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FEDERAL RULE 23(b)(3)(D): The Manageability Requirement In The Treble Damage Consumer Class Action

City of Philadelphia v. American Oil Co.[1]

The adoption of the 1966 amendments to the Federal Rules of Civil Procedure led to extensive changes in many areas of the law.[2] This was especially true of the amendment of rule 23 dealing with class actions. Although the new rule was designed to correct many of the ambiguities in its predecessor,[3] its requirements have spawned new controversy when considered in the complexity of a civil antitrust suit.[4] An initial question posed by the new rules was whether an antitrust class action, in which each consumer's damage was unique, would satisfy the requirement that questions common to the class as a whole should predominate over those questions peculiar to individual class

1. 53 F.R.D. 45 (D.N.J. 1971).

2. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356 (1967).

3. *Id.* at 375–400.

4. *See generally* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1 (1971); Note, *The Use of Federal Rule 23 in Private Antitrust Enforcement,* 20 SYRACUSE L. REV. 949 (1969).

members.[5] This question was answered in the consumers' favor by allowing the issue of whether there was a conspiracy to lessen competition to constitute a predominant common question.[6] Another problem was determining what was necessary to satisfy the notice requirement of rule 23(c)(2).[7] This problem, too, was alleviated by allowing a combination of individual notice by mail and general notice by publication.[8]

In *City of Philadelphia v. American Oil Co.*,[9] a district court was faced with interpreting manageability,[10] a further requirement of rule 23. The court considered a motion for class certification[11] in three treble damage suits based on section 4 of the Clayton Act[12] and stemming from a series of 1965 indictments charging the defendants[13] with violations of sections 1 and 2 of the Sherman Act.[14] The first class was to be made up of all state and municipal governments, agencies, commissions and subdivisions and all general consumers in Pennsylvania, New Jersey and Delaware who had purchased gasoline for their own use between 1955 and 1965. A second suit sought to provide class representation for all individuals, partnerships and cor-

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5. FED. R. CIV. P. 23(b)(3) provides: "An action may be maintained as a class action if . . . 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 . . . ."

6. *See, e.g.*, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967).

7. FED. R. CIV. P. 23(c)(2) provides in pertinent part: "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."

8. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971). *See also* Comment, *Class Actions Under Federal Rule 23(b)(3) — The Notice Requirement*, 29 MD. L. REV. 139 (1969).

9. 53 F.R.D. 45 (D.N.J. 1971).

10. FED. R. CIV. P. 23(b)(3)(D) provides:

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

. . .

(3) the court finds 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 . . . (D) the difficulties likely to be encountered in the management of a class action.

11. FED. R. CIV. P. 23(c)(1) provides: "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."

12. Clayton Act § 4, 15 U.S.C. § 15 (1970) reads:

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 of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

13. The right of consumer plaintiffs to sue the gasoline producer rather than the consumer's immediate retailer involves complex problems of standing and the "passing on" defense, which are beyond the scope of this note. *See* Klingsberg, *Bull's Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act*, 16 ANTITRUST BULL. 351, 365–68 (1971); Wright, *Legal Cause in Treble Damage Actions Under the Clayton Act*, 27 MD. L. REV. 275 (1967).

14. 15 U.S.C. §§ 1, 2 (1970). The indictments charged the defendants with unlawfully combining and conspiring to raise and fix the price of both tank wagon and retail gasoline. The defendants pled nolo contendere and fines were imposed.

porations in the same geographic area who had been injured as a result of purchasing gasoline in tank wagon quantities for their own consumption. This class was to be represented by McCloskey and Company, a large contracting firm. In the third suit, the Yellow Cab Company of Philadelphia sought to represent a class consisting of all individuals, partnerships and corporations in the same area who had engaged in taxicab, limousine or related services. The latter two classes specifically excluded representation of any governmental entities.

