtures case]; and *West Virginia v. Chas. Pfizer & Co., Inc.*, Civil No. 68-240 (S.D.N.Y. 1969) [hereinafter cited as the Antibiotic Drugs case], was obtained from Calvin E. Robinson of the Nebraska Attorney General's office. Some of the history of the *Antibiotic Drugs* case is summarized in *San Francisco v. Chas. Pfizer & Co.*, 48 F.R.D. 105 (S.D.N.Y. 1969).

<sup>20</sup> Plumbing Fixtures case, note 19 *supra*.

<sup>21</sup> Antibiotic Drugs case, note 19 *supra*.

<sup>22</sup> 324 U.S. 439 (1945).

[W]e find no indication that when Congress fashioned [the anti-trust] 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.<sup>23</sup>

The state was not allowed damages, however. Though there was a price-fixing conspiracy the rate set by the I.C.C. was for all purposes the legal rate between shipper and carrier.<sup>24</sup> Hence, the Court reasoned, there was no illegal overcharge for the purpose of recovering damages.

In the *Plumbing Fixtures* case,<sup>25</sup> Kansas and California unsuccessfully contended that *Georgia v. Pennsylvania Railroad* constituted authority that the state could sue in its *parens patriae* capacity on behalf of its consumers. However, *Georgia v. Pennsylvania Railroad* did not depart from the established requirement that a *parens patriae* suit may recover *only* for injury to the state<sup>26</sup> and may not seek recovery on behalf of individual citizens.<sup>27</sup>

The states in *Plumbing Fixtures* also relied on *Hawaii v. Standard Oil Co.*,<sup>28</sup> to support their *parens patriae* consumer claim. Hawaii had alleged the defendant oil companies, by restraint of trade, had injured the state as a consumer of oil products, and in its *parens patriae* capacity by adversely affecting the prosperity and economy of Hawaii. The court held *Georgia v. Pennsylvania Railroad* established that a state could recover damages in its *parens patriae* capacity.<sup>29</sup> But in *Hawaii v. Standard Oil* there was no attempt to recover for individual consumers, only for the state's proprietary and *parens patriae* injuries.<sup>30</sup>

The rule appears to be that a state may not maintain a *parens patriae* suit to recover for specific consumers' injuries caused by antitrust violations.<sup>31</sup> When an overcharge injures the state's consumers an injury to the state results; the *parens patriae* suit may only recover the state's damages to its economy, growth and tax revenues which are derived from this consumer loss. Presumably,

<sup>23</sup> *Id.* at 447.

<sup>24</sup> *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922).

<sup>25</sup> Note 19 *supra*.

<sup>26</sup> *E.g.*, *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923); *Oklahoma v. Atcheson T. & S.F. Ry.*, 220 U.S. 277, 286 (1911); *Missouri v. Illinois*, 180 U.S. 208, 251 (1901).

<sup>27</sup> *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 446-49 (1945).

<sup>28</sup> 301 F. Supp. 982 (D. Hawaii 1969).

<sup>29</sup> *Id.* at 987. See note 23 and accompanying text *supra*.

<sup>30</sup> *Id.* at 986.

<sup>31</sup> *Plumbing Fixtures* case, note 19 *supra*.

if the state intended to distribute the award recovered in a *parens patriae* suit to injured consumers the suit would be deemed to be for the benefit of individual citizens and would not be allowed. Since the reduced prosperity of the consumer injures the state only to the extent that less money flows into the state treasury, only this amount can be recovered by the state for its own use.<sup>32</sup>

It is only fair that the state recover its own damages, but the *parens patriae* suit is unsatisfactory as relief for the consumer. While he benefits indirectly from the revenue brought into the state treasury,<sup>33</sup> the injury he suffers is not redressed. Moreover, the state's recovery alone does not deter antitrust violations as effectively as it would in conjunction with the consumers' recovery. Therefore, recovery should be based on the total overcharge, not merely that portion which affects the state in its *parens patriae* capacity.

#### B. THE STATE AS REPRESENTATIVE OF THE CLASS OF ITS INJURED CONSUMERS

The state bringing suit as representative of the injured consumer class appears, at first blush, to be a *parens patriae* wolf in sheep's clothing and hence would be excluded from the legal fold. But the *parens patriae* suit and the state-consumer class action are different.<sup>34</sup> If the state meets the procedural requirements of a class action set out by federal rule twenty-three<sup>35</sup> it should be allowed to act as class representative, especially since it is doubtful that a private representative would act where claims are small. In both the *Plumbing Fixtures* case<sup>36</sup> and *Hawaii v. Standard Oil*<sup>37</sup> the court stated that the *parens patriae* suit could not be used to

<sup>32</sup> When one thinks of the term *parens patriae* it is usually in the context of the state suing on behalf of a person non sui juris, e.g., *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917 (1922).

