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Antitrust Remedies - State Given Setback to Sue as Parens Patriae

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do we have it?" The answer is the *Constitution of the United States.*[22] The standards established by the Supreme Court are not intended to be final; they are merely intermediate steps in a long evolutionary process which must continue if the law is to be made complete and perfect. It would be unreasonable to expect the Supreme Court, alone, to develop the details of desegregation law. The Supreme Court has recognized this and acknowledged the vital role played by the lower courts in this evolutionary process. The lower courts have, consequently, been left with a great deal of discretion in formulating desegregation decrees in order that they may continue to experiment.[23] A continuing effort on the part of the lower courts to perfect and refine the law is essential if desegregation is to develop beyond its present state. The Supreme Court has provided the lower courts with a mandate for both change and a direction for that change.[24] It is further submitted that the Court in *Swann* could have given credence to lower federal court opinions which recognized such a constitutional duty.[25]

Swann has been considered a busing decision. The Court did not order wholesale busing across the South, but did call for as much "actual" desegregation as possible, and legitimized a reasonable degree of busing as one way to accomplish it.

The Supreme Court left to lower courts how much desegregation and busing to insist upon in each district. The Court's ruling has been applied mainly to urban school districts in the South, those where black schools are locked inside large black neighborhoods. Some civil rights lawyers regarded it as the most important desegregation decree since the Court first outlawed separate black and white schools in 1954.

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State Given Setback to Sue as Parens Patriae

The State of North Carolina has alleged injury to its general economy and to its power of raising revenues through sales taxes.[1] In *North*

[22] 306 F. Supp. 1293 (1969).
[23] — U.S. —, 91 S. Ct. at 1282 (1971), — L. Ed.2d —.
[24] 49 Tex. L. Rev. 902 (1971).
[25] 16 How. L.J. 582 (1971).

[1] North Carolina v. Chas. Pfizer & Co., M-19-93 (S.D.N.Y.), 69 Civ. 839 (S.D.N.Y.), Civil No. 2287 (E.D.N.C., filed Jan. 31, 1969).

Carolina v. Chas. Pfizer & Co.,[2] a 1969 case filed involving drug manufacturers conspiring to fix prices with the resulting damage to the general economy of the state, North Carolina seeks recovery as *parens patriae*.[3] The state alleges that due to price-fixing conspiracy the price within the state of certain antibiotic drugs was artificially high. Citizens expend more of their income on prescription drugs, and accordingly have less money available for saving and purchasing. Since there is no tax on prescription drugs, purchasers buy fewer items subject to the sales tax and thereby the state's revenues are correspondingly diminished. The purpose of the suit is to save millions of dollars for the state. North Carolina antitrust laws have been on the books since 1913 and there has never been an action for consumers brought against the companies. If the business community knows the state will sue, competitive bids should follow. The filing of this suit marks a new day, a new era in consumerism.

Generally speaking *Parens patriae*, the parent of the country, is the government's duty to guard the interests of children, lunatics, and other dependents, and to protect and control them.[4] In the United States, the term has been expanded to include cases where a state seeks redress for injuries to quasi-sovereign interests, such as damage to its general economy or environment. We are dealing here with the quasi-sovereign interests and not the historical role of protecting incompetents. The quasi-sovereign interest includes the health, comfort and prosperity of its citizens.[5] The Supreme Court in *Georgia v. Pennsylvania R.R.*, *supra*, a 1945 case involving railroad companies conspiring to fix rates so as to discriminate against the state, recognized the propriety of a *parens patriae* suit for damages.[6] Georgia was not allowed to recover its alleged damages; however a precedent was set for giving states standing to sue as *parens patriae* in order to seek recovery for damages to their general economy.

In *North Carolina v. Chas. Pfizer & Co.*,[7] the case is pending in a

[2] *Id.*

[3] The *parens patriae* or quasi-sovereign capacity is one in which a state asserts its position as agent and protector of all its citizens in behalf of their general welfare. Georgia v. Pennsylvania R.R., 324 U.S. 439, 443-44 (1945).

[4] *Ballentine's Law Dictionary* 911 (rev. 3rd ed. 1969).

[5] Kansas v. Colorado, 206 U.S. 46 (1907), Missouri v. Illinois, 180 U.S. 208 (1901).

[6] 324 U.S. 439 (1945).

[7] North Carolina v. Chas. Pfizer & Co., M-19-93 (S.D.N.Y.), 69 Civ. 839 (S.D.N.Y.), Civil No. 2287 (E.D.N.C., filed Jan. 31, 1969).

Minneapolis U.S. District Court and is counting on the favorable outcome of the *Hawaii v. Standard Oil Co. of California* case.[8] This note explains why North Carolina was given a setback to sue as *parens patriae.*

The United States Court of Appeals for the Ninth Circuit held that the State of Hawaii, as *parens patriae,* could not maintain a treble suit for injury to its general economy resulting from an alleged conspiracy to fix unreasonably high prices for motor gasoline and asphalt in the state.[9] Hawaii's claim of damages to economy was fought by the defendant oil companies, for if the *parens patriae* count was upheld, the defendant could have been liable for substantial monetary damages.