After reviewing all three classes in terms of the requirements of rule 23, the court certified both the McCloskey and Yellow Cab classes and further subdivided the Philadelphia-New Jersey class into governmental and nongovernmental users.[15] The governmental class was certified and the nongovernmental class was then further subdivided into tank quantity and non-tank quantity users. The court considered the tank quantity users already included in the McCloskey class. However, it found that the class composed of the non-tank users — the general retail consumers of gasoline — was unmanageable and, as such, not certifiable.

The decision of the court not to certify was not based on the unwieldy size of the consumer class, estimated conservatively at over six million members, nor on the obvious problem of providing notice to that many individuals. Instead the court stated that it could not envision an acceptable method of administering any damage fund awarded to the class as a whole. According to the court, the great majority of class members would have no way of proving the amounts of gasoline purchased during the period in question. The decision not to certify could have a significant effect on the emerging use of the consumer class action in antitrust enforcement.

I.

Criminal penalties provided by federal antitrust statutes leave much to be desired in the way of effective enforcement. The Sherman Act provides that a violator "shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."[16] Penalties of $5,000 or one year imprisonment or both are also available against individual directors, officers or agents of the violating corporation.[17] Not only are these fines often of minimal economic impact, in light of the massive finances of the modern corporation, but they are also rarely levied.[18] In the early 1960's, some of the nation's leading producers of electrical equipment were charged with violations of the Sherman

15. FED. R. CIV. P. 23(c)(4)(B) provides in part: "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."

16. 15 U.S.C. §§ 1-3 (1970). The fines were increased from $5000 in 1955. Act of July 7, 1955, ch. 281, 69 Stat. 282 (1955).

17. 15 U.S.C. § 24 (1970).

18. *See generally* Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 TEXAS L. REV. 1301 (1967) [hereinafter cited as Flynn].

Act.[19] Twenty-nine corporations were found guilty of engaging in a price-fixing conspiracy which according to one estimate involved approximately 1.7 billion dollars in sales; yet the resulting corporate fines amounted to only $1,721,000, with individual fines totalling only $136,000 and thirty-one thirty-day jail sentences, twenty-four of which were suspended.[20] The result of such actions is that possible gains to the violator usually far outweigh any losses in governmental fines.[21] The limited deterrent effect of criminal sanctions has thus generated a need for the private suit in antitrust enforcement.[22] This need was apparently recognized by Congress which enacted section 5(a)[23] of the Clayton Act, allowing private litigants the use of governmental final decrees or judgments against the defendants as prima facie evidence of guilt in private actions.

II.

Consumer class actions are not possible in many areas of federal law, because of the requirement that the amount in controversy exceed $10,000.[24] Section 4 of the Clayton Act,[25] however, specifically allows private antitrust suits to be maintained without regard to the amount in controversy. Though permitted, individual treble damage suits may be unavailable to plaintiffs like those in *City of Philadelphia* because of the costs involved.[26] Class actions would thus seem to be ideally

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19. United States v. Westinghouse Elec. Corp., Crim. No. 20399 (E.D. Pa., filed June 22, 1960). *See also* Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration,* 50 A.B.A.J. 621, 622 (1964).

20. *See* Flynn, *supra* note 18, at 1319 & n.99 (1967).

21. It has even been said that in some corporations a $50,000 fine under the Sherman Act has been treated as amounting to no more than a license fee to do business in America. Alioto, *The Economics of a Treble Damage Case,* 32 ANTITRUST L.J. 87 (1966).

22. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969), wherein the Court noted: "As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition."

23. Clayton Act § 5(a), 15 U.S.C. 16(a) (1970) provides:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

24. *See* Snyder v. Harris, 394 U.S. 332 (1969), in which the Supreme Court ruled that federal jurisdiction is allowed under the class action rules only where each claimant can allege injury of $10,000 or more without aggregation by multiple claimants.

25. *See* note 12 *supra.*

26. It has been urged that the costs of a private antitrust suit will total an absolute minimum of $5,000. Alioto, *The Economics of a Treble Damage Case,* 32 ANTITRUST L.J. 87, 93 (1966). This must be contrasted with the comparatively small amount of damages suffered by a single consumer. *See also* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

suited to such antitrust plaintiffs. The accessibility of the class action to the consumer in the field of antitrust may, however, be adversely affected by recent applications of the manageability standard. The lack of precedent has enabled some courts to base their decisions on whether to certify classes on their own preexisting philosophies concerning the most effective and economical use of limited judicial resources.

