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RECENT DEVELOPMENTS

Hawaii v. Standard Oil Co.: Aloha to Parens Patriae?

In a recent decision, the Supreme Court declined to enlarge the role a state can play in bringing treble-damage claims under the antitrust laws. The opinion in *Hawaii v. Standard Oil Co. of California*[1] is instructive in regard to the limitations it has put on plaintiffs in antitrust cases. This note will explore these limitations, as well as the arguments rejected by the Court, and will attempt to show the implications of the holding when viewed in the light of the problem of mass-consumer claims recovery.

Background

The State of Hawaii alleged violations of Sections 1 and 2 of the Sherman Act[2] against three oil companies and a subsidiary of one,[3] and sought to bring a treble-damage[4] action against them in U.S. District Court for the district of Hawaii. Hawaii's fourth amended complaint contained three counts. In Count I the State sued in its proprietary[5] capacity as a consumer of petroleum products. In Count II it sued "by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*,[6] trustee, guardian and representative of its citizens." Count III

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1. 405 U.S. 251 (1972).

2. 15 U.S.C. § 1 (1970):

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . .

15 U.S.C. § 2 (1970):

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . .

3. The defendants were Standard Oil Co. of California, Union Oil Co. of California, Shell Oil Co., and Chevron Asphalt Co. (a subsidiary of Standard of California).

4. *See* note 25 *infra*.

5. The term "proprietary," as used in this article, refers to a state in its non-governmental capacity, as a consumer and purchaser of goods and services.

6. Literally, "father of his country;" BLACK'S LAW DICTIONARY 1269 (4th ed. 1951).

pleaded a class action,[7] the class comprising all purchasers of the defendants' gasoline, asphalt, and/or other refined petroleum products. The district court sustained defendants' motion to dismiss Count III but denied the motion to dismiss Count II.[8] Both rulings were certified for interlocutory appeal[9] to the Ninth Circuit Court of Appeals, but only the denial of the dismissal of Count II was appealed. The Court of Appeals then reversed, ordering the dismissal of Count II.[10] Subsequently, Hawaii petitioned for a writ of certiorari, which was granted on March 1, 1971,[11] and the case was argued before the Supreme Court on October 21, 1971.[12] The possible implications of a decision favorable to Hawaii were suggested by the fact that 37 states joined in submission of an amicus curiae brief. On March 1, 1972, the Supreme Court affirmed the Ninth Circuit in a 5-2 decision.[13]

The Parens Patriae Action

The nub of Hawaii's argument was the concept of a state's ability to sue in its *parens patriae* capacity. A recent study[14] has noted that the term "*parens patriae*" connotes two distinct and unrelated roles which can be assumed by a political entity for judicial purposes. The earlier concept developed in England and derived from the practice of the King acting in his role as general guardian of all infants, idiots and lunatics, as well as the general superintendent over all charities. The study concludes, however, that this source of the *parens patriae* doctrine has been accorded limited use in the United States, and that the classes over which the King exercised his prerogative were limited to those enumerated above. Such a limitation shows that the Crown would not act to protect persons having the legal capacity to assert their own interests, but rather represented only those lacking such capacity.

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7. FED. R. CIV. P. 23(a):

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

8. 301 F. Supp. 982 (D. Hawaii 1969). The class action was dismissed on the ground that "under the circumstances, . . . the class action based upon the injury to every individual purchaser of gasoline in the state, . . . in the context of the pleadings would be unmanageable." Reporter's Transcript at 154 (May 29, 1969).

9. 28 U.S.C. § 1292(b) (1970).

10. 431 F.2d 1282 (9th Cir. 1970).

11. 401 U.S. 936 (1971).

12. 40 U.S.L.W. 3189 (October 26, 1971).

13. 405 U.S. 251 (1972).

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

The second branch of the doctrine emerged from a line of cases in which the original jurisdiction of the Supreme Court was invoked in order for the Court to decide claims of one state against another or claims of one state against citizens of another.[15] These quasi-sovereign rights have been recognized in a number of cases[16] and found wanting in others.[17] Before the Supreme Court will entertain a *parens patriae* action, it has required, first, that the facts show that the state has an interest independent of that of its citizens and, second, that the acts attacked adversely affect a substantial portion of the suing state's inhabitants. As against this background, it is apparent that the *parens patriae* claim cannot be a substitute for class action suits. This much the district court in *Hawaii* admitted in rejecting defendants' motion to dismiss.[18] It will be remembered that the district court also dismissed plaintiff's class action suit, a ruling which Hawaii declined to appeal. While this course of action on Hawaii's part at first appears to be a tactical error, it is submitted that it represents nothing more than an acknowledgement of the practical difficulties with which a class action suit is encumbered.[19]

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15. *Id.* at 202.

