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Parens Patriae and the Union Carbide Case: The Disaster at Bhopal Continues

Lisa Moscati Hawkes

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On the night of December 2, 1984, methyl isocyanate gas escaped from a pesticide plant owned by Union Carbide India, Ltd.[1] The deadly gas spread over the Indian city of Bhopal, killing approximately 1,700 people and injuring 200,000 others.[2] American lawyers raced to India.[3] On December 7, 1984, only five days after the disaster, they filed the first of 145 lawsuits in the United States on behalf of Indian citizens against Union Carbide Corp., the U.S. parent corporation of Union Carbide India, Ltd.[4]

The Union of India ("India") entered the litigation on April 8, 1985, claiming the exclusive right to represent the plaintiffs pursuant to a specially enacted Ordinance (hereinafter "Bhopal Ordinance").[5] The Southern District of New York denied India exclusive representation of the plaintiffs' claims, and ordered instead the formation of an executive committee to represent the plaintiffs.[6] When Union Carbide offered $358 million as a settlement, the plaintiffs' executive committee wished

1. *In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 108 S. Ct. 199 (1987). Methyl isocyanate is a highly toxic gas used in the production of Sevin and Temik, which are pesticides produced by Union Carbide, India, Ltd. Exposure to the gas can result in an agonizing death, or severe injuries. Long term exposure to the gas can have genetic and carcinogenic consequences. *See* Envtl. L. Rep. (Envtl. L. Inst.) § 65870 (Feb. 1984) (quoting plaintiffs' complaint for Union of India v. Union Carbide Corp.).

2. Riley, *Bhopal: The Legal Escalation Begins in Earnest*, 7 Nat'l L.J., Apr. 22, 1985, at 8, col. 1. In addition to filing personal injury suits in the United States, a group of plaintiffs' lawyers also filed suit against the Indian government in India, alleging that the government could not exclusively represent the plaintiffs. The plaintiffs claimed that India had a conflict of interest, and that the Bhopal Ordinance, granting exclusive representation to India, violated Indian constitutional guarantees. *Id.*

3. *See* Riley, *U.S. Lawyers Court Disaster in Bhopal*, 7 Nat'l L.J., Dec. 31, 1984, at 3, col. 2.

4. *In re* Union Carbide Corp., 634 F. Supp. at 844. All references to Union Carbide Corp. designate the U.S. parent corporation. References to Union Carbide, India, Ltd., refer to the Indian subsidiary, 51% of which is owned by Union Carbide Corp.

5. *The Bhopal Tragedy: Social and Legal Issues*, 20 TEX. INT'L L.J. 267, 285 (1985); Riley, *New Bhopal Law May Affect Future Role of U.S. Lawyers*, 7 Nat'l L.J., Mar. 11, 1985, at 4, col. 3 (summarizing the key provisions of the Bhopal Ordinance).

6. *Judge Selects Panel to Direct Bhopal Litigation*, 193 N.Y.L.J., Apr. 26, 1985, at 1, col. 1.

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to accept the offer, but India refused.[7]

India based its suit on the common law doctrine of *parens patriae*,[8] which allows a state to sue to protect the well-being of its citizens when no citizen has standing to sue.[9] The district court, however, dismissed the case without reaching the *parens patriae* issue. Relying on forum non conveniens, the court dismissed the case because it found India a more appropriate and convenient forum to hear the suit.[10] The plaintiffs are currently pursuing litigation in India.[11]

Many scholars agree that litigation in India is not an adequate solution.[12] Moreover, by granting itself the exclusive right to handle the case through the Bhopal Ordinance, the Indian government has left the plaintiffs without any authority in settlement decisions. India's use of the *parens patriae* doctrine may allow the Indian government to keep any compensation, rather than disbursing it among the victims.[13] This Note argues that settlement is usually in the best interests of the victims in industrial disaster cases, since injured persons need rapid compensation. By dismissing the case to India, the victims no longer have the choice to settle rather than litigate.

The district court could have avoided this result by reaching India's *parens patriae* claim. Although the district court denied India the right to exclusively represent the plaintiffs,[14] it never decided whether India had

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7. *See infra* notes 25-26 and accompanying text.

8. Riley, *supra* note 2.

9. *See infra* notes 38-41 and accompanying text.

10. *In re* Union Carbide Corp., 634 F. Supp. at 876.

11. *Carbide Agrees to Try Bhopal Case in India*, 195 N.Y.L.J., June 13, 1986, at 1, col. 1.

12. The plaintiffs' attorneys also argued that India's legal system is not equipped to handle the complexities of such a large tort action. Ironically, India made the same argument in trying to keep the action in the U.S. courts. *In re* Union Carbide Corp., 634 F. Supp. at 867. The district court rejected this argument, finding that although "[p]laintiffs allege that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people . . . to retain the litigation in this forum . . . would be yet another example of imperialism. . . ." *Id.* For the argument that India's legal system is inadequate to handle the Bhopal litigation, see Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273 (1985). Mr. Galanter discusses several shortcomings of the Indian legal system. First, tort law is uncodified, and there are few Indian tort cases. Courts charge enormous fees to discourage suits from being brought. Furthermore, there are no civil juries to decide cases and assess damages. Second, courts are viewed as places to pursue disputes with neighbors, rather than places to secure redress from remote, impersonal entities. Finally, the Indian lawyer is only a courtroom advocate, not an investigator, intermediary, negotiator, trustee, planner, or advisor. These roles are left to businessmen, clerks, politicians, and administrators. *Id.* at 274-79. These shortcomings will make discovery and proof of fault difficult in the Bhopal cases because the cause of the accident is unclear. Indeed, the Chief Justice of the Supreme Court of India stated: "It is my opinion that these cases must be pursued in the United States. . . . It is the only hope these unfortunate people have. . . ." Stewart, *Why Suits for Damages Such as Bhopal Claims are Very Rare in India*, Wall St. J., Jan. 23, 1985, at 1, col. 1.

13. *See infra* notes 134-35 and accompanying text.

14. *In re* Union Carbide Corp., 634 F. Supp. at 844. The district court's forum non conveniens decision did not encompass the *parens patriae* issue. *See infra* notes 21-

proper standing to sue under *parens patriae*. As this Note subsequently argues, India had no right to claim *parens patriae* standing. If the court had denied India standing, the plaintiffs could have accepted Union Carbide's settlement offer. By not deciding the *parens patriae* issue, the court allowed India to remain a party to the litigation. Thus, India could and did effectively block any settlement by refusing to accept Union Carbide's offer.

