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PARENS PATRIAE ACTION UNDER SECTION FOUR OF THE CLAYTON ACT

For the first time in history, the courts have been called upon to decide whether a state, acting in its capacity as parens patriae, may maintain a treble damage action under section 4 of the Clayton Act for injuries to its general economy. In Hawaii v. Standard Oil Co., the United States Court of Appeals for the Ninth Circuit answered this question in the negative. While the holding is narrowly restricted to an interpretation of the treble damage provision in the Clayton Act, the case nevertheless raises broader questions. Today there exist businesses, industries and interest groups of unprecedented magnitude, with power to threaten and damage not only individuals, but communities or entire regions as well. The damage may result from antitrust violations that thwart the development of a state's economy, from dumping of refuse and byproducts that contaminate its natural environment or from other activities yet to be imagined. Often the state rather than the individual citizen will be the more appropriate and practical party to redress these infringements. The larger question raised by the Hawaii case is this: will the states be limited to their traditional injunctive remedies against injuries to the general economy, or can they develop theories upon which to recover money damages as well?

The Hawaii case is an action brought by the state against three oil companies and a subsidiary to recover damages for price-fixing, monopolization and various other violations of sections 1 and 2 of the Sherman Act. Count II of the complaint alleged damage to the "general economy" suffered by Hawaii in her capacity as parens patriae, trustee, guardian and protector of her citizens. The Ninth Circuit took a firm and restrictive stand when it reversed an order of the district court denying the defendants' motion to dismiss count II. Considering the importance of the underlying issue involved in Hawaii, and considering the adverse effect the Ninth Circuit's decision might have upon future development of the parens patriae action, a detailed analysis and criticism of the decision is clearly warranted.

Background—Georgia v. Pennsylvania R.R.

Before analyzing the Hawaii case, it is helpful to look briefly at

Georgia v. Pennsylvania R. R., 4 a 1945 Supreme Court case factually similar to Hawaii and upon which the district court relied heavily in denying the defendant's motion to dismiss Hawaii's parens patriae count. In Georgia the state instituted an action in federal district court, then moved for leave to file a bill of complaint invoking the original jurisdiction of the Supreme Court. The complaint alleged a conspiracy in restraint of trade among the defendant railroads to fix and maintain freight rates in the State of Georgia. Because rates charged by the defendants in other parts of the United States were substantially lower than those charged in Georgia, Georgia complained that rates fixed pursuant to the conspiracy resulted in the following injuries: (a) Georgia's products had been denied access to national markets on an equal basis with those of other states; (b) Georgia's economy had been limited to staple agricultural products, opportunity in manufacturing had been limited, and the state had been prevented from achieving full and complete utilization of its natural wealth; (c) the state's measures to promote a well-rounded agricultural program had been frustrated; and (d) Georgia's economy had been held in a state of arrested development. 5

Georgia sued in four capacities, two of which were discussed in the Supreme Court's opinion: (1) her capacity as quasi-sovereign (parens patriae) or trustee, guardian and protector of her people, and (2) her capacity as proprietor of a railroad and other state-owned institutions. The bill included a prayer for both injunctive relief and damages.

The Supreme Court granted the amended bill of complaint, thereby allowing Georgia to assert both claims—her claim as proprietor as well as her claim as parens patriae. The court recognized that a state may not only bring an antitrust suit to protect its obvious interest in state-owned properties, but also may protect the health and comfort of its citizens. 6 These "quasi-sovereign" interests in the general welfare of the state are not merely an accumulation of all the individual citizen's private interests, the Court held, but rather are "independent of and behind the titles of its citizens." 7 In bringing a parens patriae action, a state is not acting solely for the benefit of the citizens in protecting their individual rights, but is protecting a matter of state interest independent of any interest which the private citizens may have.

The difference between the separate and distinct interests of a state as parens patriae and the interests of individual citizens of a state

5. Id. at 444.
was emphasized in *Oklahoma v. Cook.* There an Oklahoma statute provided that a bank's shareholders shall be liable to depositors and creditors in proportion to the amount of stock owned and authorized the Bank Commissioner to enforce this statutory obligation. The statute further provided that the State of Oklahoma shall own the assets of failed banks in trust for the benefit of the depositors and creditors of the bank. The state brought an action to enforce Cook's duty as shareholder under the statute, but the Supreme Court refused to take original jurisdiction. The Court reasoned that it is not enough "that a State has acquired the legal title to a cause of action against the defendant"; and that "[W]e must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest." Although Oklahoma had legal title to these rights and claimed that their enforcement was a matter of state policy, in reality the rights asserted were for the benefit of the individual citizens (creditors and depositors). These individuals were the real parties in interest. Therefore, Oklahoma did not have a separate and independent interest in the enforcement of these rights sufficient to enable her to maintain a *parens patriae* action.

