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## Federal Jurisdiction -- Suits by a State as *Parens Patriae*

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Denial of indemnity should tend to motivate each director to police the actions of the other directors out of self-interest. In an age of super-corporations, the policy favoring a knowing, passive director over a knowing, active one weighs lightly in comparison to the policy of protecting shareholders. For this reason, the court in *Landoe* reached a questionable result by allowing recovery of indemnification by the passive corporate director.

RICHARD L. GRIER

### Federal Jurisdiction—Suits by a State as Parens Patriae

Although the right of a state to bring suit in a federal court was expressly provided for in the Constitution,<sup>1</sup> a state, in order to have standing, must have a sufficient interest in the outcome of the litigation.<sup>2</sup> Basically, the types of cases in which a state has capacity to sue have been classified as proprietary suits<sup>3</sup> and *parens patriae* suits.<sup>4</sup> Suing in each capacity, the State of Hawaii recently filed an antitrust action, *Hawaii v. Standard Oil Co.*,<sup>5</sup> in a United States district court against three oil companies and an asphalt company. Realizing the importance of its de-

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<sup>1</sup> U.S. CONST. art. III, § 2, extends the judicial power of the United States to cases "between a State and Citizens of another State," and provides that in cases "in which a State shall be a Party, the supreme Court shall have original Jurisdiction." Suits by one state against another are within the original and exclusive jurisdiction of the Supreme Court. 28 U.S.C. § 1251(a)(1) (1964). Suits by a state against the citizens of another state are in the original, but not the exclusive, jurisdiction of the Supreme Court. 28 U.S.C. § 1251(b)(3) (1964).

Concepts of justiciability presumably apply equally to suits brought originally in the Supreme Court and in a lower federal court; however, it may well be that the Supreme Court, conscious of its caseload (*e.g.*, *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 396 (1938)), would apply different standards of justiciability when jurisdiction by a lower court is available. *But see Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451-52 (1945).

<sup>2</sup> *E.g.*, *Florida v. Anderson*, 91 U.S. 667, 675-76 (1875). It is difficult to determine from the cases to what extent standing is grounded in constitutional mandate and to what extent in judicial policy. Clear-cut rules in the area are difficult to find because "[t]his complicated speciality of federal jurisdiction . . . is in any event more or less determined by the specific circumstances of individual situations . . ." *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153, 156 (1953).

<sup>3</sup> *E.g.*, *Virginia v. West Virginia*, 246 U.S. 565 (1918) (suit on a debt).

<sup>4</sup> *E.g.*, *Missouri v. Illinois*, 180 U.S. 208 (1901) (suit to enjoin the discharge of sewage into interstate river).

<sup>5</sup> 301 F. Supp. 982 (D. Hawaii 1969). Hawaii sued under sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2 (1964) and section 4 of the Clayton Act, 15 U.S.C. § 15 (1964).

cision to deny the defendants' motion to dismiss,<sup>6</sup> the trial court certified the case to the court of appeals.<sup>7</sup>

In order to sue in a proprietary capacity, a state must be in the same position as a private litigant. It is established that a state is a "person" within the meaning of the antitrust laws,<sup>8</sup> and states have been allowed to sue in many cases to protect their proprietary rights.<sup>9</sup> Hawaii clearly had proprietary standing in the instant case because it was a purchaser of the allegedly over-priced petroleum products.<sup>10</sup>

Much more difficult, however, is Hawaii's claimed right to sue on behalf of its citizens as *parens patriae*. The right of a state to bring suit as *parens patriae* was first articulated in 1901 by the Supreme Court's decision in *Missouri v. Illinois*.<sup>11</sup> Missouri, solicitous of the well-being of its citizens, sought to enjoin Illinois from dumping sewage into the Mississippi River. Granting Missouri the requested relief, the Court noted that although previous state-initiated actions had involved disputes over boundaries or proprietary interests, "[s]uch cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy . . . ."<sup>12</sup> For when "[s]uits brought by individuals . . . would be wholly inadequate and disproportionate . . . ,"<sup>13</sup> the state is the proper party to protect the "[h]ealth and comfort of its inhabitants."<sup>14</sup> Thus the state, as *parens patriae*, is able to fill the vacuum created by the inability of private citizens to redress adequately their possible injuries.<sup>15</sup>

Following the decision in *Missouri v. Illinois*, Georgia was permitted

<sup>6</sup> 301 F. Supp. at 988.

<sup>7</sup> *Hawaii v. Standard Oil Co.*, 301 F. Supp. 980, 981 (D. Hawaii 1969).

<sup>8</sup> *Georgia v. Evans*, 316 U.S. 159 (1942).

<sup>9</sup> *E.g.*, *South Dakota v. North Carolina*, 192 U.S. 286 (1904) (suit on bonds of one state that were owned by another state).