This Note analyzes *parens patriae*, the doctrine under which the Indian government asserted the right to sue Union Carbide on behalf of the individual plaintiffs. Given the current limits of the doctrine, the Note argues that India is not entitled to *parens patriae* standing. The Note further argues that settlement is currently the best solution to such disaster cases, and that determination of the *parens patriae* issue is necessary to facilitate settlement. Finally, the Note discusses the pros and cons of a class action suit, which some courts have suggested as an alternative to a *parens patriae* suit.

I. Background

A. History of the Bhopal Litigation

The Bhopal litigation began with the filing of the first lawsuit against Union Carbide Corp. in the United States on December 7, 1984.[15] One hundred and forty-four lawsuits followed in seven forums.[16] The Judicial Panel on Multidistrict Litigation joined the plaintiffs and assigned them to the Southern District of New York for consolidated pretrial proceedings.[17]

On February 20, 1985, the Union of India enacted an ordinance, granting itself "the exclusive right to represent, and act in place of every person who has made claim or is entitled to make" a claim against Union Carbide Corp. for the Bhopal disaster.[18] The Indian Govern-

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23 and accompanying text. A suit as *parens patriae* is not necessarily an exclusive remedy. Although the State has been the only one with standing to sue in all of the existing cases, no court has specifically adopted exclusivity as a requirement for *parens patriae* standing. Because a quasi-sovereign interest is an "interest behind the titles of its citizens," the possibility exists that both the state and a private citizen could have standing to sue. Because the exclusivity of *parens patriae* is unclear, one cannot infer that the court allowed such standing by referring to the decisions on other motions.

15. *In re* Union Carbide Corp., 634 F. Supp. at 844.

16. *Id.*

17. *In re* Union Carbide Corp., 601 F. Supp. 1035 (J.P.M.D.L. 1985).

18. *See supra* note 5 and accompanying text. For an argument that the Bhopal Ordinance violates India's Constitution, *see* Chittor, *A Second Bhopal Disaster*, 7 Nat'l L.J., May 13, 1985, at 13, col. 1. Mr. Chittor makes four arguments: the Bhopal Ordinance denies the claimants a chance to express their views on every significant issue of the case; deprives them of a property right; prevents them from carrying on their business when a necessary concomitant of that business is pursuing the actionable claims that arise from it; and violates the rights of equality and equal protection under the law.

ment filed suit in the Southern District of New York on April 8, 1985,[19] relying on the doctrine of *parens patriae* to sue on behalf of all of the victims of the Union Carbide disaster.[20]

Judge Keenan of the Southern District of New York refused to hear any motions until the plaintiffs formed an executive committee to represent the plaintiffs, consisting of three lawyers who had not solicited clients in India.[21] At this point, India requested the right to exclusively represent the plaintiffs.[22] The court denied India's request, but failed to determine whether India had the right as *parens patriae* to participate in the litigation.[23]

Union Carbide Corp. then moved to dismiss the action on the ground of forum non conveniens.[24] After hearing arguments for both sides, Judge Keenan postponed his decision to give the parties time to settle. Union Carbide then made a settlement offer of $358 million which the individual plaintiffs wished to accept.[25]

India found the amount "totally unacceptable"[26] and took action to block settlement. Michael Ciressi, counsel for the Indian government, and one of the three-member executive committee representing the plaintiffs, threatened that India would refuse to acknowledge the offer as a final settlement and would continue to litigate under *parens patriae* even if the court approved the settlement offer.[27] Union Carbide, probably fearing that India could successfully sue and obtain a judgment for additional compensation, refused to settle.[28]

Union Carbide based its refusal to settle on the fear of double liability, a problem which the courts have repeatedly recognized in *parens patriae* cases. Defendants in disaster cases rely on courts to identify who

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19. *In re* Union Carbide Corp., 634 F. Supp. at 844.

20. *See* Riley, *supra* note 2.

21. *Judge Selects Panel to Direct Bhopal Litigation*, 193 N.Y.L.J., Apr. 26, 1985, at 1, col. 1.

22. *Id.*

23. *Id.*

24. *See In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 845 (S.D.N.Y. 1986). The doctrine of forum non conveniens allows a court to dismiss the litigation, even though it has jurisdiction, if a foreign court is better suited to hear the case. In making its decision, a court may consider the practical problems of a trial, such as the location of the proof and availability of compulsory process for the attendance of unwilling witnesses. A court may also consider public interests such as the congestion of the courts, the local interest of having localized controversies decided at home, and conflict of law problems. *See* Piper Aircraft v. Reyno, 454 U.S. 235 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

25. [9 Current Report] Int'l Env't Rep. (BNA) 173 (June 11, 1986). Under Union Carbide's initial $358 million settlement offer, each victim would have received approximately $1750. [9 Current Report] Int'l Env't Rep. (BNA) 107 (April 9, 1986).

26. *Indian Government Rejects Carbide's Settlement Offer*, 195 N.Y. L.J., Mar. 25, 1986, at 1, col. 1. India's position has been that it will only settle for an amount that will fully and adequately compensate all victims. Although the plaintiffs wished to accept the offer, the Government of India threatened court action if the plaintiffs did so. Unwilling to settle unless all the parties agreed, Union Carbide withdrew the offer.

27. [9 Current Report] Int'l Env't Rep. (BNA) 107 (Apr. 9, 1986).

28. *See supra* note 26.

has standing to sue. Once a defendant knows with which parties it must negotiate a settlement, it can settle with the security that no other potential liability exists.

After Union Carbide withdrew its settlement offer, the court ruled, in response to an earlier motion by Union Carbide, that India was a more appropriate forum to hear the case.[29] The court conditioned dismissal of the Bhopal litigation on three requirements: 1) that Union Carbide Corp. submit to Indian jurisdiction; 2) that Union Carbide Corp. allow discovery in compliance with the Federal Rules of Civil Procedure; and 3) that Union Carbide Corp. agree to satisfy any judgment rendered by the Indian courts.[30] The court refused to hold a fairness hearing on the $358 million settlement offer prior to deciding the forum non conveniens motion.[31]

The two attorneys representing the plaintiffs, rather than the interests of India, appealed both the forum non conveniens decision and the court's refusal to hold a fairness hearing on the settlement offer.[32] The plaintiffs' brief argued that, by denying the fairness hearing, the court was allowing India to block settlement.[33] Therefore, India's *parens patriae* lawsuit usurped the plaintiffs' cause of action, depriving them of a property right and "violat[ing] the due process standard of the U.S. Constitution."[34] The Second Circuit affirmed the district court's forum non conveniens decision and affirmed the condition that Union Carbide submit to Indian jurisdiction, while reversing the other two conditions.[35] The Second Circuit never reached the *parens patriae* issue.[36]

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29. *In re* Union Carbide Gas Plant Disaster, 634 F. Supp. 842, 845 (S.D.N.Y. 1986).

