

entry of injunctive relief, and for the payment to the States of \$34 million in damages. With court approval, the settlement will resolve all claims against Nine West and Nine West retailers on behalf of residents of the Plaintiff States for antitrust violations related to the sale of Nine West shoes during the relevant period.

The filing of this complaint and settlement agreement followed an intensive investigation of the practices of the Nine West Group by the States. The State of Florida began investigating the vertical pricing practices of the Easy Spirit Division of the Nine West Group in 1996. The states of Texas, Ohio, and New York later joined with Florida to form a working group to conduct an in-depth investigation of all Nine West Group divisions. Utilizing the states' pre-complaint investigatory subpoena powers, the states examined over 150 boxes of documents produced by Nine West and various retailers, and conducted dozens of interviews and depositions. These states worked jointly with the Federal Trade Commission, which was also investigating Nine West's pricing policies. The FTC's investigation culminated in a consent order, unanimously approved by the Commission on March 6, 2000.

The claims set forth in the Plaintiff States' complaint are substantially similar to the claims in the private actions which have been consolidated as *In re Nine West Antitrust Litigation*, Master File No. 99 Civ. 0245 by an order of this Court, dated March 5, 1999. However, as will be demonstrated in this brief, Congress has established that *parens patriae* claims by state attorneys general are superior to actions brought pursuant to Fed. R. Civ. P. 23 as a means to resolve multiple claims.

HISTORY OF *PARENS PATRIAE*

The Plaintiff States brought their claims for damages pursuant to Section 4C of the Clayton Act, 15 U.S.C. §15c, which provides in pertinent part:

Any attorney general of a state may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State in any district court of the United States having jurisdiction of the defendant, to secure monetary relief...for injury sustained by such natural persons to their property by reason of any violation of [the federal antitrust laws].

The enactment of Section 4C in 1976 expanded the ancient common law doctrine of *parens patriae*.

The term “*parens patriae*” literally means “parent of the country.” Under English common law, the term referred to the royal authority to protect persons, such as infants and incompetent persons, who were unable to protect themselves. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 257 (1972). See also Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361 (1999); Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 Ill. B.J. 684 (1998). English law also recognized the King as the guardian of “all charitable uses in the kingdom.” 3 William Blackstone, *Commentaries*, 47-48 (1794).

In the United States, the *parens patriae* role of the King was assumed by the states. *Hawaii*, 405 U.S. at 257. The doctrine evolved to encompass a wide range of actions to protect the health and safety of a state’s citizens. See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (action to enjoin interstate air pollution); *Kansas v. Colorado*, 185 U.S. 125 (1902) (water diversion); *Louisiana v. Texas*, 176 U.S. 1 (1899) (action to prevent spread of communicable disease).

The authority of a state to bring a *parens patriae* action for violation of the antitrust laws was recognized by the Supreme Court in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). In that case, the State of Georgia sued twenty railroads for fixing prices on interstate rail shipments. The Court recognized a state's right to seek an injunction against price fixing, declaring that antitrust violations could erect trade barriers harmful to the state's "prosperity and welfare," and that the state had a sovereign interest in such "matter[s] of grave public concern." *Id.* at 449.

While *Pennsylvania Railroad* recognized the authority of states to seek *injunctive relief*, the state's common law *parens patriae* authority was not extended by the courts to suits for *damages*. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972). In *California v. Frito-Lay, Inc.*, 474 F. 2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973), the state sued twelve snack food producers for conspiracy to fix prices. California sought to stand in the shoes of its residents and recover damages for injuries to their business or property. While the Ninth Circuit recognized a state's historic role in protecting its citizens, the court concluded that the *parens patriae* doctrine did not apply to such actions. *Id.* at 778. However, the court suggested that legislative action was needed to allow a state to represent its injured citizens for the recovery of damages.

Congress responded to the Ninth Circuit's suggestion in *Frito-Lay* by enacting the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSRA), which, among other amendments, added section 4C to the Clayton Act. This change gave state attorneys general the authority to represent the natural persons in their states as *parens patriae* in any lawsuits arising under the Sherman Act, such as this action. 15 U.S.C. §15c(a)(1). The legislative history indicates that section 4C was a response to the invitation extended in the *Frito-Lay*

decision. See H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 8, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2578 (hereinafter House Report).

