

**The original documents are located in Box 4, folder “Antitrust - Parens Patriae Act - H.R. 8532” of the John Marsh Files at the Gerald R. Ford Presidential Library.**

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[March 1976]

SUMMARY OF KEY CONCERNS RE PROPOSED PARENS PATRIAE LEGISLATION

Following is a summary of key concerns and objections regarding proposed parens patriae legislation pending in the Congress which would radically alter the Nation's antitrust laws:

1. Aggregate Damages Provision Permits Enormous Claims

The proposed legislation would authorize State Attorneys General to bring treble damage "class action" suits against business corporations for alleged violations of the Sherman Act. Such suits could be brought on behalf of all individual residents of a state and, under the Senate version, even for damages to the "general economy" of the State. Statistical aggregation of such a large number of "plaintiffs" would permit enormous damage claims to be brought against an individual company, even though the amount of alleged "injury" to any individual is minimal. Furthermore, any company named as a co-conspirator could be potentially liable, jointly and individually, for the entire amount of damages alleged in the complaint.

2. No Proof of Injury Necessary

The proposed legislation would eliminate the need to prove that any individual injury in fact took place, a major innovation in antitrust law. In effect, the proposed legislation would create a new device to transfer alleged "illegal profits" or monopoly "overcharges" from business firms to States for redistribution. Furthermore such actions could be brought without the traditional safeguards developed under Rule 23 of the Federal Rules of Civil Procedure to assure fairness and manageability, and to prevent abuse in the conduct of such "class action" suits.

3. Contingent Fee Arrangements Permitted

The Senate bill would permit plaintiffs' lawyers to be authorized by State Attorneys General to bring such "class" suits on a contingent fee basis. House Judiciary Chairman Peter Rodino has announced that an attempt will be made on the House floor to remove a ban on contingency fee arrangements presently in the House bill. Permitting contingent fee arrangements creates a serious potential for abuse because the private lawyers bringing the suits frequently are the main monetary beneficiaries in such suits. Thus the bill has been characterized as a potential "shakedown for corporations, rip-off for consumers, and the great bicentennial money machine for antitrust entrepreneurs."



#### 4. Potential for Political Abuse

The proposed legislation contains unlimited potential for exploitation by Attorneys General who are elective officials. It would permit ambitious state Attorneys General to victimize corporate scapegoats in media-oriented "class action" suits. For example, the Attorney General of any state could abuse the system by filing politically motivated actions against large national corporations. An additional incentive is offered by contingent fee arrangements under which such a suit could be brought without having to incur any costs to the state government. To date, state officials have been confined to enforcing state antitrust laws and to filing federal antitrust claims for actual injuries sustained by the state in its proprietary capacity as a purchaser. Past antitrust claims asserted on behalf of large classes have reached multi-million or even billion dollar dimensions. Such a weapon in the hands of a State Attorney General, far beyond the enforcement powers of the U.S. Department of Justice, entails obvious risks of abuse.

#### 5. Adverse Impact on Economic Recovery

Passage of parens patriae would have a potentially harmful impact on the financing and capital access opportunities, particularly of smaller firms exposed to huge contingent liabilities arising out of massive antitrust claims. This is so because any public firm which is named as a defendant or co-conspirator in a massive antitrust claim is required by SEC regulations to disclose such "material" liabilities which adversely affect its earnings and financial position. Such disclosures of a multi-million dollar contingent liability, where a recovery cannot be dismissed as remote or impossible in view of the inherent vagueness of the antitrust laws' prohibitions and their judicial interpretation, may preclude a "clean" auditor's report for the company. A "qualified" auditor's report for a business firm, particularly a smaller firm, will obviously be weighed by banks or other lenders in assessing the safety and risk factors of substantial extensions of credit. Naturally, the diminished ability of a business firm, particularly a smaller firm, to secure capital financing would have an adverse effect on its growth and ability to generate jobs and employment which are particularly important at a time of emergence from an economic recession.

#### 6. Small Business Especially Hurt

The legislation would have an especially harmful effect on medium and small businesses. If a smaller company is named as a defendant in a "conspiracy" case, for example, and thereby is forced to disclose on its financial statements enormous sums of "potential" liability for which it may be jointly and individually



responsible, such a company's ability to obtain necessary capital financing may be impaired. Furthermore, small companies frequently cannot afford to finance such costly litigations and are therefore forced to settle suits which larger companies could successfully defend.

7. Doctors and Real Estate Brokers Vulnerable

In the question-and-answer portion of the hearing, it was brought out that doctors and real estate brokers, for example, may face enormous potential liability under the bill, jointly and individually.

8. Advice of Chief Justice and Judicial Conference

GMA pointed out that the impact of such legislation on the already seriously overcrowded federal court system has not been adequately examined by the Committee. Senator Roman Hruska (R-NE) who chaired the hearing then announced that he has written to Chief Justice Burger and to the Administrative Office of the U.S. Courts requesting information on how this legislation might impact on the federal court system.

9. Aggravation of "Crisis" in Overcrowded Federal Courts

Antitrust class action litigation is among the most burdensome and time consuming activities facing the courts. Furthermore, such cases frequently have been thrown out and denounced by the courts because of the "miniscule recoveries by intended beneficiaries", "while the "real bonanza . . . will go to counsel." By broadening the basis for such actions, eradicating procedural safeguards, and at the same time authorizing private attorneys to bring such actions for the State, the proposed *parens patriae* legislation could choke the judicial system, and aggravate the court "crisis" deplored by the Chief Justice of the U.S. In effect, the proposals would further pressure the already overburdened federal courts to take the very type of "blackmail" cases they have thrown out and castigated because they "shock the conscience."

This is not cured by Court supervision of attorneys' fees in antitrust treble damage litigation, which in itself is a very complex and time-consuming process, and can take years to litigate in addition to the years of litigation on the merits. In and of itself, this issue casts substantial additional burdens on the courts.

10. Constitutional Infirmity

A potential Constitutional infirmity is presented by the proposed legislation, based upon the Supreme Court's recent decision declaring the Federal Elections Commission's enforcement powers to be unconstitutional because all members were not Presidential appointees. A similar problem may arise by virtue of the fact that the State Attorneys General are not officers appointed under Article II of the Constitution to enforce federal laws by litigation in the federal courts to enforce heavy forfeitures under the Sherman Act.



MAR 17 1976

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# Congress of the United States

## Committee on the Judiciary

House of Representatives  
 Washington, D.C. 20515

Telephone: 202-225-3951

March 11, 1976

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STAFF DIRECTOR:  
 GARNER J. CLINE

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 CONSTANTINE J. GEKAS  
 ALAN F. COFFEY, JR.  
 KENNETH N. KLEE  
 RAYMOND V. SMITANKA

Dear Colleague:

Re: H.R. 8532 - Antitrust Enforcement Improvement Act  
(Parens Patriae)

We the undersigned Members of the Subcommittee on Monopolies and Commercial Law are writing to urge your support for H.R. 8532, the Antitrust Parens Patriae Act, which will come to the Floor for a vote on Thursday, March 18, 1976.

This is in our judgment one of the most important bills of this Session. It will fill a major gap in our present antitrust enforcement scheme and provide a most effective deterrent to future antitrust violations.

At present, most widespread antitrust violations, for example price-fixing conspiracies, have their ultimate and principal impact upon consumers, who pay higher prices for goods and services than they would if there were free and open competition.

The law now tells the consumer that he may sue for three times the damages he has sustained. But this right to sue is more theoretical than actual.

Suppose, for example, that bread manufacturers conspire to fix the price of bread, and that they overcharge consumers by a mere four cents per loaf. A family which consumed a lot of bread would probably not be overcharged more than \$8.00 in a year. Yet the Federal Trade Commission in a major case found that precisely such an overcharge resulted in \$35 million in illegal profits to the manufacturers over a ten year period in the city of Seattle alone.

The family that has lost \$8.00 in a year will never exercise its theoretical right to sue. It will have no means of unearthing the conspiracy in the first place. It would have no incentive to sue if it happened to learn of the violation. Antitrust litigation is notoriously protracted, vexatious and expensive. No one would undertake the burdens of such litigation for a small individual stake. No one could afford it financially.

As a result, the price-fixing manufacturers of bread would in all probability reap the profits of their illegal conduct and have no reason not to repeat it over and over.



H.R. 8532 would provide an effective advocate for consumers injured by this sort of lawlessness. The state attorney general has the law enforcement responsibility, the resources and the know-how to redress antitrust violations which impact on the consumer. The bill would allow him to bring one action on behalf of all injured consumers in his state. In that action the stakes would be high enough to justify the enormous expenditure of time and money demanded by such cases, and effective redress of consumer injuries could be achieved.

Equally important, enactment of the bill would for the first time provide a realistic deterrent to antitrust violations which directly affect consumers. At present, a businessman can engage in conduct proscribed by the antitrust laws and incur very little financial risk if the principal effect of his conduct is to overcharge many consumers in small individual amounts. He knows that while there may be large numbers of potential individual claims, the consumers have no practical means of pursuing them. As a result, American consumers are gouged for billions of dollars in illegal overcharges every year. H.R. 8532 would provide an effective deterrent to this kind of antitrust violation.

In the light of these facts, it is easy to understand why big business has opposed H.R. 8532. In fact, they have made the bill the target of an intense lobbying campaign which has distorted both the purpose and the effect of the bill.

Actually, H.R. 8532 has been carefully crafted to protect the rights of antitrust defendants and to streamline some of the cumbersome procedures which entangle other kinds of class actions. The attorney general would be required to give notice of the suit to all potential claimants in the state. The defendant would be protected against duplicative recovery and harassment by multiple suits by the requirement that all claimants expressly "opt out" of the attorney general's suit or else be bound by the result.