In *Georgia,* by contrast, the Supreme Court concluded that since the economy of Georgia had suffered damage as a result of the alleged conspiracy, therefore the state itself, which has an independent interest in its economy, may properly maintain an action in its capacity as *parens patriae* to protect this "quasi-sovereign" interest:

Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.

While the Court held the complaint sufficient to state a cause of action for an injunction, it disposed of the prayer for damages on the authority of *Keogh v. Chicago & N.W. Ry.* In *Keogh* a manufacturer of excelsior alleged that eight defendant railroad companies and others had eliminated competition in interstate freight hauling by conspiring to establish uniform rates. The rates had been approved by the Interstate Commerce Commission. The Supreme Court held that while such approval by the commission would not bar an action by the Government to enforce the Sherman Act, it does bar a private action for damages. Any rate ratified by the commission, the Court reasoned, is the legal rate as between shipper and carrier. Since the rates fixed by

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9. *Id.* at 393.
11. 260 U.S. 156 (1922).
the defendants in *Georgia* had likewise been approved by the commission, the *Keogh* rule applied with equal force in *Georgia*.  

Because the *Keogh* rule foreclosed Georgia's claim for damages, the Court was able to sidestep the question whether, absent approval of the fixed rates by an administrative agency having primary jurisdiction, Georgia would have been able to maintain its *parens patriae* action for damages. In view of the many factual similarities between the *Georgia* case and the *Hawaii* case, the parties in *Hawaii* naturally indulged in considerable speculation as to what the Supreme Court would have done with Georgia's prayer for damages had it not relied on *Keogh*. In *Georgia*, the Supreme Court unequivocally upheld a state's right to bring an action in its *parens patriae* capacity under the antitrust acts. The Court did not specifically limit its approval to actions for injunctive relief.

It therefore remains an open question whether some of the language in *Georgia* lends support to a state's right to bring a *parens patriae* action for damages as well. After all, this is the interpretation the district court in *Hawaii* gave it. The court of appeals rejected this interpretation, reasoning that the *Georgia* holding applies only to suits for injunctive relief under section 16 of the Clayton Act.

**Hawaii v. Standard Oil Co.**

In *Hawaii* the Ninth Circuit was compelled to decide the question which the Supreme Court managed to sidestep in the *Georgia* case: Can a state recover damages to its general economy in a private antitrust action under section 4 of the Clayton Act? The State of Hawaii alleged that the four defendants—three oil companies and a subsidiary—conspired to fix and maintain prices on motor gasoline and asphalt in the Hawaii market. Count I of the complaint alleged that the state suffered losses in its proprietary capacity. The Ninth Circuit was concerned only with count II, which alleged:

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

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12. In *Hawaii* the *Keogh* rule is not applicable since the alleged conspiracy does not involve rates fixed by any commission.

13. "The Supreme Court held Georgia had properly asserted a cause of action for injunctive and damage relief as *parens patriae* as well as proprietor. . . ." *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 984 (D. Hawaii 1969). The district court goes all the way in its interpretation of the language in *Georgia*, considering *Georgia* to have recognized a state's right to bring an action for damage as *parens patriae* ignoring the language's status as dictum.

The complaint particularized the injuries suffered by the economy of Hawaii as a result of the defendant's alleged unlawful activity:

(a) revenues of its citizens have been wrongfully extracted from [the economy 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 [sic] 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.15

The defendants moved to dismiss the parens patriae count for failure to state a claim. The district court denied the motion. The case then came before the Ninth Circuit on an interlocutory appeal.

The Ninth Circuit reversed and distinguished the Georgia case on the ground that its language authorizing private antitrust suits by a state in its parens patriae capacity applies only to suits for injunctive relief under section 16 of the Clayton Act. The court set forth two separate grounds for its decision: First, that injury to a state's economy is not injury to "business or property" within the meaning of section 4 of the Clayton Act; and second, that the damages alleged in the parens patriae count were too remote and indirect to give Hawaii standing to sue.

The Parens Patriae Action

Hawaii's claim was not a claim asserted on behalf of the citizens of the state to recover the accumulated damage directly suffered by them as individuals.16 This would constitute a representative or "class action," "an action brought in behalf of other persons similarly situated."17 Rather, Hawaii's claim was asserted in its own capacity as parens patriae. It was predicated on an interest in the economy of the state, an interest existing independently of the interests of individual citizens of Hawaii.