<sup>10</sup> For discussion of standing requirements in private antitrust actions, see Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964); Note, *Antitrust—Clayton Act § 4—Standing—Antitrust Violator May Be Liable for Damages Resulting from Over-Charges in Sales by Non-Conspiring Competitors*, 82 HARV. L. REV. 1374 (1969).

<sup>11</sup> 180 U.S. 208 (1901).

<sup>12</sup> *Id.* at 241.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See also *In re Debs*, 158 U.S. 564, 584 (1895): "The obligations which [the federal government] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

<sup>15</sup> *But cf.* *Massachusetts v. Mellon*, 262 U.S. 447 (1923), in which it appears no one had standing to raise the constitutionality of a federal appropriation. *Quaere* to what extent *Flast v. Cohen*, 392 U.S. 83 (1968), changes this.

to go to court to protect the forests, vegetable life, and health of a five-county area from sulphurous fumes emitted by a private industry in Tennessee.<sup>16</sup> Describing the suit as based on the state's "quasi-sovereign"<sup>17</sup> rights over the ultimate disposition of its natural resources, Justice Holmes said that "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."<sup>18</sup> By these oft-quoted words, he shifted the emphasis from the inadequacy of private remedies to the inherent power of the state as sovereign and intimated that the state has interests beyond—and perhaps in spite of<sup>19</sup>—the aggregate interests of its citizens.

In 1923, Pennsylvania and Ohio were allowed to sue "as representatives of the consuming public"<sup>20</sup> to strike down a West Virginia statute requiring a locally preferential distribution of privately-owned natural gas. There was concern that residents of Pennsylvania and Ohio would be denied fuel. It was noted that "private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the state's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream."<sup>21</sup> The Court then added, "This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law."<sup>22</sup>

In its suit in *Standard Oil*, Hawaii relied heavily on *Georgia v. Pennsylvania Railroad*,<sup>23</sup> in which Georgia was allowed to bring suit as

<sup>16</sup> *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

<sup>17</sup> *Id.* at 237.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 239: "Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine." See also Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 678-80 (1959) for a discussion of the right of individuals and minority groups in the state bringing suit to intervene because their interests differ from those of the state.

<sup>20</sup> *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923).

<sup>21</sup> *Id.* at 592.

<sup>22</sup> *Id.*

<sup>23</sup> 324 U.S. 439 (1945). The complaint by Georgia alleged that the rates were fixed so as

(a) to deny to many of Georgia's products equal access with those of other States to the national market;

(b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;

*parens patriae* against twenty out-of-state railroad companies for rate discrimination allegedly violative of antitrust acts. The Supreme Court in that case found that discriminatory rates "stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets."<sup>24</sup> To deny Georgia the right to sue "would whittle the concept of justiciability down to the stature of minor or conventional controversies."<sup>25</sup>

It has been suggested that *Pennsylvania Railroad* departed from previous *parens patriae* cases because it dealt with the protection of a state's economic resources rather than its natural resources.<sup>26</sup> Such an analysis, however, does not seem to be accurate. To begin with, previous *parens patriae* cases did not deal exclusively with the protection of natural resources.<sup>27</sup> Moreover, the proper concern in *parens patriae* cases is not only with the particular subject matter of the controversy, but also with whether an adequate remedy exists for the people whom the state represents.<sup>28</sup> *Pennsylvania Railroad* has timely importance because in it the Court acknowledged the role of a state in protecting its citizens from higher prices. In a highly organized and interdependent society, the consumer ultimately bears the burden of higher prices, but usually is unable to remedy his plight. He often must rely on the state to take the proper measures that will ensure his economic security.

*Pennsylvania Railroad* is equally significant because the state as the plaintiff in that case was permitted to take advantage of a federally-created right in the capacity of *parens patriae*. It would not have been exceptional for the Court to find that Congress did not intend in federal statutes to give the states causes of action as *parens patriae*, as it would

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(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and

(d) to hold the Georgia economy in a state of arrested development.

*Id.* at 444.

<sup>24</sup> *Id.* at 450.

<sup>25</sup> *Id.* at 451.

<sup>26</sup> 93 U. PA. L. REV. 442, 444 (1945); 32 VA. L. REV. 157, 159 (1945).

<sup>27</sup> In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), natural gas was not dealt with as a natural resource, but as an article of interstate commerce vital to the citizens of two states.