In support of his refusal to certify the Philadelphia consumer class, District Court Judge Augelli cited three earlier cases in which large classes of consumers had been found unmanageable. In *Hawaii v. Standard Oil Co.*,[27] also a gasoline price-fixing suit, Hawaii sought injunctive relief and damages as the representative of its citizens in both a class action and a suit *in parens patriae*. The district court allowed a modified *parens patriae* suit but refused to certify the class action, declaring the proposed class to be unmanageable.[28] In *United Egg Producers v. Bauer International Corp.*,[29] a New York district court refused certification to a class comprising all consumers of eggs in the United States, noting that "[t]he management problems for the court would be virtually insuperable."[30]

Neither of these cases, however, appears persuasive for the point asserted in *City of Philadelphia*. The Ninth Circuit reversed the allowance of the *parens patriae* suit in *Hawaii*, noting that the dismissal of the class action was not appealed and thus not before the court for determination. The court did seem to indicate, however, that its reversal of the *parens patriae* suit was not meant as a prohibition of the class action.[31] The statement on manageability in *United Egg Producers* seems to be pure dictum, as the court actually based its dismissal of the action on plaintiffs' lack of standing to sue. The court noted that "[u]ltimate consumers are not within the economic class with standing to sue in the circumstances shown here, where the direct injury, if any, falls on the primary buyer in the chain of distribution and cannot be passed on to the ultimate consumer."[32] Another distinguishing feature of *United Egg Producers* was that the party seeking the status of representative had an economic interest that lay with the suppliers and not with the consumers.[33]

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27. 301 F. Supp. 982 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 40 U.S.L.W. 4246 (U.S. Mar. 1, 1972).

28. 301 F. Supp. at 984 n.3. The conclusion as to unmanageability, rendered during the district court hearing, is reported in the Supreme Court decision. Hawaii v. Standard Oil Co., 40 U.S.L.W. 4246, 4247 (U.S. Mar. 1, 1972).

29. 312 F. Supp. 319 (S.D.N.Y. 1970).

30. *Id.* at 321.

31. The court of appeals stated:

> Hawaii's claim does not constitute an effort to prevent unjust enrichment by the wrongdoers through recovery by the state, for the affected consumers or for itself, of the total of direct injuries suffered by persons who are unable to seek recovery for themselves. Hawaii's claim is over and above all such recovery by persons, or on behalf of classes, and is asserted to have independent existence quite apart from such direct injuries.

431 F.2d at 1285.

32. 312 F. Supp. at 321. For a discussion of the modern trend toward liberalization of standing requirements see Note, *Standing, Ripeness and Bureaucratic Inertia*, 31 MD. L. REV. 134 (1971).

33. FED. R. CIV. P. 23(a)(3) requires that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the claims

The court in *City of Philadelphia* found further, and perhaps more persuasive, support in the unreported memorandum opinion of *Hackett v. General Host Corp.*[34] Plaintiff, a consumer of bread who had purchased from a retail outlet, sought to represent all individual consumers throughout the Philadelphia area who had purchased pan-baked bread for the use of themselves or their families. Confronted with a class estimated at six million persons, the court ruled that the problems of management would be insurmountable and would lead to "many knotty, complicated and unnecessary problems."[35] Yet just why these problems were unnecessary is at least questionable, since the consumers were left remediless by the dismissal of the suit. The value of *Hackett* as a precedent is weak, moreover, because the court in that case placed primary reliance on such authorities as the district court decision in *Hawaii* and *United Egg Producers,* buttressed by a dissenting opinion in *Eisen v. Carlisle & Jacquelin,*[36] a Second Circuit decision reversing a district court's dismissal of a securities transaction class action. On remand of the *Eisen* case, a class of nearly six million shareholders was certified.[37]