15. Id. at 1283 n.2.
16. Hawaii's class action claim pursuant to Federal Rule of Civil Procedure 23, count III of the complaint, was dismissed by the district court in Hawaii and no appeal has been taken from that order.
The *parens patriae* action originated as a prerogative power of the King of England and was inherited by America as part of the common law. When this country separated from England, certain prerogatives of the crown vested, it is said, in the people of the states. "The State, as a sovereign, is the *parens patriae*." One of these prerogatives was the power to protect persons *non sui juris*, such as minors, insane and incompetent persons. While originally this sovereign power of guardianship was exercised to protect persons *non sui juris*, the courts have not limited the power of the state to these particular circumstances. The Supreme Court has repeatedly held that *parens patriae* actions will lie for protection against pouring of sewage into a state's river, drainage of surface water into a state, withdrawal of natural gas from the established current of commerce or discharge of noxious fumes over the territory of a state. It would seem, therefore, that a state may bring a *parens patriae* action both to protect persons who would otherwise have no rightful protector and to preserve the general welfare of the state.

### The Parens Patriae Action in Hawaii

In *Hawaii* the district court undertook to delineate the requirements a state must satisfy before it can maintain an action in its *parens patriae* capacity. First it must show some interest "independent of and behind the titles of its citizens." That is to say, the interests to be vindicated must be something other than the sum total of the interests of individual citizens of the state. Moreover, an action brought merely to protect the state's proprietary interests does not qualify as *parens patriae* action. Second, a state may not sue in its *parens patriae* capacity where only a small portion of its citizens are adversely affected by the acts of the defendants.

When these principles are applied to the *Hawaii* case, the alleged injury to the economy of Hawaii appears to meet the requirements for a proper *parens patriae* action. A state's independent interest in the economy—an interest over and above the interests of the citizens—has

23. *Id.* at 237; *accord, e.g.*, Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938); Louisiana v. Texas, 176 U.S. 1 (1900).
been explicitly recognized by the Supreme Court. Likewise, every citizen of a state is affected, either directly or indirectly, by injuries to the state's economy.

Although the Ninth Circuit's decision did not rest on this ground, it should be noted that the court questioned the appropriateness of the parens patriae action to protect against harm to the economy. Voicing skepticism as to the possibility of independent harm to the general economy, the court expressed the view that "[The economy] has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects," and that "[t]he general economy is an abstraction." Apparently the court considers that the "economy" exists only in the mind, is not part of reality and is therefore incapable of being damaged. On this issue the Ninth Circuit seems to have parted company with the Supreme Court. That the general economy may suffer independent harm and that such harm is the proper subject matter for a parens patriae action was long ago decided in Georgia v. Pennsylvania R. R.

Hawaii's parens patriae count was also attacked on the general ground that such an action will not lie to recover money damages. "We know of no case from the Judiciary Act of 1789 to the present time", the appellants asserted, "in which a State has been permitted to recover damages in such an action." But this point, even if assumed to be true, is not really dispositive of the question whether a state may recover money damages in a parens patriae action. For there is likewise no case on record in which such recovery has been denied. The only reasonable conclusion, it would seem, is that the courts have never squarely confronted this precise question, and that consequently the question remains open.

The Ninth Circuit's Holding in Hawaii

Section 4 of the Clayton Act is the general statutory provision for recovery of treble damages in private antitrust actions. It reads as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue there-

27. Hawaii v. Standard Oil Co. of California, 431 F.2d 1282, 1285 (9th Cir. 1970).
28. Id.
for in any district court of the United States . . . and shall recover threefold the damages by him sustained.\textsuperscript{31}

The lower federal courts have consistently construed section 4 quite narrowly, thereby foreclosing claims which would otherwise seem to fall within the purview of the statute. One way of narrowing the application of the statute is to impose judicial restrictions upon its so-called “standing” requirement. Another way is to construe the words “business or property” strictly and to deny recovery on the ground that the plaintiff’s injury does not fall within the category of injuries which the court considers “injuries to business or property” within the meaning of the statute. In \textit{Hawaii} the court rested its holding upon both of these “closely related” grounds—lack of standing and absence of injury to “business or property”. Actually the case law has not always carefully distinguished between the two grounds when denying a plaintiff recovery. This is understandable since the standing question—that is, the question whether a plaintiff has a substantive, legally protected interest—may depend upon whether the particular plaintiff alleges injury to business or property within the meaning of the statute. Manifestly, therefore, the two grounds are interrelated and in part interdependent. In the discussion to follow, the two grounds for the Ninth Circuit’s decision in \textit{Hawaii} will be taken up separately.

A. Standing

Section 4 of the Clayton Act provides: “Any person who shall be injured in his business or property [may sue].”\textsuperscript{32} Assuming for the moment the injury alleged does constitute injury to business or property, the language ostensibly sets up a broad and all-inclusive standard by which to determine standing: “Any person who shall be injured [may sue].”\textsuperscript{33} The lower federal courts are markedly indisposed to construe the statute with the sweeping breadth which its literal wording seems to invite; they have in effect superimposed judicial restrictions on the standing requirements of section 4. In \textit{Hawaii} the Ninth Circuit relied upon one of these judicial restrictions in barring Hawaii’s \textit{pares patriae} claim.