<sup>28</sup> The Court in *Missouri v. Illinois*, 180 U.S. 208 (1901), was concerned not only with the status of the states' rivers, but also with protecting citizens who could not adequately protect themselves from diseases caused by the dumping of sewage.

have been if the Court had held that a state could not protect its proprietary interests in the same manner as a private citizen. Implicit in the Court's opinion is the requirement of express Congressional intent in order to deny a *parens patriae* suit to states even if a proprietary suit is appropriate.<sup>29</sup> While arguably limited to the antitrust laws, the holding may have ramifications in other federally regulated areas. For example, it has been suggested that a state might sue as *parens patriae* to enjoin the construction of a nuclear power plant sanctioned by the Atomic Energy Commission.<sup>30</sup>

Because *Pennsylvania Railroad* and *Standard Oil* are substantially related,<sup>31</sup> Hawaii should have little difficulty in being upheld in its attempt to bring suit as *parens patriae*. However, there are boundaries to the concept. The trial court in *Standard Oil* set forth two primary requirements for a *parens patriae* suit: that a substantial portion of the inhabitants of the state be adversely affected, and that the state have a direct interest of its own concerning the matter in controversy.<sup>32</sup>

The first test is conceptually difficult because the extent of harm<sup>33</sup> that must be shown and the number of people<sup>34</sup> who must be affected are matters of degree.<sup>35</sup> The court, however, had little trouble with the first requirement because of the great importance to, and pervasive use of, petroleum products by citizens of Hawaii.<sup>36</sup>

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<sup>29</sup> "[W]e find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. . . . There is no apparent reason why [*parens patriae*] suits should be excluded from the antitrust acts." 324 U.S. 439, 447.

<sup>30</sup> Telephone interview with Mr. Jean A. Benoy, Deputy Attorney General of North Carolina, March 17, 1970. Another suggested example would be a suit to enjoin termination by the Interstate Commerce Commission of train service to parts of a state.

<sup>31</sup> In both cases suit was brought under antitrust acts. See note 5 *supra*.

<sup>32</sup> 301 F. Supp. at 986-87.

<sup>33</sup> See, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

<sup>34</sup> See, e.g., *Kansas v. Colorado*, 185 U.S. 125 (1902).

<sup>35</sup> Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 675 (1959).

<sup>36</sup> 301 F. Supp. at 987: "[T]here is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other petroleum products . . ."

Plaintiff's fourth amended complaint alleged injury to the state because:

(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;

(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;

(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

The requirement that the state have a direct interest of its own is made difficult by the corollary that a suit by a state must not be a guise to enforce the rights of individuals<sup>37</sup> or small groups of citizens.<sup>38</sup> In *Oklahoma v. Atchison, Topeka & Santa Fe Railway*,<sup>39</sup> a case factually similar to *Pennsylvania Railroad* and *Standard Oil*,<sup>40</sup> the Supreme Court refused to allow Oklahoma to bring suit to protect its citizens and economy from alleged excessive railroad rates. The Court reasoned that in reality the state was enforcing the rights of individual shippers rather than the rights of its citizens in general.

When the Court decided *Pennsylvania Railroad* thirty-four years later, it expressly affirmed the rule in *Atchison* and distinguished the factual similarity in a conclusory manner.<sup>41</sup> Similarly, the court in *Standard Oil* made only slight mention of *Atchison*.<sup>42</sup> This result is perhaps explained by the conceptual change that has occurred concerning the role of standing in the antitrust field.<sup>43</sup> Standing is a concept tied closely to the substantive right claimed. As a policy matter, a major function of a private antitrust suit, whether brought by a state or a

(d) the full and complete utilization of the natural wealth of the State has been prevented;

(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

(g) the Hawaii economy has been held in a state of arrested development.

*Id.* at 983-84. Compare this complaint with the one in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), reprinted in part in note 23 *supra*.

<sup>37</sup> *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (citizen assigned bond to state and state sued upon it).

<sup>38</sup> *North Dakota v. Minnesota*, 263 U.S. 365, 374-76 (1923) (farmers).

<sup>39</sup> 220 U.S. 277 (1911).

<sup>40</sup> Note Oklahoma's allegations and compare them with those in *Pennsylvania Railroad*, note 23 *supra*, and *Standard Oil*, note 36 *infra*. The state alleged that it had

about two million inhabitants, is developing and building towns, villages and individual farmhouses, and that lime, cement, plaster, brick and stone are very essential to its growth; that at this time in the State of Oklahoma there are very large and extensive petroleum oil wells, and the manufacture or refining of the same is an industry continually growing in said State; that the transportation rates on crude and refined oil, lime, cement, plaster, brick and stone are very important and essential to the development of said State; and, that the violation by said respondent of the said conditions of said grant is a menace to the future of said State.

220 U.S. at 283-84.

<sup>41</sup> 324 U.S. at 451-52.

<sup>42</sup> 301 F. Supp. at 986.