Clearly, the impetus for the enactment of Section 4C was Congress' concern that private class actions had not adequately served consumers. The legislative history of the HSRA is replete with references to Congress's dissatisfaction with the limitations inherent in Rule 23 class actions, which often rendered them ineffective as a means of providing redress for consumers harmed by violations of the antitrust laws. See House Report at 4, [1976] U.S. Code Cong. & Admin. News at 2573. Representative Peter Rodino, Chairman of the House Judiciary Committee and one of the principal sponsors of the legislation, explicitly stated that a *parens patriae* action "is a superior alternative to a Rule 23 (b) (3) class action." 122 Cong. Rec. 30, 868, at 30, 879 (1976). As explained by Chairman Rodino:

[T]he compromise bill does not incorporate the various requirements of rule 23 (b) (3): That the claims be "typical"; that common issues "predominate" over individual ones; that the action be "manageable" within the meaning of rule 23 – for this bill represents the legislative conclusion that the State's attorney general is the best representative conceivable for the State's consumers – as the courts have repeatedly recognized.

122 Cong. Rec. at 30, 879 (emphasis added).

Likewise, the House Report on the bill notes that Section 4C was intended "to avoid, in consumer actions, the cumbersome litigation of peripheral issues which under Rule 23 has sometimes become more time-consuming and costly than litigating the merits of the case." House Report at 11, [1976] U.S. Code Cong. & Admin. News at 2580. Similarly, the Senate Report describes the statute as the "legislative response to restrictive judicial interpretation of the notice and manageability provisions of Rule 23." Senate Report No. 803, 94th Cong., 2d Sess. 40-41 (1976).

It was for these compelling reasons that state attorneys general were relieved of the cumbersome Rule 23 requirements and were statutorily deemed as the best representatives for consumers in their states. Thus in *parens patriae* actions, Section 4C dispenses with the complex determinations that courts must make in Rule 23 class actions on whether the class is sufficiently numerous, manageable, etc. It does so by simply authorizing state attorneys general to represent their citizens as *parens patriae*.

Moreover, *parens patriae* authority is exercised as soon as the Attorney General files the action. In contrast to Rule 23 practice, Section 4C does not require court approval, certification, or factual findings before the Attorneys General may exercise their authority to represent citizens as *parens patriae*. Compare 15 U.S.C. §15c (a) (1) with, e.g., Fed. R. Civ. P. 23(c) (1) (court approval needed for class actions); *id.* 23(b) (3) (requires finding of superiority of class adjudication); *id.* 23(a) (requires findings of typicality, impracticability of joinder, and fair and adequate representation); see *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 573 n.29 (1983) (Section 4C designed to remedy problems inherent in private Rule 23 antitrust actions and exempted *parens patriae* suits from class action requirements of Rule 23).¹

Along with these streamlined procedures for defining the claims, *parens patriae* actions, most importantly, finally resolve all consumer claims. A final judgment or settlement of the *parens* action is “*res judicata* as to any claim [under the antitrust laws] by any person on behalf of whom such action was brought.” Section 4C(b) (3). The only exception is for those persons, if any, who expressly opt out of the *parens patriae* action, after publication

¹ Section 4C does require an attorney general to publish notice of the action in a manner approved by the court.

of notice. *Id.* Unless and until individual consumers opt out of the action, those consumers will be represented and bound by their state attorneys general in the action. *See* Section 4C(b) (3).

Section 4C invests the Attorneys General, subject to judicial oversight, with considerable authority, latitude, and creativity in fashioning appropriate remedies. Congress sought to give the Attorneys General the latitude to succeed where Rule 23 representatives had demonstrably failed; *i.e.*, in redressing small individual monetary injuries inflicted on a large number of consumers.

A PARENS PATRIAE ACTION IS SUPERIOR TO A CLASS ACTION AS A MEANS OF RESOLVING ANTITRUST CLAIMS

A class has not been certified in any of the actions pending before this Court. In order to obtain class certification, the moving party must demonstrate that “a consolidated action is superior to other available methods for the fair and efficient adjudication of the controversy”. Fed. R. Civ. P. 23(b) (3). However, in this instance, the putative class representatives cannot do so because Congress has preempted such a demonstration by declaring the superiority of *parens patriae* claims brought by state attorneys general.