When the state sues for injunctive relief to protect its interests in its economy it incidentally protects citizens. This is also referred to as a suit *parent patriae*. E.g., *Missouri v. Illinois*, 180 U.S. 208 (1901). But when the state sues for damages instead of injunctive relief the analogy to the suit for a person non sui juris breaks down. The state may not sue to protect its individual citizens, but only to protect itself. Perhaps the term applied to this type of suit is a misnomer.

<sup>33</sup> Simply, all the citizens of the state would derive benefit from either the increased services the money brought in would buy or the decreased taxes needed to purchase the same amount of services.

<sup>34</sup> See *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 986 (D. Hawaii 1969).

<sup>35</sup> Set out in the appendix *infra*.

<sup>36</sup> Note 19 *supra*, Opinion and order at 12.

<sup>37</sup> 301 F. Supp. at 986.

circumvent the requirements of rule twenty-three.<sup>38</sup> Thus it appears that the objections voiced in those cases would not apply to a class action.

Rule twenty-three is designed to give relief in cases such as the consumer antitrust action. Professor Benjamin Kaplan, reporter to the Advisory Committee on Civil Rules, has written to the effect that rule twenty-three was formulated with a view toward the class action's "historic mission of taking care of the smaller guy."<sup>39</sup> The policy behind the federal rules as a whole also opts for a solution which would bring relief for the consumer claim. Rule one provides: "[The rules] shall be construed to secure the just, speedy and inexpensive determination of every action."<sup>40</sup>

Fear of "too much government" may lead some to view the state-consumer class action with distrust, but the spectre of the state crushing the businessman or wresting the consumer's day in court from him is unconvincing. The corporate giant which is able to control the market will probably have more funds to conduct a lawsuit than the state has,<sup>41</sup> and the provisions of rule twenty-three insure that the consumer will have a chance to conduct his own suit or to intervene in the class suit if he desires.

Consumer antitrust suits involve big money. In the *Antibiotic Drugs* case,<sup>42</sup> the defendant drug companies proposed a settlement for the staggering figure of one hundred million dollars.<sup>43</sup> It is understandable that the courts might be unwilling to impose such onerous penalties upon defendants. But determining the suitable

---

<sup>38</sup> In fact, in both cases the state joined class actions on behalf of its consumers with its *parens patriae* claim. In the Hawaii case this count was dismissed on motion of the defendants, *id.* at 984 n.3. In the *Plumbing Fixtures* case the states were allowed to bring the class action. Note 19 *supra*, Opinion and order at 11, n.4.

<sup>39</sup> Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 A.B.A. ANTITRUST L.J. 295, 299 (1967). See also, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 398 (1967).

<sup>40</sup> FED. R. CIV. P. 1. Cf. FED. R. CIV. P. 8(f); "All pleadings shall be so construed as to do substantial Justice."

<sup>41</sup> For the year ending June 30, 1968, Nebraska's total revenue was \$381 million and its total expenditures were \$346 million. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1969, 420-21 (90th ed. 1969). This leaves a surplus of \$35 million. For the year ending December 31, 1968, General Electric Co. had net earnings of \$357,107,000. MOODY'S INDUSTRIAL MANUAL 2444 (July, 1969).

<sup>42</sup> Note 19 *supra*.

<sup>43</sup> Cf. the electrical equipment cases, where the settlement total has reached approximately \$600,000,000. Alioto, *Private Antitrust Suits*, TRIAL 47 (Feb./Mar., 1968).



penalty is the legislature's province. The heavy burden thus imposed is the only punishment which fits the crime, and the only deterrent commensurate with the possible rewards of the violation.<sup>44</sup>

Where claims are small, consumer apathy, ignorance of the injury or economic considerations militate against any consumer initiating a class action. The state, however, has economic power which at least approaches that of the large corporation,<sup>45</sup> and a trained, full-time legal staff, supposedly well informed of the antitrust picture. It seems likely, therefore, that more antitrust class actions involving large masses of people will be brought if the state may sue on behalf of the consumer. Since antitrust litigation is complex to begin with, and given the problems of proving damages of the members of a large class, an increased number of these suits could be extremely burdensome to an already straining legal system. On the other hand, this effort would be worthwhile if justice is brought to large masses of people whose claims now go unredressed.

The question arises whether the state should expend the taxpayers' funds in attempting to recover the losses suffered by part of the state's citizens, or whether this money would be better spent to benefit all the citizens of the state.

Where small consumer claims were involved, a great many consumers would have to be injured to induce the state to bring the suit. Otherwise, the suit would not be economical, nor would the state have as great an interest in protecting its citizens. In some instances, political pressure or bribery might induce the attorney general's office to bring suits which were designed to benefit the antitrust defendants' competitors, or to save litigation costs for those who were actually able to conduct their own suits. State legislation which would penalize this sort of interference and set up standards for when the state action could be maintained would be desirable, if not indispensable. Hence, in the state-consumer suit, many if not all of the state's citizens would be involved, and there would be few taxpayers who would not benefit from the suit.

