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Antitrust - Standing - State Does Not Have Standing to Sue as Parens Patriae under Section 4 of the Clayton Act for Damages to the General Economy Attributed to Violations of the Antitrust Laws

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The Court has chosen certainty in the law at the expense of flexibility. This result was reached with the full realization that, although Topco's horizontal territorial restriction agreement reduced competition among the Topco members, it actually enhanced competition with the big chains.[95] The Court believed that its decision was mandated by precedent and, therefore, established a per se rule. However, such a rule does not simultaneously elaborate "a doctrine which is at once rooted in sound social policy, internally consistent, and able to cope comfortably with the problems for which the law is expected to supply solutions."[96] As was noted by the district court:

> There has been a marked concentration of economic resources and retail outlets among a few of the most powerful national and large regional food chains, while independent grocers and smaller chains have disappeared at an accelerating rate.[97]

It is highly probable that the *Topco* decision will serve as a springboard for even greater acceleration in the abolition of independent grocers and small food chains. In any event, the Topco decision will *not* serve to retard the pace of concentration in the large national and regional food chains.

A. Roy DeCaro

ANTITRUST — STANDING — STATE DOES NOT HAVE STANDING TO SUE AS PARENS PATRIAE UNDER SECTION 4 OF THE CLAYTON ACT FOR DAMAGES TO THE GENERAL ECONOMY ATTRIBUTED TO VIOLATIONS OF THE ANTITRUST LAWS.

Hawaii v. Standard Oil Co. (U.S. 1972)

Petitioner, the State of Hawaii, charged respondents with violating the Sherman Act[1] and filed a complaint[2] praying for monetary and in-

have; nor does it attempt to show that those practices "lack . . . any redeeming virtue."
405 U.S. at 622 (Burger, C.J., dissenting).

95. 405 U.S. at 620 n.9 (Burger, C.J., dissenting).

96. Bork, *supra* note 15, at 776.

97. 319 F. Supp. at 1034.

1. The Sherman Act, 15 U.S.C. §§ 1 & 2 (1970), was allegedly violated by the respondents in the following ways: (1) entering into unlawful contracts; (2) conspiring and combining to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products; and (3) attempting to monopolize and actually monopolizing trade and commerce. Hawaii v. Standard Oil Co., 405 U.S. 251, 253 (1972).

The respondents included Standard Oil of California, Union Oil of California, Shell Oil, and Chevron Asphalt Company.

2. Hawaii filed its initial complaint on April 1, 1968, and thereafter amended it four times. *Id.*

junctive relief pursuant to sections 4[3] and 16[4] of the Clayton Act. The state sought recovery in three distinct capacities: (1) in its proprietary capacity;[5] (2) as *parens patriae*,[6] alleging damages to the general economy[7] as distinct from individual consumer injuries; and (3) as representative plaintiff in a class action on behalf of all consumers. The district court dismissed the class action as "unmanageable,"[8] but denied respondents' motion to dismiss the *parens patriae* count.[9] However, the federal district court certified[10] the *parens patriae* count to the United States Court of

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3. Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount in controversy and shall recover threefold the *damages* by him sustained, and the cost of suit, including reasonable attorney's fees.

15 U.S.C. § 15 (1970) (emphasis added).

4. Section 16 of the Clayton Act provides in relevant part that:

> Any person, firm, corporation, or association shall be entitled to sue for and have *injunctive relief* . . . against threatened loss or damage by a violation of the antitrust laws . . . .

15 U.S.C. § 26 (1970) (emphasis added).

5. The state, as a purchaser of petroleum products itself, had standing to sue in that capacity for overcharges and possibly a decrease in gasoline tax revenues under section 4. This count was never challenged by the respondents.

6. The *parens patriae* complaint was framed as follows:

> The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.

405 U.S. at 254.

7. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization . . . have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:

> (a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;
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> (b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;
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> (c) opportunity in manufacturing, shipping and commerce have *(sic)* been restricted and curtailed;
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> . . . .
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> (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;
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> . . . .
>
> (g) the Hawaii economy has been held in a state of arrested development.

Id. at 255.

8. The district court, in an unreported opinion, reasoned that "under the circumstances . . . the class action based upon the injury to every individual purchaser of gasoline in the State . . . would be unmanageable." *Id.* at 256 n.5, *citing* Reporter's Transcript, at 154 (1969).

9. Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Hawaii 1969).

10. A district judge in a civil action may certify an otherwise nonappealable order to the court of appeals if it presents a controlling question of law on which there is substantial ground for difference of opinion. 28 U.S.C. § 1292(b) (1970). The court of appeals has discretion to accept or reject the certification.