16. Missouri v. Illinois, 180 U.S. 208 (1901) (restrain the discharge of sewage into the Mississippi River); Kansas v. Colorado, 206 U.S. 46 (1907) (restrain diversion of water from an interstate stream); New York v. New Jersey, 256 U.S. 296 (1921) (restrain discharge of sewage into New York Bay); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (preclude restraints on the commercial flow of natural gas); North Dakota v. Minnesota, 263 U.S. 365 (1923) (enjoin changes in drainage which increased water flow in an interstate stream).

17. New Hampshire v. Louisiana, 108 U.S. 76 (1883) (collection of claims owed by one state to another); Louisiana v. Texas, 176 U.S. 1 (1900) (enjoin alleged interference with interstate commerce resulting from state quarantine regulations); Oklahoma v. Atcheson, T. & S.F.R.R., 220 U.S. 277 (1911) (recovery for injury allegedly resulting from unlawful freight rates charged its citizenshippers); Oklahoma v. Cook, 304 U.S. 387 (1938) (enforcement of claims of bank's creditors and depositors); Land O' Lakes Creameries v. Louisiana, 160 F. Supp. 387 (E.D. La. 1958) (have labeling statute declared unconstitutional and enjoin officials from giving effect to provisions of statute).

18. "It is not a substitute for a class action under Rule 23, FED. R. CIV. P. The two *theories for recovery* of damages are separate and distinct." 301 F. Supp. at 986 (emphasis in original).

19. *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1 (1971) [hereinafter Handler]; Dole, *The Settlement of Class Actions for Damages,* 71 COLUM. L. REV. 971 (1971) [hereinafter Dole]; and DeLone, *The Use of Rule 23 Class Actions in Antitrust Litigation,* 38 ANTITRUST L.J. 101 (1968) [hereinafter DeLone]. Among the drawbacks in the use of the class action as a tool for mass-consumer damage recovery are: (1) requirements of actual proof of each individual claim (Handler at 7; Dole at 972); (2) difficulty in identifying the members of the class (Handler at 7); (3) staggering tasks of complying with notice requirements (Handler at 7; DeLone at 108-09); (4) "gargantuan" discovery procedures (Handler at 8); and (5) necessity of complying with the seventh amendment guarantee of a jury trial with respect to each claim (*Id.* at 7-8).

Hawaii's *parens patriae* action was bottomed on the contention that the State was suing in its quasi-sovereign capacity for alleged damage to its economy. In its third amended complaint Hawaii had initially made a *parens patriae* claim which was rejected by the district court. This prior claim had asserted that Hawaii was suing as *parens patriae* for the use of its citizens who purchased refined petroleum products. Rejection of this claim resulted in plaintiff's counsel amending the complaint so as to reflect injury to the general economy of Hawaii. The effect of this was that Hawaii thereby abandoned any attempt to sue on behalf of its citizens as consumers. Clearly, in an antitrust action alleging gasoline overcharges, the persons most immediately damaged are the consumers of the gasoline. Hawaii stood to gain recovery, if successful at trial, on its Count I allegation that it was damaged in its proprietary capacity as a purchaser of gasoline and petroleum products. Of course, all other purchasers of gasoline in Hawaii suffered similar damage. However, in its suit as it was presented to the Supreme Court, Hawaii did not seek damages for these persons,[20] but asked instead for damages for harm done to its economy by the alleged violations.[21]

The complaint listed seven specific ways[22] in which Hawaii's economy had suffered.[23] Yet, granting that for the purposes of overcoming a motion to

20. The remedy for these consumers lay in a class action suit. However, by failing to appeal the district court's dismissal of Count III and its subsequent failure to redefine the class, Hawaii abandoned any such action.