While the federal courts exercise discretion in imposing standing requirements which limit the inclusiveness of section 4, they are not in accord as to the particular test to be applied. Under one test, enunciated in \textit{Loeb v. Eastman Kodak Co.},\textsuperscript{34} a private antitrust plaintiff has stand-

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\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} 183 F. 704, 709 (3d Cir. 1910), \textit{discussed in Comment, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570, 581-82 (1964).}
ing to sue only if his alleged injuries are "direct." In practice, this "directness" concept has been used to exclude such would-be plaintiffs as creditors, employees, shareholders and patent owners suing for loss of royalties. Another test, first propounded by the Ninth Circuit in Conference of Studio Unions v. Loew's Inc., requires that the plaintiff, in order to have standing, must fall within the "target area" of the violator:

One who is only incidentally injured by a violation of the antitrust laws—the bystander who was hit but not aimed at—cannot recover against the violator.

1. The Target-Area Test

In Conference an association of labor unions and individual union members brought an antitrust action alleging a conspiracy among the defendants, a group of "major" film producers and another labor union. The gist of the alleged conspiracy was that the major film producers agreed to hire only members of the defendant union, and the union agreed, in turn, to furnish their most skilled members to the defendant film producers and to supply employees to the other film producers only at higher rates. Plaintiffs alleged that the purpose of the conspiracy was to destroy both the independent producers and the plaintiff union, whose members would be out of work once their employers—the independent producers—went out of business. The district court entered a judgment on the pleadings for the defendants and the Ninth Circuit affirmed. The court's reasoning was that the conspiracy to restrain competition was directed at "minor" film producers, and the

35. See, e.g., Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929). The court refused to allow plaintiff as creditor of a corporation to recover for damages allegedly suffered by the corporation as a result of an illegal restraint of trade by the defendants.


39. 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).

40. Although the test itself originated in Conference, this phrase by which it has come to be known was first used in Karseal Corp. v. Richfield Oil Co., 221 F.2d 358 (9th Cir. 1955).

41. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955).
damage suffered by the plaintiff was merely incidental.\textsuperscript{42}

The Ninth Circuit considerably broadened the "target area" test in \textit{Twentieth Century Fox Film Corp. v. Goldwyn}.\textsuperscript{43} Goldwyn, a motion picture producer, brought an action alleging a price-fixing combination among the defendant motion picture exhibitors and their agents which resulted in depreciation of the value of the plaintiff's pictures, reduction of fees paid to the plaintiff under licenses and a detrimental effect upon the goodwill of the plaintiff's business. Here the Ninth Circuit made it clear that "to be aimed at" did not require that the purpose of the conspiracy be to injure the particular plaintiff. It only meant that plaintiff's affected operation be "in the area which it could reasonably be foreseen would be affected by the conspiracy."

Applying this "reasonable foreseeability" test to the facts of \textit{Conference}, where the "target area" test originated, one would likely arrive at the opposite conclusion from the one actually reached in that case; this difference in result indicates a shift in the application of the test. In \textit{Conference}, it will be recalled, a plaintiff labor union was held not to have standing to sue another labor union and a number of motion picture producers who allegedly combined to drive out the "independent" producers who were the employers of the plaintiff union's members. It would seem to be "reasonably foreseeable" that the employees of a company which was driven out of business as a result of an unlawful conspiracy would be affected by the conspiracy.

What test did the Ninth Circuit apply in \textit{Hawaii} in order to determine that the plaintiff lacked standing? Although the Ninth Circuit gave the "target area" test token approval by citing \textit{Karseal Corp. v. Richfield Oil Corp.},\textsuperscript{45} the "directness" test was actually applied. All the remaining authority cited consisted of prior cases applying the "directness" test. Moreover, the court's language leaves little room for doubt that the directness test was being used: "[O]ne whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act."\textsuperscript{46} It is not surprising that the Ninth Circuit in \textit{Hawaii} declined to rely solely on the "target area" test it first devised. Since that test has metamorphosed into a mere reasonable foreseeability test, it has lost much of its usefulness as a judicial limitation on standing in antitrust cases. Clearly it is difficult to say that injury to the general economy of Hawaii was not a reasonably foreseeable consequence of the defendant oil companies' alleged antitrust violations.

\begin{thebibliography}{46}
\bibitem{42} conference of studio unions v. loew's, inc., 193 F.2d 51, 54 (9th cir. 1951).
\bibitem{43} 328 F.2d 190 (9th cir.), cert. denied, 379 U.S. 880 (1964).
\bibitem{44} Id. at 220.
\bibitem{45} 221 F.2d 358, 363 (9th cir. 1955).
\end{thebibliography}
2. The Directness Test