If the state won, the cost of the suit would be paid by the defendant under 15 U.S.C. section 15;<sup>46</sup> therefore, no citizen would be paying to conduct another's suit.

---

<sup>44</sup> *Id.*

<sup>45</sup> See note 41 *supra*.

<sup>46</sup> Set out in note 1 *supra*.

On the other hand, if the state lost, all taxpayers would pay the costs of the suit, even though they would not have benefited if the state had won. Formerly, most plaintiffs have lost their private antitrust suits,<sup>47</sup> but this has been largely due to the greater financial strength of the defendant,<sup>48</sup> a factor which is practically negated in the state-consumer suit. Hence, fewer suits would be lost.

In addition, when the state won, and a consumer had an extremely small injury, it is doubtful that he would go to the trouble to claim his award. If the state may keep these unclaimed treble damages the cost of lost suits would be offset, and probably exceeded, given the size of the aggregated awards.<sup>49</sup> Although lost suits would cost the taxpayer who stood to gain nothing from its prosecution, he would gain on successful suits though he had suffered no damage.

Moreover, the taxpayer would benefit indirectly due to the deterrent effect of the state-consumer action on potential antitrust violators, and even though he were not damaged by a particular antitrust violator, the chances are good that he would at some time suffer damages from another. The objection that a state would benefit more of its citizens by spending these funds for something else thus has little validity.

### III. THE REQUIREMENTS OF RULE 23

Regardless of the desirability or undesirability of bringing a state-consumer class action, it must be determined whether a class action is maintainable under rule twenty-three, which is designed to ensure that these suits will result in the fairest and most efficient adjudication of the controversy.<sup>50</sup> Some of the requirements of rule twenty-three affect this type of suit in such a way that analytical treatment may be helpful.

#### A. ADEQUACY OF REPRESENTATION

Under federal rule twenty-three, subsection (a) (3), the claim of the representative party must be typical of the class claims. This prerequisite to the maintenance of a class action is met if the repre-

---

<sup>47</sup> In monopoly and price fixing cases, the two types of violations contemplated herein, defeats outnumbered victories 39.0 to 1 and 4.6 to 1 respectively, from 1940-63. Hart, *Change Antitrust Laws to Increase Private Suits*, TRIAL 45-46 (Feb./Mar., 1968).

<sup>48</sup> *Id.*

<sup>49</sup> Note 43 and accompanying text *supra*.

<sup>50</sup> FED. R. CIV. P. 23(b) (3).

sentative and class are united in interest. In part this means that the representative must be a member of the class,<sup>51</sup> but the claims of the representative and the class need not be identical.<sup>52</sup>

The claim of the state may arise in two ways. It may buy as an end consumer and pay the overcharge. In this instance, the state's claim would be identical to the claims of the class. If this were the only way that a state's claim could be typical, the entire suit would depend on the fortuitous circumstance of whether the state had happened to purchase the overpriced article. If the state intentionally bought an overpriced article so it could maintain the suit, it might have to contend with the consent doctrine.<sup>53</sup> Even if this defense were held not to apply or could not be proved, the state may not learn of the violation until the violation has ceased to exist, and thus would not have an opportunity to "injure" itself by buying the overpriced goods. At any rate, the federal rules should not be construed to require such a vain act when the result would be to deprive consumers of relief.<sup>54</sup>

The state may also be injured in its *parens patriae* capacity.<sup>55</sup> Is the *parens patriae* claim typical of the consumer claim, in accordance with rule twenty-three, subsection (a) (3)? When the injury to the consumer reduces the tax revenues, stunts the growth of or

---

<sup>51</sup> Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 387 n.120 (1967). Cases are collected in Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 500 (1967); Note, *The Use of Federal Rule 23 in Private Antitrust Enforcement*, 20 SYR. L. REV. 949, 954 (1969).

<sup>52</sup> Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (N.D. Ill. 1969). See, Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969). 3B J. MOORE, MOORE'S FEDERAL PRACTICE 23-325 to -327 (2d ed. 1969).

<sup>53</sup> "Consent to an act is simply willingness that it shall occur. Actual willingness, established by competent evidence, will prevent liability; and if it can ever be proved, will no doubt do so even though the plaintiff has done nothing to manifest it to the defendant." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 18 (3d ed. 1964) (citations omitted). Cf. Ragnar Benson, Inc v. Kassab, 325 F.2d 591, 595-96 (3d Cir. 1963) (consent to interference with contractual relations).

<sup>54</sup> Notes 39 and 40 and accompanying text *supra*.