<sup>43</sup> See p. 966 *supra*.

citizen, is that it "supplements government enforcement of the antitrust laws."<sup>44</sup> Recent decisions on the issue of standing have been consistent with this policy.<sup>45</sup> Although under an expansive doctrine of standing the possibility of a treble-damage windfall may attract suits with little merit, such a risk may be justified by improving the enforcement of antitrust laws. Moreover, the fear of sham suits would be less applicable when states are involved, for, despite the potential for harassment because of concentration of power and resources, state officials hopefully are invested with better judgment and are checked by political processes.

Any ultimate reconciliation of *Atchison* and *Pennsylvania Railroad*<sup>46</sup> must answer an important question lurking beneath the concept of *parens patriae*: Whether a state has standing to seek redress when private parties, more directly concerned, can also bring suit. In both of these cases private parties could have sued to enjoin the alleged discriminations in rate that the states, as *parens patriae*, attempted to enjoin.<sup>47</sup> *Atchison* intimated that if an acceptable private remedy exists, a state may not sue. *Pennsylvania Railroad*, however, indicated that a state may sue as *parens patriae* if it has a legitimate interest in the controversy, notwithstanding the availability of a private remedy.

Because Hawaii's complaint in *Standard Oil* was for monetary damages as well as injunctive relief, the issue is more clearly delineated than in *Pennsylvania Railroad* or *Atchison*, in which only injunctive relief was sought. In reaching the same result as reached in *Pennsylvania Railroad*, the court in *Standard Oil* distinguished the possible claims of individual citizens, for which the state cannot recover, from the claims of the state.<sup>48</sup> Such a solution is logical but begs the difficult question of just what are the damages to the state, or, rather, what

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<sup>44</sup> *United States v. Borden Co.*, 347 U.S. 514, 518 (1954).

<sup>45</sup> *E.g.*, *Radovich v. National Football League*, 352 U.S. 445 (1957).

<sup>46</sup> One possible explanation of the practical inconsistency of the two cases is that the Supreme Court in *Pennsylvania Railroad* perceived a distinction that the Court may have overlooked when it decided *Atchison*—the distinction between one state suing another state and a state suing a citizen of another state. When one state sues another state, the policy underlying the eleventh amendment buttresses the case for finding lack of standing since it is more likely that in actuality an individual is suing under the guise of the state. The main case relied upon in *Atchison* was *Louisiana v. Texas*, 176 U.S. 1 (1900), a suit between two states. See generally Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 677 (1959).

<sup>47</sup> Georgia alleged that the rate-fixing practices "give manufacturers, sellers and other shippers in the North an advantage over manufacturers, shippers and others in Georgia." *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 444 (1945).

<sup>48</sup> 301 F. Supp. at 986.

are the state's interests "independent of and behind the titles of its citizens."<sup>49</sup> The court's failure to answer this question exposes an anomalous situation: The court as a matter of law has concluded, for purposes of standing, that independent interests of the state are present; however, the court lends no aid as to the identity of these interests for purposes of damages. Apparently the State of Hawaii also found this problem troublesome, for after twice fully briefing and arguing the *parens patriae* issue, she had not alleged the precise extent of her monetary damages.<sup>50</sup>

A recent suit brought by North Carolina may help bring about a solution.<sup>51</sup> Relying largely on *Standard Oil*, North Carolina has filed suit against five drug companies for excessively priced drugs. Two types of monetary relief are being sought: 200,000 dollars for loss of tax revenue from the sale of taxed commodities that would have been purchased but for the over-priced and untaxed drugs; and twenty million dollars for general economic injury caused by the diversion of money by the drug companies from the state's economy.

Despite the problem of damages, the concept of *parens patriae* has great potential in the area of consumer protection. California, for instance, recently filed an antitrust action against automobile manufacturers for conspiracy to suppress the development of anti-pollution devices on automobiles.<sup>52</sup> Cases such as those brought by California, North Carolina, and Hawaii should not be dismissed for lack of standing. The *parens patriae* concept, while not denying private substantive rights, gives the public a voice in matters of utmost importance to society.

WILLIAM MACNIDER TROTT

### Income Tax—Charitable Contributions under the Tax Reform Act of 1969

In a message to Congress on April 22, 1969, President Nixon emphasized the need for tax reform in order to "lighten the burden on those who pay too much, and increase the taxes on those who pay too little."<sup>1</sup>

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<sup>49</sup> *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

<sup>50</sup> 301 F. Supp. at 984.

<sup>51</sup> Telephone interview with Mr. Jean A. Benoy, Deputy Attorney General of North Carolina, March 17, 1970.

<sup>52</sup> Telephone interview with Mr. Benoy, note 51 *supra*.

<sup>1</sup> *Hearings on H.R. 13270 Before the House Committee on Ways and Means*, 91st Cong., 1st Sess. 5047 (1969) [hereinafter cited as *1969 Hearings*].