Finally, H.R. 8532 would promote federal-state cooperation in the enforcement of the antitrust laws. As President Ford said in his State of the Union message, "Under the Constitution, the greatest responsibility for curbing crime lies with state and local authorities. They are the frontline fighters in the war against crime." This is equally true in the antitrust field, where many of the violations which most directly affect consumers occur at the regional or local level. State attorneys general are ideally situated to assist in the discovery and redress of such violations, and we should enlist their help.

Mr. McClory will introduce an amendment requiring the reduction of treble damages to single damages on a showing that the antitrust violation was committed in "good faith". We support this amendment.



The bill has the express support of the Antitrust Division of the Department of Justice, the AFL-CIO, the UAW, major consumer groups and the National Association of Attorneys General. It passed the Judiciary Committee by a voice vote.

We hope you will support us.

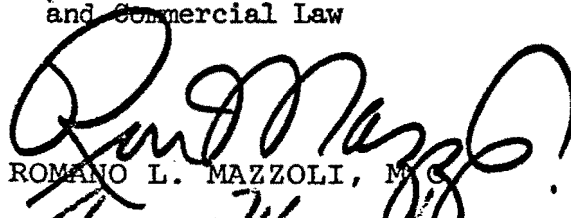
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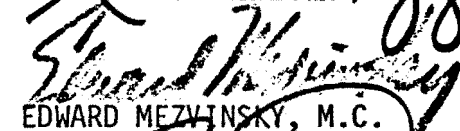
PETER W. RODINO, JR., CHAIRMAN,  
Subcommittee on Monopolies  
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Attachment: (1)

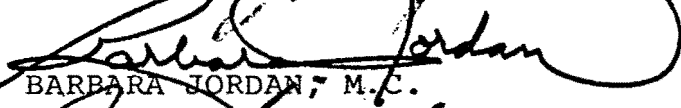
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ROMANO L. MAZZOLI, M.C.



EDWARD MEZHINSKY, M.C.



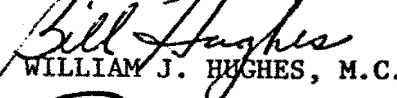
BARBARA JORDAN, M.C.



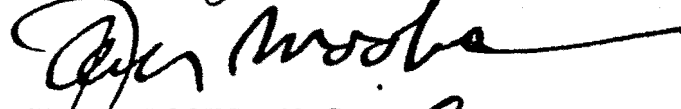
JOHN F. SEIBERLING, M.C.



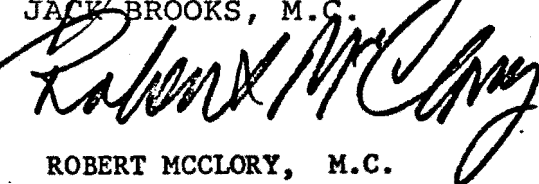
PAUL S. SARBANES, M.C.



WILLIAM J. HUGHES, M.C.



JACK BROOKS, M.C.



ROBERT MCCLORY, M.C.



JOHN J. RHODES  
1ST DISTRICT, ARIZONA

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WASHINGTON, D.C. 20515

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6040 FEDERAL BUILDING  
PHOENIX, ARIZONA 85023

ROBERT J. SCANLAN

Office of the Minority Leader  
United States House of Representatives  
Washington, D.C. 20515

H-232, THE CAPT  
WASHINGTON, D.C.

JOHN J. WILLIAM  
DENNIS J. TAYLOR  
J. BRIAN SMITH  
CLARA POSEY

March 16, 1976

Dear Republican Colleague:

Contrary to the views expressed by the Department of Justice on the Antitrust Parens Patriae bill, after personal review the President has indicated his strong opposition to H.R. 8532.

For your information, we have attached a copy of the Republican Policy Committee Statement which also opposes the Parens Patriae bill. The legislation is ill-conceived, and we urge all Republicans to vote against H.R. 8532.

Sincerely,

John J. Rhodes, M. C.  
Minority Leader

Robert H. Michel, M. C.  
Minority Whip





ROBERT McCLORY  
13TH DISTRICT, ILLINOIS

ROOM 2452  
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(202) 225-5221

JUDICIARY COMMITTEE

U.S. INTERPARLIAMENTARY  
UNION DELEGATION

**Congress of the United States**  
**House of Representatives**  
**Washington, D.C. 20515**

March 16, 1976

DISTRICT OFFICES  
KANE COUNTY  
MUNICIPAL BUILDING  
150 DEXTER COURT  
ELGIN, ILLINOIS 60120  
(312) 697-5005

LAKE COUNTY  
POST OFFICE BUILDING  
326 NORTH GENESEE STREET  
WAUKEGAN, ILLINOIS 60085  
(312) 336-4554

McHENRY COUNTY  
McHENRY COUNTY COURTHOUSE  
2200 SEMINARY ROAD  
WOODSTOCK, ILLINOIS 60098  
(815) 338-2040

Dear Colleague:

The Antitrust Parens Patriae Act is scheduled for floor action this Thursday. If the House adopts an amendment which I will offer, I will support it fully. My amendment should make the bill more acceptable to those Members of the House who are concerned that, in its present form, the bill might have adverse economic consequences for corporations found to have violated the antitrust laws despite good faith efforts to comply with those laws.

When companies willfully violate the antitrust laws (e.g., by illegally fixing prices), the trebling of damages is an entirely appropriate remedy in a parens patriae case where the State attorney general is suing on behalf of consumers.

Many companies, on the other hand, may inadvertently violate the antitrust laws. For these companies, treble damages in parens patriae cases may well be an unnecessary and undesirable remedy. These are not the companies which need to be punished. Significantly, in the normal private damage case under the antitrust laws, the trebling of damages is intended to provide an incentive for an injured person to sue an antitrust violator. The trebling of damages does not create such an incentive in parens patriae cases, however, because the State does not keep the damages it recovers for consumers. In good faith cases, trebling is not needed.

My amendment, therefore, provides that there shall be single damages in parens patriae cases where the defendant has acted in good faith and treble damages only in those cases where the defendant has not acted in good faith.

• In addition, the amendment deletes the provision concerning aggregation of damages in antitrust class actions other than parens patriae cases. This provision is extraneous to the parens patriae sections of the bill.



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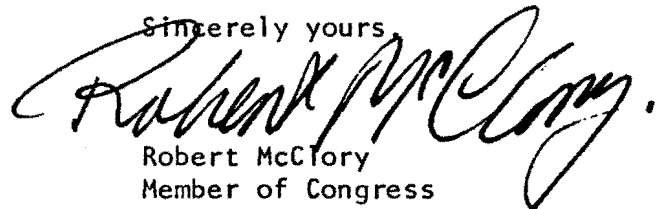
I would like to quote the views of the Administration's Assistant Attorney General in charge of antitrust enforcement. Addressing himself to H.R. 8532, Assistant Attorney General Thomas Kauper declared:

The Administration has taken a position in support of the basic concept of permitting a State to sue on behalf of its citizens for damages sustained because of violations of the Sherman Act. H.R. 8532 would establish a workable mechanism for assuring that those antitrust violations which have the broadest scope and perhaps the most direct impact on consumers do not escape civil liability...

The parens patriae concept, as embodied in H.R. 8532, is both desirable and useful from the perspective of better antitrust enforcement.

Finally, this legislation, as modified by my amendment, should encourage full and fair competition -- which is the single most vital ingredient of a free enterprise system.

Sincerely yours,



Robert McCorty  
Member of Congress

RMcC:lr



Congress of the United States

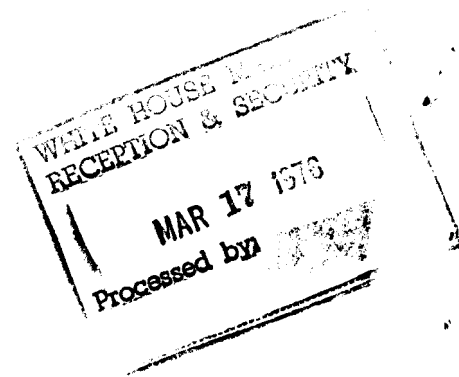
House of Representatives

Washington, D.C. 20515

OFFICIAL BUSINESS

Robert McCloy  
M.C.

Mr. John Marsh  
The White House  
Washington, D. C. 20500



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FROM: JACK MARSH  
TO: DICK CHENEY

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THE WHITE HOUSE

WASHINGTON

March 12, 1976

MEMORANDUM FOR: THE PRESIDENT  
THROUGH: DICK CHENEY  
FROM: JACK MARSH   
SUBJECT: H. R. 8532, Parens Patriae

You asked for background information on Parens Patriae. I call to your attention the attached which has been prepared by Paul O'Neill.





EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

March 12, 1976

INFORMATION

MEMORANDUM FOR JACK MARSH

FROM: PAUL H. O'NEILL *Ohneill*

SUBJECT: Legislation Permitting State Attorney's General  
to File Consumer Class Action Suits (Parens Patriae)

The parens patriae legislation, H.R. 8532, which will be taken up on the House floor next week, would authorize a state attorney general to sue on behalf of the State's citizens to recover damages that result from violations of the Sherman Antitrust Act. A summary of the provisions of the pending bill is set forth at Tab A.