Appeals for the Ninth Circuit, which, exercising its discretion to hear the case, reversed and directed that the *parens patriae* count be dismissed.[11] Viewing the question of whether a state has standing to sue as *parens patriae* for damages to its general economy under section 4 of the Clayton Act as one of first impression, the Supreme Court granted certiorari.[12] The Court, through Justice Marshall,[13] *held* that a state does not have standing to maintain a claim as *parens patriae* under section 4 of the Clayton Act when it alleges damages to the general economy attributable to an alleged violation of the antitrust laws. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

In the course of the development of the common law, the Sovereign retained duties and powers referred to as the "royal prerogative."[14] He was said to exercise these powers as *parens patriae* or "father of the country." Blackstone described the Sovereign, in his role as *parens patriae,* as the general guardian of infants, idiots, and lunatics,[15] and as the superintendent of all charitable uses of the realm.[16] Most commentators have expressed the view that these two powers, retained by the Sovereign in his capacity as *parens patriae,* were all inclusive;[17] that is, these powers did not represent broad categories of uses to which they might be put, but rather they exhausted the scope of the power of the Sovereign in his role as *parens patriae.*

In the United States, the concept of *parens patriae* assumed new and more expansive dimensions as the traditional scope of the power was widened into the broader concept of the *quasi-sovereign interests*[18] of the state. This expansion of the scope of the power stemmed from a series of decisions[19] concerning the constitutional grant of original jurisdiction to the Supreme Court whenever a state is a party.[20]

It is unfortunate that the major cases involving the concept of *parens patriae* were brought directly to the Court through its original jurisdiction,

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11. Hawaii v. Standard Oil Co., 431 F.2d 1282 (9th Cir. 1970). The Ninth Circuit based its opinion on two grounds: an injury to the general economy of the state is not an injury to its "business or property;" and even if the general economy can suffer damages, such an injury is indirect and therefore not compensable. *See* notes 59–95 and accompanying text *infra.*

12. Hawaii v. Standard Oil Co., 401 U.S. 936 (1971).

13. Marshall, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, White, and Blackmun, JJ., joined. Douglas and Brennan, JJ., filed dissenting opinions. Powell and Rehnquist, JJ., took no part in the consideration or decision of the case.

14. *See* Malina & Blechman, *Parens Patriae Suits for Treble Damages under the Antitrust Laws,* 65 NW. U.L. REV. 193, 197 (1970).

15. W. BLACKSTONE, COMMENTARIES 47–48 (12th ed. E. Christian ed. 1793).

16. *Id.*

17. Malina & Blechman, *supra* note 14, at 197.

18. For purposes of continuity, the term *parens patriae* is used throughout this Note.

19. *See* notes 21–38 and accompanying text *infra.*

20. U.S. CONST. art. III, § 2, provides in pertinent part:
In all Cases . . . in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

for this avenue of consideration resulted in a blending of the constitutional requirements for original jurisdiction and the common law requirements for a *parens patriae* action. Notwithstanding this problem, an analysis of the relevant cases reveals two distinct requirements which have evolved to form a condition precedent to every *parens patriae* action.

The first important case dealing directly with the concept of a *parens patriae* action was *Louisiana v. Texas*.[21] Texas had passed a quarantine law to prevent the spread of infectious disease into Texas from the cargoes and crews of Louisiana shippers. Louisiana argued that the law was being administered so as to place an embargo on Louisiana shipping and sued for injunctive relief in its capacity as *parens patriae*. The Court denied original jurisdiction and, in so doing, delineated the first requirement of a *parens patriae* action:

> [I]t must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and *not* a controversy in the vindication of grievances of *particular individuals*.[22]

Although the right to invoke the Court's original jurisdiction was denied in *Louisiana,* that case established the validity of a *parens patriae* action which was much broader than the traditional common law concept of the Sovereign as *parens patriae*.[23] The broadened dimension of *parens patriae* was emphasized seven years after *Louisiana* in *Georgia v. Tennessee Copper Co.*[24] Georgia sought to enjoin the defendant, a Tennessee corporation, from discharging noxious gas from its plant in Tennessee, the fumes therefrom being carried by the wind into Georgia, and from causing wholesale destruction of forests, orchards, and crops. The Court allowed the *parens patriae* action to proceed:

> This is a suit by a State for an injury to it in its capacity as quasi-sovereign [*parens patriae*]. In that capacity the State has an interest *independent of and behind the titles of its citizens* in all the earth and air within its domain.[25]

Clearly, then, *parens patriae* was established as a viable theory upon which the state could predicate an action. Arguably, the *Georgia* case could be read narrowly as permitting a *parens patriae* action only in cases where the state interest was obvious, such as in protection of its natural resources, boundaries, or other areas in which it had a logically paramount interest.[26] Such a reading, however, would be incorrect. In *New York*

21. 176 U.S. 1 (1900).

