Supreme Court, U.S.
FILED
NOV 2 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term 1970
No. 45 Original

STATE OF WASHINGTON, STATE OF ILLINOIS,
STATE OF ARIZONA, STATE OF COLORADO,
STATE OF HAWAII, STATE OF IOWA, STATE OF KANSAS,
STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS,
STATE OF MINNESOTA, STATE OF MISSOURI,
STATE OF OHIO, STATE OF RHODE ISLAND,
STATE OF VERMONT, AND COMMONWEALTH OF VIRGINIA,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland corporation, and
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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INTRODUCTION

The issues before this Court are narrow. Defendants do not dispute the right of the seventeen plaintiff States[1] to bring this action as *parens patriae* of their citizens and as

1. Since the complaint was filed two additional states, North Dakota and West Virginia, have filed motions for leave to join as additional parties plaintiff, making a present total of seventeen plaintiff States.

proprietors, nor do the defendants contend that the States have failed to state a case which comes within this Court's original jurisdiction. Defendants simply urge this Court to withhold the exercise of its jurisdiction because, defendants assert, plaintiffs have a suitable alternative forum or forums in other courts (Def. Br. 2, 11-20). Defendants further challenge the need for and the appropriateness of the relief sought by plaintiff States on the ground that other branches of the Federal Government (specifically the Congress and the Executive) are presently regulating motor vehicle emissions which cause air pollution (Def. Br. 2, 4, 20-24). Accordingly this reply brief will be limited to those two points.

I. There Is No Suitable Alternative Forum to Which This Case Could Be Remitted in the Interests of Convenience, Efficiency and Justice

Defendants urge this Court to withhold the exercise of its jurisdiction in this case on the ground that there is no want of other suitable forums (Def. Br. 11). Yet defendants are unable to indicate any *one* alternative forum which they can say with certainty will adjudicate this case on all three counts. Unless a single federal district court agreed in its discretion to hear Count III on the basis of pendent jurisdiction, see *infra* at pp. 8-10, defendants' proposed alternative would split this case, with Count I (and probably Count II[2]) tried in a single federal district

2. Count II differs from Count I only in that it alleges that the pertinent facts constitute a violation of the common law against restraints of trade as distinguished from the Sherman Act. It was included as a safeguard against an argument, previously made by these defendants in the multidistrict cases, that the power of a federal court to grant equitable relief pursuant to Section 16 of the Clayton Act is less broad than the general equity powers of such a court.

court and Count III tried as seventeen separate nuisance actions in the state courts of the seventeen plaintiff States (Def. Br. 11).

Such a result is not in the interest of convenience, efficiency or justice, and is not what this Court intended when referring to those standards it exercised its original jurisdiction in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

To the contrary, the action taken by this Court in *Georgia v. Pennsylvania R. Co., supra,* together with the clear language of the majority opinion show that this Court will not strain reality to avoid the exercise of its original jurisdiction in cases where a State has stated a cause of action against citizens of another State and is otherwise properly before this Court.

Recognizing the original jurisdiction of this Court as "one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between states and between a state and citizens of another state," 324 U.S. at 450, the court stated:

> . . . Once a state makes out a case which comes within our original jurisdiction, its right to come here is established. There is no requirement in the Constitution that it go further and show that no other forum is available to it. 324 U.S. at 466

The defendants urge that in the *Georgia* case, "the court left little doubt that if plaintiffs could have obtained jurisdiction over the defendants in a single district, a denial of leave to file would have been 'wholly appropriate'" (Def. Br. 12). But the language on which defendants rely to support their argument is extracted from the dissent, not

from the opinion of the Court (Def. Br. 12, 14-15). Moreover, the point made by Chief Justice Stone in his dissent, 324 U.S. at 471-472 (that facts of which the Court could take judicial notice showed that there was no want of a suitable forum in which Georgia could reach the same number of defendants as she could sue in the Supreme Court), demonstrates that in appropriate cases this Court will exercise its original jurisdiction without an exhaustive search for suitable alternative forums.

A. *There Is No Suitable Alternative Forum in Respect to Count I.*

In suggesting that Count I could be filed by agreement of the seventeen plaintiff States in a single federal district court, defendants have overlooked the problems presented by pending anti-trust litigation involving Multidistrict Vehicle Air Pollution Control Equipment, problems clearly perceived by Judge Manuel L. Real, the United States District Judge to whom the multidistrict private civil treble damage anti-trust litigation involving motor vehicle air pollution control equipment MDL District No. 31 has been assigned pursuant to 28 U.S.C., §1407. As stated by the defendants, in addition to the instant case, there are presently pending a series of seventeen private anti-trust suits filed in district courts in Illinois, California, Pennsylvania, New York, Wisconsin and Minnesota. If Count I of this lawsuit were filed in a federal district court, it would be consolidated for pre-trial proceedings before Judge Real, and be simply the eighteenth private case so filed.