The legislation is intended to correct an inequity in anti-trust enforcement, which presently does not as effectively deter violations affecting many small consumers as those violations which affect a few large purchases of a product. Where price fixing violations lead to small overcharges on such items as snack-foods, for example, consumers generally do not have the documentation of purchases, have only a small stake, are not likely to have the sophistication or resources necessary to prosecute their individual claims.

The legislation would give a role to the States in antitrust enforcement by allowing state attorneys general to aggregate individual damages into one suit. It would encourage States to develop their antitrust capabilities on the assumption that state attorneys general would be more successful than the U.S. Attorney General in uncovering "localized" price-fixing and other antitrust violations. As a result of a number of recent court cases, States have been prevented from establishing this capability, absent specific Federal authorizing legislation to do so.



The Administration developed and communicated its position on the *parens patriae* legislation to the House Judiciary Committee last summer. (See chronology of events at Tab B.) Most of the suggested modifications have been adopted in the Committee bill.

Background on the rationale for this legislation and the main points of disagreement are set forth at Tab C.

At Tab D is our best current reading on amendments that will be offered next week.

Attachments



Analysis of H.R. 8532  
(Parens Patriae)

The pending bill, as reported to the House, may be summarized as follows:

Actions by State Attorneys General. Any state attorney general would be authorized to bring a civil action in federal court on behalf of any residents of his state who may have been damaged by an alleged violation of the federal antitrust laws. The bill would not permit a state attorney general to farm out such cases to private attorneys on a contingent fee basis.

Treble Damages. If a violation of the federal antitrust laws were established, the state, as parens patriae, would be entitled to recover "threefold the damages and the cost of suit, including a reasonable attorney's fee."

Notice by Publication. Notice to all persons in the state on whose behalf such a suit is filed would be given by publication in accordance with applicable state law, or in whatever manner the court specified.

Exclusion of Claimants upon Request. Any claimant could elect not to be represented by the attorney general and could be excluded from such a suit by filing a request within sixty days after notice of the suit is given. Any person in the class involved who failed to file such a notice (except for good cause) would be bound by the decision of the court.

No Compromises without Court Approval. Suits brought under the proposed statute could not be dismissed or compromised without approval of the court.

Estimation of Damages. The court would be permitted to determine the lump sum to be recovered by the state by any "reasonable system of estimating aggregate damages" without requiring separate proof by the individuals on whose behalf a suit is brought. Thus the bill provides that damages could be assessed "in the aggregate by statistical or sampling methods."





Distribution of Damages. The amounts recovered would be distributed by the state "in such manner as the district court may in its discretion authorize" provided that each person is given "a reasonable opportunity to secure his appropriate portion..."

Assistance by the U.S. Attorney General. Whenever the attorney general of the United States files an antitrust suit and believes that any state attorney general would be entitled to bring a class action based substantially on the same alleged violation, he would notify the state attorney general. In addition, the U.S. attorney general would be required to make available to the state authorities any relevant investigative files and other materials to the extent permitted by law.



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TO: DICK CHENEY

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THE WHITE HOUSE

WASHINGTON

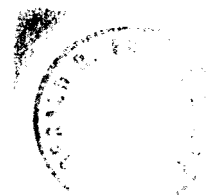
March 12, 1976

MEMORANDUM FOR: DICK CHENEY

FROM: JACK MARSH

John Rhodes gave me the attached list of companies who have indicated their opposition to the *Parents Patria* bill.

Attachment



AMERICAN HOME PRODUCTS  
New York, New York

ASHLAND OIL COMPANY  
Ashland, Kentucky

BETHLEHEM STEEL CORPORATION  
Bethlehem, Pennsylvania

AMERICAN PETROLEUM INSTITUTE  
Washington, DC

THE B. F. GOODRICH COMPANY  
Akron, Ohio

UNION CARBIDE CORPORATION  
New York, New York

CPC INTERNATIONAL, Inc.  
Englewood Cliffs, New Jersey

BRISTOL-MEYERS CO.  
New York, New York

DEERE & COMPANY  
Moline, Illinois

DEL MONTE  
San Francisco

E. I. du PONT de NEMOURS & COMPANY  
Wilmington, Delaware

ELI LILLY & COMPANY  
Indianapolis, Indiana

EXXON COMPANY, U.S.A.  
Houston, Texas

GORHAM INDUSTRIES  
Detroit, Michigan

GENERAL MOTORS CORPORATION  
Detroit, Michigan

GROCERY MANUFACTURERS OF AMERICA, Inc.  
Washington, DC

ALLIS-CHALMERS  
Milwaukee, Wisconsin

BENDIX CORPORATION  
Southfield, Michigan

ALUMINUM COMPANY OF AMERICA  
Pittsburgh, Pennsylvania

AKZONA INCORPORATED  
Asheville, North Carolina

AMWAY CORPORATION  
Ada, Michigan

CARNATION COMPANY  
Los Angeles, California

CATERPILLAR TRACTOR  
Peoria, Illinois

CIBA-GEIGY  
Summit, New Jersey

DOW CHEMICAL  
Midland, Michigan

DURAMETALLIC CORPORATION  
Kalamazoo, Michigan

FIRESTONE TIRE & RUBBER  
Akron, Ohio

FORD MOTOR COMPANY  
Dearborn, Michigan

GENERAL ELECTRIC COMPANY  
Fairfield, Connecticut

GENERAL MILLS  
Minneapolis, Minnesota

GENERAL REFRACTORIES COMPANY  
Bala Cynwyd, Pennsylvania

GULF OIL CORPORATION  
Pittsburgh, Pennsylvania



GREYHOUND  
Phoenix, Arizona

HOFFMAN-IA ROCHE  
Nutley, New Jersey

THE GILLETTE COMPANY  
Boston, Massachusetts

MILES LABORATORIES, INC.  
Elkhart, Indiana

MARCOR, INC.  
Chicago, Illinois

REYNOLDS METAL COMPANY  
Richmond, Virginia

QUAKER OATS COMPANY  
Chicago, Illinois

UNITED STATES STEEL CORPORATION  
Pittsburgh, Pennsylvania

OWENS-CORNING FIBERGLAS CORPORATION  
Toledo, Ohio

UNIROYAL INCORPORATED  
Washington, DC

TEXACO, INC.  
New York, New York

MOBIL OIL CORPORATION  
New York, New York

LITTON INDUSTRIES  
Beverly Hills, California

KENNECOTT COPPER CORPORATION  
New York, New York

PHARMACEUTICAL MANUFACTURERS ASSN.  
Washington, DC

SCM CORPORATION  
New York, New York

PROCTER & GAMBLE  
Cincinnati, Ohio

HERCULES, INC.  
Wilmington, Delaware

HEWLETT-PACKARD  
Palo Alto, California

HONEYWELL, INC.  
Minneapolis, Minnesota

RALSTON PURINA  
St. Louis, Missouri

WHIRLPOOL CORPORATION  
Benton Harbor, Michigan

PFIZER, INC.  
New York, New York

SUN OIL COMPANY  
Wayne, Pennsylvania

WESTINGHOUSE ELECTRIC CORPORATION  
Washington, DC

MONSANTO COMPANY  
St. Louis, Missouri

UNIVERSAL OIL PRODUCTS COMPANY  
Des Plaines, Illinois

PEPSICO  
Purchase, New York

PHILLIPS PETROLEUM COMPANY  
Houston, Texas

KRESGE INTERNATIONAL  
Troy, Michigan

KRAFTCO CORPORATION  
Glenview, Illinois

SEARS, ROEBUCK & COMPANY  
Chicago, Illinois

J. C. PENNEY, INC.  
Washington, DC

LTV CORPORATION  
Dallas, Texas



GRAND CENTRAL INDUSTRIAL CENTRE  
Glendale, California 91201

BANK OF A. LEVY  
Oxnard, California

HARRY T. CAMPBELL SONS' COMPANY  
Baltimore, Maryland

PENNSYLVANIA PRESSED METALS, INC.  
Cameron County, Pennsylvania

J. O. AYERS METAL PRODUCTS  
Cassopolis, Michigan

FRANKLIN ELECTRIC  
Bluffton, Indiana

SOUTHERN MICHIGAN GROCER CO., INC.  
Coldwater, Michigan

CLINTON MILLS  
Clinton, South Carolina

WHITEHALL CONVALESCENT HOMES  
Ann Arbor, Michigan

STANLEY G. FLAGG & CO.  
Montgomery County, Pennsylvania

RICHARD S. DAWSON COMPANY  
Los Angeles, California

FIRST FEDERAL SAVINGS  
Pasadena, California

ALOHA PARTY SALES, INC.  
Honolulu, Hawaii

LEASE MOBILE  
San Mateo, California

OTIS ELEVATOR COMPANY  
Yonkers, New York

WICKERSHAM, INC.  
Lancaster, Pennsylvania



Rhodes  
2845-

March 12, 1976

MEMORANDUM FOR: THE PRESIDENT  
THROUGH: DICK CHENEY  
FROM: JACK MARSH  
SUBJECT: H. R. 8532, Parens Patriae

You asked for background information on Parens Patriae. I call to your attention the attached which has been prepared by Paul O'Neill.

JOM/dl

*Indexed memo + Tab A only.*

*jm*





EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

March 12, 1976

INFORMATION

MEMORANDUM FOR JACK MARSH

FROM: PAUL H. O'NEILL

*Ohim*

SUBJECT: Legislation Permitting State Attorney's General to File Consumer Class Action Suits (Parens Patriae)

The parens patriae legislation, H.R. 8532, which will be taken up on the House floor next week, would authorize a state attorney general to sue on behalf of the State's citizens to recover damages that result from violations of the Sherman Antitrust Act. A summary of the provisions of the pending bill is set forth at Tab A.