22. *Id.* at 16 (emphasis added).

23. *See* text accompanying notes 14–17 *supra.*

24. 206 U.S. 230 (1907).

25. *Id.* at 237 (emphasis added).

26. Malina & Blechman, *supra* note 14, at 206.

v. New Jersey,[27] *North Dakota v. Minnesota*,[28] and *Pennsylvania v. West Virginia*,[29] the Court made it clear that *parens patriae* actions encompassed but were not limited to the state's vindication of disputes involving only natural resources or boundaries. Therefore, the initial requirement of a *parens patriae* action became apparent — the state interest must transcend the interest of the individual citizen; that is, the action by the state must be more than a mere assertion of the claims of its individual citizens.[30] This requirement was further emphasized by *New Hampshire v. Louisiana*,[31] in which a *parens patriae* action was denied. In *New Hampshire*, involving an obvious factual ruse to circumvent the eleventh amendment,[32] the Court held:

> [O]ne State cannot create a controversy with another State . . . by assuming the prosecution of debts owing by the other State to its citizens.[33]

27. 256 U.S. 296 (1921). New York sought to enjoin New Jersey from discharging sewage into the upper New York Bay. Along with an allegation of damage to the water, New York alleged that the discharge was offensive and injurious to persons living nearby, that it interfered with bathing, swimming, and fishing, and that it was a contaminant of marine life. The Court, holding that New York could maintain the suit, stated:

> The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced . . . the State is the proper party to represent and defend such rights . . . .

Id. at 301–02.

28. 263 U.S. 365 (1923). North Dakota sought to enjoin Minnesota from continuing to use a system of drainage ditches and sought to recover money damages for the injury to North Dakota farmers caused by river overflows atttributed to the ditches. The Court remarked:

> The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continual action of another State . . . is to be differentiated from its [the plaintiff-state] lost power as sovereign to present and enforce individual claims of its citizens as their trustee against a sister state.

Id. at 375–76. The traditional power of a sovereign state to present and enforce claims of its subjects has its roots deep in feudal law. *See generally* Comment, *Armed Reprisals During Intermediacy — A New Framework For Analysis of International Law*, 17 VILL. L. REV. 270, 273 (1971).

29. 262 U.S. 553 (1923). Pennsylvania sought to enjoin West Virginia from enforcing a legislative act which required West Virginia drillers of natural gas to keep all gas found in West Virginia within that state. The Court observed:

> Their [Pennsylvania consumers] health, comfort and welfare are seriously jeopardized by the threatened withdrawal of natural gas from the interstate system. This is a matter of grave public concern in which the State . . . has an *interest apart from the individuals affected.*

Id. at 592 (emphasis added).

30. This requirement has been criticized. *See* Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570, 590 (1970).

However, this requirement seems to be the only correct analysis in view of the eleventh amendment which provides:

> The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State.

U.S. CONST. amend. XI. Therefore, if the state were merely asserting claims of individual citizens against a sister state, it would exalt form over substance to allow the suit.

31. 108 U.S. 76 (1883).

32. New Hampshire sued Louisiana to collect on assigned coupon bonds which had become due. A New Hampshire statute allowed an individual holder of defaulted coupons to assign them to the state for collection. *Id.* at 77–78.

33. *Id.* at 91. *Accord*, Kansas v. United States, 204 U.S. 331 (1907). *See* note 30 *supra*.

The second requirement which must be met in order to institute a *parens patriae* action was initially alluded to in *Missouri v. Illinois*.[34] There, Missouri sought to enjoin a corporation, chartered by Illinois, from dumping sewage into the Mississippi River, thereby allegedly causing a nuisance to all Missouri citizens. The Court permitted the suit to proceed, stating:

> [I]t must surely be conceded that, if the health and comfort of the *inhabitants* of a State are threatened, the State is the proper party to represent and defend them.[35]

The *Missouri* decision implied that a substantial number of state residents be adversely affected by the alleged wrongful acts of the defendant in order to maintain a *parens patriae* action. Arguably, the *Missouri* holding is sufficiently ambiguous to be limited in scope to citizens along the Mississippi River, and therefore, it could be an application of the first requirement — the transcendence of the state interest beyond the interests of individual citizens. That this reading is improper, however, was demonstrated subsequently by *Kansas v. Colorado*.[36] Kansas sought the original jurisdiction of the Court to restrain Colorado from diverting water from the Arkansas River to be used for irrigation in Colorado. Although Kansas did not succeed on the merits,[37] the Court granted jurisdiction, holding:

> [T]he mere fact that a State had no pecuniary interest in the controversy, would not defeat original jurisdiction of this court, which might be invoked by the State as *parens patriae,* trustee, guardian or representative *of all or a considerable portion of its citizens* . . . .[38]