A careful analysis will show that the "directness" test is equally inappropriate to bar Hawaii's claim. In support of its conclusion that the alleged injuries to Hawaii's general economy are too remote, the Ninth Circuit cited a case where a corporate shareholder was held to be too remote to sue for treble damages under the Clayton Act, a case where creditor's claims were too remote and a case where patent owners suing for loss of license royalties were held to be inappropriate parties to bring an action. It is unquestionable that in each of these cases the defendant's alleged antitrust violations had injured some third party more directly than they had injured the would-be plaintiff.

In Bookout v. Schine Chain Theatres, Inc., the administrator of the estate of a deceased majority shareholder in a theater corporation alleged that the defendants had cut off the corporation's supply of films, as a result of which it was forced out of business. The district court granted summary judgment for the defendants and the Court of Appeals for the Second Circuit affirmed. Although a shareholder of a corporation injured by an antitrust conspiracy might be thought to have a claim different from any claim assertable by the corporation, the court remarked that "this has not been the course of the decisions." The corporation was more directly harmed and is the proper party to bring suit. The shareholder must rest content with such increase in the value of his shares as results from any recovery by the corporation.

Again, in Loeb v. Eastman Kodak Co., the corporation was held to be the appropriate party to bring the action. Plaintiff was a shareholder, creditor and employee of the Liberty Photo Supply Company, which had been forced into bankruptcy as a result of the alleged monopolistic activities of the defendant. The shareholder of a corporation would not have had a direct remedy against the defendant even in the pre-Sherman Act period, and the court held that the act should not be construed to contravene this established policy of the common law. To hold otherwise, the court pointed out, would give the plaintiff-creditors an advantage over non-plaintiff creditors.

In Productive Inventions, Inc. v. Trico Products Corp., the plaintiff had granted an exclusive license on certain patents to the An-

50. 253 F.2d 292 (2d Cir. 1958).
51. Id. at 295.
52. 183 F. 704 (2d Cir. 1910).
53. 224 F.2d 678 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956).
dersen Company. The plaintiff complained that his royalties on these patents had been reduced as a result of defendant's selling its products upon the condition that purchasers do not deal with the Andersen Company. Again the court considered the plaintiff's interest too remote since the licensee was the party who was directly injured. In *Productive Inventions*, as in *Bookout* and *Loeb*, the plaintiff's interest was patently subordinate to and less substantial than another's more direct interest.

In *Melrose Realty Co. v. Loew's Inc.* the plaintiff was the owner of a motion picture theater. One of the defendants, the lessee-operator of the theater, paid as part of his rent a percentage of admission fees. The plaintiff alleged that the lessee had conspired in violation of the antitrust laws to show third-run pictures in the theater and that lower admission fees and lower rent resulted. Following the rule of *Harrison v. Paramount Pictures, Inc.*, the court held that the non-operating lessor-owner of a motion picture theater whose rental interest is based upon a percentage of the receipts was not entitled to recover. Likening a theater owner's interest in a percentage contract to Hawaii's interest in its general economy, as the Ninth Circuit did, is stretching an analogy to the extremities of reason. One federal district court has refused to follow the *Melrose* case in an almost identical fact situation.

The foregoing cases show that the "directness" rule has been applied to exclude a plaintiff's claim in cases where there is another potential plaintiff—the corporation in *Bookout* and *Loeb*, for example, or the licensee in *Productive Inventions*—who has suffered more immediate harm and who is therefore deemed a more appropriate party to bring suit. In *Hawaii*, by contrast, the plaintiff state brought an action in its capacity as *parens patriae* to recover damages to its general economy. To maintain a *parens patriae* action an interest independent and separate from the interests of the citizens is a prerequisite. Therefore, assuming the existence of a state's *separate and independent interest* in its general economy, it is difficult to say that the interest is too remote since no party other than the state itself could conceivably protect such an interest.

Over 25 years ago the Supreme Court held in *Georgia v. Pennsylvania R.R.* that

57. The *Georgia* case appears to have decided that issue. See text accompanying note 10 supra.
Georgia has in interest [in its economy] apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate.\textsuperscript{59}

No court has ever indicated that the \textit{standing} requirements applied in injunction suits differ from those to be applied in damage actions. Therefore, the \textit{Georgia} case should have put to rest any questions concerning Hawaii's standing to sue.