In citing examples of previous class actions found unmanageable, the district court in *City of Philadelphia* conceded that neither the size of the class nor the complexity of gasoline pricing should alone determine manageability.[38] Instead the court concluded that "[i]t is readily apparent that no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to *distribute* these sums to their rightful recipients, the class is unmanageable."[39]

In the most recent decision in the *Antibiotic Drug* cases,[40] a series of private antitrust actions alleging a nationwide conspiracy to fix drug prices, a district court found a manageability problem present but not controlling. In its answer to the argument of the defendants that no class action of that magnitude[41] had ever been authorized, the court noted that the only method open to the plaintiffs by which they might pursue their claims was that of a class action. It added that "the

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or defenses of the representive parties are typical of the claims or defenses of the class . . . ."

34. Civil No. 70-364 (E.D. Pa. July 30, 1970).

35. *Id.* at 7.

36. 391 F.2d 555, 570 (2d Cir. 1968) (Lumbard, C.J., dissenting).

37. 52 F.R.D. 253 (S.D.N.Y. 1971). This was an action by an odd-lot investor, on behalf of himself and all other buyers and sellers of odd lots of securities on the New York Stock Exchange during the years 1960–1966, against two brokerage firms for combining and conspiring to monopolize odd-lot trading and for fixing odd-lot differentials in an excessive amount in violation of the Sherman Act, and against the Exchange for failing to adopt rules protecting odd-lot investors.

38. *See, e.g.,* Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1968).

39. 53 F.R.D. at 72 (emphasis added).

40. *In re* Coordinated Pretrial Proceedings in the Antibiotic Antitrust Actions (Consumer Class Actions Opinion No. 2), 333 F. Supp. 278, 285 (S.D.N.Y. 1971).

41. It may be noted here that the number six million seems to be a recurrent figure in many class actions for antitrust violations. In *Hackett, Eisen* and *City of Philadelphia,* the estimated number of potential class members was consistently set at six million.

Court cannot simply close the doors to these litigants because their actions present novel and difficult questions. Instead the Court and the parties must use their ingenuity to conduct this litigation in a manner which will guarantee the rights of both sides."[42] The court also rebuffed the argument of defendants that the plaintiffs were actually only seeking a "pot of gold." The court stated that plaintiffs would still need to prove the price-fixing conspiracy at trial and, if so proved, the defendants would not be entitled to the "pot of gold" created by their illegal activities.[43] The court in *City of Philadelphia* took note of this opinion, but decided that it was dealing with an aspect of the manageability problem not present in the drug litigation, that of individual class members not being able to claim against any damage fund established because they would lack records to substantiate the amounts of their claims. Judge Augelli recognized that credit card records or itemized income tax returns would allow some consumers to prove their damages, but feared that such recoveries would unjustifiably prejudice the rights of those without records. Moreover, he noted, the question would remain of what to do with the undistributed damages.[44]

In a 1969 law review article, the reporter of the Advisory Committee on Civil Rules, which drafted the amendments, anticipated the difficulties that lay ahead in the securing of final relief to class members and declared that "imagination and even daring may be required of counsel and courts in devising abbreviated but fair procedures leading to hand-tailored relief which may well be quite novel in form."[45] Perhaps it was in this spirit that the California Supreme Court acted in *Daar v. Yellow Cab Co.*,[46] a suit brought by customers of a taxicab company to recover excessive charges made during a period of more than four years. The court recognized that, in the absence of a class suit, the defendant would retain the benefits of its alleged wrongs. Accordingly, it found preferable a procedure that would permit the parties claiming injury to recover the amount of their overpayments. In reversing a lower court's sustaining of a demurrer and remanding for further proceedings, the court took notice of a suggestion made by the state of California, as amicus curiae, that the total amount of overcharges recovered be deposited with the court or its named trustee, subject to an order that class members presenting adequate proof be able to obtain a refund of overcharges. At the end of seven years, the uncollected portion of the deposited monies would be presumed abandoned and escheat to the state. Such a plan, the state urged, would ensure that each of the injured parties would recover all of his provable excess payments and that the defendants would not retain unjustly acquired profits.[47]

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42. 333 F. Supp. at 289.