In the instant case, Hawaii encountered no difficulty meeting the second requirement of a *parens patriae* action. It was not disputed that a substantial number of Hawaiians were injured through the alleged violations of the antitrust laws. Therefore, the first requirement — the need to show that the state interest stood apart from the claims of individual citizens — became the focal point of the litigation. In order to meet this requirement, Hawaii found it necessary to allege damages to the state's general economy,[39] which raised a potential conflict with the antitrust laws.[40]

No case before 1945 had dealt with the right of a state to sue as *parens patriae* under the antitrust laws.[41] Then, however, in a five-to-four

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34. 180 U.S. 208 (1901).
35. *Id.* at 241 (emphasis added). Missouri explicitly recognized, however, that questions of boundary rights or of direct property rights belonging to the state were not at issue. *Id.*
36. 206 U.S. 46 (1907).
37. The Court determined that there was an equal displacement of benefit and of burden, and therefore both states had rights to the water. *Id.* at 117.
38. *Id.* at 99 (emphasis added). Note that this wording was used by Hawaii in its fourth amended complaint. *See* note 6 *supra.*
39. *See* note 7 *supra.*
40. *See* notes 3 & 4 *supra.*
41. Massachusetts v. Mellon, 262 U.S. 447 (1923), held that a state could not sue as *parens patriae* to protect its citizens from the operation of a federal statute.

decision, the Court decided *Georgia v. Pennsylvania Railroad.*[42] Georgia sought the original jurisdiction of the Court and charged twenty railroads with a conspiracy in restraint of trade, alleging that, by fixing arbitrary and noncompetitive rates to and from Georgia so as to prefer other states, the railroads effectively limited commerce between the states. Georgia sued in two capacities: first, in its capacity as a proprietor to redress the wrongs suffered in its ownership of a railroad;[43] second, in its capacity as *parens patriae,* alleging damages to its general economy and seeking treble damages under section 4[44] of the Clayton Act and injunctive relief under section 16[45] of the Clayton Act.

In its request that the complaint be dismissed for not presenting a justiciable issue, the railroad raised arguments similar to those raised by the defendants in the instant case. First, the railroad argued that Georgia lacked standing to sue under the antitrust laws, except in its proprietary capacity.[46] The Court, construing section 4 liberally and with Justice Douglas as its spokesman, stated:

> [W]e find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae,* have long been recognized. There is no apparent reason why those suits should be excluded from . . . the anti-trust acts.[47]

The railroad further argued that Georgia was merely asserting the claims of individual citizens and was therefore not suing as *parens patriae.* The Court rejected this argument:

> This is a suit in which Georgia asserts claims arising out of federal law and the gravamen of which runs far beyond the claim of damages to individual shippers.[48]

Although section 4 provides for recovery of damages for a violation of the antitrust laws, Georgia could not recover due to prior approval of the challenged rates by the Interstate Commerce Commission.[49] Nevertheless, Justice Douglas, intent on giving section 4 a broad scope, moved headlong

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However, the Court did not reach the question of a suit for damages under a statute similar to the Clayton Act.

42. 324 U.S. 439 (1945).

43. The Court disposed of this claim by treating it merely as a "makeweight." *Id.* at 450.

44. *See* note 3 *supra.*

45. *See* note 4 *supra.*

46. It should be noted that, at the outset, the Court had to decide that a state is a "person" within the meaning of the Clayton Act in order for the state to have standing to sue in *any* capacity. 324 U.S. at 452.

47. *Id.* at 447.

48. *Id.* at 452.

49. Approval of the challenged rates barred a damage recovery on the ground that Georgia would have an unfair economic advantage over shippers of other states. Keough v. Chicago & N.W. Ry., 260 U.S. 156 (1922).

Justice Douglas, in his dissent in *Hawaii,* called this a "technicality irrelevant to the present case." 405 U.S. at 269 (Douglas, J., dissenting).

into the issue of recovery of damages for injury to the economy. Feeling that the general economy of a state could suffer injury severable from the injuries to individual citizens, he stated:

> If the allegations . . . are taken as true, the *economy* of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers . . . . Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, *and relegates her to an inferior economic position among her sister States.* These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate.[50]

Although this is strong dicta, the issue of recovery of damages was not properly before the Court,[51] and, concretely, *Georgia* stands only for the proposition that a state, *as parens patriae,* may sue for an injunction under section 16 of the Clayton Act.[52] *Georgia* represented the last word of the Court on this matter until the instant case.