The legislation is intended to correct an inequity in anti-trust enforcement, which presently does not as effectively deter violations affecting many small consumers as those violations which affect a few large purchases of a product. Where price fixing violations lead to small overcharges on such items as snack-foods, for example, consumers generally do not have the documentation of purchases, have only a small stake, are not likely to have the sophistication or resources necessary to prosecute their individual claims.

The legislation would give a role to the States in antitrust enforcement by allowing state attorneys general to aggregate individual damages into one suit. It would encourage States to develop their antitrust capabilities on the assumption that state attorneys general would be more successful than the U.S. Attorney General in uncovering "localized" price-fixing and other antitrust violations. As a result of a number of recent court cases, States have been prevented from establishing this capability, absent specific Federal authorizing legislation to do so.





The Administration developed and communicated its position on the parens patriae legislation to the House Judiciary Committee last summer. (See chronology of events at Tab B.) Most of the suggested modifications have been adopted in the Committee bill.

Background on the rationale for this legislation and the main points of disagreement are set forth at Tab C.

At Tab D is our best current reading on amendments that will be offered next week.

Attachments



Analysis of H.R. 8532  
(Parens Patriae)

The pending bill, as reported to the House, may be summarized as follows:

Actions by State Attorneys General. Any state attorney general would be authorized to bring a civil action in federal court on behalf of any residents of his state who may have been damaged by an alleged violation of the federal antitrust laws. The bill would not permit a state attorney general to farm out such cases to private attorneys on a contingent fee basis.

Treble Damages. If a violation of the federal antitrust laws were established, the state, as parens patriae, would be entitled to recover "threefold the damages and the cost of suit, including a reasonable attorney's fee."

Notice by Publication. Notice to all persons in the state on whose behalf such a suit is filed would be given by publication in accordance with applicable state law, or in whatever manner the court specified.

Exclusion of Claimants upon Request. Any claimant could elect not to be represented by the attorney general and could be excluded from such a suit by filing a request within sixty days after notice of the suit is given. Any person in the class involved who failed to file such a notice (except for good cause) would be bound by the decision of the court.

No Compromises without Court Approval. Suits brought under the proposed statute could not be dismissed or compromised without approval of the court.

Estimation of Damages. The court would be permitted to determine the lump sum to be recovered by the state by any "reasonable system of estimating aggregate damages" without requiring separate proof by the individuals on whose behalf a suit is brought. Thus the bill provides that damages could be assessed "in the aggregate by statistical or sampling methods."



Distribution of Damages. The amounts recovered would be distributed by the state "in such manner as the district court may in its discretion authorize" provided that each person is given "a reasonable opportunity to secure his appropriate portion..."

Assistance by the U.S. Attorney General. Whenever the attorney general of the United States files an antitrust suit and believes that any state attorney general would be entitled to bring a class action based substantially on the same alleged violation, he would notify the state attorney general. In addition, the U.S. attorney general would be required to make available to the state authorities any relevant investigative files and other materials to the extent permitted by law.



TAB A

TAB B

Development of Administration Position In  
Support of H.R. 8532 (Parens Patriae):  
A Chronology

1. March 18, 1974. Assistant Attorney General Kauper testified in hearings before House Judiciary Subcommittee expressing his belief in need for parens patriae legislation. Kauper reiterated this position in a report to the House Subcommittee in March 1975.
2. May 7, 1975. Kauper again testified on the advisability of parens patriae legislation in connection with S. 1284 (Title IV). Subcommittee members requested "Administration views on S. 1284).
3. May-June 1975. OMB held four meetings with Justice, Commerce, FTC to seek an Administration position on S. 1284.
4. July 7, 1975. Kauper responded to the Senate Subcommittee with Administration position on S. 1284. On parens patriae (Title IV), he stated that the Administration supported the Department's position, set forth in his earlier House and Senate testimony, but would limit scope to violations of the Sherman Act only.
5. July 1975. House Subcommittee reported H.R. 6786 to the full committee by a 9-2 vote on July 10. On July 28, the House Judiciary Committee by voice vote ordered a clean bill (H.R. 8532) as amended, be reported favorably to the House.
6. September 25, 1975. In a letter to Chairman Rodino, Kauper stated that "the Administration has taken a position in support of the basic concept of permitting a State to sue on behalf of its citizens for damages sustained because of violations of the Sherman Act.... With only minor exceptions, the parens patriae provisions of H.R. 8532 are appropriately designed and limited to serve these goals". (See attached.)



Department of Justice

Washington, D.C. 20530

Honorable Peter W. Rodino, Jr.  
Chairman  
Committee on the Judiciary  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to the letter of Mr. Alan A. Ransom of your staff, seeking our views on H.R. 8532, which now has been favorably reported out of the Committee on the Judiciary. You will recall that I appeared before the Subcommittee on Monopolies and Commercial Law on March 18, 1974, and testified in considerable detail about an earlier version of the bill. Subsequently, I again had occasion to consider the advisability of parens patriae legislation, this time in connection with S. 1284. See Hearings on S. 1284 before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate, pp. 93-96 (1975).

The Administration continues to support strongly the concept of permitting a State to sue on behalf of its citizens for damages sustained because of violations of the Sherman Act. H.R. 8532 would establish a workable mechanism for assuring that those antitrust violations which have the broadest scope and perhaps the most direct impact on consumers do not escape civil liability.

Antitrust violations that result in relatively small economic damage to each of a large number of people are very troublesome: the economic incentives for such conduct are made more alluring by the realization that no single consumer has a sufficient economic stake to bear the litigation burden necessary to maintain a private suit for recovery under Section 4. Although it was once thought that the 1966 liberalization of Federal Rule of Civil Procedure 23 might provide a satisfactory mechanism for effectuating the deterrent objectives of Section 4, the class action device is apparently of limited utility in securing relief for large classes of individual consumers, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).



The parens patriae concept, as embodied in H.R. 8532, is both desirable and useful from the prospective of better antitrust enforcement. Toward this same end, we support the provision in Section 3 of the bill that requires an award of attorneys' fees to a private party who secures injunctive relief in a suit brought under Section 16 of the Clayton Act. Such a provision is also consistent with the enforcement goals of the Clayton Act.

In our view, with only minor exceptions, the parens patriae provisions of H.R. 8532 are appropriately designed and limited to serve these goals.

Section 4C(b) of the bill authorizes a court, in any suit brought pursuant to Section 4C(a), to order that the state attorney general proceed "as a representative of any class" of persons alleged to have been injured by a violation of the antitrust laws. Given the broad parens patriae authority conferred in Section 4C(a), I remain uncertain of the purpose to be served by Section 4C(b), and I continue to be apprehensive about the entanglement of parens patriae authority with interpretive problems of Rule 23. When I testified before the Subcommittee on Monopolies and Commercial Law in early 1974, the Eisen case had not yet been decided by the Supreme Court. The Court's decision is suggestive of the panoply of problems presented by large class actions, and I would be reluctant to make the effectiveness of H.R. 8532 dependent upon judicial construction of Rule 23. H.R. 8532 imposes certain requirements upon parens patriae actions that are less burdensome than corresponding provisions of Rule 23. Compare the notice provisions of Section 4C(c) with Rule 23(c)(2). Those less onerous requirements may be quite reasonable when taken in the context of the traditional responsibilities of an attorney general to the citizens of his State. But Section 4C(b) apparently contemplates the possibility of a class action on behalf of citizens outside the State represented by the attorney general, and in those circumstances it is unclear whether a departure from the carefully developed protections of Rule 23 is desirable. We continue to believe that deletion of Section 4C(b) would strengthen the bill.



In order to forestall any uncertainty, the Administration favors inclusion of a provision in H.R. 8532 that would make it clear that the States could sue to recover treble damages for the entire amount of overcharges or other damages sustained in connection with any federally funded state program. Under current law, it is not clear whether a State has the power under the Clayton Act to sue for such damages, but we see no reason why States should be denied the power in circumstances such as these where the deterrent purposes underlying Section 4 would be advanced. Section 4E(a) of S. 1284 contains such a provision, which we have supported, and we favor amending H.R. 8532 to conform in this respect to S. 1284.

Section 4G(1) defines the term "state attorney general" so as to exclude "any person employed or retained on a contingency fee basis." The impact that this limitation will have upon the effectiveness of the *parens patriae* legislation is sufficiently unclear so as to warrant careful consideration. While the primary goals of H.R. 8532 are to increase the deterrent force of the Clayton Act and provide redress for injuries caused by antitrust violations, this legislation would accomplish these objectives in a way that might have beneficial consequences extending far beyond this rationale. By drawing state attorneys general directly into the enforcement of the federal antitrust laws, the long run impact of H.R. 8532 may be to encourage the development and sophistication of state antitrust enforcement capacities.

We certainly would welcome that development, and the definition of "State attorney general" presently contained in the bill would probably force States to develop internal antitrust enforcement capacity. Such a proposition, however, is not without its trade-offs. By depriving States of the option of retaining outside counsel on a contingency fee basis, the bill would delay full implementation of the *parens patriae* authority until such time as States could start-up a program of rigorous antitrust enforcement. While this is a short-run concern, the restriction might cause some smaller States, with limited law enforcement personnel, to forego completely antitrust enforcement because of the impracticality of internal development. The contingency-fee scheme has proven to be an important spur to antitrust enforcement, and it is not clear to me that the States should be denied this tool.



The provisions of this legislation about which I expressed primary concern in my earlier testimony have largely been eliminated or satisfactorily modified. While we think the further refinements suggested above would strengthen the bill, we would still urge enactment of this legislation.