\textbf{Injury to Business or Property Within the Meaning of Section 4 of the Clayton Act}

As a second ground for its decision in \textit{Hawaii}, the Ninth Circuit held that as a matter of law "injury to the general economy of a State is not an injury to the \textit{business or property} of the State or its people."\textsuperscript{60} No court has ever before expressly decided this precise question. In \textit{Georgia}, the Supreme Court allowed Georgia's \textit{parens patriae} action; but after the damage issue was dropped, Georgia merely sought injunctive relief under section 16 of the Clayton Act.\textsuperscript{61} In Hawaii, the Ninth Circuit tried to distinguish \textit{Georgia} by pointing to an assertedly crucial difference in wording between section 16, which enables private plaintiffs to sue for injunctive relief against "threatened loss or damage" resulting from antitrust violations, and section 4, which provides for recovery of treble damages for injury to a plaintiff's "business or property." The Ninth Circuit determined that the former section is "far broader" than the latter.\textsuperscript{62} Therefore, the court concluded, Hawaii's general economy may suffer "loss or damage" within the meaning of section 16 of the Clayton Act, but such loss or damage does not necessarily constitute injury to "business or property" within the meaning of section 4.

The court cited no authority—no legislative history and no prior

\begin{itemize}
\item \textsuperscript{59} \textit{Id.} at 451.
\item \textsuperscript{60} \textit{Hawaii v. Standard Oil Co.}, 431 F.2d 1282, 1285 (9th Cir. 1970) (emphasis added).
\item \textsuperscript{62} 431 F.2d 1282, 1284 (9th Cir. 1970). Section 15 reads as follows: "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." 15 U.S.C. § 15 (1964). Section 26 provides in 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, under the rules governing such proceedings. . . ." \textit{Id.} § 26.
\end{itemize}
decisions—in support of its conclusion that the phrase "loss or damage" is "far broader" than the phrase "injury to business or property." Hawaii appears to be the first decision to attribute any special legal significance to this semantic difference. Other decisions have pointed to a contrary conclusion: That the antitrust plaintiff suing for injunctive relief under section 16 must satisfy the same "standing" requirements as the plaintiff in a section 4 damage action; and that loss or damage under section 16 means substantially the same thing as injury to business or property under section 4. These propositions, if correct, are fatal to the Ninth Circuit's attempted distinction between Hawaii and Georgia, where a state bringing an antitrust suit in its parens patriae capacity was held to have satisfied the requirements of section 16.

1. Injury to "Business"

To buttress its holding that injury to Hawaii's general economy is not injury to the state's "business or property" within the meaning of section 4, the court cited to a recognized body of law on the issue. There is ample authority to the effect that the phrase "business or property" in section 4 is used in its ordinary sense and denotes a commercial venture or enterprise.

Many of the cases construing the "business or property" language of section 4 involve situations where a plaintiff alleges he has been prevented from starting a business by the defendant's antitrust violations. These cases, in other words, usually deal with the recoverability of anticipated earnings from a prospective business. A typical example is

64. Tivoli Realty, Inc. v. Paramount Pictures, Inc., 80 F. Supp. 800 (D. Del. 1948): "Section 4 of the Clayton Act provides that any person 'injured in his business or property by reason of anything forbidden in the antitrust laws' may sue therefore [sic] and shall recover threefold the damages sustained by him. Section 16 of the Clayton Act provides for equitable relief in the form of an injunction for any person upon substantially the same conditions." (emphasis added).
Duff v. Kansas City Star Co.," cited by the Ninth Circuit in Hawaii, where the plaintiff, a one-time newspaper publisher in Kansas City, ceased publishing his weekly paper for 8 years due to the war. Upon returning to Kansas City, he made arrangements to recommence publishing, but he was prevented from doing so due to alleged monopolization of the market by defendant, the publisher of the Kansas City Star. The court held that plaintiff could not recover the anticipated earnings of his prospective business.

The courts conclude that some line must be drawn in order to forestall a deluge of spurious claims by plaintiffs alleging they have been prevented from entering a business. When dealing with claims of this sort, therefore, the courts have consistently construed “business or property” strictly.

The “prospective business” cases yield a variety of tests for determining what constitutes injury to business or property within the meaning of section 4. One test is whether the plaintiff has sufficient background and experience in the particular prospective business to justify a finding that but for the defendant’s illegal conduct, he would in fact have entered the business. Another test is whether the plaintiff has taken any affirmative steps toward entering the business, or whether he has signed any contracts with that end in view. Still another test is whether the plaintiff has sufficient ability to finance his proposed venture. Clearly these tests have relevance only in cases dealing with business ventures in the strict sense. They are totally inapplicable to the vastly different facts of the Hawaii case.

2. Injury to “Property”

Hawaii alleged damage to its general economy and sought redress for an injury suffered in its parens patriae capacity. In the language of section 4, Hawaii’s interest in its general economy would seem more akin to a “property” interest than to a “business” interest. The courts have not generally distinguished between business and property although, as the foregoing discussion suggests, the primary emphasis has been on the business aspect of the statute.