43. *Id.* at 287.

44. The court in the *Antibiotic Drug* case left open the question of the distribution of any unclaimed damages. *Id.* at 288.

45. Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 499–500 (1969).

46. 63 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

47. 433 P.2d at 746, 63 Cal. Rptr. at 738. The court did not decide the merits of this argument, finding it prematurely raised and within the discretion of the trial

Another possible solution was formulated in *Illinois Bell Telephone Co. v. Slattery,*[48] wherein a telephone company was allowed to redistribute its own rate overcharges under the supervision of a master. The Company had argued that it should be allowed to retain any unclaimed refunds to offset the amount it spent in distributing the rebates. The court rejected this argument, reminding the Company that it was responsible for the situation that had made these expenditures necessary.[49] The Company still kept part of the fund.[50]

Of the two foregoing alternatives, the former may be preferable in the situation in *City of Philadelphia,* since it would allow all who could furnish proof of loss to recover, while not allowing the alleged wrongdoer to keep the greater portion of his ill-gotten gains. The method used in the *Illinois Bell* case, while reducing the court's time and costs in distributing the fund, still permitted the defendant to retain a portion of his unjust profits. A court could just as well require the defendant to reimburse it for the costs of distribution and thereby increase the deterrent effect.

An even more innovative method of recovery was suggested in *Eisen v. Carlisle & Jacquelin,*[51] a securities transaction class action brought by approximately six million shareholders. That court's theory, equally applicable to *City of Philadelphia,* was that

> Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. Such a view is appropriate where the disputed transactions themselves are personal and individual and have litigable significance to the plaintiff. The situation here, however, is different. Although the total volume of transactions is very large, each transaction, as far as the issues here are concerned, is thoroughly stereotyped and is sufficiently small so that the benefits of individual recovery are not worth the price of litigating individual claims.[52]

Holding the suit maintainable as a class action, the court urged the plaintiffs to consider some kind of "fluid class recovery" — the distribution of damages to the class as a whole rather than to individual class members. Such a recovery had earlier been suggested by a federal court of appeals in *Bebchick v. Public Utilities Commission,*[53] in which a Commission order allowing a transit fare increase had been overruled, leaving the problem of how to return a five cents-per-fare over-

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court. It should also be noted that this was a state action and thus not controlled by rule 23. The court did, however, analogize to the Federal Rules.

48. 102 F.2d 58 (7th Cir. 1939).

49. *Id.* at 66.

50. The court allowed the unclaimed damages to be retained because the wording of the original court decree ordering the refunds called for the Company to be "released," with some exceptions, after a three-year period had elapsed. The court disallowed a claim by the state of Illinois that it should be allowed the unclaimed funds on the basis of *Bona Vacantia,* a common law theory of escheat.

51. 52 F.R.D. 253 (S.D.N.Y. 1971).

52. *Id.* at 264.

53. 318 F.2d 187 (D.C. Cir.), *cert. denied,* 373 U.S. 913 (1963).

charge to transit riders. The court ruled that, even though refunds to the individuals who had paid the increased fare were not feasible, the amount realized by the transit company from the increase had to be utilized for the benefit of the class who had paid the overcharges. Thus the transit company was required to establish a fund equal to the overcharge — comprising five twenty-fifths of the amount of money collected as increased fares.[54] The court left the disposition of this special fund to the defendant Commission, "provided such discretion is exercised consistently with the purpose of benefiting Transit users in any rate proceedings pending or hereafter instituted. For example, the fund might be used to cover costs which otherwise might lead to an increase in fares, or might be used to aid in determining whether fares should be reduced now or hereafter."[55]

Such a fluid recovery might have been utilized in the noted case by depositing the damage fund with the states to be used in a reduction of gasoline taxes.[56] The reduction would serve as a direct benefit to some individual members of the class and would generally be in proportion to the harm suffered by each. Rejecting the possibility of such recovery, the court determined that since the composition of the motoring public had changed considerably in the six years since the alleged price-fixing, any fluid class recovery would be a windfall to those who had since become gasoline consumers and a deprivation to those who were entitled to recovery but had left the area.