Sincerely yours,

*Thomas E. Kauper*

THOMAS E. KAUPER  
Assistant Attorney General  
Antitrust Division



TAB C



Background on  
H.R. 8532 (Parens Patriae)

The Administration developed its position last summer on the parens patriae legislation and communicated its support in a September 25, 1975 letter from Assistant Attorney General Kauper to Chairman Rodino. The Administration endorses the concept of authorizing a state attorney general to sue on behalf of the state's citizens to recover damages that result from violations of the Sherman Antitrust Act. With certain exceptions discussed below, H.R. 8532 appears to be close to the Administration's position.

A. Need for Legislation: The rationale for such legislation is as follows:

1. Compensation for Consumers. Private treble damage suits are authorized by Section 4 of the Clayton Act. Whereas this remedy has been effective for large businesses with a few transactions, it has not been effective in price fixing cases where many transactions of a relatively small size are involved, particularly purchases by consumers that may cost less than a dollar. Examples are small overcharges on such items as snack foods, soft drinks and bakery and dairy products. Such consumers generally do not have documentation of purchases, have only a small stake, and are less likely to have either the sophistication or resources necessary to prosecute their individual claims.

Private class action suits have not been able to overcome these practical barriers, despite the fact that the suit could involve millions of dollars in damages and be spread over a multitude of plaintiffs. Further, these actions cannot overcome problems in the Federal Rules of Civil Procedure which were never intended to accommodate such suits.

As a result, there is an inequity in antitrust enforcement which does not as effectively deter violations affecting many small consumers in contrast to those which affect a few large purchasers of a product.

2. Deterrence of Antitrust Violations. President Ford has said that "vigorous antitrust action must be part of the effort to promote competition". An important part of his antitrust program, already enacted into law in December, 1974, was the increase in penalties for antitrust violations (from \$50,000 to \$1 million for corporations and \$100,000 for individuals).



Increase in antitrust penalties were considered a long overdue measure for deterring violations of the antitrust laws.

Similarly, the parens patriae bill penalizes offenders by preventing "unjust enrichment" that results from these actions. There are certain antitrust violations which could be handled effectively by a parens patriae suit for damages rather than a federal criminal proceeding or action for injunctive relief. Such a suit deprives a violator of the profits gained from his illegal conduct and provides relief which compensates injured customers.

3. Role of the States in Antitrust Enforcement and Consumer Protection. The parens patriae legislation, is viewed as an important step toward vigorous anti-trust enforcement and consumer protection. It encourages States to develop their antitrust capabilities and reflects the fact that, in many cases, state attorneys general would be more successful than the U.S. Attorney General in uncovering "localized" price-fixing and other antitrust violations. In this way, the States can provide an important complement to Federal antitrust enforcement. As a result of a number of recent court cases, states have been prevented from establishing this capability, absent specific Federal authorizing legislation to do so.

B. A summary of the provisions of H.R. 8532 is set forth at Attachment A. The main points of disagreement are as follows:

1. Private Class Actions. H.R. 8532 would extend the concept of statistically calculated damages, beyond parens patriae legislation, to all private antitrust class actions. Although there is an argument for this provision from the standpoint of consistency, it does raise the question whether parens patriae legislation is an appropriate vehicle for changes in consumer class action legislation. The Administration has not taken a position on this new provision.
2. Scope. The Administration would limit the applicability of parens patriae to violations of the Sherman Act. The bill now includes certain Clayton Act provisions but excludes Section 2 (price discrimination) and Section 7 (merger) violations.



3. Mandatory vs. Discretionary Awards. The Justice Department has argued in testimony on other legislation for discretionary not mandatory awards of attorney's fees to plaintiffs, but the Administration has taken no position on the provision for mandatory awards in the House bill. The Administration has passively supported mandatory treble damage awards, but others believe that the court should be permitted to reduce awards based on the willfulness of the violation.
4. Contingency Fees. Although the House bill does not allow state attorneys general to permit contingency fees for private lawyers, there is some interest in removing a "flat ban" on contingency fees. The Administration has not supported such a provision.



TAC D



H.R. 8532 (Parens Patriae) IssuesA. Scope. Should parens patriae legislation be limited to:

- Per se violations of Sherman Act Section 1 only? These include price fixing agreements, agreements dividing markets or classes of customers, and concerted refusals to deal (e.g. boycotts).
- Sherman Act Section 1 violations only? Includes unreasonable restraints of trade which are determined by applying Supreme Court's rule of reason. Includes restrictive marketing activities such as exclusive dealing arrangements. However, most marketing practices (e.g. tie-ins, exclusive dealing) are dealt with under Section 3 of the Clayton Act.
- All Sherman Act violations (present Administration position)? Includes Section 2 violations (monopolization, as well as combinations and attempts to monopolize), Parens actions taken under Section 2 would generally relate to predatory behavior, not structural problems such as mergers. Cases under this section would likely be few in number.
- Sherman and some Clayton Act violations? House bill excludes only Clayton Section 2 (price discrimination) and Section 7 (mergers), but retains other provisions (e.g. Section 3 which covers marketing arrangements).

Discussion: House floor amendments (Wiggins) will try to limit scope to price fixing violations only or to per se violations. Fall back position for supporters appears to be all Sherman Act violations (Administration position which is also the present scope of the Senate version)

B. Mandatory vs. Discretionary Awards.

- Under House bill, damages are treble the computed cost to individual consumers plus reasonable attorney's fees. Narrower than Senate bill which includes damages to "general economy" (e.g. reduced number of visitors to a State who would otherwise pay hotel/motel taxes as a result of increased gas prices from a price-fixing violation)





- Administration has passively supported mandatory treble damage awards.
- Key issue in House Judiciary has been mandatory vs. discretionary treble damages. Majority has opposed "any weakening of the treble damage remedy even though it might work injustice in individual cases." Dissenters make a strong case for discretionary approach allowing the court to reduce awards based on the wilfulness of the Act. Similarly, it can be argued that award of attorney's fees should be discretionary rather than mandatory, a position taken by Justice in other testimony.

Discussion: Seiberling/McClory amendment will provide for reduction from treble to single damages when the defendant can prove "good faith and without reasonable grounds to believe its conduct violated the antitrust laws." Legislative history to define this "gray area" more precisely. Supported by Subcommittee members in favor of parens.

No amendments expected on mandatory award of attorney's fees.

#### C. Measurement of Damages.

The heart of the bill is the provision allowing for statistical aggregation of damages for a class of consumers without requiring separate proof by the individuals on whose behalf a suit is brought.

House bill, in present form would also extend this measure of statistically calculated damages to all private antitrust class actions on behalf of natural persons. (The Administration has taken no position on this later provision).

Discussion: House floor amendment (Wiggins) will likely attempt to eliminate the statistical aggregation feature which permits parens recovering without separate proof of individual claims.

McClory/Seiberling amendment would strike the provision extending this feature to private class actions.



D. Cases Farmed Out by State: Contingent Fee Arrangements

House bill would not permit state attorneys general to make such arrangements with private attorneys. Administration, while weighing the pros and cons, has not taken a position.

Discussion: Supporters of the bill have argued that the contingent fee restriction "may have effect of undermining a great deal of what the bill is intended to accomplish". Others believe that without the discipline on the State of devoting resources to undertake suits, much frivolous legislation might result.



THE WHITE HOUSE  
WASHINGTON

Louie -

Please send  
Paul O'Neil copies  
of top 3 pieces  
of paper attached  
w/ FYI slip from  
me w/ typed note  
"Paul, thanks for  
your help"  
Rues



THE WHITE HOUSE  
WASHINGTON



March 11, 1976

MEMORANDUM FOR: JACK MARSH  
FROM: RUSS ROURKE *RAR*

Paul O'Neill held a Parenis Patri bill meeting at 2:00 p.m. today. OMB decided to favor single damages. I advised Paul of the substance of your conversation with John Rhodes and of Rhodes' conversation with the President.

Paul did indicate that OMB had advised the Republican Policy Committee last summer that the Administration was going to favor this legislation.

Paul is preparing a brief summary on this and will get it to you as soon as possible for transmittal to the President.

*R*  
*must have some thing from OMB today - by COB*



THE WHITE HOUSE

WASHINGTON

March 11, 1976

MEMORANDUM FOR: RUSS ROURKE

FROM: JACK MARSH

The attached copy indicates the President's concern of the  
Parens Patri bill.

Please try to have a summary on this bill so that I can send  
it to the President while he is on the Illinois trip.

\* Jack, as per my telephone memo  
to you, Paul O'Neil is sending  
you requested summary for  
transmittal to TT.

Rum



Sickling

THE WHITE HOUSE  
WASHINGTON

John Rhodes called 3/11/76

Anti-Trust legislation  
passes (?)

Treble damage.

Says Dept. Justice in  
favor & he opposes.

Wonders if W. H. is  
in favor.

Somewhat urgent. Bill  
is on Home floor next  
week he believes.



THE WHITE HOUSE

WASHINGTON

March 10, 1976

MEMORANDUM FOR: RUSS ROURKE

FROM: JACK MARSH *Jack Marsh*

Have someone, either the Domestic Council, Legal Counsel's office or OMB, pull together a one-page fact sheet on a bill called Parentis Patri, S. 1284.

John Rhodes is very concerned about this bill. The list of companies which I brought down are the names of major United States industries which are very concerned about this bill. John Rhodes equates this bill to situs picketing. He also says the Republican Policy Committee has taken a position against it.