67. 299 F.2d 320 (8th Cir. 1962).
70. See Pennsylvania Sugar Refining Co. v. American Sugar Refining Co., 166 F. 254 (2d Cir. 1908).
71. E.g., North Texas Producers Ass’n v. Young, 308 F.2d 235 (5th Cir. 1962), cert. denied, 372 U.S. 929 (1963).
A New York federal district court has, however, drawn attention to the fact that "[t]he statute explicitly uses the words 'business or property' in the disjunctive." 73 It asserted that "[l]ess is required to prove 'property' than to prove 'business.'" 74 The reason why the majority of the courts have not referred to this distinction, it has been suggested, is that the distinction has seldom been in issue. 75 In Waldron v. British Petroleum Co., 76 plaintiff had negotiated a contract with an Iranian Oil Company under which plaintiff was given a right to act as a principal in importing and selling oil. The plaintiff claimed that the defendants' conspiracy prevented him from securing domestic purchasers before his rights expired under the contract. The district court held that the plaintiff's contract right was a sufficient "property" interest within the meaning of section 4 of the Clayton Act, even though such a right would not qualify as a "business" interest.

When the courts determine what constitutes "property" within the meaning of section 4, their language has tended to be less restrictive than when they construe the term "business." In Congress Building Corp. v. Loew's Inc. 77 the court held that a lessor's reversionary interest and right to a percentage of the lessee's gross receipts were sufficient property interests to bring plaintiff within the purview of section 4. 78 The court stated that a plaintiff is injured in his property whenever his property is diminished: "To the extent that the value of any of these rights is diminished, the lessor is injured." 79 As the district court held in Waldron,

[i]f it be decided that the rights privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possessed "property." 80

Similarly, in Martin v. Phillips Petroleum Co., 81 the court said that "whether appellant has property within the meaning of the statute

74. 231 F. Supp. at 86.
75. Id.
77. 246 F.2d 587 (7th Cir. 1957).
would appear to depend on whether what he possessed was deserving of legal protection."
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The statute clearly provides that an antitrust plaintiff can recover treble damages only for injury to his business or property. But it is left up to the courts to determine exactly what constitutes "business" or "property." The term "property," as used in section 4, has come to mean any legal interest which the court deems deserving of judicial protection. Thus when the Ninth Circuit decided that Hawaii does not have a "property" interest in its general economy, this meant in essence that Hawaii's recognized rights, privileges and powers in regard to its general economy do not deserve judicial protection in the form of damage awards.

Clearly, the cases construing "business or property" are no string of pearls laying down precise rules to be applied in concrete cases. The court's application of a restrictive rule in Hawaii can, of course, be supported by prior cases decided on different facts. Perhaps the court would have been better off to recognize the existing authority for what it is: inapposite to a determination of whether injury to a state's general economy constitutes injury to business or property within the meaning of the act. The court would then have been free to decide whether allowing Hawaii to bring an action to protect itself against damage to its general economy would be consistent with the aims and objectives of the antitrust laws. This would seemingly be more suitable than to rely upon existing authority of dubious relevance.

The Supreme Court's Treatment of Judicial Limitations on the Scope of Section 4

In determining what constitutes injury to business or property within section 4 of the Clayton Act, the courts have repeatedly construed the statute narrowly, thereby superimposing judicial restrictions upon the language of the act. Although the Supreme Court has not yet dealt with the "business or property" issue, there is language in a number of recent cases which casts serious doubt upon the propriety of any judicially created restrictions upon the broad language of the Clayton Act.

In Radovich v. National Football League, for example, the Supreme Court held that professional football is a form of "commerce" and is therefore not outside the coverage of the Sherman Act. Radovich specifically limited the rule of Federal Baseball Club v. Na-

82. Id. at 634.
83. See cases cited notes 69-72 supra.
tional League\textsuperscript{85} and Toolson \textit{v. New York Yankees, Inc.},\textsuperscript{86} which had excluded professional baseball from the purview of the antitrust laws. In upholding the sufficiency of the complaint, the Court pointed out that Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of \S\ 5 of the Clayton Act. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.\textsuperscript{87}

In \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.},\textsuperscript{88} the plaintiff, an owner of a small retail store, brought an action under section 4 alleging that ten national manufacturers and distributors of household appliances conspired with a chain of department stores either not to sell to the plaintiff or to sell only at discriminatory prices. Defendants moved for a summary judgment and produced supporting affidavits showing that hundreds of other retail stores were selling the same appliances in the community. Consequently, the defendants argued, plaintiff's "private quarrel" was not a "public wrong" proscribed by the Sherman Act. The district court granted the motion, and the Ninth Circuit Court of Appeals affirmed. The Supreme Court reversed, stating that "Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case [public] injury [has] actually occurred."\textsuperscript{89} Thus the Supreme Court struck down another judicial limitation on section 4—the so-called "public injury doctrine."