North Carolina was encouraged when Chief Judge Martin Pence of the United States District Court, District of Hawaii, denied a motion to dismiss the *parens patriae* count.[10] However, the United States Court of Appeals for the Ninth Circuit justified its action in the light of Hawaii's inability to articulate a more precise theory or measure of damages to the general economy. Even accepting injury, such injury is indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection. In section 4 of the Clayton Act,[11] one may not recover for injury which is an incidental or remote consequence of defendant's violation.

The State of North Carolina is suing Charles Pfizer & Co., Upjohn Co., Bristol-Myers, Olin Mathieson Chemical Corp. and American Cyanamid, accusing them of conspiring to fix prices of antibiotics. Using the *parens patriae* claim, the state is trying to win a pending antitrust suit.[12] There have been only two successful *parens patriae* suits to date: *Georgia v. Pennsylvania R.R.*[13] case and now the case on appeal to the Supreme Court of the United States, *Hawaii v. Standard Oil Co.*[14] In the antitrust suit *North Carolina v. Chas. Pfizer & Co., supra,* the state alleges that part of the damages are for lost tax revenues. North Carolina claims that it has a good measure of the damages alleged because the state requires that records be kept on drug sales. The

[8] Hawaii v. Standard Oil Co. of Cal., 301 F. Supp. 982 (D. Hawaii 1969).
[9] Hawaii v. Standard Oil Co. of Cal., (1970 TRADE CASES ¶73,340).
[10] Hawaii v. Standard Oil Co. of Cal., 301 F. Supp. 982 (D. Hawaii 1969).
[11] 15 U.S.C. § 15 (1964). The Court found that there was no apparent reason why states should be excluded from the purview of the antitrust laws. 324 U.S. at 452.
[12] North Carolina v. Chas. Pfizer & Co., M-19-93 (S.D.N.Y.), 69 Civ. 839 (S.D.N.Y.), Civil No. 2287 (E.D.N.C., filed Jan. 31, 1969).
[13] 324 U.S. 439 (1945).
[14] Hawaii v. Standard Oil Co. of Cal., 301 F. Supp. 982 (D. Hawaii 1969).

difficulty that the United States Court of Appeals for the Ninth Circuit found in allowing a *parens patriae* claim was Hawaii's inability to articulate a more precise theory or measure of damages, thus leaving the court skeptical of the existence of an independent harm to the general economy. The state's claim for lost tax revenue is a claim for damage separate from the damage incurred by citizens as purchasers of gasoline or drugs. As the court in *Standard Oil* pointed out, there is no risk of double recovery when the injuries to the state and its citizens are severable.[15]

North Carolina has developed a *Receiver ad litem*[16] theory which suggests that the class of known purchasers and consumers be supplemented by a class of unknown purchasers. The plan is that the *Receiver* will turn over the unclaimed recovery to the state. The state may have to wait until the recovery held in receivership is deemed abandoned, then the recovery is forfeited to the state. The recovery could be used to reduce taxes or increase governmental services. The courts will not allow the suit to continue as a class action for the group if the members of a class are not likely to share in the judgment.[17]

The progress of the pending North Carolina case, *North Carolina v. Chas. Pfizer & Co.*,[18] hinged to some degree on the decision of the case on appeal from Hawaii. The setback was that the United States Court of Appeals for the Ninth Circuit took a different view of the *Hawaii v. Standard Oil Co., supra,* case than did the United States District Court for the District of Hawaii. The holding was that Hawaii's claim for money damages does not fall within section 4 of the Clayton Act. The reasoning was that an injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. But the terms "business or property" are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community.[19] Since the Hawaii case has been reversed and remanded with instructions that Count II of Hawaii's

[15] *Id.* at 982-988.

[16] Plaintiff's Notice of Motions and Motions for Orders at 2, 3, North Carolina v. Chas. Pfizer & Co., M-19-93 (S.D.N.Y.), 69 Civ. 839 (S.D.N.Y.), Civil No. 2287 (E.D.N.C., filed Jan. 31, 1969); Plaintiff's Memorandum of Points and Authorities in Support of Motions for Orders at 6, 7, *id.*

[17] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968).

[18] North Carolina v. Chas. Pfizer & Co., M-19-93 (S.D.N.Y.), 69 Civ. 839 (S.D.N.Y.), Civil No. 2287 (E.D.N.C., filed Jan. 31, 1969).

[19] Hawaii v. Standard Oil Co. of Cal., (1970 TRADE CASES ¶73,340).

amended complaint be dismissed, North Carolina now stands in the dilemma of what the outcome of its pending case for the people of North Carolina will bring.

The Consumer Protection Division of North Carolina is looking with great interest at the final outcome of the *Hawaii v. Standard Oil Co. of California* case.[20] Up to this date, North Carolina has progressed favorably for the people of North Carolina in its fight for consumer protection. The favorable final outcome of the *North Carolina v. Chas. Pfizer & Co.* case could set a precedent for the nation in recovery by the state for its people in antitrust actions.[21]

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[20] Hawaii v. Standard Oil Co. of Cal., 301 F. Supp. 982 (D. Hawaii 1969).

[21] Notes taken from visiting with Mr. Jean A. Benoy, Deputy Attorney General of State of North Carolina Consumer Protection Division.