It must be admitted that this type of recovery when applied to the facts of this case is an imperfect method of getting the damages to injured parties, but it seems clear that it is superior to no recovery at all. The *Eisen* court appears to have stated the better reasoning: that emphasizing individual recovery may unduly stress considerations not totally relevant to the conditions of the case, especially in view of the small amounts of damages incurred by most class members which, absent the class action device, would effectively bar any suit.[57] To this, of course, should be added the acknowledged punitive as well as compensatory aspects of treble damage actions.[58]

III.

While the restrictive effect of the manageability requirement may preclude the use of rule 23 by large consumer groups, there may be an alternative remedy if a recent effort to revitalize governmental *parens patriae*[59] suits is successful. It has been argued that the technical

54. The fare increase was from twenty cents to twenty-five cents.

55. 318 F.2d at 204.

56. A court's directing a governmental entity to use the damages awarded for a specific purpose is not unique. The device was used, for example, by the *Bebchick* court as the basis for its award. *See* note 55 *supra* and accompanying text.

57. 52 F.R.D. at 264.

58. *See* notes 22 & 23 *supra* and accompanying text.

59. *Parens patriae* literally means "parent of the country" and refers to the role of the government as sovereign and guardian. The doctrine has often been used by a state government acting as the guardian of juveniles, the insane or the unknown. *See generally* Note, *State Protection of its Economy and Environment: Parens*

problems presented in the use of rule 23 may be bypassed by the use of such *parens patriae* suits, viewed as no more than super class actions.[60] Yet in a 1969 case involving alleged antitrust violations in the plumbing fixtures business,[61] the states of Kansas and California were denied standing to sue *in parens patriae* after making just such an argument. The district court ruled that allowing a state to sue in such a manner would amount to permitting a class action without the limitations set out in rule 23. The court added:

> the writers of the revised Rule 23 weighed the problems of manageability, fairness, and judicial economy in establishing the requirements therein, and the Court agrees with defendants that to allow a plaintiff State to recover damages for individual claimants in a substitute type of representative suit without the safeguards there provided would undermine the aims of that Rule.[62]

More recently, however, a district court allowed the state of California, in *California v. Frito Lay Inc.*,[63] to sue on behalf of its citizens who, because of lack of records, were unable to prove their claims and vindicate their rights. The suit, for treble damages under antitrust laws, was based on an alleged conspiracy to fix the prices of snack foods. The court noted that, unlike gasoline purchases, where many credit card holders could substantiate their losses, "[h]ere, the purchase of snack foods is done largely on a direct cash basis (much with the dimes and quarters of children) where no receipt is kept by the consumer."[64] It concluded that "[c]ourts cannot shrink from the responsibility of providing a forum for litigating claimed violations of rights — private or public — just because it has never been done before. *Parens patriae* in this representative sense meets both the letter and the spirit of Section 4 of the Clayton Act."[65]

This effort at revitalization of *parens patriae* suits was dealt a blow recently by the United States Supreme Court decision in *Hawaii v. Standard Oil Co.*[66] The district court in that gasoline price-fixing case, while refusing to certify a class action,[67] stated it would allow a suit *in parens patriae* for recovery of damages due to economic injury, "if defendants' acts have a deleterious impact upon the general welfare or economy of the state."[68] After a reversal by

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Patriae Suits for Damages, 6 COLUM. J.L. & SOC. PROB. 411, 412 (1970); Note, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970).

60. *See Wrongs Without Remedy, supra* note 59, at 593.

61. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 1970 Trade Cas. ¶ 73,013 (E.D. Pa. 1969).

62. *Id.* at 87,971.

63. 40 U.S.L.W. 2218 (C.D. Cal. Oct. 13, 1971).