30. *Id.* at 867. The district court fashioned the conditions for dismissal of the case to provide for the concerns the plaintiffs had in trying the case in India, and the reasons they sought suits in the United States originally. [9 Current Reports] Int'l Env't Rep. (BNA) 4 (Jan. 8, 1986).

31. [9 Current Report] Int'l Env't Rep. (BNA) 313 (Sept. 10, 1986). The second circuit affirmed the denial of the fairness hearing. *In re* Union Carbide Gas Plant Disaster, 809 F.2d 195, 203 (2d Cir.), *cert. denied*, 108 S.Ct. 199 (1987). As a result, Union Carbide Corp. submitted to Indian jurisdiction, triggering India to file suit in an Indian court. *Carbide Agrees to Try Bhopal Case in India*, 195 N.Y.L.J., June 13, 1986, at 1, col. 2.

32. *Id.* The plaintiffs' brief argued that the district court "took a far too narrow and literalistic interpretation of forum non conveniens law." According to the brief, the core of the case lies not in what happened in Bhopal, but with the responsibility of Union Carbide Corp. The key evidence for this responsibility is that corporate headquarters is in Connecticut, not Bhopal. *See supra* note 28.

33. *Id.*

34. *Id.*

35. *In re* Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d Cir.), *cert. denied*, 108 S. Ct. 199 (1987). The second circuit held that the court could not require Union Carbide to consent to the enforcement of an Indian judgment and to abide by the discovery provisions of the Federal Rules of Civil Procedure. First, the court reasoned that the New York courts could enforce such a judgment against Union Carbide if it met the requirements of the New York Statute and did not violate the corporation's due process. *See* Art. 53, Recognition of Foreign Money Judgments, 7B N.Y. CIV. PROC. L. & R. §§ 5301-09 (McKinney 1978). If a judgment failed to meet the due process requirements, Union Carbide could raise this problem as a

Through the Bhopal Ordinance, India sought exclusive control of the litigation. Despite the difficulties foreign plaintiffs may encounter suing in U.S. courts, they do not receive any more rights than domestic claimants.[37] India has the same *parens patriae* rights in U.S. courts as individual states would have. As will be discussed, India cannot create *parens patriae* standing by assuming the individuals' claims. Ironically, although the individual claimants had overcome the difficulty of suing in the United States, India prevented them from pursuing the litigation.

B. History of *Parens Patriae*

Parens patriae literally means "parent of the country." The doctrine developed in England from the common law concept of the royal prerogative.[38] The Sovereign was "the general guardian of all infants, idiots, and lunatics" and represented their interest as *parens patriae*.[39] English law required the following four elements before granting the sovereign *parens patriae* representation: 1) the party is legally incapable of securing his rights; 2) the sovereign or his representative is the only alternative; 3) the sovereign has a duty to protect the subject's welfare; and 4) the sovereign has no personal interest and acts on someone else's behalf.[40]

Although the United States adopted these general elements of the *parens patriae* doctrine from English law, the U.S. courts modified the doctrine after independence to accommodate the new federal structure.[41] *Parens patriae* has now become a tool that states use to protect the well-being of their citizens when no one citizen has standing to sue

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defense. Second, the court would not require Union Carbide to submit to the exclusive discovery requirements of the Federal Rules of Civil Procedure, because the court could not require the Indian government to similarly submit. Despite these holdings, the court required Union Carbide to submit to Indian jurisdiction.

36. *Id.*; *see supra* note 14.

37. Pfizer, Inc. v. Lord, 522 F.2d 612, 616 (8th Cir. 1975).

38. The royal prerogative consists of those rights and capacities which the King singularly enjoys. It is a special pre-eminence which the sovereign has over all other persons. BLACK'S LAW DICTIONARY 1195 (5th ed. 1979). For an in-depth discussion of the history of *parens patriae* in England, see Comment, *Parens Patriae Antitrust Suits by Foreign Nations*, 6 DEN J. INT'L L. & POL'Y 705, 712 (1977).

39. 2 W. BLACKSTONE, COMMENTARIES *48.

40. Comment, *supra* note 38, at 719.

41. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600-01 (1981) (footnotes omitted). Louisiana v. Texas, 176 U.S 1 (1900), illustrates these changes. The Court held that Louisiana could not sue as *parens patriae* when representing particular plaintiffs; the general public must suffer harm.

> It is in [the] aspect [that the harm affects the public at large] that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens. . . . Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to

and thus cannot remedy the problem.[42]

In the United States, the doctrine of *parens patriae* was historically used by one State to sue another.[43] In 1975, however, a foreign government first claimed *parens patriae* standing.[44] Although the court did not explicitly decide if a foreign government could claim *parens patriae* standing, by using the traditional common law analysis the court implicitly decided that a foreign government may claim *parens patriae* standing like a state, if the government meets the necessary requirements. A history of the *parens patriae* issue as it developed within the United States is necessary to understand the relevance of this issue to the Bhopal situation.

II. Requirements For *Parens Patriae* Standing

A. Necessity of a Quasi-Sovereign Interest

The primary requirement for a State to maintain *parens patriae* standing is harm to a State's quasi-sovereign interest.[45] Quasi-sovereign interests

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seek relief in this way because the matters complained of affect her citizens at large.

Id. at 19. Louisiana sought to enjoin Texas from maintaining a quarantine which established an embargo on goods shipped from New Orleans. Texas introduced the quarantine because a single case of yellow fever had developed in New Orleans. The Court denied *parens patriae* standing to Louisiana for failure to assert an injury to a quasi-sovereign interest of the state. The court held that no controversy existed between the two states because "acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State." *Id.* at 22. The court further held that the bill did not present a controversy between a State and citizens of another State, but the court did not give any reason for this conclusion. *See id.* at 22-23. The court focused on the requirement of a distinct controversy between two states or between a State and the citizens of another State because Louisiana sought to invoke the Court's original jurisdiction. *Id.* at 23. In contrast, when a party does not seek to invoke the Court's jurisdiction for determining *parens patriae* standing, the Court merely requires that a state assert a quasi-sovereign interest, making it more than a nominal party. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). The Court did not define a quasi-sovereign interest. However, the Court did establish that such an interest existed independently from individuals' interests, and involved injury to the entire populace.

42. *See infra* text accompanying notes 51-54.