<sup>55</sup> Section II A *supra*. A second prerequisite to maintenance of a *parens patriae* suit, not dispositive of the issue in Section II A, should be noted for consideration here. "[T]he state has standing to sue in [its *parens patriae* capacity] only if a substantial portion of the inhabitants of the state are adversely affected by the challenged acts of the defendants." Hawaii v. Standard Oil Co., 301 F. Supp. 980, 986 (D. Hawaii 1969), and cases cited therein. A state-consumer class action would probably not be brought unless a substantial portion of state citizens were injured anyway.

otherwise damages the state's economy, the state has been injured in its *parens patriae* capacity.<sup>56</sup> The state suffers such an injury only because there is an injury to the consumer. Thus, the state and consumer are united in interest. Not only has the same wrongful act caused both injuries, but the state's injury results from the consumer's injury. Suits have been allowed in which the state sues as representative of a class of institutions which has received its funds.<sup>57</sup> The claim of the state is not identical to the class in this situation, but the state's interest evidently arises in seeing that full value is received for its expenditures. The state's interest in the *parens patriae* situation is in seeing that it receives its money in the first place. It is difficult to see how the state and the class are any more united in the former case than they are in the latter. If the federal rules are in fact to be construed to do substantial justice,<sup>58</sup> the *parens patriae* claim should be deemed typical of the claims of the class, because otherwise small consumer claims probably could not be recovered at all unless by chance the state had bought the overpriced article.<sup>59</sup>

#### B. REQUIREMENTS UNDER RULE 23(b) (3)

Most consumer class actions have been brought under federal rule twenty-three, subsection (b) (3). For an action to be maintained under this subsection, questions of law or fact common to the members of the class must predominate over questions affecting only individual members and a class action must be superior to other available methods for the fair and efficient adjudication of the controversy. Considerations pertinent to a finding that these requirements are met are enumerated in the section. These considerations are: (1) the interest of class members in prosecuting their own

<sup>56</sup> *Id.* at 982.

<sup>57</sup> *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *Illinois v. Brunswick Corp.*, 32 F.R.D. 453 (N.D. Ill. 1963).

<sup>58</sup> Note 40 and accompanying text *supra*.

<sup>59</sup> Recently, defendants have been able to require plaintiffs' lawyers to agree not to bring another suit of any kind against the defendants for a specified period, as a condition to settlement. Alioto, *The Economics of a Treble Damage Case*, 32 A.B.A. ANTITRUST L.J. 87, 94-95 (1967). This trend may make it even more difficult for consumers to obtain a reasonably priced attorney by reducing their supply in a particular case.

The state might be able to qualify as representative for the injured consumers in other states in some instances, or at least as representative of other injured states. The principles (and hence the analysis) would be the same in the larger type of suit. For this reason, only the situation in which the state sues for its own injuries and as representative of its own consumers is treated herein.

action; (2) suits already commenced; (3) desirability of concentrating the litigation in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.<sup>60</sup> These considerations should be examined.

Because the consumer's claim is likely to be so small, he would probably never bring his own antitrust suit. Thus, the interest of class members in prosecuting their own action<sup>61</sup> "may be theoretic rather than practical."<sup>62</sup> For this reason also, it is doubtful that many other suits would already have been commenced.<sup>63</sup> A choice of forums is provided by 15 U.S.C. section 15; presumably litigation could be concentrated in any of these forums.<sup>64</sup>

If each consumer had a larger claim, the answer to these questions might be different:

It was, no doubt, because of the large size of the claims and the considerable strength of the claimants, among other factors, that class actions were not conspicuous in the flood of private antitrust cases arising from the successful prosecution of the electrical equipment manufacturers. The same factors would tend to limit use of class actions under subdivision (b) (3) of the new rule if a like crisis should arise hereafter. . . .<sup>65</sup>

Similarly, if claims were large enough, many claimants might elect to press their claims in privately brought class suits. There is no reason why suits by the state government should supplant all consumer antitrust suits; it is in the situation where the claims would be so small and the claimants so numerous that the private individual would not be induced to bring suit, or would be unable to conduct the suit effectively, that the state suit might be an effective device. Where claims were large enough so that a private representative would bring the suit and could effectively represent the consumers' interests, the court should allow him to do so.<sup>66</sup>

The difficulties likely to be encountered in the management of a class action involving all the injured consumers in a state<sup>67</sup> would almost certainly be great. But other class actions with large num-

---

<sup>60</sup> FED. R. CIV. P. 23(b) (3).

<sup>61</sup> FED. R. CIV. P. 23(b) (3) (A).

<sup>62</sup> *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 104 (1966).

<sup>63</sup> FED. R. CIV. P. 23(b) (3) (B).

<sup>64</sup> FED. R. CIV. P. 23(b) (3) (C).

<sup>65</sup> Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 n.135 (1967).

<sup>66</sup> In a case where there were large and small claimants, the classes can be divided into subclasses under FED. R. CIV. P. 23(c) (4) (B).