He feels the Administration should oppose it; however, he fears there are some who are supporting it. Would you please find out its status so that we can get together with Buchen, Lynn, Cannon and others to develop an Administration position.

Many thanks.



March 12, 1976

MEMORANDUM FOR: DICK CHENEY  
FROM: JACK MARSH

John Rhodes gave me the attached list of companies who have indicated their opposition to the Parens Patria bill.

Attachment

JOM/dl





March 13, 1976

MEMORANDUM FOR: MAX FRIEDERSDORF  
FROM: JACK MARSH

Dennis Taylor is having a meeting next Tuesday at 3:30 in his office to discuss the Parents Patriae bill.

Invited to this meeting are key industries concerned with this legislation.

Dennis called to indicate representatives of the Administration were invited to attend, should we want to. He understood that the Administration's position maybe contrary or adverse to the position of the group, but he did want us to know we were invited, inasmuch as it might be helpful from the standpoint of learning the position of those who oppose the bill.

I think it would be good to have a representative at the meeting. We may want to have someone from either Domestic Council or OMB, or one from both there.

If you would follow-up on this, I would be grateful.

Many thanks.

JOM/dl



UNITED STATES GOVERNMENT

MAR 15 1976

# Memorandum

TO : John Marsh  
Counselor to the President  
The White House

DATE: March 15, 1976

FROM :

SUBJECT: Attorney General Edward Levi *EL*

Herewith the Antitrust Division's explanation of its present position.

It would limit the provision to Sherman Act violations, would remove damages based on the general economy of the State, is equivocal on contingent fee arrangements and attorney fees, and would provide some limitation on treble damage awards.

Attachment

cc: Philip Buchen  
Counselor to the President  
The White House



5010-110

*Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan*

MAR 15 1976

Department of Justice  
Washington, D.C. 20530

March 15, 1976

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: House Parens Patriae Bill

You have asked for a description of the House Parens Patriae bill and our position on it.

The House bill would provide for the recovery of treble damages by a State Attorney General acting on behalf of "natural persons" in his state injured by any violation of the antitrust laws. The term antitrust laws is defined to exclude the Robinson-Patman Act and § 7 of the Clayton Act. The term natural persons is defined to exclude proprietorships or partnerships. Damages may be proved in the aggregate by statistical or sampling methods. The bill contains a prohibition against the employment of private counsel on a contingent fee basis and a provision for the award of reasonable attorneys' fees to prevailing plaintiffs.

The Department has supported the concept of a parens patriae action limited to recovery on behalf of natural persons for violations of the Sherman Act. We have supported the damage calculation features of the bill. We have opposed any provision which would alter current procedures relating to private class actions. We have taken no position on the prohibition against the use of contingent fee arrangements, nor have we taken any position on the awarding of reasonable attorneys' fees.

We do now have pending at OMB a response to a letter from Congressman Hutchinson asking for our views on the House bill. This letter would restate our previous position, be silent on the contingent fee provision, about which we have mixed feelings, and, consistent with previous Department testimony favor discretionary awards of attorneys' fees.

We understand that Representative McClory will introduce an amendment, concurred in by the majority of the Judiciary Committee, to remove any reference to



private class actions and to provide a procedure for reducing damages from treble damages to actual damages under certain conditions. We do not oppose this amendment and so state in the proposed letter to Congressman Hutchinson, a copy of which is attached.

Some of the confusion in this area may result from the fact that Title IV of S. 1284, the Omnibus Antitrust Bill now pending in the Senate, also deals with *parens patriae* concepts, but in a somewhat different way. For example, the Senate bill would allow the recovery of damages to the general economy of the State, a provision we have consistently opposed. While I am confident, based on representations of Senate staff, that the general economy provision will be deleted from the bill during full Committee markup, its continued presence and the presence of some other slightly different provisions in the Senate bill which exist in the House bill may be causing a certain amount of confusion.

The Senate bill is now in markup, but it is not expected to be voted on in the Judiciary Committee until April 6. Our best information indicates that the House bill, which is now on the floor, will be taken up this coming Thursday.

*Thomas E. Kauper*  
THOMAS E. KAUPER  
Assistant Attorney General  
Antitrust Division

Attachment



Files  
Corres.  
Kauper-3109  
Sims-3109  
Fein-3112  
OLA-1139  
Saunders-8120\*  
Chrono

JSims/BFein:jrh

TEK:JS  
60-01

Honorable Edward Hutchinson  
House of Representatives  
Washington, D.C. 20515

Dear Congressman Hutchinson:

This is in response to your letter of February 18, 1976, to the Attorney General requesting the Department's views on H.R. 8532, the *parens patriae* bill. The views of the Administration on this legislation were expressed by Assistant Attorney General Kauper in his September 25, 1975, letter to Chairman Rodino and in his testimony before the House Judiciary Subcommittee on Monopolies and Commercial Law on March 18, 1974.

We have carefully considered the thoughtful objections raised by your minority views in H. Rep. 94-499 on the Antitrust *Parens Patriae* Act. With the minor exceptions noted below, however, the Administration continues to believe that this legislation is desirable and supports its passage.

The need for legislation which would authorize a state to sue on behalf of its citizens to recover damages sustained on account of violation of the antitrust laws, is clear. Private treble damage actions authorized by Section 4 of the Clayton Act provide a strong deterrent against anticompetitive activities, especially price fixing and other *per se* offenses. It has been particularly effective in cases involving large purchasers, for these plaintiffs are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the costs of protracted and complex litigation. However, the remedy has been less effective in circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as 25 or 30 cents. Such claimants generally lack documentation of purchases, have only a small amount at stake, and are less likely to have either the sophistication or resources necessary to prosecute their individual claims.



Class action suits brought under Rule 23 of the Federal Rules of Civil Procedure cannot overcome these practical barriers to private antitrust suits involving millions of dollars in damages but spread over a multitude of plaintiffs. The Supreme Court has interpreted Rule 23 to require class named plaintiffs to assume the cost of notifying all potential class members of the pendency of the suit, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). In a large number of such cases, the cost of notification will be prohibitive, reaching hundreds of thousands of dollars.

This legislation would thus provide a needed procedural tool to insure that antitrust violators are prevented from retaining illegally acquired profits merely by spreading the effects of their unlawful conduct over a large number of individual consumers.

The Administration does, however, oppose certain features of H.R. 8532 as reported out of the Judiciary Committee. As indicated in my letter of September 25, 1975, to Chairman Rodino, the Administration believes that actions under this legislation should be limited to the recovery of damages from violations of the Sherman Act.

In addition, the Administration, consistent with the views expressed in my earlier testimony, opposes any provision in this legislation to change current procedures relating to private class actions. Thus, we oppose the language in Section 4D which would extend the measurement of damages provisions of H.R. 8532 to non-parens patriae, private class actions. The Administration believes H.R. 8532 should be limited to the parens patriae concept itself and should not attempt to deal with private class actions or procedures.

In this respect, we understand that Representative McClory will offer an amendment, concurred in by the majority of the members of the Judiciary Committee, which would substitute a new Section 4D for that contained in H.R. 8532 as reported by the Judiciary Committee. The amendment would, we understand, remove any reference to private class actions in Section 4D, and would provide a



procedure for the reduction of maximum damages available against a defendant who has acted in good faith and without reasonable grounds to believe that his conduct violated the antitrust laws. The Administration has no objection to this proposed amendment.

Finally, the Administration, consistent with previous testimony by the Department of Justice, would favor discretionary, rather than mandatory, awards of attorneys fees to the prevailing plaintiffs in antitrust cases brought by persons other than the federal government.

With these noted exceptions, the Administration strongly supports passage of H.R. 8532.

Sincerely yours,

THOMAS E. KAUPER  
Assistant Attorney General  
Antitrust Division



COMMITTEES:

RANKING MINORITY MEMBER,  
COMMITTEE ON THE JUDICIARY

STANDARDS OF OFFICIAL CONDUCT

MRS. A. G. SCHULTZ  
ADMINISTRATIVE ASSISTANT

EDWARD HUTCHINSON  
REPRESENTATIVE IN CONGRESS  
4TH DISTRICT, MICHIGAN

Congress of the United States  
House of Representatives  
Washington, D.C. 20515

2336 HOUSE OFFICE BUILDING  
PHONE: (202) 225-3761

February 18, 1976

The Honorable Edward H. Levi  
Department of Justice  
Tenth and Constitution, N.W.  
Suite 5111  
Washington, D.C. 20530

Dear Mr. Attorney General:

On February 10, 1976, the House Rules Committee reversed its prior action and granted a rule making it in order for the House to consider H.R. 8532, the *parens patriae* bill. The Committee on the Judiciary had reported this bill on September 22, 1975, and on September 25, 1975, Assistant Attorney General Kauper wrote to Chairman Rodino indicating general support for the reported bill.

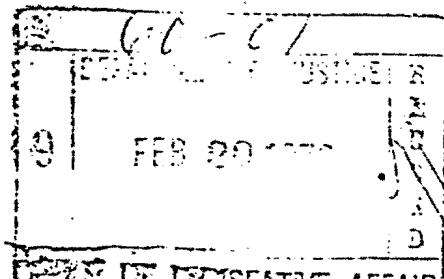
Since that time the business community has strongly voiced opposition to this legislation. This opposition, in part, apparently caused the Rules Committee to refuse to grant a rule, until Chairman Rodino made an extraordinary personal plea to the Speaker and to the Rules Committee.

In view of these recent developments and in view of the bill's imminent consideration by the House, I would appreciate having your views on this important question. Although the Committee made some improvements in the legislation, I still find it unacceptable for reasons stated in my minority views to the report, a copy of which is enclosed.