43. *See, e.g.*, Kansas v. Colorado, 185 U.S. 125 (1902) (Kansas sued to enjoin Colorado from diverting the water of the Arkansas River and thereby drastically reducing the volume of water flowing through Kansas); Missouri v. Illinois, 180 U.S. 208 (1901) (Missouri sued to enjoin Illinois from discharging the sewage of Chicago into the Mississippi river); Louisiana v. Texas, 176 U.S, 1 (1900) (Louisiana sued Texas to enjoin Texas from maintaining a quarantine on Louisiana goods).

44. *See* Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975). This was the first case in which a foreign government claimed *parens patriae* standing. India, Iran, the Philippines, and Vietnam unsuccessfully sought *parens patriae* standing to sue U.S. pharmaceutical companies for price fixing. Although the court did not explicitly state that a foreign government could claim *parens patriae* standing, the court used the traditional common law analysis, implying that a foreign government could sue as *parens patriae* if the government met the traditional requirements. *Id.*

45. *Alfred L. Snapp*, 458 U.S. at 601. United States courts developed the concept of a quasi-sovereign interest to fit within the U.S. dual-sovereign, Federal-State system. *See supra* note 41 and accompanying text. For a discussion of the effect of a

must be distinguished from interests that private citizens may remedy by litigation, as well as from the sovereign and proprietary interests of the state. Courts classify the following three interests as quasi-sovereign interests: protecting the physical welfare of citizens, ensuring the well-being of the economy, and maintaining a state's rightful position in the federal system.

A clear delineation of the previous categories is difficult.[46] Indeed, the Supreme Court has never specifically defined a quasi-sovereign interest. As the Court explained in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, "[q]uasi-sovereign interests . . . consist of a set of interests that the State has in the well-being of its populace. Formulated so broadly, the concept risks being too vague. . . . The vagueness of this concept can only be filled in by turning to individual cases."[47] The following cases provide some guidance for determining what constitutes a quasi-sovereign interest.

The cases fall into three basic groups. First, States have historically succeeded in obtaining *parens patriae* standing to protect the physical well-being of their citizens by enjoining public nuisances.[48]

Second, a State's quasi-sovereign interest includes protecting its economic well-being.[49] The differing outcomes of two cases illustrate the limits of this aspect of the doctrine. In *Pennsylvania v. West Virginia*,[50] Pennsylvania obtained *parens patriae* standing to enjoin West Virginia from withdrawing its natural gas from interstate commerce.[51] The Court found that such a withdrawal of natural gas would seriously jeopardize the Pennsylvania citizens' health, comfort and welfare.[52] In *Oklahoma v. Atchison, Topeka & Santa Fe Ry.*,[53] however, the Court denied Oklahoma standing when it sought to prevent a railroad company from charging unreasonable rates for a few specific commodities.[54] Oklahoma alleged that these commodities were essential to the development of the state.[55] According to the Court, as later clarified in

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foreign nation claiming *parens patriae* standing instead of a State, see *infra* notes 71-79 and accompanying text.

46. *Alfred L. Snapp*, 458 U.S. at 601. "[A] quasi-sovereign interest . . . is a judicial construct that does not lend itself to a simple or exact definition." *Id.*

47. *Id.* at 602.

48. *See, e.g.* North Dakota v. Minnesota, 263 U.S. 365 (1923) (flooding); Wyoming v. Colorado, 259 U.S. 419 (1922) (division of water); New York v. New Jersey, 256 U.S. 296 (1921) (water pollution); Georgia v. Tennessee Copper Co., 206 U.S 230 (1907) (air pollution); Kansas v. Colorado, 206 U.S. 46 (1907) (division of water); Kansas v. Colorado, 185 U.S. 125 (1902) (division of water); Missouri v. Illinois, 180 U.S. 208 (1901) (water pollution); *see also* Annotation, *State's Standing to Sue on Behalf of its Citizens*, 42 A.L.R. FED. 23 (1979).

49. Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

50. *Id.*

51. *Id.*

52. *Id.* at 592-93.

53. 220 U.S. 277 (1911).

54. *Id.* at 289. The commodities were lime, cement, plaster, brick, stone and oil. *Id.* at 286-87.

55. *Id.* at 284.

Oklahoma v. Cook,[56] the State had no direct interest in the transportation of these commodities, but was instead trying to represent the rights of the shippers.[57] Despite the possible broad reading of *Pennsylvania*, that a state may sue as *parens patriae* to remedy the economic harms of its citizens, the two *Oklahoma* decisions demonstrate that courts will only grant *parens patriae* standing to a State seeking to protect its economic well-being when the injury harms the entire populace, and individuals cannot sue to remedy the situation.

Third, a State has a quasi-sovereign interest in maintaining its rightful status within the federal system.[58] These *parens patriae* actions allow a State to guarantee its residents either the benefits created, or hardships alleviated by federal statutes.[59] This doctrinal allowance is obviously inapplicable to foreign sovereigns such as India.

Quasi-sovereign interests must be distinguished from other interests that might motivate a State to sue but which do not constitute grounds for *parens patriae* standing. A State's quasi-sovereign interests do not include its citizens' own private interests.[60] States also have proprietary and sovereign interests. Proprietary interests result from ownership of land or participation in business ventures.[61] Sovereign interests include "[t]he exercise of sovereign power over individuals and entities within the relevant jurisdiction . . . [and] the demand for recognition from other sovereigns. . . ."[62] None of these state interests are "quasi-sovereign," and no case has allowed them to give a state standing under the *parens patriae* doctrine.

B. Limitations on the Right of a State to Sue as *Parens Patriae*

The courts have placed three limitations on *parens patriae* standing. First, the defendant must violate an interest of the State, independent of the interest of its particular citizens (i.e., a quasi-sovereign interest).[63] Second, the harm must extend to a substantial portion of the population.[64] Third, the State must overcome the courts' skepticism towards State assertion of a quasi-sovereign interest in the well-being of the State's economy.[65]

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56. Oklahoma v. Cook, 304 U.S. 387, 395 (1938) (interpreting Oklahoma v. Atchison, Topeka & Santa Fe Ry., 220 U.S 277 (1911)).

57. *Atchison*, 220 U.S. at 287.

58. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

59. *See, e.g., id.* (federal employment service scheme); Maryland v. Louisiana, 451 U.S. 725 (1981) (Natural Gas Act); Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) (federal antitrust laws).

60. *See infra* notes 69-83 and accompanying text.

61. *Alfred L. Snapp*, 458 U.S. at 601.

62. *Id.*

63. *See infra* notes 66-70 and accompanying text.

64. *See infra* notes 71-79 and accompanying text.

65. Moreover, the Court rarely finds such an interest if there is no corresponding injury to the state's position in the federal system. *See infra* notes 80-90 and accompanying text.