<sup>67</sup> FED. R. CIV. P. 23(b) (3) (D).

bers of claimants have been allowed. In *Eisen v. Carlisle & Jacquelin*,<sup>68</sup> the court allowed a class action in which the class numbered approximately three and three-quarter million persons.<sup>69</sup> According to the last census, the total population of Nebraska was less than one and one-half million persons,<sup>70</sup> considerably smaller than *Eisen's* class. When it is remembered that the difficulty in maintaining a class action is only one factor to be considered in determining whether the action should be maintained, and that otherwise no relief on the claims would be given, the action should be allowed to proceed.<sup>71</sup>

### C. NOTICE

Some form of notice must be given to members of the class when an action is brought under rule twenty-three, subsection (b) (3).<sup>72</sup> The "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"<sup>73</sup> is required. Clearly, the courts are allowed flexibility in the application of the requirement. The requirement the court formulates will depend upon the effort necessary to identify the individual consumer. In many cases an unreasonable effort would be required to identify *any* consumer, especially in the small claim situation. In similar situations, courts have allowed notice by publication.<sup>74</sup> This might be appropriate in many state-consumer suits, in view of the liberal policy of the federal rules,<sup>75</sup> and since it is doubtful many consumers would want "out" of the class action to maintain their own suit.<sup>76</sup>

The Federal Rules Advisory Committee has indicated that the representative must be cautious in fulfilling the notice requirement

---

<sup>68</sup> 391 F.2d 555 (2d Cir. 1968).

<sup>69</sup> *Id.* at 561-62.

<sup>70</sup> U.S. BUREAU OF THE CENSUS, UNITED STATES CENSUS OF POPULATION: 1960 VOL. 1, *Characteristics of the Population, Part A, Numbers of Inhabitants* 29-7 (1961).

<sup>71</sup> "The Judicial Conference of the United States . . . has encouraged the courts to devise and employ new procedures for increasing the efficiency and improving the quality of justice without increasing the burdens arising out of complex and multidistrict litigation of the character herein involved." *Antibiotic Drugs* case, note 19 *supra*, Order at 3; notes 39 and 40 *supra*.

<sup>72</sup> FED. R. CIV. P. 23(c) (2).

<sup>73</sup> *Id.* (emphasis added).

<sup>74</sup> *Booth v. General Dynamics Corp.*, 264 F. Supp. 465, 472 (N.D. Ill. 1967). See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968).

<sup>75</sup> Notes 39 and 40 and accompanying text *supra*.

<sup>76</sup> See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); notes 61 and 62 and accompanying text *supra*.

to avoid the appearance of soliciting claims.<sup>77</sup> The danger of solicitation would be less when the state acted as representative, since the attorney general, unlike counsel for other representatives, would usually gain nothing from the addition of claimants.<sup>78</sup>

#### D. FLEXIBILITY

Subsection (d) of rule twenty-three allows the court to issue appropriate orders for the efficient conduct of a class action, thus allowing the court considerable discretion about how the suit will be conducted. Marvin E. Frankel, United States District Judge for the Southern District of New York has said:

[T]here is no doubt that the new Rule does entrust district judges with a broad measure of discretion, of room for prudence, for discrimination, for choice, for judgment—synonyms from the dictionary that sound as though they might relate to the judicial function. I think this realm of discretion marks the ground on which the new rule will be vindicated or destroyed. It is a robust challenge to all of us.<sup>79</sup>

With the flexibility which is given to any class action,<sup>80</sup> the courts can mold the claims into the form which will allow just, fast, simple and inexpensive adjudication. This is not without significance in determining whether the many consumers who are now without a remedy can invoke the protection of the antitrust laws.

#### IV. PROOF AND DISTRIBUTION OF DAMAGES

If the state-consumer antitrust action can be brought in a particular case, proof of the overcharge, though difficult, will not differ from other antitrust actions. If the defendant is found guilty for one purpose, he is guilty for another.<sup>81</sup> Proof and payment of damages in the state-consumer action are another matter, however.

<sup>77</sup> *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 107 (1966).

<sup>78</sup> This was the conclusion of the court in *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 576-77 (D. Minn. 1968).

<sup>79</sup> Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 A.B.A. ANTITRUST L.J. 295, 301 (1967) (apparently speaking of the rule as a whole, and not only of subsection (d). In this context, see note 80 *infra*).

<sup>80</sup> The "flexible approach" is also suggested by FED. R. CIV. P. 23(b) (3) (in which "fair and just adjudication" is paramount); 23(c) (1) ("An order under this subdivision may be conditional, and may be altered or amended. . ."); 23(c) (2) (Section III C *supra*); and 23(c) (4) (allowing the court to create subclasses or to maintain subclasses with respect to particular issues). See also note 71 *supra*.