21. However, it should be pointed out that in oral argument, counsel for Hawaii suggested that any recovery by the State would ultimately benefit injured citizen-consumers in one of two ways: (1) if the State retained the funds, citizens would benefit by reduced taxation made possible by the recovery, or (2) the State could set up an apparatus through which injured consumers could recover their specific damage claims out of the funds recovered by the State. *See* 40 U.S.L.W. at 3189 (Oct. 26, 1971).

22. "(a) revenues of its citizens have been wrongfully extracted from the economy and citizens of the State of Hawaii;

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

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

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

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

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

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

Fourth Amended Complaint, Count 20.

23. For a practical analysis of how Hawaii's economy may have suffered from gasoline and petroleum overcharges, *see State Protection of Its Economy and Environ-*

dismiss, Hawaii could allege sufficient harm to its economy, there were three weaknesses in the argument Hawaii made to the Supreme Court.

First, all suits by states in their *parens patriae* capacities, save one, have been exclusively for injunctive relief. Hawaii was asking for treble damages under § 4 of the Clayton Act, and in doing so placed great reliance on the one case which did discuss antitrust treble damage suits, *Georgia v. Pennsylvania R. Co.*[24] However, a careful reading of this case reveals that though the decision could conceivably be read to sanction the availability of a damage remedy to a state suing *parens patriae*, no such claim was before the Court in the case. Thus Hawaii relied, as did District Judge Pence, on what is—at best—dicta in but one case.

Secondly, there is the difficult question of whether, assuming that a state suing in its *parens patriae* capacity can maintain an action for damages, the state has suffered an injury remediable under § 4 of the Clayton Act[25] by alleging injury to its economy. The court of appeals responded in the negative. One reason given for this holding was that "business or property," the key words in the statute, "are to be construed in their ordinary sense,"[26] and so taken do not comprise a state's general economy. The court also found that even if a state's economy could suffer injury from an antitrust violation, that injury is too indirect and remote to allow recovery under the Clayton Act.[27]

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ment: Parens Patriae Suits for Damages, 6 COLUM. J.L. & SOC. PROB. 411, 414-16 (1970).

24. 324 U.S. 439 (1945) [hereinafter cited as *Georgia*]. In that case, the State of Georgia sought both injunctive and treble-damages relief for harm done its economy by a railroad price-fixing conspiracy. While the State was granted the injunction, the question of damages was not reached because of a technicality involving the nonsusceptibility of rates set by the Interstate Commerce Commission to antitrust damage recovery under Keogh v. Chicago N.W.R. Co., 260 U.S. 156, 163 (1922).

25. 15 U.S.C. § 15 (1970):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

26. 431 F.2d at 1285. The court contrasted § 4 with § 16, which reads, in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . .

27. This holding is based on the ruling in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955), that one whose injury is an incidental and remote consequence of an antitrust violation may not recover under the Clayton Act. This so-called "target-area" concept was discussed by the parties in their briefs to the Supreme

The third, and by far the most serious problem with Hawaii's case, is the difficulty a court would have in determining the damages Hawaii had suffered. Hawaii began poorly, calling attention to this issue, by stating that it had "not yet ascertained the precise extent of said damage to itself and its citizens,"[28] but asked leave to insert such a sum when ascertained. In its brief to the Supreme Court, Hawaii cited *Bigelow v. RKO Pictures, Inc.*[29] for the proposition that "the wrongdoer shall bear the risk of the uncertainty [as to damages] which his own wrong has created." Although no nearer to ascertaining the extent of the damage, Hawaii suggested two ways in which such a figure might be divined, viz., expert economic analysis, or a simple mathematical computation based on the alleged overcharge multiplied by the units of overpriced products.[30] While it is possible to be somewhat more sympathetic with plaintiff at the pleading stage in trying to ascertain damages, such a course of action must be weighed against the words of Professor Freund, commenting on subsequent developments in *Georgia*:

> Whatever strategic end may have been achieved through the earlier overruling of a motion to dismiss (324 U.S. 439), the complete inability of the state to make good its claim of injury as parens patriae suggests that in the future the Court may be more wary of sweeping allegations of detriment to a state's economy as a basis of case or controversy.[31]

Considerations of judicial administration are surely to be weighed by a court in deciding whether to grant standing to sue,[32] especially where it is apparent that on the merits damages may be so speculative and unrelated to proven harm as to constitute a penalty.