It is important to note that this is not a case of first impression. On the contrary, since enactment of Section 4C, courts have firmly rejected attempts by private class action parties to supersede *parens* representation by state attorneys general. *See* Farmer, 68 Fordham L. Rev. at 387-88. For example, in *Pennsylvania v. Budget Fuel Co.*, 122 F.R.D. 184 (E.D. Pa. 1988), the Pennsylvania Attorney General brought a *parens patriae* action as the representative of consumers injured by a price-fixing conspiracy. An individual seeking to

represent himself and all others similarly situated filed a private class action complaint based on the same price-fixing allegations. The Commonwealth moved to strike plaintiff's request for class certification. In granting the Commonwealth's motion and recognizing the superiority of the *parens* action, the court expressly held that where an Attorney General has filed a *parens* action, "there is simply no reason *or authority* for allowing coextensive representation by private parties." *Id.* at 186 (emphasis added). The court found that natural persons are adequately represented by the Attorney General; allowing private counsel also to represent those same persons would only cause unnecessary delay, expense, and confusion. 122 F.R.D. at 185-86. The Court noted that Congress had clearly made a *parens patriae* action superior to a class action by not requiring state attorneys general to seek court approval or certification before bringing an action on behalf of their consumers. *Id.* at 185.

The same conclusion was reached in *In re Montgomery County Real Estate Antitrust Litigation*, 1988-2 Trade Cas. (CCH) ¶ 68,230 (D. Md. 1978), another case involving a private class action and a state *parens patriae* action. In *Montgomery County*, a class had been certified for individuals who had purchased from the defendants prior to September 30, 1976. The Maryland Attorney General represented as *parens patriae* individuals who had purchased from the defendants on or after September 30, 1976 and before April 1, 1977. When the private class representatives and defendants sought to expand the certified class to include those consumers already represented by the Maryland Attorney General as *parens patriae*, the court echoed the language in *Budget Fuel*. It held that such an action was precluded as a matter of law, as there is "no reason *or authority*" to permit representation by private parties when *parens* representation exists. *Id.* at 59,473 (emphasis added).

Another case acknowledging the superiority of an attorney general's *parens patriae*

action over a class action brought by private parties was *Sage v. Appalachian Oil Co., Inc.*, 1994-2 Trade Cas. (CCH) ¶70,745 (E.D. Tenn. 1994). In *Sage*, the plaintiffs sought to maintain a class action alleging a conspiracy to fix retail gasoline prices. The State of Tennessee brought a *parens* suit alleging similar claims, and also sought to maintain a class action on behalf of business customers affected by the conspiracy. The court stated that “[w]hile it is not clear that the State has a superior right to bring a Rule 23 class action, the State, through the Attorney General, is clearly in a superior position to bring a *parens patriae* action against defendants on behalf of all natural persons in this state.” *Id.* at 73,127. Accordingly, the private plaintiffs’ motion for class certification was denied, while the state was granted an opportunity to seek class certification on behalf of non-natural persons.

In their letter to the Court dated March 15, 2000, class plaintiffs’ co-lead counsel cite two cases for the proposition that a *parens patriae* action does not supersede a class action. These cases, however, are clearly distinguishable from the situation here. In one of the cases, the court denied the State of Florida’s motion to intervene as *parens patriae* but permitted it to intervene as a class representative, based on purchases by state agencies. *Davis v. Southern Bell Telephone & Telegraph Co.*, 149 F.R.D. 666 (S.D. Fla. 1993).

In *Davis*, the court explained that allowing the state to intervene as *parens patriae* would create a conflict of interest for the private attorneys who represented the state under contract and also represented private class plaintiffs (including business purchasers). *Id.* at 672. The court determined that the conflict warranted disqualification of the contractor attorneys, and that this would result in significant delay of a case that had been pending for over three years. Such circumstances are clearly not present here. The facts in *Davis* were thus very different from those in the present case, where the Plaintiff States have filed a

separate action, in their *parens patriae* capacity, which will resolve all claims on behalf of the persons harmed by the alleged violations.

Co-lead counsel also cite *In re Arizona Escrow Fee Antitrust Litigation*, 1982-83 Trade Cas. (CCH) ¶65,198 at 71,802 (D. Ariz. 1982). In that case, because there were areas where the state's *parens* representation did not overlap with the private attorneys' class representation, and because the class representatives and the state were at essentially the same stage of investigation, the private attorneys and the Attorney General agreed to jointly prosecute the case. Here, there is complete overlap between the consumers represented by the Attorneys General and those in the putative classes.

Both of the cited cases highlight the type of situation where it might be appropriate to allow parallel *parens patriae* and class action litigation: namely, where both business and consumer interests are at stake. Section 4C only permits the Attorneys General to represent natural persons, while affected businesses could be represented individually or through a class action. There is no need for such parallel litigation here. Consumers were injured by the alleged resale price maintenance scheme, and the Attorneys General represent all of those consumers.