<sup>81</sup> Cf. 15 U.S.C. § 16 (1964), providing that certain decrees in civil or criminal suits brought by the United States may be used by any private litigant against a defendant as prima facie evidence of an antitrust violation.

In the small claim situation the consumer may lack the necessary records to prove his claim in court. Just as the time, trouble and expense involved may not justify bringing a suit when the claim is small,<sup>82</sup> these same considerations might cause the consumer to forego proving his claim. Even where the consumer could and would be helpful, the suit could easily become bogged down in a quagmire of proof if the state had to present evidence of each class member's loss.

It is the general rule that: "[O]nce the plaintiff has proven the 'fact of damage,' uncertainty as to the amount of damage will not bar recovery [in antitrust suits]."<sup>83</sup> In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>84</sup> the Supreme Court held that if the plaintiff can show that he paid an illegally high price for the defendant's product and the amount of the overcharge, he has made out a prima facie case of injury and damage under 15 U.S.C. section 15.<sup>85</sup> By analogy, if the overcharge and its amount were proven and the total quantity sold to the class was known, the total of damages to the class could be recovered by the class representative, who could then distribute the award. This approach was early advocated for class actions by Harry Kalven, Jr. and Maurice Rosenfield. They wrote:

[T]he method is likely to be almost completely successful inasmuch as the various members are simply notified that a completed recovery is available for them; they are not asked to put up money or to give authorizations, but are simply asked to 'come and get it.'<sup>86</sup>

Kalven and Rosenfield emphasized that the shareholders' derivative class suit was a successful, widely used method of vindicating the rights of small claimants, which allowed the representative to recover for the entire class.<sup>87</sup> In addition: "Bankruptcy, probate, equity practice in receivership, and fraudulent conveyance cases afford obvious analogies."<sup>88</sup> The authors suggested that:

If the court finds that there may be a problem of collecting the judgment, it might enter the entire judgment in the name of the plaintiffs of record as trustees to collect and distribute to all who

<sup>82</sup> Section I *supra*.

<sup>83</sup> *Minnesota v. United States Steel Corp.*, 299 F. Supp. 596, 601 (D. Minn. 1969). See cases cited therein.

<sup>84</sup> 392 U.S. 481 (1968).

<sup>85</sup> *Id.* at 489.

<sup>86</sup> Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 691 (1941).

<sup>87</sup> *Id.* at 691-92.

<sup>88</sup> *Id.* at 693.



have proved claims; in such cases the court should reserve jurisdiction until the matter has been completely disposed of.<sup>89</sup>

A reasonable approximation of the total overcharges collected by an antitrust violator within any one state could be reached by proving the amount of the overcharge<sup>90</sup> and the total volume of sales within the state.<sup>91</sup> If the goods are sold at an illegally high price, someone must suffer the overcharge: either the middleman, the consumer or the state.

If the middleman passes on his loss (from the overcharge) to the consumer, the state, or both,<sup>92</sup> the state could recover the total amount (trebled) as claimant for its own loss and as representative of the consumer class.<sup>93</sup>

But under *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>94</sup> the middleman may recover if he has paid an illegally high overcharge, even if he cannot prove that he did not pass on the higher charge to his customers through raising his own prices. Carrying this to its logical conclusion,<sup>95</sup> if the middleman did not in fact pass on all or part of his loss and can prove it, or if the antitrust defendants cannot assert the passing-on defense, as indicated in *Hanover*, or cannot prove the overcharge was passed on, the violator might be subjected to liability for treble damages twice for the same overcharge. The state would recover three times the total overcharge which the defendant collected from within the state, and the portion which represented the middleman's damages would be paid again,

---

<sup>89</sup> *Id.* at 694. For other flexible approaches which have been formulated to reach similar results, see cases cited therein.

<sup>90</sup> This proof would be the same that is required in a normal antitrust case.

<sup>91</sup> Although difficult, establishing a reasonably close approximation (see note 83 and accompanying text *supra*) of the sales within the state would probably not be an insuperable barrier, given the liberal discovery which usually accompanies private antitrust actions. See, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 207 F. Supp. 407 (M.D. Pa. 1962); *Jack Loeks Enterprises, Inc. v. W. S. Butterfield Theatres, Inc.*, 13 F.R.D. 5 (E.D. Mich. 1952); *American Banana Co. v. United Fruit Co.*, 153 F. 943 (C.C.S.D. N.Y. 1907).

<sup>92</sup> Section I *supra*.

<sup>93</sup> Section II B *supra*.

<sup>94</sup> 392 U.S. 481, 489 (1968); Pollock, *Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183 (1968) [hereinafter cited as Pollock]; Section II *supra*.