With best wishes.

Sincerely,

*Edward Hutchinson*



✓ enclosure



March 15, 1976

MEMORANDUM FOR: DICK CHENEY  
FROM: JACK MARSH

Here's the official Department of Justice position on the  
Parens Patriae's legislation. Quite frankly, I do not  
believe we can go with it, and in fact I believe the Presi-  
dent will have some real reservations to some of the views  
expressed in the accompanying memo.

JOM/dl



March 15, 1976

**MEMORANDUM FOR: MAX FRIEDERSDORF**

**FROM: JACK MARSH**

**Here's the official Department of Justice position on the  
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**JOM/dl**



UNITED STATES GOVERNMENT

MAR 15 1976

# Memorandum

TO : John Marsh  
Counselor to the President  
The White House

DATE: March 15, 1976

FROM :

SUBJECT: Attorney General Edward Levi *EL*

Herewith the Antitrust Division's explanation of its present position.

It would limit the provision to Sherman Act violations, would remove damages based on the general economy of the State, is equivocal on contingent fee arrangements and attorney fees, and would provide some limitation on treble damage awards.

Attachment

cc: Philip Buchen  
Counselor to the President  
The White House



5010-110

*Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan*

MAR 15 1976

Department of Justice  
Washington, D.C. 20530

March 15, 1976

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: House Parens Patriae Bill

You have asked for a description of the House Parens Patriae bill and our position on it.

The House bill would provide for the recovery of treble damages by a State Attorney General acting on behalf of "natural persons" in his state injured by any violation of the antitrust laws. The term antitrust laws is defined to exclude the Robinson-Patman Act and § 7 of the Clayton Act. The term natural persons is defined to exclude proprietorships or partnerships. Damages may be proved in the aggregate by statistical or sampling methods. The bill contains a prohibition against the employment of private counsel on a contingent fee basis and a provision for the award of reasonable attorneys' fees to prevailing plaintiffs.

The Department has supported the concept of a parens patriae action limited to recovery on behalf of natural persons for violations of the Sherman Act. We have supported the damage calculation features of the bill. We have opposed any provision which would alter current procedures relating to private class actions. We have taken no position on the prohibition against the use of contingent fee arrangements, nor have we taken any position on the awarding of reasonable attorneys' fees.

We do now have pending at OMB a response to a letter from Congressman Hutchinson asking for our views on the House bill. This letter would restate our previous position, be silent on the contingent fee provision, about which we have mixed feelings, and, consistent with previous Department testimony favor discretionary awards of attorneys' fees.

We understand that Representative McClory will introduce an amendment, concurred in by the majority of the Judiciary Committee, to remove any reference to



private class actions and to provide a procedure for reducing damages from treble damages to actual damages under certain conditions. We do not oppose this amendment and so state in the proposed letter to Congressman Hutchinson, a copy of which is attached.

Some of the confusion in this area may result from the fact that Title IV of S. 1284, the Omnibus Antitrust Bill now pending in the Senate, also deals with parens patriae concepts, but in a somewhat different way. For example, the Senate bill would allow the recovery of damages to the general economy of the State, a provision we have consistently opposed. While I am confident, based on representations of Senate staff, that the general economy provision will be deleted from the bill during full Committee markup, its continued presence and the presence of some other slightly different provisions in the Senate bill which exist in the House bill may be causing a certain amount of confusion.

The Senate bill is now in markup, but it is not expected to be voted on in the Judiciary Committee until April 6. Our best information indicates that the House bill, which is now on the floor, will be taken up this coming Thursday.

*Thomas E. Kauper*

THOMAS E. KAUPER  
Assistant Attorney General  
Antitrust Division

Attachment



Files  
Corres.  
Kauper-3109  
Sims-3109  
Fein-3112  
OLA-1139  
Saunders-8120\*  
Chrono

JSims/BFein:jrh

TEK:JS  
60-01

Honorable Edward Hutchinson  
House of Representatives  
Washington, D.C. 20515

Dear Congressman Hutchinson:

This is in response to your letter of February 18, 1976, to the Attorney General requesting the Department's views on H.R. 8532, the parens patriae bill. The views of the Administration on this legislation were expressed by Assistant Attorney General Kauper in his September 25, 1975, letter to Chairman Rodino and in his testimony before the House Judiciary Subcommittee on Monopolies and Commercial Law on March 18, 1974.

We have carefully considered the thoughtful objections raised by your minority views in H. Rep. 94-499 on the Antitrust Parens Patriae Act. With the minor exceptions noted below, however, the Administration continues to believe that this legislation is desirable and supports its passage.

The need for legislation which would authorize a state to sue on behalf of its citizens to recover damages sustained on account of violation of the antitrust laws, is clear. Private treble damage actions authorized by Section 4 of the Clayton Act provide a strong deterrent against anticompetitive activities, especially price fixing and other per se offenses. It has been particularly effective in cases involving large purchasers, for these plaintiffs are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the costs of protracted and complex litigation. However, the remedy has been less effective in circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as 25 or 30 cents. Such claimants generally lack documentation of purchases, have only a small amount at stake, and are less likely to have either the sophistication or resources necessary to prosecute their individual claims.



Class action suits brought under Rule 23 of the Federal Rules of Civil Procedure cannot overcome these practical barriers to private antitrust suits involving millions of dollars in damages but spread over a multitude of plaintiffs. The Supreme Court has interpreted Rule 23 to require class named plaintiffs to assume the cost of notifying all potential class members of the pendency of the suit, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). In a large number of such cases, the cost of notification will be prohibitive, reaching hundreds of thousands of dollars.

This legislation would thus provide a needed procedural tool to insure that antitrust violators are prevented from retaining illegally acquired profits merely by spreading the effects of their unlawful conduct over a large number of individual consumers.

The Administration does, however, oppose certain features of H.R. 8532 as reported out of the Judiciary Committee. As indicated in my letter of September 25, 1975, to Chairman Rodino, the Administration believes that actions under this legislation should be limited to the recovery of damages from violations of the Sherman Act.

In addition, the Administration, consistent with the views expressed in my earlier testimony, opposes any provision in this legislation to change current procedures relating to private class actions. Thus, we oppose the language in Section 4D which would extend the measurement of damages provisions of H.R. 8532 to non-parens patriae, private class actions. The Administration believes H.R. 8532 should be limited to the parens patriae concept itself and should not attempt to deal with private class actions or procedures.

In this respect, we understand that Representative McClory will offer an amendment, concurred in by the majority of the members of the Judiciary Committee, which would substitute a new Section 4D for that contained in H.R. 8532 as reported by the Judiciary Committee. The amendment would, we understand, remove any reference to private class actions in Section 4D, and would provide a



procedure for the reduction of maximum damages available against a defendant who has acted in good faith and without reasonable grounds to believe that his conduct violated the antitrust laws. The Administration has no objection to this proposed amendment.

Finally, the Administration, consistent with previous testimony by the Department of Justice, would favor discretionary, rather than mandatory, awards of attorneys fees to the prevailing plaintiffs in antitrust cases brought by persons other than the federal government.

With these noted exceptions, the Administration strongly supports passage of H.R. 8532.

Sincerely yours,

THOMAS E. KAUPER  
Assistant Attorney General  
Antitrust Division





EDWARD HUTCHINSON  
REPRESENTATIVE IN CONGRESS  
4TH DISTRICT, MICHIGAN

Congress of the United States  
House of Representatives  
Washington, D.C. 20515

2336 HOUSE OFFICE BUILDING  
PHONE: (202) 225-3761

February 18, 1976

COMMITTEES:

RANKING MINORITY MEMBER,  
COMMITTEE ON THE JUDICIARY

STANDARDS OF OFFICIAL CONDUCT

MRS. A. G. SCHULTZ  
ADMINISTRATIVE ASSISTANT

The Honorable Edward H. Levi  
Department of Justice  
Tenth and Constitution, N.W.  
Suite 5111  
Washington, D.C. 20530

Dear Mr. Attorney General:

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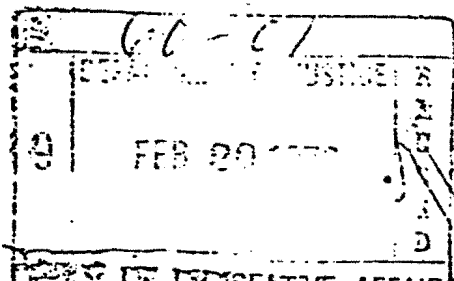
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In view of these recent developments and in view of the bill's imminent consideration by the House, I would appreciate having your views on this important question. Although the Committee made some improvements in the legislation, I still find it unacceptable for reasons stated in my minority views to the report, a copy of which is enclosed.

With best wishes.

Sincerely,

*Edward Hutchinson*




✓ enclosure

MAR 16 1976

THE WHITE HOUSE  
WASHINGTON

March 16, 1976

MEMORANDUM FOR: JACK MARSH  
FROM: ED SCHMULTS   
SUBJECT: Legislation Permitting State Attorneys  
General to File Consumer Class Action  
Suits (Parens Patriae)

ISSUE

The President decided at Tuesday's Senior Staff Meeting that the Administration would oppose H. R. 8532 (parens patriae legislation) which may be considered on the House Floor this week. This position was communicated to the House Minority Leadership. We need guidance on how to explain the Administration's opposition to this legislation.

BACKGROUND

H. R. 8532 (parens patriae legislation) would authorize a state attorney general to sue on behalf of the state's citizens to recover damages that result from violations of the federal antitrust laws.