In order to recover damages for violation of the antitrust laws, the state, even if pursuing a valid *parens patriae* claim, must conform to the additional requirements of section 4 of the Clayton Act. Section 4 is a reenactment of section 7 of the Sherman Act, which provided that a "person" could sue for treble damages if he was injured in his "business" or "property" due to a violation of the antitrust laws. Although the injunctive provision of the Act, section 16,[53] was not at issue in *Hawaii,* it should be noted that this section does not contain the "business" or "property" restriction on standing.[54]

It can be argued that the issue of recovery of damages by a state for injury to its general economy was settled in *Georgia,*[55] and Hawaii did, in fact, assert that *Georgia* was authority on which to grant the state standing as *parens patriae* under section 4.[56] However, the Court declined to follow the dicta in *Georgia* and construed that decision narrowly, limiting it to its precise holding.[57] The initial inquiry in the instant case

50. 324 U.S. at 450–51 (dicta) (emphasis added).

51. In the instance case, however, Justice Douglas maintained that the discussion of the damage issue in *Georgia* was not an idle gesture, and thus *Georgia* was dispositive of the case. 405 U.S. at 268–69 (Douglas, J., dissenting).

52. It is odd indeed that there should be any argument as to whether a state may sue as *parens patriae* for an injunction after *Georgia.* Yet, the majority in *Hawaii* suggested that the state might not have standing to do so. *Id.* at 261.

53. *See* note 4 *supra.*

54. *See* note 71 *infra.*

55. *See* notes 42–49 and accompanying text *supra. See also* 405 U.S. at 266, 270 (Douglas & Brennan, JJ., dissenting).

56. *See* Proceedings, *Arguments Before the Court: Parens Patriae and Antitrust,* 40 U.S.L.W. 3189 (1971).

57. 405 U.S. at 260. The Court remarked that: "[n]owhere in *Georgia* did the Court address itself to the question whether § 4 of the Clayton Act authorizes damages for an injury to the general economy of a state." *Id.* Apparently, Justice Marshall simply meant that the issue of damages was not properly before the

was, therefore, whether an injury to the general economy was an "injury" to the "business" or "property" of a state.[58]

It is significant to note that the terms "business" or "property" are neither defined in the statute[59] nor discussed in the legislative history.[60] They have, therefore, been a nemesis to the courts which heretofore sought to define them. At the very least, the disjunctive position of the two words indicates that they are to be treated as different concepts, and, in general, the courts have favored a rigid construction.[61]

In dealing with the concept of "business," evidence of an ongoing business is not necessary, but there must, at least, be a showing of an intention to enter business combined with a preparedness to do so.[62] The most concise definition of "business" was set forth in *Roseland v. Phister Manufacturing Co.*:[63]

> [T]he word business . . . signifies ordinarily that which habitually busies, or engages, time, attention or labor, as a principal serious concern or interest. In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit, — persistent human efforts which have for their end pecuniary reward.[64]

The *Hawaii* Court declined to expand the meaning of "business" and opted for the strict definition developed by the lower federal courts[65] as exemplified by *Roseland*.

The concept of "property" in this context is even more elusive.[66] "Property" in ordinary connotation has a broader meaning than "business." As was stated in *Waldron v. British Petroleum*:[67]

> The word "property" is, in a sense, a conclusory term, *i.e.*, an interest which the law protects. A determination whether plaintiff has "property" involves a value judgment as to whether that which plaintiff factually possesses should be legally protected.[68]

Confining itself to these strict — albeit traditional — definitions, the *Hawaii* Court, without analysis, simply concluded that standing could not

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Georgia Court, and therefore, the dictum in that case (*see* notes 47 & 50 and accompanying text *supra*) was irrelevant to the instant case.

58. *Id.* at 264–65.

59. Clayton Act § 4, 15 U.S.C. § 15 (1970). *See* note 3 *supra*.

60. 405 U.S. at 264–65.

61. *See* notes 62–68 and accompanying text *infra*.

62. Martin v. Phillips Petroleum Co., 365 F.2d 629, 633 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); American Banana Co. v. United Fruit Co., 166 F. 261 (2d Cir. 1908), *aff'd*, 213 U.S. 347 (1909); Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961).

63. 125 F.2d 417 (7th Cir. 1942).

64. *Id.* at 419. *See* Jack v. Armour & Co., 291 F. 751 (8th Cir. 1923); Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp. 641 (D.N.J. 1960).

65. 405 U.S. at 264.

66. Hamman v. United States, 267 F. Supp. 420 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968).

67. 231 F. Supp. 72 (S.D.N.Y. 1964).

68. *Id.* at 86.

be granted to Hawaii to sue for damages under section 4 because its general economy was not part of its "commercial interests or enterprises."[69]

It is important to note that, even if the general economy of a state could be considered its "business" or "property," the issue of severability of damages might still prevent recovery; that is, if the economy were not severable, then the state would, in fact, be suing to redress individual claims and thus would not meet the first requirement of the *parens patriae* concept.[70] Therefore, the question, in the instant case, narrowed to whether the allegedly damaged economy of Hawaii was severable from the aggregate of individual damages sustained by Hawaiian consumers.