<sup>95</sup> The discussion which follows is not intended as a prognosis of what the courts will do with the *Hanover* doctrine. Rather, it is intended to point out what are believed to be some logical weaknesses in the rejection of the passing-on doctrine which may present problems if consumer relief becomes a reality, and to introduce a suggested resolution of these problems.

this time to the middleman. Since one reason the courts have been reluctant to allow the passing-on defense was because the consumer could not sue for his own damages,<sup>96</sup> it seems now that, *at least where the consumer has sued*, the defendant should be permitted to assert the passing-on defense against the middleman. If the middleman can prove his damages, his recovery should be from the fund, since it would include all losses within the state.

But where the defendant knew his damages would be based on the total amount of his overcharges within the state, regardless of whom the parties were, he would probably not care to whom the award went. The defendant would not, therefore, assert the passing-on defense because it would be cheaper and easier not to. As a result, the middleman would only need to assert a claim and he could recover, if the suit were successful, from the fund. Regardless of whether the middleman had passed on his overcharge, he could collect damages. In essence, this is the same result reached in many cases today without the state-consumer class action.<sup>97</sup> The middleman could eat up much of the fund, leaving but little for the consumer or the state. As a final result, the state would have expended considerable resources for small benefits to the consumer or itself while making it easier for the middleman to recover what he might well have recovered for himself. Alternatively, requiring the antitrust defendant to pay sextuple damages is harsh at best. Requiring the state to prove each consumer's damages, including the way in which the loss was passed on to the consumer by the middleman would in many cases be impossible, or at least too costly to justify the effort. Nor would the answer seem to be that the state should recover from the middleman. This would encourage a multiplicity of suits, because two suits would be required to allow the state to recover its loss and because in a given case there may be many middlemen. In addition, the middleman may not be guilty of any wrongdoing. It would be unfair to saddle him with the burden of trying suits to recover damages which he had recovered but which were not rightfully his if this could be avoided by having the state sue the guilty party.

But if we assume that the middleman will pass on the higher cost of his product to the consumer, we take the dilemma by the horns. The court may take judicial notice that the businessman will seek to maximize profit and minimize loss. To whatever extent possible, it may be presumed he will pass on his increased costs to

<sup>96</sup> See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. at 494.

<sup>97</sup> See *id.* at 489, 494.

the consumer.<sup>98</sup> Why should he not be required to overcome this presumption with clear and convincing proof as a prerequisite to recovery?<sup>99</sup> This solution seems more justifiable than allowing the middleman to recover even if he has not proven any loss, as in *Hanover*. The proposed solution does not require the middleman to refute an affirmative defense before it is raised by the defendant; in fact, he is only proving he was damaged. The passing-on defense is not really a *defense* at all.

When there are claimants besides the state and the consumer class<sup>100</sup> the court may insure that some are not precluded from recovery and that the defendant is not subjected to double liability. The court could allow claimants to intervene in the suit to protect their interests<sup>101</sup> or require that those with claims related to the alleged violation be joined in a single proceeding.<sup>102</sup> Defendants or plaintiffs may bring in parties who may be liable to them for claims asserted in the lawsuit.<sup>103</sup> The judge may delay final judgment until the rights and liabilities of all the parties are adjudicated.<sup>104</sup> With judicial ingenuity, the respective parties' claims can be justly and efficiently adjudicated.<sup>105</sup>

After damages have been awarded, the state could hold the consumer award for distribution, under the supervision of the court.<sup>106</sup> This would seem to be the most economical and least burdensome way to distribute the award, since the state would surely

---

<sup>98</sup> If there is an elastic demand for his product the middleman may be unable to pass on all or part of his higher cost. See W. PETERSON, *INCOME, EMPLOYMENT AND ECONOMIC GROWTH* 379 (rev. ed. 1967).

<sup>99</sup> The court in *Hanover* makes much of the difficulty of proving that the overcharge was not passed on. 392 U.S. at 492-93. However, as pointed out in Pollock, note 94 *supra*: "[I]t would generally be no more difficult or complex than the plaintiff's task of proving an overcharge in the first instance." *Id.* at 1210 (emphasis in original).

<sup>100</sup> These may be consumers who wished to be excluded under Fed. R. Civ. P. 23(c) (3), middlemen, or others.

<sup>101</sup> Fed. R. Civ. P. 24. See *Atlantis Dev. Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967).

<sup>102</sup> Fed. R. Civ. P. 19 and 20.

<sup>103</sup> Fed. R. Civ. P. 14. See *Jeub v. B/G Foods, Inc.*, 2 F.R.D. 238 (D. Minn. 1942).

<sup>104</sup> Fed. R. Civ. P. 54.

<sup>105</sup> See also note 79 and accompanying text *supra*.