The Second Circuit has recognized the superiority of actions brought by state attorneys general. In a decision rejecting a challenge by unnamed beneficiaries to the settlement of a *parens patriae* action, the court observed that the purpose of Section 4C was "to overcome obstacles to private class actions through enabling state attorneys general to function more efficiently as consumer advocates." *New York v. Reebok International Ltd.*, 96 F. 3d 44, 48 (2d Cir. 1996), quoting *In re Grand Jury Investigation of Cuisinarts*, 665 F.2d 24, 35 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983).

In other contexts, courts have generally recognized the superiority of governmental actions over private actions involving similar claims. The Supreme Court has stated that:

[A] State is presumed to speak in the best interests of those citizens, and requests to intervene by individual[s]... may be treated under the general rule that an individual's motion for leave to intervene in this Court will be denied absent a "showing [of] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

Nebraska v. Wyoming, 515 U.S. 1, 21-22 (1995) quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953). See also *Kamm v. California City Development Co.*, 509 F. 2d 205, 210-13 (9th Cir. 1975) (false and misleading advertising); *Brown v. Blue Cross & Blue Shield of Michigan*, 167 F.R.D. 40, 45 (E.D. Mich. 1996) (ERISA claims); *United States v. City of Chicago*, 411 F. Supp. 218, 243 (N.D. Ill. 1976) (civil rights claims), *aff'd and rev'd in part on other grounds*, 549 F.2d 415 (7th Cir. 1977); *Stuart v. Hewlett-Packard Co.*, 66 F.R.D. 73, 77-78 (E.D. Mich. 1975) (sex discrimination claims); *Wechsler v. Southeastern Properties, Inc.*, 63 F.R.D. 13, 16-17 (S.D.N.Y.) (securities claims), *aff'd*, 506 F.2d 631, 636 (2d Cir. 1974).

THE PUTATIVE CLASS REPRESENTATIVES' REQUEST FOR CO-REPRESENTATION OF CONSUMERS IN THIS CASE IGNORES THE WELL-SETTLED SUPREMACY OF PARENS PATRIAE ACTIONS

At the status conference held on March 10, 2000, attorneys for the putative classes cited the *Toys "R" Us* litigation as precedent for allowing co-representation of consumers by the states and private class attorneys. *In re Toys "R" Us Antitrust Litigation*, (*TRU*) 98 M.D.L. 1211 (E.D.N.Y. 1998) (order granting final approval entered on February 17, 2000). Class plaintiffs' reliance on *TRU*, however, is misplaced. The issue of co-representation was never litigated in that case, and the state attorneys general never conceded the right of private

class attorneys to represent their citizens. The settlement agreements in *TRU* (signed by the defendants, states, and private class attorneys) expressly stated that “[n]othing herein shall be construed as setting any precedent with respect to the States Attorneys General and counsel for the Plaintiff Settlement Class.” See *TRU Settlement Agreement*, ¶8.15 (pertinent pages attached hereto as Exhibit A).

Moreover, the circumstances in *TRU* were quite different from those in the case at bar. At the time the cases against Toys “R” Us were filed, all plaintiffs were essentially on the same footing. The states had not conducted an in-depth investigation prior to filing their action, which was based instead on findings by an Administrative Law Judge of the Federal Trade Commission. In the instant case, however, the states had conducted a thorough investigation prior to filing their action. The working group reviewed approximately 150 boxes of documents, conducted dozens of witness interviews, and took several sworn statements. The private plaintiffs, on the other hand, have yet to begin discovery.

Additionally, when the states’ complaint in *TRU* was filed, no settlement was in place or even contemplated. The states simply elected to cooperate with attorneys for the private classes in an effort to resolve their claims in the most expeditious manner. Finally, only 44 states joined in the *TRU* complaint, so that the private class representatives could seek to represent consumers in the remaining states. Here, however, all fifty states and all United States territories and possessions have joined in the action. There are thus no citizens of the United States who are not represented in the *parens* action.

TRU, then, does not support class attorneys’ argument that they are entitled to simultaneously represent the same consumers who are represented in this action by the Attorneys General. The case also does not contradict the line of judicial precedent which

recognizes the superiority of *parens patriae* actions.

CONCLUSION

Congress has granted state attorneys general the right to represent their citizens in *parens patriae* actions in federal court. When state attorneys general exercise this authority, their action supersedes any private action asserting similar claims. Therefore, the Plaintiff States urge the Court to recognize the superiority of the States' action and allow the attorneys general to exercise their Congressionally-granted authority as the sole representatives of the States' citizens.

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New York, New York

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