In his memorandum order dated September 4, 1970

(Re Motion to Dismiss)* Judge Real expressly recognized that "The function of the judge assigned cases pursuant to Title 28, United States Code, Section 1407, is to coordinate pre-trial proceedings *with the view of returning cases to the transferor judge in condition to be tried* expeditiously to the benefit of all parties to the litigation" (Memo Order p. 4). (Emphasis supplied).

Thus, as Judge Real states and as plaintiffs have pointed out in their opening brief, there is presently no existing mechanism in our judicial system for the unified *trial* of the factual issues presented by the pending multidistrict cases.

In another memorandum order, also dated September 4, 1970, (Re Class Actions) Judge Real stated in respect to the cornerstone issue of conspiracy:

> . . . certainly the question of conspiracy is one which, as alleged herein, is common not only to the class within each separate action but also to all of the actions filed. This is an issue which should, in the interests of justice, need be litigated only once. Memorandum Order (Re Class Actions, p. 4).

But how, other than by this Court exercising its original jurisdiction, can this be accomplished? Even the defendants concede that if this Court does exercise its original jurisdiction in this case, "a decision by this Court would, as a practical matter, be controlling throughout the nation" (Def. Br. 19). The issue of conspiracy alleged in Counts I and II of the complaint is the same conspiracy alleged in the seventeen pending separate private treble damage actions. The appropriateness and feasibility of

*The Memorandum Orders of Judge Real referred to in this brief are printed as appendices.

equitable relief sought in this case is similarly an issue in sixteen of the other seventeen cases. These are the factual and legal issues on whose determination the outcome of all this litigation turns. They are the time consuming issues, the issues of universal national significance. The remaining questions of impact in individual states and communities and the measure of monetary damages, if any, are ones which may well in the interests of efficiency be tried separate from the principal factual and legal issues in any event.[3]

If this Court views the instant case in isolation rather than in the context of pending motor vehicle pollution control litigation, and if it separates Counts I and II from Count III, neither of which should be done, it could perhaps be argued, as defendants have attempted to do, that, in balance, convenience, efficiency and justice could be better served if plaintiffs were to file Counts I and II of this action in a single federal district court. However, such an argument ignores the pendency of other similar cases in various federal districts. When those other cases are taken into consideration, it is apparent that, in balance, a trial in this Court before a master is better adapted to a final resolution of the issues presented than those of a single district court which would have no binding effect upon other pending cases. Moreover, in light of the motion which these defendants filed on October 15, 1970 in the multidistrict litigation for reconsideration of Judge Real's order denying their motion to dismiss or in the alternative to certify for interlocutory appeal under 28 U.S.C. 1292(b),

3. Furthermore, the recent decision of the United States Court of Appeals for the Ninth Circuit in *Hawaii v. Standard Oil Co.*, No. 24,603 (9 Cir. Sept. 25, 1970) may make the *parens patriae* claims for monetary damages moot.

their argument that "trial under such a procedure might be slower, since this Court might have to rule on interlocutory matters which would not ordinarily be presented to an appellate body" (Def. Br. 17) has a hollow ring. It is apparent that whether these cases are litigated in the district courts or in this Court, interlocutory review and *certiorari* are going to be the rule, not the exception.

Certainly the standards of convenience, efficiency and justice apply not only to the individual parties to the particular cases before this Court but more broadly to the resolution of the issues presented by that case. As Judge Real has pointed out, the overreaching factual question of conspiracy is an issue which should be litigated only once in the interests of justice. Yet, unless this Court exercises its original jurisdiction in this case or unless all the parties in existing multidistrict cases agree to be bound by the findings of fact or jury verdict in the first case to be tried, that issue will be tried a number of times.

Neither *res judicata* nor collateral estoppel would apply to a State or other plaintiff not a party to the action which was actually tried. Moreover, rulings on questions of law and admissibility of evidence rendered by a federal district trial judge would in no way be controlling on the parties in other pending cases. However, not only would a trial of the conspiracy issue in this Court be controlling throughout the nation as a practical matter but all rulings on questions of law including admissibility of evidence would be legally binding. Defendants urge that such a result "would be true in any kind of case the Court might be willing to hear originally" but the need for such a result in the interests of efficiency and justice is unlikely to arise frequently.