<sup>106</sup> This was the procedure used in the settlement of the *Antibiotic Drugs* case, note 19 *supra*. Note, *Damages in Class Actions: Determination and Allocation*, 10 B.C. IND. & COM. L. REV. 615, 622 (1969). Other methods are discussed therein and in Kalven & Rosenfield, *The Contemporary Function of a Class Suit*, 8 U. CHI. L. REV. 684 (1941) [hereinafter cited as Kalven & Rosenfield].

have agencies which already perform analogous tasks.<sup>107</sup> Any consumer who could show the amount of his damages with reasonable certainty, and whose claim was large enough to prod him to assert it, could recover his treble damage award from the fund. In many cases the consumer would be unable to prove his damages or they would be too small to make it worth his while. If the unclaimed amount of the overcharge were returned to the antitrust violator, the deterrent effect of the private antitrust suit on potential violators would be correspondingly lessened.<sup>108</sup> There does not seem to be any reason to return the excess to the guilty party when Congress has indicated he should not have it.<sup>109</sup>

The common law doctrine of bona vacantia<sup>110</sup> has been suggested as a means for the state to take what went unclaimed. In *Jerry Rossman Corp. v. Commissioner*,<sup>111</sup> there was an inadvertent overcharge by a processor of woolen goods. A statute required the overcharges, trebled in some cases, be returned to the customers of the processor, but these customers could not be ascertained, and besides, they had already passed on the overcharges to ultimate consumers. The statute provided that if the terminal buyers were unable to bring suit the administrator could sue for damages. Chief Judge Learned Hand stated:

<sup>107</sup> Presently Nebraska has agencies which must determine whether individuals are entitled to funds according to certain legislative standards. See, e.g., NEB. REV. STAT. §§ 48-601 to -669 (Reissue 1968) (payment of unemployment compensation); 68-309 (Reissue 1966) (establishment of Dept. of Public Welfare to administer welfare programs); 80-403 (Reissue 1966) (Veterans' relief). Even if it were established that none of these agencies were equipped to distribute the consumer award the experience which the agency had accumulated could be utilized in training new employees or by transferring personnel to a new agency. Techniques developed in the older agencies and found effective could be adapted to new functions. Cf. Kalven & Rosenfield, note 106 *supra*, at 695. "[T]here may be a proceeding . . . pending concurrently, which will provide a ready vehicle for participation and distribution and need only be adopted." (citation omitted).

<sup>108</sup> "The Supreme Court writes panegyrics to the importance of private actions in the struggle against monopoly. The Ninth Circuit tells us that a 'niggardly construction of the treble damage provision would do violence to the clear intent of Congress.' A former head of the Antitrust Division states unequivocally that the private suit is more efficacious than governmental enforcement." Alioto, *The Economics of a Treble Damage Case*, 32 A.B.A. ANTITRUST L.J. 87 (1967) (citations omitted).

<sup>109</sup> 15 U.S.C. § 15 (1964).

<sup>110</sup> "Vacant, unclaimed or stray goods. Those things in which nobody claims a property right, and which belonged, under common law to the finder, except in certain instances, when they were the property of the king." BLACK'S LAW DICTIONARY 223 (4th rev. ed. 1968) (citing 1 BL. COMM. 298).

<sup>111</sup> 175 F.2d 711 (2d Cir. 1949).

[S]ince the "terminal buyers" were inaccessible, the overcharge 'was subject . . . to the right of appropriation by the sovereign as bona vacantia.' . . . Indeed, if [the statute] had not intervened, conceivably as a matter of strict theory, the overcharge might have passed to the several states.<sup>112</sup>

The full deterrent effect of 15 U.S.C. section 15 would be felt by the antitrust violator, as Congress intended, if the unclaimed portion were not returned to the wrongdoer. In addition, where the state kept the unclaimed portion of the total recovery, the injured consumer would still benefit indirectly, even if he could not or did not assert his claim, by the income brought into the state treasury.

## V. CONCLUSION

Seldom can an individual consumer even approach the wealth of a corporate antitrust defendant. Congress has fashioned a remedy for all who suffer by antitrust violations, but the consumer claim is generally too small to justify bringing suit. The state-consumer class action would bring to bear a power which is comparable to that of the antitrust violator.

The size of the action may cause unwieldy administrative problems, and it will be difficult for the courts to invent procedures refined enough to reach the fairest result. But it seems that the suit could be brought within our existing procedural framework. The issue then becomes whether it will be useful enough to outweigh its negative aspects.

The social policies which lie behind the antitrust laws and the class action device favor maintenance of the state-consumer suit. If the suit is successful it will help insure, in some measure, the longevity of our free economy, by deterring antitrust law violation. And it is difficult to think of a more laudable task for our legal system than redressing and preventing wrongs done to vast segments of society.

If the suit proves effective in the antitrust arena, it may ultimately provide redress for other intentional torts which injure large masses of people. If workable, the state-consumer antitrust class action may be a vehicle which brings us closer to the ideal of justice for all.

*Rodney Confer '71*

---

<sup>112</sup> *Id.* at 712.

## APPENDIX

### RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the

class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.