The Supreme Court's Decision

Justice Marshall's opinion made it clear that the issue, in the Court's mind,

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Court. It is clear that Congress did not vest a cause of action in everyone who asserts some connection with the alleged restraint of trade, no matter how far removed. The problem is one of line-drawing. Hawaii's brief cited a line of cases in the Ninth Circuit which, it argued, the court of appeals had ignored, for the proposition that a plaintiff had standing if the defendant could reasonably have foreseen that plaintiff would be affected by the conspiracy. While the Supreme Court's decision mentioned the issue only tangentially, Justice Marshall's opinion cited with approval cases from 10 circuits, all of which respondent Standard Oil had cited in its brief, as support for the argument that § 4 of the Clayton Act does not protect all persons remotely affected by alleged illegal activity. Petitioner's Brief at 58; Respondent's Brief at 37-38; 405 U.S. at 262 n.1, 4.

28. Fourth Amended Complaint at 20.
29. 327 U.S. 251 (1946).
30. Petitioner's Brief at 50-56.
31. Freund, Book Review, 3 J. LEG. ED. 643, 644 n.2 (1951).
32. Considerations of judicial economy have also been cited as a factor in the failure of Congress thus far to pass consumer class action legislation. *See* Dole, *supra* note 19, at 973.

was whether the injury for which Hawaii sought recovery is one compensable under § 4 of the Clayton Act. From its study of the *Georgia* case the Court found that nowhere had the Court in *Georgia* addressed itself to the question whether § 4 of the Clayton Act provides a damage remedy for an injury done to a state's general economy. "Thus, the question presented here is open,"[33] the Court concluded. The crucial question was whether the injury asserted by Hawaii in its *parens patriae* count was an injury to its "business or property" in the words of Clayton 4. The Court re-examined the distinctions between sections 4 and 16 of the Clayton Act made by the Ninth Circuit[34] and agreed with that court's holding that § 4 was narrower. Finding the legislative history "not very instructive,"[35] the Court felt that "the most likely explanation" for the fact that only § 4 included the "business or property" requirement lay in the essential differences between the two remedies. The Court reasoned that less injury need be shown to obtain an injunction under § 16 since, in a case in which a defendant's antitrust violations injured 100 persons, one injunction would be as effective as 100. The requirement of sustaining an injury to "business or property" was added to the § 4 authorization of treble damages, though, because in that same suit 100 claims for damages are cumulative. Congress thus manifested an intent that each of the damage claimants show more to collect damages than he would be required to show to obtain injunctive relief. The Court's conclusion that treble-damage plaintiffs must be able to show damage to business or property is not disputed by the two dissenters, Justices Douglas and Brennan. But these two disagreed with the majority's holding that Hawaii's remedy was restricted to damages that it had suffered in its proprietary capacity. The majority concluded that the words "business or property" referred to commercial interests or enterprises, and that while the State could properly seek damages for injury to its commercial interests, the Clayton Act provided no remedy for other injuries. Implicit in this reasoning was adoption of the court of appeals' "target-area" argument.[36] Thus, the Court noted:

> [T]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.[37]

The Court based its construction of the words "business or property" largely

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33. 405 U.S. at 260.
34. *See* text at notes 25, 26 *supra.*
35. 405 U.S. at 261.
36. *See* note 27 *supra*, and accompanying text.
37. 405 U.S. at 262, n.14.

on the legislative history of § 4(a)[38] of the Clayton Act, which plainly states that the United States is authorized to recover damages only for injuries suffered in its capacity as a consumer of goods and services, and not for general injury to the national economy.[39] For the Court, the conclusion from this is that it ". . . is *nearly inescapable* that § 4, which uses identical language, does not authorize recovery for economic injuries to the sovereign interests of a State."[40] The majority's confident assertion that a 1955 amendment to the antitrust laws makes any construction of § 4 "nearly inescapable" is surprising in view of its admission that the legislative history of the Sherman and Clayton Acts is "not very instructive" as to the reasons for the inclusion of the term "business or property."[41] Justice Douglas, the author of the majority decision in *Georgia*, did not take issue with the Court's requirement that the State show injury to business or property.[42] He argued that the *Georgia* case entitled Hawaii to an opportunity to offer proof as to the damage which its general economy had suffered. He dismissed as "imaginary" and as "rationales that express a prejudice against liberal construction of the antitrust laws"[43] any difficulties in distinguishing between the damages to the quasi-sovereign aspects of a state's economy and the economic harm to the state's individual citizens. In a separate opinion Justice Brennan also expressed the belief that *Georgia* required a reversal. While agreeing with the majority that Counts I and II of Hawaii's complaint represented injuries to the State in separate capacities, he felt that the injuries were "not so unrelated as to justify a different treatment under the Clayton Act."[44] He saw no difference between the possible harm done to Hawaii's economy, because of a failure to generate additional wealth, and added bur-