1. State's Interest Must be Independent of Citizens' Interest

The courts refrain from granting *parens patriae* standing when private individuals can obtain adequate relief.[66] Thus, a State cannot use *parens patriae* to represent the individual interests of particular citizens; the State must have its own independently wronged quasi-sovereign interest.[67] The Supreme Court established this limitation in 1907 in *Georgia v. Tennessee Copper Co.*[68] This limitation seeks to protect defendants from double liability that could occur if both a State and an individual could sue for the individual's harm.[69] Thus, historically, a State has successfully maintained *parens patriae* standing when no one individual could sue and obtain adequate relief.[70]

2. Injury to Substantial Portion of the Population

Although *parens patriae* standing requires that the injury extend to the public-at-large, it need not directly harm all of a state's citizens. Injury to a substantial segment of the population will probably justify *parens patriae* standing.[71] Furthermore, even when the harm directly affects an identifiable group of persons, a court may sustain *parens patriae* standing if the harm extends indirectly to a substantial portion of the population.[72] For example, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, Virginia apple growers directly discriminated against an indentifiable group of Puerto Rican citizens. The Supreme Court granted Puerto Rico *parens patriae* standing, however, because the indirect effects of discrimination

66. *See, e.g.*, Oklahoma v. Atchison, Topeka & Santa Fe Ry., 324 U.S. 439 (1911) (court denied Oklahoma *parens patriae* standing to sue the railroad for excessive rates, since the shippers could sue); Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975) (court denied several governments *parens patriae* standing to sue U.S. pharmaceutical companies for excessive prices, since foreign nationals could sue).

67. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907).

68. *Id.*

69. *See generally* New York v. Louisiana, 108 U.S. 76 (1883); Note, *Civil Procedure—The Right of a State to Sue as Parens Patriae—Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 19 WAKE FOREST L. REV. 471 (1983).

70. *See, e.g.*, Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) (*parens patriae* standing granted to sue twenty railroads for conspiracy to fix prices in violation of § 16 of the Clayton Act, article III, § 2 of the U.S. Constitution, and 28 U.S.C. § 341); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (*parens patriae* standing granted to Georgia to seek injunctive relief to prevent Tennessee Copper Co. from discharging noxious gases which spread over Georgia even though elements which would form the basis of relief between private parties were wanting); Missouri v. Illinois, 180 U.S. 208 (1901) (court granted Missouri *parens patriae* standing to sue for an injunction to prevent Illinois from discharging sewage into the Mississippi river).

71. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

72. *Id.* The Court's language on this point is somewhat contradictory. An identifiable group of Puerto Rican citizens who came to the United States to work in the apple orchards was directly harmed. The Court said indirect harm to a substantial portion of the population would justify *parens patriae* standing. However, the Court held that discrimination directly harms the entire population. For the future, it remains unclear whether the indirect harm must be to the entire population as required by Louisiana v. Texas, 176 U.S. 1 (1900), or if indirect harm to a substantial portion of the population will suffice.

"carry a universal sting"[73] and thus indirectly harmed all Puerto Ricans.[74]

The fact that individuals may find it difficult to file suit, however, will not justify granting *parens patriae* standing. In *Pfizer, Inc. v. Lord*,[75] the court denied *parens patriae* standing to four foreign governments seeking to sue several U.S. drug companies for conspiring to fix prices. The widespread purchase and use of the overpriced drugs by these countries' citizens did not justify their governments' *parens patriae* intervention.[76] Although the harm affected a substantial segment of the population, the injured individuals could sue the drug companies in their own right. The governments argued that the *parens patriae* concept should be expanded so they could "sue on behalf of persons legally entitled to sue on their own behalf, but as a practical matter generally unable to do so."[77] The court rejected this argument, but suggested that governments might be able to bring a class action suit on behalf of their citizens.[78] Moreover, in rejecting the plea that distance made private suits impractical, the court said that "[t]he mere fact that the claimant or creditor is a foreign national does not afford him or his government access to judicial procedures barred to domestic creditors."[79]

3. *Courts Treat Skeptically a State's Assertion of a Quasi-Sovereign Interest in the Well-Being of the Economy*

Courts view skeptically a State's arguments regarding injury to its general economy as a basis for *parens patriae* standing. States have successfully asserted this injury only twice.[80] The Supreme Court stated its reason for this skepticism in *Hawaii v. Standard Oil Co.*: "A large and ultimately indeterminable part of the injury to the 'general economy,' . . . is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves. . . ."[81]

In both cases where the State successfully maintained *parens patriae* standing for an injury to the general economy, the State had another element to its argument besides economic injury. In *Alfred L. Snapp &*

73. *Alfred L. Snapp*, 458 U.S. at 607.
74. *Id.* at 609.
75. 522 F.2d 612 (8th Cir. 1975).
76. *See id.*
77. *Id.* at 617.
78. *Id.*
79. *Id.*
80. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982) (refusal by Virginia apple growers to use Puerto Rican pickers harmed Puerto Rican economy); Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) (price fixing by railroads is a monopolistic activity that harms Georgian economy). *But see* Pennsylvania v. West Virginia, 262 U.S. 553 (1923). Although Pennsylvania argued that withdrawal of natural gas from commerce would hurt its economy, Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975), has interpreted *Pennsylvania* as seeking an injunction to prevent a potential injury to the physical well-being of its citizens.
81. Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).

Son, Inc. v. Puerto Rico, as already seen, the Court found that Puerto Rico had a substantial interest both in protecting its residents from discrimination,[82] and pursuing the Commonwealth's full and equal participation in a federal employment service scheme.[83] In *Georgia v. Pennsylvania Railroad Co.*,[84] Georgia sought injunctive relief under § 16 of the Clayton Act against several railroads for conspiracy to fix prices. Georgia claimed that her freedom from antitrust conspiracies, guaranteed to all the states by the federal government, was being violated.[85] Thus, in addition to damage to her general economy, Georgia could argue that her quasi-sovereign interest in maintaining her equal position among the states had been violated.[86] In contrast, *Oklahoma v. Atchison, Topeka & Santa Fe Ry.* resulted in the denial of *parens patriae* standing.[87] The Court refused to find that the economic harm to Oklahoma's industrial development was anything other than the sum of specific harms actionable by private parties.