The legislation is intended to correct a perceived inequity in antitrust enforcement, which presently is not as effective in deterring violations affecting many small consumers as violations affecting a few large purchasers of a product.

Assistant Attorney General Kauper expressed his support for parens patriae legislation in March 1974 and reiterated this support in House and Senate Judiciary testimony early last year. The Administration (Justice, Commerce, FTC, OMB, etc.) developed and communicated its earlier position on the legislation to the



House Judiciary Committee last summer. This position would have limited the scope of the legislation to violations of the Sherman Act, and eliminated many objectionable features which remain in the Senate version of this legislation. In the House, the Justice Department urged passage of a *parens patriae* bill, so that the House could then turn to consideration of the Administration's proposed amendments to the Civil Process Act.

Congressman Rhodes and most of the Republicans on the House Judiciary Committee have strongly objected to the *parens patriae* legislation. Their position is that the state attorneys general will use this authority for political purposes and that the bill goes much too far in dealing with the problem of inadequate consumer redress for antitrust violations. We understand that Congressman Wiggins and others may be introducing modifying amendments when the legislation reaches the House Floor.

#### DECISION

The Administration will have to communicate the nature and rationale for its opposition to H. R. 8532. Presumably the views would be discussed with Justice before being communicated. The main options are:

- Option 1: Signal that the Administration is opposed in principle to *parens patriae* legislation. (Tab A sets forth a position on Option 1.)
- Option 2: Express the Administration's opposition to the current *parens patriae* legislation, but would agree to consider substantial modifications that would narrow its reach. Congressman Wiggins has been prepared to offer such modifications on the House Floor (e. g., limitations to price fixing or per se violations of the Sherman Act). (Tab B sets forth a position on Option 2.)

Option 1 \_\_\_\_\_ Option 2 \_\_\_\_\_

Attachments



Administration Opposed to the  
Principle of Parens Patriae

The Administration is opposed to Federal parens patriae legislation.

The Administration does not believe a Federal legislative remedy, which would establish revolutionary procedural machinery for the calculation and imposition of treble damage fines for violation of the antitrust laws, is desirable at this time.

During the last two years, the Administration has sought to improve Federal enforcement efforts in the antitrust area. In December 1974, the President signed the Anti-trust Penalties and Procedures Act which increased maximum penalties from \$50,000 to \$1 million for corporations and \$100,000 for individuals.

Many years ago, when the maximum fine under the antitrust laws was only \$5,000, a good case could be made for more effective class action suits where mandatory treble damage awards to plaintiffs effectively supplemented the light Federal penalty. Since that time, Congress has increased the maximum fine tremendously--now over 200 times, in the case of corporations, the maximum fine which existed in 1956. The Administration believes that mandatory treble damage awards based on a new principle of statistical aggregation of damages are no longer justifiable on the grounds that Federal penalties are inadequate.

In addition to the deterrents under the present Federal antitrust laws, most states have their own antitrust laws. States could further amend these laws to authorize parens patriae suits in their own courts. If a state legislature, acting for its own citizens is not convinced the parens patriae concept is sound policy, the Administration questions whether the Congress should bypass the state legislatures and provide state attorneys general with access to the Federal courts to enforce it.



Administration Opposed to H.R. 8532 (Parens Patriae) in  
its Present Form

The Administration opposes the present parens patriae legislation. However, if major modifications were made, it would have no objection to enactment.

An acceptable bill would narrow the scope of parens patriae legislation to price fixing violations or, at a minimum, to per se violations of the antitrust laws. In addition, the Administration is opposed to mandatory treble damage awards in parens patriae suits, preferring instead a provision which would limit awards only to the damages that actually result from the violation. The Administration opposes extension of the statistical aggregation of damages, beyond parens patriae legislation, to private class action suits. Finally, the Administration supports discretionary rather than mandatory award of attorney's fees.

With these changes, the Administration would have no objection to the enactment of H.R. 8532.

The Administration will continue to review its position on antitrust legislation. Any further suggested Administration amendments will be transmitted to the Senate, prior to action on S. 1284.



**ROBERT McCLORY**  
13TH DISTRICT, ILLINOIS

ROOM 2482  
RAYBURN HOUSE OFFICE BUILDING  
(202) 225-8221

JUDICIARY COMMITTEE

U.S. INTERPARLIAMENTARY  
UNION DELEGATION

**Congress of the United States**  
**House of Representatives**  
**Washington, D.C. 20515**

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(312) 336-4554

McHENRY COUNTY  
McHENRY COUNTY COURTHOUSE  
2500 SEMINARY ROAD  
WOODSTOCK, ILLINOIS 60096  
(815) 338-2040

March 16, 1976

Dear Colleague:

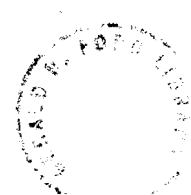
The Antitrust Parens Patriae Act is scheduled for floor action this Thursday. If the House adopts an amendment which I will offer, I will support it fully. My amendment should make the bill more acceptable to those Members of the House who are concerned that, in its present form, the bill might have adverse economic consequences for corporations found to have violated the antitrust laws despite good faith efforts to comply with those laws.

When companies willfully violate the antitrust laws (e.g., by illegally fixing prices), the trebling of damages is an entirely appropriate remedy in a parens patriae case where the State attorney general is suing on behalf of consumers.

Many companies, on the other hand, may inadvertently violate the antitrust laws. For these companies, treble damages in parens patriae cases may well be an unnecessary and undesirable remedy. These are not the companies which need to be punished. Significantly, in the normal private damage case under the antitrust laws, the trebling of damages is intended to provide an incentive for an injured person to sue an antitrust violator. The trebling of damages does not create such an incentive in parens patriae cases, however, because the State does not keep the damages it recovers for consumers. In good faith cases, trebling is not needed.

My amendment, therefore, provides that there shall be single damages in parens patriae cases where the defendant has acted in good faith and treble damages only in those cases where the defendant has not acted in good faith.

In addition, the amendment deletes the provision concerning aggregation of damages in antitrust class actions other than parens patriae cases. This provision is extraneous to the parens patriae sections of the bill.



March 16, 1976  
Page 2

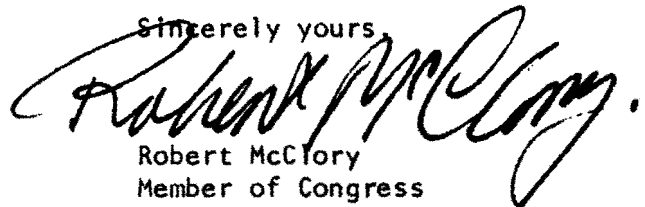
I would like to quote the views of the Administration's Assistant Attorney General in charge of antitrust enforcement. Addressing himself to H.R. 8532, Assistant Attorney General Thomas Kauper declared:

The Administration has taken a position in support of the basic concept of permitting a State to sue on behalf of its citizens for damages sustained because of violations of the Sherman Act. H.R. 8532 would establish a workable mechanism for assuring that those antitrust violations which have the broadest scope and perhaps the most direct impact on consumers do not escape civil liability...

The *parens patriae* concept, as embodied in H.R. 8532, is both desirable and useful from the perspective of better antitrust enforcement.

Finally, this legislation, as modified by my amendment, should encourage full and fair competition -- which is the single most vital ingredient of a free enterprise system.

Sincerely yours,



Robert McClory  
Member of Congress

RMCC:lr



Mr. Hartmann:

*P file* ✓

Charles Barrett called and dictated this telegram (copy of which was sent to you but has not as yet been received). (916-445-7075)

MARCH 16, 1976

PRESIDENT GERALD R. FORD  
THE WHITE HOUSE  
WASHINGTON, D. C.

ATTORNEY GENERAL YOUNGER OF CALIFORNIA HAS LONG LED THE FIGHT FOR ANTITRUST PARENS PATRIAE LEGISLATION. WE HAVE HEARD THAT YOU INTEND TO IMMEDIATELY ANNOUNCE BOTH WITHDRAWAL OF ADMINISTRATION SUPPORT AND AN INTENT TO VETO ANY SUCH LEGISLATION. WE URGENTLY REQUEST THAT NO SUCH ACTION BE TAKEN AT LEAST UNTIL CONSIDERATION OF COMPROMISE AMENDMENTS AND AN OPPORTUNITY FOR REPRESENTATIVES OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL TO PRESENT THEIR VIEWS. THIS TELEGRAM IS BEING SENT ON BEHALF OF CALIFORNIA ATTORNEY GENERAL EVELLE YOUNGER BY CHARLES A. BARRETT, CHIEF DEPUTY ATTORNEY GENERAL.

(Signed) CHARLES A. BARRETT, CHIEF DEPUTY ATTORNEY GENERAL.

(Mr. Barrett said Mr. Younger was on vacation was why he did not send the telegram.)

*Jack Marshall  
Bob H. wanted not  
to show you this for the  
record - even though there  
is no hope for ED's cause  
in view of present direction.*



*Alamy*



March 18

THE WHITE HOUSE  
WASHINGTON

TO: ED SCHMULTS  
FROM: JOHN O. MARSH, JR.

\_\_\_\_\_ For Direct Reply  
\_\_\_\_\_ For Draft Response  
XX For Your Information  
\_\_\_\_\_ Please Advise

March 18

THE WHITE HOUSE  
WASHINGTON

TO: PHIL BUCHEN  
FROM: JOHN O. MARSH, JR.

\_\_\_\_\_ For Direct Reply  
\_\_\_\_\_ For Draft Response  
XX For Your Information  
\_\_\_\_\_ Please Advise