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38. 15 U.S.C. § 15(a) (1970).

39. Justice Marshall quotes congressional committee reports on the legislation to demonstrate that the basis for this limitation was the federal government's ability to use "criminal and civil process" to enforce the antitrust laws. 405 U.S. at 265. Justice Brennan's dissent argues from this that since state governments lack similar recourse to "criminal and civil process" to enforce federal antitrust statutes, the use of identical language in § 4 does not imply a like limitation on the states. 405 U.S. at 275-76.

40. *Id.* at 265 (emphasis added).

41. *See* note 35 *supra*.

42. Justice Douglas did, however, dispute the majority's determination that Hawaii's general economy was not within the definition of "business or property":

> Hawaii is the magnet of tourism and of industry as well. She measures the health of her economy by her economic growth. No one citizen can stand in her shoes for she represents the collective. Those interests should be held to be the State's "business or property" interests, within the meaning of the Clayton Act and not merely the plants, factories, or hotels which she may own as a proprietor. 405 U.S. at 269.

43. *Id.* at 270.

44. *Id.* at 273.

dens placed on a city's treasury by antitrust violations, a burden deemed sufficient to bring an action in *Chattanooga Foundry v. Atlanta.*[45]

In ruling that § 4 of Clayton only entitled Hawaii to relief for damages suffered in its proprietary capacity, the Court commented that private citizens aggrieved had an adequate remedy due to the class action provisions of Rule 23. It appears that Hawaii's use of a *parens patriae* argument was only advanced after plaintiff discarded the idea of a class action remedy.[46] The Court, however, made known its preferences in the area. "*Parens patriae* actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area."[47] The Court's disposition of Hawaii's claim at the pleading stage precluded an examination of other problem areas in the field of consumer damage suits which might have been made if the suit had proceeded further.

Distribution of Damages

For example, if the State is ultimately allowed to collect damages, problems may be encountered in determining what to do with the funds. For this reason it is essential to precisely define the capacity in which the State is suing. On the one hand, had Hawaii been granted standing to sue *parens patriae* for damage to its economy, and subsequently recovered damages from the oil companies, the State itself would be the proper recipient of the damage claims, since it was the "person" suffering the damage. No difficulty is encountered in disposition of the damages. If the violations had resulted in the non-collection of certain taxes because of decreased demand for petroleum products caused by the conspiracy, the claim received in the suit would offset the State's previous pecuniary loss.

But if, on the other hand, the State was accorded standing to sue *parens patriae* representing all consumers of petroleum products in Hawaii, retention by the State of the damage recovery would not be proper, and the task of ascertaining the injured parties and effecting recompense would devolve on the State.[48] Ascertainment of all original consumers presents monumental difficulties, but unless the State is allowed to hold the damage award in trust pending disbursement to injured individuals, a defendant would be allowed to unjustly retain the difference between the sum awarded and the

45. 203 U.S. 390 (1906).

46. *See* notes 19, 20 *supra*, and accompanying text.

47. 405 U.S. at 266.

48. Interestingly, two recent studies have suggested that it is just such a settlement as this, devised by the court in West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), that has sparked a flurry of *parens patriae* claims by states. *See* note 14 *supra* and Handler, *supra* note 19.

total of individual claims submitted. In the instant case, where the commodity was petroleum, indirect return of overcharges to the injured parties can be roughly accomplished by a subsequent tax decrease since users remain fairly constant from one year to the next. Under this method, the necessity of identifying injured individuals is obviated. However, had the conspiracy involved price fixing on an article purchased less regularly, tax savings to post-conspiracy buyers would not necessarily benefit those injured by the conspiracy. Hawaii, of course, did not claim that it was suing on behalf of its citizen-consumers, but in its quasi-sovereign capacity. It is in the area of class action suits where the courts are presently being called upon to resolve such distribution problems.[49] The distribution problems in *parens patriae* actions, on the contrary, would not be nearly so severe so long as the damage award was compensation for injury to the State in its sovereign capacity.