Dicta in *Hawaii v. Standard Oil*[88] elucidates one reason for the courts' skepticism. There, the Court suggests that suits for physical harm are usually injunctive in nature, whereas suits for damages contain the danger of double liability.[89] If the State can receive damages as *parens patriae*, the individuals harmed may still have standing to sue, leaving the defendant open to multiple liability.[90]

III. Analysis

A. The Court Should Have Denied India *Parens Patriae* Standing

Although the district court denied India the exclusive representation of the plaintiffs, the court did not decide if the Indian government was a proper party to the litigation.[91] The court should have denied India *parens patriae* standing before deciding the forum non conveniens issue. India did not have an injured quasi-sovereign interest, but instead merely sought to represent the individual claims of its citizens.[92] The court's failure to reach the *parens patriae* issue significantly reduced the plaintiffs' ability to settle the case and sets a precedent for the same result in future cases.

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82. *Alfred L. Snapp*, 458 U.S. at 608-10.
83. *Id.*
84. 324 U.S. 439 (1945).
85. *Id.* at 497.
86. *Id.*
87. Oklahoma v. Atchison, Topeka & Santa Fe Ry., 220 U.S. 277 (1911).
88. 405 U.S. 251 (1972).
89. *Id.* at 261-62.
90. *Id.*
91. *In re* Union Carbide Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986).
92. *See supra* notes 45-62 and accompanying text.

1. Lack of a Quasi-Sovereign Interest

a. India is Not Protecting the Physical Well-Being of its People

Generally, *parens patriae* standing for physical harm has been based on harm to the environment, and the relief sought has been an injunction, not damages.[93] Cases allowing such suits do so to *prevent* harms, such as enjoining the diversion of water from an interstate stream,[94] or enjoining the discharge of sewage into the Mississippi.[95] Justice Holmes described such an interest as "independent of and behind the titles of its citizens, in all the earth and air within its domain."[96] Union Carbide, however, has caused harm to individual citizens, rather than a continuing harm to the environment necessitating an injunction. Although physical harm from the gas leak may continue, the actual leak has ceased. Intervention by India, therefore, is unnecessary. Although 200,000 Indian citizens suffered physical harm, the degree or extent of the harm will not alone justify *parens patriae* standing.[97] The harm may affect every citizen, but *parens patriae* standing will not be justified unless the state has an injured quasi-sovereign interest. The state must have an injured interest, separate from the summation of individual citizens' interests, "independent of and behind the titles of its citizens. . . ."[98]

b. India is Not Suing to Protect its Citizens' Economic Welfare

India is not seeking to protect the economic well-being of its people. No independent harm to the State exists; rather, the economic harm is a summation of individual economic harms. Granted, the individual victims suffered severe economic harm, but the injured individuals can sue to recover damages.

A comparison to a case where the economic harm did give rise to a quasi-sovereign interest may prove helpful. In *Georgia v. Pennsylvania R.R. Co.*,[99] Georgia alleged that the defendant railroads had violated antitrust laws by conspiring to fix rates in a way that discriminated against Georgia.[100] The Court wrote that,

> [trade barriers] may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may

93. *See* Pfizer, Inc. v. Lord, 522 F.2d 612, 616 (8th Cir. 1975).
94. Kansas v. Colorado, 206 U.S. 46 (1907).
95. Missiouri v. Illinois, 180 U.S. 208 (1901).
96. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). Mr. Justice Holmes noted that when a state sues the defendant for injuring one of its quasi-sovereign interests, the suit differs significantly from a case between two private parties. The grounds which give rise to equitable relief among fellow citizens are lacking. Equitable grounds for granting fellow citizens relief do not exist when a state substitutes for a probable plaintiff. The state may not own the damaged territory. Furthermore, a court cannot estimate the state's damage in money. The states gave up certain rights by joining the union; yet their quasi-sovereign interests remain. *Parens patriae* provides states with an alternative to force in protecting these interests.
97. *See supra* notes 75-76 and accompanying text.
98. *Georgia*, 206 U.S. at 237.
99. 324 U.S. 439 (1945).
100. *Id.* at 443.

> affect the prosperity and welfare of a state . . . profoundly. . . . 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.[101]

This kind of claim clearly fits the dictum of Justice Holmes that a "State has an interest independent of and behind the titles of its citizens."[102] The economic harm occurring in Bhopal, in contrast, is to specific individuals. Compensating the individuals, not the State, will compensate for the harm. Moreover, in alleging harm to its economic well-being, Georgia also was being deprived of the benefits of the federal antitrust laws and thus was seeking restoration to its rightful place within the Federal system. In addition, the remedy sought in *Georgia* was injunctive relief, directed at continuing economic harm, and precluding double recovery from the same defendant.[103]

2. India Improperly Seeks to Represent the Individual Claims of her Citizens

The Indian government provided in the Bhopal Ordinance that "the central government shall represent and act in place of any claimant."[104] Therefore, even if India shows that Union Carbide harmed a quasi-sovereign interest, the court should not grant *parens patriae* standing. A court will refuse to grant *parens patriae* standing if the state usurps its citizens' claims, despite making a prima facie case that a quasi-sovereign interest has been harmed. In *New York v. Louisiana*,[105] for example, the Court denied *parens patriae* standing for claims that individuals had assigned to the state. After a group of New York residents had assigned their Louisiana consolidated bonds to New York, New York sued Louisiana for the balance due on the bonds.[106] The Court held that one state cannot create a controversy with another state by assuming debts owed to its citizens and then suing for payment of the debts.[107] Just as in *New York v. Louisiana*, the Bhopal Ordinance reveals a clear intent by India to usurp the specific claims of its citizens.

3. The Bhopal Ordinance Violates U.S. Sovereignty

The doctrine of sovereignty assumes that each nation legislates for itself, that its legislation governs itself alone, and that its legislation operates only within its own territory.[108] One State's actions, however, frequently have effects beyond the State's borders. The United States will only give legal effect to a foreign sovereign's actions if such actions fall

101. *Id.* at 450-51.
102. *Georgia*, 206 U.S. at 237.
103. *Pennsylvania*, 324 U.S. at 443.
104. Riley, *supra* note 5 (quoting the Bhopal Ordinance).
105. 108 U.S. 76 (1883).
106. *Id.*
107. *Id.* at 91.
108. 45 AM. JUR. 2D *International Law* § 38 (1969).

within one of two doctrines: the act of state doctrine or the principles of comity.