64. *Id.*

65. *Id.*

66. 301 F. Supp. 982 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 40 U.S.L.W. 4246 (U.S. Mar. 1, 1972).

67. 301 F. Supp. at 984 n.3.

68. *Id.* at 987. The Ninth Circuit reversed the district court on this point. 431 F.2d 1282 (9th Cir. 1970). The court ruled that,

> 1. An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary

the Ninth Circuit,[69] which rejected Hawaii's right to sue in this manner for damages to its general economy, certiorari was granted. The Supreme Court affirmed the Ninth Circuit, and held that while section 4 of the Clayton Act would permit Hawaii to sue in its proprietary capacity for treble the damages it had suffered from antitrust violations, "[a] large and ultimately indeterminable part of the injury to the 'general economy,' as it is measured by economists, is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4."[70] The Court noted the claim of Hawaii that denying the state the right to sue for injury to her quasi-sovereign interests would allow antitrust violations to go unremedied since private citizens cannot normally shoulder the burdens and costs of private suits. It stated, however, that the earlier district court dismissal of Hawaii's class action was not intended to rule out the use of the class action by a state suing on behalf of some or all of its citizens, and in the antitrust area such suits would be preferred.

CONCLUSION

It is in the spirit of the *Antibiotic Drug* cases rather than that of the court in *City of Philadelphia* that the problems of management in class actions should be treated. As the rule itself states, manageability is pertinent to the judicial finding that "a class action is superior to other *available* methods for the fair and efficient adjudication of the controversy."[71] The direct results of the reasoning in *City of Philadelphia* are that those who have been injured by the conspiracy but cannot prove with certainty the amount of their damages can receive no relief; those who could prove their damages will not be able to do so because of the high costs of individual antitrust litigation; and the price-fixing conspirators will be allowed to keep the greater portion of their illegally gained profits. A more important indirect result is that private enforcement of antitrust laws will be greatly impeded. The search for certainty in judicial proceedings is admirable, but the end result reached in *City of Philadelphia* can perhaps better be described as the "certainty of injustice."[72]

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capacity, engage in business. For injury suffered in these respects a state can recover under § 4. . . . Such was the basis for Hawaii's Count I. But the terms "business or property" are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community. . . .

2. Accepting that the general economy can suffer injury from antitrust violations, such injury is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection. It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act.

431 F.2d at 1285.

69. 431 F.2d 1282 (9th Cir. 1970).

70. 40 U.S.L.W. at 4250.

71. FED. R. CIV. P. 23(b)(3) (emphasis added).

72. Allison v. Chandler, 11 Mich. 542, 555 (1863).

In view of the apparent philosophy behind the present rule,[73] and in view of the innovative procedures adopted by other courts dealing with similar situations, the decision of the court in *City of Philadelphia* to seek further amendment of the federal rules and the antitrust laws seems to lack the "imagination" and "daring" anticipated by the 1966 rulemakers.[74]

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73. "Departing from sound practice, I made an ex parte call to Prof. Ben Kaplan of Harvard, who, as you know, was the Reporter of the new rules . . . . The reasoning, as he told it to me, relates to the fundamental conception that I have already touched of classes comprised of little people, who don't normally have much dealing with lawyers or with legal formalities. He got speaking quite professorally — and I wrote down what he said — of the class action's 'historic mission of taking care of the smaller guy.'" Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966).

74. The problem presented in this case may take on added significance to the Maryland Bar as a result of a Justice Department complaint filed in the United States District Court for the District of Maryland charging four wholesale bakers in the Baltimore and Eastern Shore areas of Maryland, Delaware and Virginia with conspiring to fix and raise the price of bread. The complaint alleged violations in the Baltimore area since at least December, 1965, and in the Eastern Shore area since April, 1969. The bakeries involved, with annual sales of nearly $22 million, entered pleas of nolo contendere on Jan. 11, 1972. United States v. E. H. Koester Bakery Co., Criminal Nos. 71-0315, 71-0316 (D. Md., filed July 29, 1971).