The Court recognized that the problem of severability was vitiated under section 16 because 100 injunctions are no more deleterious to the defendant than one injunction.[71] However, when the relief sought is damages, the aspect of recovery for injury to the general economy, considered together with the threat of future private antitrust actions against the same defendant by individual consumers, raises the spectre of potential double recovery.[72] The Court summarily dealt with this issue of double recovery and injury to the economy:

> A large and ultimately indeterminable part of the injury to the "general economy" as it is measured by economists is no more than a reflection of injury to the "business or property" of consumers, for which they recover themselves under § 4.[73]

Thus, the majority of the Court subscribed to the theory that damage to the economy is simply an aggregation of individual consumer damages and limited Hawaii's standing to a suit in its proprietary capacity.[74] Justice Douglas disagreed, stating that "growth, progress, and development are more than symbols . . . they represent the goal which planners . . . estab-

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69. The majority stated:
When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But, where as here, the State seeks damages for other injuries, it is not properly within the Clayton Act.
405 U.S. at 264.

Justice Brennan felt that the property of Hawaii was diminished by the additional tax revenue it was denied due to a decrease in the sales of gasoline. Thus, the harm was to the economic welfare of the state as a whole and was an injury to the property of the state which was compensable under section 4 of the Clayton Act. *Id.* at 273 (Brennan, J., dissenting). *See* Chattanooga Foundry v. Atlanta, 203 U.S. 390 (1906). However, this approach merely begs the question of whether the demand for gasoline within the state is elastic; that is, there is no demonstrable evidence that an increase in gasoline prices leads to a decrease in gasoline sales and, hence, a decrease in gasoline tax due the state. *See* notes 80–86 and accompanying text *infra.*

70. *See* notes 21–33 and accompanying text *supra.*

71. 405 U.S. at 261. The parties were in agreement that, whether or not Hawaii could sue for injunctive relief as *parens patriae,* it was of no practical consequence since it could be granted the same relief in its proprietary capacity. Standard Oil, nevertheless, expressed doubt as to whether Hawaii could sue as *parens patriae* for injunctive relief. *See* Proceedings, *supra* note 56, at 3190.

72. 405 U.S. at 261–62.

73. *Id.* at 264.

74. *See* note 69 and accompanying text *supra.*

lish and seek to attain."[75] Alabama, in an amicus curiae brief, also disagreed, asserting that "a state's economy is susceptible of articulation and measurement."[76] Interestingly, neither of the foregoing positions was supported by a single authority.[77] Thus, it would seem that both sides of the dispute seized on what, to them, was obvious and, therefore, was without need of detailed proof.

There are, primarily, two economic positions[78] which have been advanced and which, at least *theoretically*,[79] support the assertion that a state's economy is severable from the aggregate of individual damages. The first is the monopoly-profit theory[80] which is founded on the belief that as businesses monopolize, growth of the economy is retarded because the economy is deprived of the money that would have been spent for labor, rent, and interest in a competitive situation. Thus, as competition decreases, small businesses are forced out of existence, and the general economy suffers due to loss of the stimulus which, in a competitive system, money would provide. It is submitted, however, that this theory does not adequately demonstrate that the aggregate of damages to individuals is necessarily different from the resultant injury to the economy because it is simply a theory utilized to formulate the deleterious effects of monopolization and is not a theory of severability of damages.[81]

The second theory involves the "multiplier effect."[82] Under this approach, a microeconomic[83] model is used to trace the effect of an injury

75. 405 U.S. at 268 (Douglas, J., dissenting).

76. *Id.* at 269.

77. Justice Douglas alluded to KUZNETS, ECONOMIC GROWTH OF NATIONS 346–47 (1971). Although this treatise dealt with economic growth on a national level, Justice Douglas, nevertheless, reasoned by analogy that the sovereign state, as a unit of the nation, is important in modern economic growth and, therefore, must have a measurable economy of its own. 405 U.S. at 268. However, this conclusion does not follow without a much more complicated and detailed analysis. *See* notes 78–86 and accompanying text *infra.*

78. *Compare* Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages,* 6 COLUM. J.L. & SOC. PROB. 441 (1970), wherein the author argued that a state can prove damages, by relevant economic data, to its economy as severable from the aggregate of individual injury, *with* KUZNETS, *supra* note 77.

79. It should be noted that the *Hawaii* Court had little patience with economic theory as distinct from economic practicality and opted for the latter to the exclusion of the former. *See* 405 U.S. at 263 n.14, *citing* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968).