The Supreme Court provided the classic formulation of the act of state doctrine in *Underhill v. Hernandez*:[109] "Every sovereign is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of another done within its own territory."[110] The act of state doctine thus confers presumptive validity on certain acts of a foreign sovereign by rendering claims that challenge such acts non-justiciable.[111] The purpose of the doctrine is to avoid embarrassing the executive in its exercise of foreign relations if that might occur by inquiring judicially into the validity of a foreign sovereign's acts.[112] In the United States, this doctrine is a function of separation of powers, according preeminence in foreign policy matters to the executive and legislature.[113]

The act of state doctrine gives legal effect to a foreign sovereign's actions, in that U.S. courts will not entertain a legal challenge to the sovereign's actions.[114] The doctrine only applies, however, when the act, such as a taking of property, is accomplished within the foreign sovereign's borders.[115]

The act of state doctrine does not protect the Bhopal Ordinance. The Ordinance declared that the Indian government "shall have the exclusive right to represent, and act in place of every person who has made claim or is entitled to make" a claim against Union Carbide Corp.[116] By dictating that the Indian government has standing to sue in U.S. courts, the Bhopal Ordinance clearly acts beyond India's borders, making the act of state doctrine inapplicable.

Allied Bank International v. Banco Credito Agricola De Cartago explains that when an act of a foreign government falls outside the act of state doctrine, recognition of the act by the courts will only be granted if the principles of comity necessitate that result.[117] Comity requires that U.S. courts recognize acts of foreign governments only if they are consistent with the law and policy of the United States.[118]

The Bhopal Ordinance clearly contradicts U.S. policy. One of the settled principles of *parens patriae* standing is that U.S. courts refuse to grant such standing if the State is usurping its citizens' claims.[119] The

109. 168 U.S. 250 (1897).
110. *Id.* at 252.
111. Allied Bank International v. Banco Credito Agricola De Cartago, 757 F.2d 516, 520 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985).
112. *Id.* at 520-21.
113. *Id.* at 520 (discussing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964)).
114. Banco Nacional de Cuba v. Sabbatino, 367 U.S. 398, 428 (1964).
115. *Allied Bank*, 757 F.2d at 521.
116. Riley, *supra* note 5 (quoting the Bhopal Ordinance).
117. *Allied Bank*, 757 F.2d at 522.
118. *Id.*
119. *See supra* notes 106-107 and accompanying text.

Ordinance specifically requires India to act "in place of" every person who has a claim.[120] Therefore, principles of comity do not apply.

The ordinance legislates who has standing to sue in U.S. courts. This intended extraterritorial effect violates U.S. sovereignty. Under the doctrine of sovereignty (unless covered by the act of state doctrine or principles of comity), only U.S. legislation can determine who has standing to sue in U.S. courts.[121] India anticipated that the ordinance might violate U.S. sovereignty and therefore drafted it to allow judicial discretion.[122] Although the ordinance's first section grants India "exclusive" representation of the claimants, the second section states that "the Government shall represent, and act in place of, or along with, such claimant [for suits already filed] as such court or other authority so permits."[123]

4. Policy Reasons Support Denial of Parens Patriae *Standing to India*

Policy as well as legal reasons support denying India *parens patriae* standing. First, the Indian Constitution grants its citizens the right to pursue actionable claims, implying a right to settle claims.[124] Therefore, arguably the Bhopal Ordinance violates the Indian Constitution. Second, the $358 million offer may exceed whatever damage award could be obtained by litigation in India, since Union Carbide, India, Ltd., has assets of only $70 million. The risks of pursuing litigation will subsequently be discussed, but given the risks, accepting the settlement offer is a reasonable decision. Third, the U.S. court system allows judicial scrutiny of proposed settlements,[125] thus providing plaintiffs with adequate safeguards from making a bad decision. Intervention by India to prevent the plaintiffs from accepting an inappropriate settlement was unnecessary. Although the plaintiffs in the Bhopal litigation requested that Judge Keenan review Union Carbide's $358 million settlement offer, he refused because India had already rejected the offer. Therefore, not only did India lack legal standing to *parens patriae* representation, but given the above arguments, it also lacked practical or policy reasons for bending or expanding the law in this particular case.

B. Settlement: The Best Solution

Although the plaintiffs wanted to accept Union Carbide's $358 million settlement offer, the Indian government refused to settle and threatened to pursue litigation based on *parens patriae*.[126] Three reasons demonstrate why settlement offers a better solution than a change of forum to India. First, industrial disaster victims need immediate compensation; settlement provides such timely compensation. Without settlement, liti-

120. *See supra* text accompanying note 116.
121. *See* 45 AM. JUR. 2D *International Law* § 38 (1969).
122. Riley, *supra* note 5 (quoting the Bhopal Ordinance).
123. *Id.* (quoting the Bhopal Ordinance).
124. *See supra* note 21.
125. FED. R. CIV. P. 23.
126. *See supra* notes 25-26 and accompanying text.

gation now continues and will probably continue for several years.[127] Meanwhile, the victims remain uncompensated.[128] Two years after the Bhopal disaster, the courts have merely managed to decide the proper forum for litigation;[129] a trial on the merits has not even begun.

Second, settlement guarantees that the victims receive more than a minimal award. The accident occurred at a pesticide plant owned by Union Carbide, India, Ltd., a corporate entity with attachable assets of only $70 million.[130] To collect damages exceeding $70 million, the plaintiffs must prove the legal culpability of the parent company, Union Carbide Corp.[131] Legally, Union Carbide Corp. may not be liable for the Bhopal disaster.[132] In order to pursue litigation in India, jurisdiction over Union Carbide Corp. must be obtained. Even then, an Indian court judgment probably would not end the litigation. India would have to return to the United States to enforce the judgment against Union Carbide Corp. and levy the judgment against Union Carbide's U.S. assets. United States courts, however, often refuse to enforce such foreign judgments.[133]

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127. Galanter, *supra* note 13, at 276-77. The case of a Lufthansa pilot illustrates the problems of prolonged litigation in India. Left quadraplegic after a New Delhi hotel swimming pool accident, the pilot sued the hotel in 1974. Ten years later the counsel stated that "[t]rial is years away and appeals could take decades." Stewart, *supra* note 13, at 16, col. 2.

128. The Indian government and Union Carbide have given minimal emergency aid to some victims. Judge Keenan urged Union Carbide to create a $5 to $10 million emergency relief fund. Cates, *100 Lawyers Start the Legal Cleanup*, 7 Nat'l L.J., Apr. 29, 1985, at 13. Although an emergency fund constitutes a nice gesture, especially considering the inefficiency of the legal system, the courts should concentrate on timely compensating the victims.

129. *See supra* note 10 and accompanying text.

130. *See infra* note 131 and accompanying text.