Damage to Consumers

A second consideration left unexamined is the recovery by consumers for injuries they sustain as a result of antitrust violations. In a gasoline and petroleum products price-overcharge conspiracy, the primary damage is done to purchasers of those products. In Count I of its complaint, Hawaii, as one such purchaser, alleged damage to the State itself. This damage can easily be measured by multiplying the amount of overcharge times the units of gasoline/petroleum purchased by the State. In Count II, Hawaii alleged damage to its economy as a whole. In spite of the fact that a dollar amount was not computed, various theories were advanced to show such damage.[50] In Count III, dismissed by the district court and not appealed, Hawaii sought to sue as representative of a class comprised of all consumers in the State who suffered injury. This group of claimants collectively suffered the largest percentage of the alleged damage. Yet, with the exception of Hawaii's claims as a consumer in its proprietary capacity under Count I, none of these claims would be recompensed. If the oil companies are found guilty of antitrust offenses, there is no reason to feel that this class did not suffer the same per-gallon overcharge as did the other two. But due to the procedural difficulties of a class action suit,[51] and the fact that a State's suit *parens patriae* cannot be stretched to include claims which are not separate from its citizens, Hawaii's hundreds of thousands of consumers of gasoline and petroleum products are left without remedy.

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49. For a discussion of the cases in the context of settlements, *see* Dole, *supra* note 19.
50. *See* note 23 *supra.*
51. *See* note 19 *supra.*

A Proposed Remedy for Consumer Claims

One rationale behind class action suits is that the aggregations of separate actions effected by such a device make for judicial efficiency and economy.[52] The inherent nature of many class action claims is such that those damaged would not sue unless participating in a class action suit. By the same token, there often is no party available to promote and orchestrate the action. The cumulative effect of these trends is that the class action device is not fully used.[53] By allowing a state as *parens patriae* to sue for the individuals involved, these obstacles to the recovering of damages would be greatly reduced.

It becomes clear from an assessment of the comparative utility of *parens patriae* and class action suits that neither adequately serves a plaintiff in Hawaii's position. What is needed in such a case is a combination of the class action and the *parens patriae* suit. One recent study proposed such a scheme, labeling it a "class action supplement."[54] The action is brought *parens patriae*, "supplementary" to a class action, on behalf of the non-claiming segment of the class. While such a procedural device has much to commend it, one must be aware of the following substantive and practical shortcomings. First, such a suit seems beyond the range of present authority. It would be foreign to the traditional notions of *parens patriae*, and outside the language of Federal Rule 23,[55] since the state would not be suing for damage to itself. One method of circumventing this problem would be to include the state within the class if it too had suffered injury as a consumer, as did Hawaii in the instant case. Second, the problem of compliance with notice and seventh-amendment trial-by-jury requirements which plague class actions would also have to be faced under such a procedure. Third, many states would find the cost in terms of time and money so prohibitive as to all but eliminate their management of consumer suits.[56]

52. *State Protection . . . Suits for Damages, supra* note 23.

53. This brings to light another shortcoming in the class action as an effective remedy for consumer grievances. In many class actions, the damage to the individual is minimal. The named plaintiff in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), one of nearly 3,750,000 odd-lot buyers, sustained $70 in damages. Under the Supreme Court's holding in Snyder v. Harris, 394 U.S. 332 (1969), individual claims may not be aggregated in order to satisfy the in-excess-of-$10,000 jurisdictional-amount requirement in federal-question and diversity-jurisdiction cases. 28 U.S.C. §§ 1331, 1332. The effect of *Snyder* in the antitrust field is not felt because under 28 U.S.C. § 1337, the jurisdictional-amount requirement is waived in cases arising under the antitrust laws. In actions in which the jurisdictional amount is required, *Snyder* is a real problem and reduces the effectiveness of the class action device.

54. *See* note 19 *supra*.

55. *See* note 7 *supra*.

56. No significant research of this proposition has been undertaken, but it is most questionable whether, save for a few large states, attorneys' general offices have suf-