\textit{Radovich} and \textit{Klor's} both reinforce the point that the Supreme Court does not favor judicial limitations upon the private antitrust plaintiff's remedies under section 4 of the Clayton Act. Therefore, if the Supreme Court were today faced with interpreting what constitutes business or property within the meaning of the act, it is open to question whether they would adhere to some of the unnecessarily restrictive constructions the lower federal courts have placed upon it.

\textbf{Damages}

It is obvious that proving the nature and extent of the damages to its general economy will impose upon the State of Hawaii a heavy

\textsuperscript{85} 259 U.S. 200 (1922).
\textsuperscript{86} 346 U.S. 356 (1953).
\textsuperscript{87} Radovich \textit{v. National Football League}, 352 U.S. 445, 454 (1957). Section 5 of the Clayton Act provides that a final judgment or decree in proceedings brought by the United States establishing that a defendant has violated the act shall be prima facie evidence against such defendant in a proceeding brought by another party against such defendant. 15 \textsc{U.S.C.} \S\ 16 (1964).
\textsuperscript{88} 359 U.S. 207 (1959).
\textsuperscript{89} \textit{Id.} at 211.
burden. Although the Ninth Circuit professed not to have reached this issue, its rather cursory handling of the case suggests that skepticism as to Hawaii’s ability to prove the alleged damages may well have been an unarticulated factor in its decision. While it is true that damages must be proved and that there is no presumption as to their amount, it must be kept in mind that the Hawaii case involves an interlocutory appeal upon a pre-trial order on a motion to dismiss. The case is still at the pleading stage.

At one time the courts though that the highly speculative nature of the damages in antitrust actions, the concomitant difficulties of proof and the characteristically long and costly trials required that special pleading rules be applied in antitrust cases. Greater detail was thought to be required in pleading “facts” than Rule 8(a) of the Federal Rules of Civil Procedure would normally require. Later cases dispensed with any such dichotomy in the pleading rules. Today federal courts apply the same liberal “notice” pleading rules to antitrust cases as are applied in all other cases. In Radovich v. National Football League, for instance, the Supreme Court reversed an order of dismissal for failure to state a claim, saying:

Likewise, we find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Justice Holmes in Hart v. Keith Vaudeville Exchange, . . . is whether “the claim is wholly frivolous.”

Whatever doubts one may have concerning the provability of Hawaii’s alleged damage to its economy, it can hardly be said that such allegations are “wholly frivolous,” or that as a mater of law they are entirely without merit.

“For purposes of the [motion to dismiss for failure to state a claim] the well-pleaded material allegations of the complaint are taken as admitted.” Therefore, to dismiss the entire count of the complaint because damage to the general economy of a state is not readily susceptible to proof is inconsistent with the modern rules of pleading. If plaintiff’s allegations of damage are too vague, the defendants’ remedy

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92. E.g., New Home Appliance Center, Inc. v. Thompson, 250 F.2d 881 (10th Cir. 1957); Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957); Louisiana Farmers Protective Union, Inc. v. Great Atl. & Pac. Tea Co. of America, 131 F.2d 419 (8th Cir. 1942).
94. Id. at 453.
95. 2A J. Moore, Federal Practice ¶ 12.08 (2d ed. 1968).
is to make either a motion for a more definite statement,96 or a motion for summary judgment,97 thereby compelling the plaintiff to support his allegations with detailed affidavits.

Conclusion

The Ninth Circuit held in Hawaii that a state cannot maintain an action for damages to its general economy under section 4 of the Clayton Act. The decision rests on two grounds: First, that the state lacks standing to sue, and second, that damage to a state’s general economy is not injury to its business or property within the meaning of the act. Such a narrow construction of section 4 of the act is in effect a judicial limitation on the scope of that section—a limitation supported neither by the express language of section 4, nor by the legislative purpose of the antitrust laws nor by prior decisions of the Supreme Court. The Ninth Circuit’s narrow construction of the section was based solely on cases whose fact situations were totally unrelated to that in Hawaii.

The Hawaii case fails in its appraisal of the problem. Rigidly interpreting the Clayton Act and sustaining existing authority by applying it to the facts of the Hawaii case, the Ninth Circuit avoids the critical policy questions involved in the case. As states continue to press theories of public compensation upon the courts, it is urged that these arguments be more carefully considered in the future. Perhaps now is the time to allow greater freedom to states to protect the health, comfort or economic well-being of their citizens.

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97. Id. 56(b).
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