131. Assuming the plaintiffs successfully overcome the preliminary legal issues, Union Carbide Corp. may still not suffer liability for the Bhopal disaster. First, the plaintiffs must establish Union Carbide, India, Ltd.'s liability. Such a burden may prove difficult, especially because the Indian government may have negligently inspected and maintained the plant. Dhavan, *For Whom? and For What? Reflections on the Legal Aftermath of Bhopal*, 20 TEX. INT'L L.J. 295, 302-03 (1985). Second, a finding that Union Carbide, India, Ltd., is liable does not make Union Carbide Corp. liable. Because they are two separate corporations, the plaintiffs must convince the court to pierce the corporate veil. Such a task is difficult to accomplish under U.S. law. If Union Carbide Corp. (the parent of Union Carbide, India, Ltd.) is not liable, only the $70 million from Union Carbide, India, Ltd. will be available to satisfy a judgment. Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L.J. 321 (1985). Third, if Union Carbide Corp. is liable, India may have to proceed through U.S. courts to enforce the judgment. Thus, successful litigation of this case is questionable.

132. *See* Westbrook, *supra* note 131.

133. Foreign judgments are enforceable in the United States as conclusive against the parties. *See* Art. 53, Recognition of Foreign Country Money Judgments, 7B N.Y. CIV. PROC L. & R. §§ 5301-09 (McKinney 1978). However, the court will have an enforcement hearing, allowing the defendant to raise defenses such as lack of due process. Judge Keenan feared that a court might not enforce an Indian judgment, therefore, he conditioned his dismissal on Union Carbide's consent to the enforceability of as Indian judgment. *In re* Union Carbide Corp Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986). The second circuit reversed, citing the above statute. *In*

Finally, *parens patriae* may not obligate India to distribute any awarded damages to the victims.[134] Because India would theoretically be suing as *parens patriae* for harm done to its quasi-sovereign interest, independent from the interests of the accident victims, the State theoretically could retain the recovered damages.[135] In prior cases, this result has not presented a problem because *parens patriae* suits have sought injunctive relief, ending a continuing harm. In such suits, the citizens receive the benefit of the injunction even though legally the state received it. Although the *Alfred* court stated that damages were available under *parens patriae*, no court has decided who is entitled to the damages.

The fact that the plaintiffs wanted to accept settlement is itself an argument that settlement is the best solution. They and their representatives are in the best position to know what they most need: compensation now, or the chance of greater compensation later. When present value is taken into consideration, even a substantially greater sum of money five years from now would not equal the value of the smaller sum today. Although India can afford to wait to protect its sovereign pride, the interests of the victims are substantially different.

1. Court Should Identify the Parties to Facilitate Settlement

To facilitate settlement, the courts should identify the parties with legal standing to sue. Such identification eliminates improper claimants from impeding settlement negotiations. A large-scale disaster involves many groups with differing interests. In the Bhopal case these included: the victims, Union Carbide, the Indian government, and the plaintiffs' lawyers who solicited clients from among the victims.[136] Requiring Union Carbide to negotiate with each separate interest group would decrease the probability of settling the case.[137] The court partially alleviated this problem by naming a three member executive committee to represent the plaintiffs, displacing many lawyers who sought ligitation to guarantee their own fee.[138] The court needed, however, to narrow the parties further by reaching the issue of India's *parens patriae* standing. It should have removed India as a party to the case so the real parties at issue could settle.

2. The Class Action Suit with the State as Representative

As an alternative to a *parens patriae* action, the courts in *Hawaii v. Standard Oil Co.*[139] and *Pfizer, Inc. v. Lord*[140] suggested that the state could bring a

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re Union Carbide Gas Plant Disaster, 809 F.2d 195 (2d Cir.) *cert. denied*, 108 S.Ct. 194 (1987).

134. *See generally* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982).

135. *Id.*

136. Dhavan, *supra* note 131 at 305.

137. Indeed, we have seen how difficult, even impossible it has been for Union Carbide to reach a settlement when it must negotiate with two parties at interest: the victims and the Indian government. *See supra* note 25 and accompanying text.

138. *See Judge Selects Panel to Direct Bhopal Litigation, supra* note 21.

139. 405 U.S. 251 (1972).

class action suit on behalf of its citizens.[141] Whether courts should promote such suits in disaster cases like Bhopal involves a weighing of relative advantages and disadvantages beyond the scope of this Note. This Note will, however, briefly outline the relative factors.

In the Bhopal case, the interests of India and the victims are very different. The victims need immediate compensation, and may, therefore, settle for a smaller amount of money. India, however, can wait several years for a large sum that satisfies its sovereign pride. India can afford the risks of pursuing litigation. The goal is more money than what could be achieved by settlement. The risks are that: 1) the suit could fail; 2) India might win against Union Carbide, India, Ltd., but fail to pierce the corporate veil and reach the assets of the parent company; and 3) India might win against the parent company in court, but be unable to enforce the judgment in U.S. courts, limiting recovery to the $70 million assets of Union Carbide, India, Ltd.[142] The plaintiffs did not wish to accept these risks.[143] Consequently, India's objectives differ from the plaintiffs' so greatly that India should not be allowed to represent the class.

One advantage of the class action suit, however, is that settlement can be reached over the representative's objection, and such settlement becomes res judicata to the entire class. The courts have uniformly used fairness to the class, rather than consent of named representatives, as the standard for settlement approval.[144] Therefore, in the Bhopal litigation, the parties could settle despite India's objection and preclude India from a subsequent suit.

In addition, once a settlement is reached, the class action suit gives the court extensive discretion to manage the case and construct a plan for the distribution of damages.[145] Distribution of damages among the Bhopal victims will prove difficult, but such difficulties exist regardless of the methods used to obtain compensation.[146] A class action suit anticipates these difficulties and gives the court the discretion necessary to fashion an appropriate solution.

IV. Conclusion

The disaster continues as long as the Bhopal victims, or victims of any industrial accident, go without compensation. Settlement, which compensates victims quickly, offers the best means to alleviate this suffering.

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140. 522 F.2d 612 (8th Cir. 1975).
141. *Hawaii*, 405 U.S. at 266; *Pfizer*, 522 F.2d at 618.
142. *See supra* note 131.
143. *See supra* note 25 and accompanying text.
144. *See* Flinn v. FMC Corp., 528 F.2d 1169, 1171 n.19 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir.) *cert. denied*, 419 U.S. 900 (1974); *see also* Strickler, *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73 (1984).
145. FED. R. CIV. P. 23(e); Blumenthal, *Awards Proposed in Agent Orange Suit*, N.Y. Times, Feb. 28, 1985, at B1, col. 1.
146. Dhavan, *supra* note 131, at 305-06.

The courts can facilitate settlement by properly identifying the victims with standing to sue. In the Bhopal disaster case, the courts should have decided the *parens patriae* issue and denied India, as representative of her citizens, standing to sue Union Carbide and receive their compensation. Unfortunately, the Bhopal victims still wait.

Lisa Moscati Hawkes