80. For a concise explanation, *see Hearings on S. 2512 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 89th Cong., 2d Sess. 76, 81 (1967) (testimony of John D. Guilfoil). *See also* A. SMITH, WEALTH OF NATIONS 573 (rev. ed. 1863).

81. To hold that the theory demonstrated severability would be to "ignore the real economic world" and prefer instead "an economist's hypothetical model." Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968).

82. The "multiplier" concept usually refers to the increase or decrease in large scale investment or government expenditure. The higher the marginal propensity to consume, the larger the total expenditure and the "multiplier." *See generally* KEISER, ECONOMICS: ANALYSIS AND POLICY 238–41 (1965).

83. Microeconomics denotes an economic analysis applied to small groups of individuals or to the individual himself. It is to be distinguished from a macroeconomic analysis which focuses on the whole economic system — state, nation, or world — and on the interplay therein.

on an individual consumer to its resultant effect on business.[84] This effect on business, in turn, sends ripples — beneficial or harmful — throughout the economy.[85] The result in an injurious situation is a slump in growth and a retardation of progress, indicated generally by a recession in varying degrees. In the logical abstract, this theory is easily understood. But it is extremely difficult to apply to the actual, ever-changing economy of a state, and therefore, it is not a proper vehicle to demonstrate severability of the economy from individual damages. It is submitted that neither theory sufficiently establishes that the general economy is distinct from an aggregation of individual injuries suffered by consumers or businesses. In order to demonstrate this point, it would be necessary to separate each state into an individual economic unit[86] — a task requiring Herculean effort. Justice Marshall expressed his concern with such prospects:

> Even the most lengthy and expensive trial could not, in the final anaylsis, cope with the problem of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the state.[87]

Therefore, recognizing the inherent difficulties in demonstrating severability as well as the threat of double recovery, the Court limited the State of Hawaii to suits in its proprietary capacity. Furthermore, realizing that it was on uncertain ground, the Court asserted that, if damage to the economy was compensable under section 4, it was up to Congress to provide such a remedy by an amendment to the Act.[88]

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84. This effect is analogous to the "accelerator principle" which suggests that investment increases or decreases with output and that, as demand for finished goods increases, demand for capital goods also increases. Therefore, for each unit of consumer goods, there will be X units or negative X units of capital goods, concommitant with a decrease in demand. *See* KEISER, *supra* note 82, at 241–44.

85. The microeconomic analysis would run as follows: (1) A, a consumer, spends $50 more than necessary due to price-fixing in petroleum products and $10 more in taxes because the state is also a consumer; (2) A is forced to forego spending that $60 on consumer goods for a given period; (3) due to decreased demand, businesses normally patronized by A decrease sales; (4) this, in turn, leads to decreased orders for manufacturers and suppliers; and (5) manufacturers and suppliers, faced with decreased orders, decrease production. In other words, as the marginal propensity to consume decreases, demand decreases; hence output and expenditures for capital goods must also decrease, but at an accelerated pace.

Although A's contribution to the loss is infinitesimal, when multipled by the 800,000 consumers in Hawaii, the resultant loss to the economy is staggering. It should also be noted that the decreased output and demand accelerate once they begin, and thus, the multiplier increases and the loss to the state's economy *theoretically* is many times that of the aggregate of individual injuries. *See* note 84 *supra*.

86. For the number of variables that enter into such a calculation, *see* KEISER, *supra* note 82, at 243–44. Moreover, these theories are usually applied on a national level, and to apply them on a state level, one would have to separate Hawaii from every other state and somehow apportion general economic injury pro rata to the complaining state. That is, not every supplier and manufacturer who was forced to forego units of capital output because of decreased demand was based in Hawaii. Hence, these theories may apply on a national level, but are of dubious value on the state level.

87. 405 U.S. at 264.

88. *Id.*

In addition to requiring an injury to "business" or "property," section 4 has been interpreted as also requiring that the injury be direct. Therefore, "only those at whom the [antitrust] violation is *directly aimed,* or who have been *directly harmed* may recover [treble damages]."[89] Thus, it has been held that damages to shareholders,[90] creditors,[91] officers,[92] and landlords,[93] grounded upon antitrust violations, are not direct. It would seem, therefore, that damages to the economy, if not severable from damages to individual consumers, are not direct.[94] While the initial loss to the consumer would be direct, the aggregation which comprises the economic injury sued for by the state as *parens patriae* would be indirect. Moreover, it is significant to note that price-fixing by oil companies is, by definition, aimed at consumers or at the state as proprietor, and it is in this context that the injury would be direct.[95]

Even assuming arguendo that the state could have shown a direct injury to its economy and that the economy was part of the "business" or "property" of the state, Hawaii would still have been confronted with the problem of proof of damages. However, while the injury to "business" or "property" must be direct and not remote, proof of damages in an antitrust action is somewhat less demanding. The applicable standard was enunciated in *Story Parchment v. Paterson Parchment Paper Co.,*[96] where it was held:

> [W]hile damages may not be determined by mere speculation or guess, it will be enough if the evidence show [*sic*] the extent of the damages as a matter of *just and reasonable inference* although the result be only approximate.[97]

Even in light of this standard, it is submitted that Hawaii could not have successfully withstood the sanction against speculation and conjecture in establishing damages. There seems to be no "just and reasonable" method of computing the potential value of the businesses which left Hawaii, those which did not locate there, the reduction in consumer spending, or the loss in the tourist trade.[98] The number of indeterminable variables in-

89. Productive Invention, Inc. v. Trico Prods. Corp., 224 F.2d 678, 679 (2d Cir. 1955) (emphasis added).
90. Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910).
91. *Id.*
92. Corey v. Boston Ice Co., 207 F. 465 (D. Mass. 1913).
93. Harrison v. Paramount Pictures, Inc., 211 F.2d 405 (3d Cir. 1954), *cert. denied,* 348 U.S. 828 (1955). *Accord,* Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir. 1956).
94. *See* Proceedings, *supra* note 56, at 3140.
95. *Id.*
96. 282 U.S. 555 (1931). The rationale behind this standard is that a denial of all relief to plaintiff would relieve the wrongdoer of making amends for his act, simply because plaintiff was unable to prove with certainty the extent of the harm. Thus, there is a fundamental distinction between injury and damages, the former presenting a more formidable hurdle than the latter.
97. *Id.* at 563 (emphasis added). For an interesting application of this standard, *see* Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959).
98. It can be argued that the trial stage, and not the pleadings stage, is the more appropriate time to decide this issue. 301 F. Supp. at 988. Justice Brennan

herent in such a calculation is staggering. Moreover, there are other serious problems in proving damages. Such cases immerse the courts in theoretical litigation in which they lack the economic expertise to operate. Secondly, ascertaining damages of this type is simply beyond the ken of the ordinary jury, and thus it is unlikely that the jury could cope with the matter competently. Lastly, the potential individual plaintiff would be squarely faced with the prospect of proving that his claim was not compensated should the state emerge victorious.

The last point relied upon by the Court in concluding that Hawaii had no standing as *parens patriae* under section 4 was the least convincing. The Court reasoned that, since section 4A[99] of the Clayton Act, which extends standing to the United States to sue for violation of the antitrust laws, does not allow the United States to sue in its capacity as *parens patriae,* "the conclusion is nearly inescapable that § 4, which uses identical language, does not authorize recovery for economic injuries to the sovereign interests of a State."[100] It is submitted that this analogy is unacceptable since sections 4 and 4A are independent provisions having entirely separate purposes. The former was enacted to encourage private suits, while the latter was passed for the narrow purpose of extending standing to the United States to sue for antitrust violations in a *limited* capacity in view of the availability of other highly effective means of enforcing the antitrust laws.[101] Thus, a similarity in the language of the two sections is largely meaningless, not only in light of the different purposes for which each was enacted,[102] but also in light of the different resources and remedies available to the United States vis-à-vis the states.

Every antitrust violation is a blow to the competitive system on which this country operates. This system, dependent upon active competition for its health and vigor, necessarily must also rely upon compliance with the antitrust laws.[103] Congress chose to encourage private individual litigants by enabling them to recover three times the amount of their

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also maintained this position. 405 U.S. at 274 n.* (Brennan, J., dissenting). However, with damages so remote and based upon so speculative an area as the economy, there seems to be no basis on which to go to trial. *But see* Note, *supra* note 78

99. This section provides in pertinent part:

> Whenever the United States is hereafter injured in its *business or property* by reason of anything forbidden in the antitrust laws it may sue therefor . . . without respect to the amount in controversy, and shall recover *actual* damages by it sustained and the cost of suit.

Clayton Act § 4A, 15 U.S.C. § 15a (1970) (emphasis added).

100. 405 U.S. at 265.

101. "The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws." S. REP. No. 619, 84th Cong., 1st Sess. 3 (1955). Clearly, the individual consumer or even the state does not possess the power which the United States has at its disposal to punish antitrust violations. This is true in terms of the number of qualified persons in the employ of the United States, the amount of time they can devote to pursuing violators, and the amount of money the United States has at its disposal for such a purpose.

102. 405 U.S. at 275–76 (Brennan, J., dissenting).

103. For a discussion of nonsanctioned monopolistic practices and the effects against which the antitrust laws guard, *see* KEISER, *supra* note 82, at 599–610.