If, contrary to expectation, similar cases do arise in the future, Congress can act to provide at a lower court level the type of judicial mechanism which today only this Court's original jurisdiction can afford. At the present time in the interests of convenience, efficiency and justice there is no suitable alternative forum for the resolution of the issues raised by Count I alone, *a fortiori* by the case in its entirety.

B. *There Is No Suitable Alternative Forum in Respect to Count III.*

(1) A Federal District Court could in its discretion decline pendent jurisdiction

Defendants state that "if the nuisance and anti-trust claims are found to be derived 'from a common nucleus of operative fact' (*United Mine Workers v. Gibbs,* 383 U.S. at 725), a federal court having jurisdiction over the anti-trust charges could also have pendent jurisdiction over the nuisance claim" (Def. Br. 13). Defendants rightfully hedge by using the word "if." They do not know whether a federal court in the future would find such a common nucleus or, even then if it would in its discretion exercise pendent jurisdiction. Defendants do not attempt to demonstrate that there is such a common nucleus under the *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), test.

It should be clear to defendants, as it is to this Court, that the principles which permit and encourage joinder of claims where a court has jurisdiction of all claims joined, are totally different from the principle enunciated in *United Mine Workers v. Gibbs, supra,* which enables a court in its discretion to exercise jurisdiction which it does not independently possess.

Even if a persuasive argument could be made that Counts I and III have the required common nucleus of operative fact, something the defendants never demonstrate, defendants' pendent jurisdiction argument facilely overlooks the fact that the federal judicial doctrine of pendent jurisdiction is one of discretion and that accordingly, pendent jurisdiction may be declined by a federal court, even in a case which might be appropriate for the exercise of such pendent jurisdiction. *United Mine Workers v. Gibbs,* 383 U.S. 715 at 726 (1966).

If the present plaintiffs were to file this suit in a federal district court, it would be transferred to the Central District of California and consolidated for discovery purposes with the presently pending Multidistrict Vehicle Air Pollution Control Equipment litigation. Thus preliminary questions on pendent jurisdiction would be considered by the California District Court, and on appeal by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit, in particular, has taken a narrow view of the scope of pendent jurisdiction and has refused to exercise such jurisdiction in a number of cases. See, *e.g., Hymer v. Chai,* 407 F.2d 136 (9th Cir. 1969); *Williams v. United States,* 405 F.2d 951 (9th Cir. 1969).

What the defendants are really doing is asking this Court to predict that some federal court in the future would exercise pendent jurisdiction over Count III. Such a petition is not equivalent to finding a suitable alternative forum.

Finally, it should be noted that while defendants now suggest that federal pendent jurisdiction as to the nuisance claim exists, their suggestion in no way binds them or af-

fects any later decision on this issue, should there be one, by a federal court. It is unlikely that defendants would seek to agree to such pendent jurisdiction if and when the time for decision should arise, but even if they would, such an agreement would be without meaning. Parties cannot stipulate to the subject matter jurisdiction of a federal court. See, *e.g.*, FED. R. CIV. P. 12(h)(3); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

Clearly, if a federal court does not exercise pendent jurisdiction over Count III, there is no other single forum where this suit can be brought.[4] Surely where this Court refused to remit the State of Georgia to a federal district court despite the facts pointed out by Chief Justice Stone in his dissent, *Georgia v. Pennsylvania R. Co.*, 324 U.S. at 471-472, it should not remit the seventeen States who are plaintiffs herein to a federal district court on the mere hope that that federal district court would in its discretion accept jurisdiction of the entire case.

(2) Plaintiff States have a right to a federal forum in respect to Count III

Defendants apparently admit that unless a district court exercises pendent jurisdiction over Count III, plaintiff States would not have an alternative federal forum for Count III. But defendants are fundamentally wrong in stating that plaintiffs' argument that they are entitled to a federal forum is a "novel suggestion." (Def. Br. 14).

To the contrary one of the specific purposes of Article III, Section 2 of the Constitution was to furnish a national

4. Just as no other federal court has independent jurisdiction over Count III, so no state court has jurisdiction over Count I, the Sherman Act claim.

tribunal to states suing citizens of another state. As the court stated in *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888):

> As to "controversies between a State and citizens of another State." The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist, No. 80; Chief Justice Jay, in *Chisholm v. Georgia*, 2 Dall. 419, 475; Story on the Constitution, §§1638, 1682.

In Federalist, No. 80, Alexander Hamilton stated:

> . . . the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

See also *Hart and Wechsler, The Federal Courts and The Federal System*, 23-24 (1953); Comment, *The Original Jurisdiction of The United States Supreme Court*, 11 *Stan. L. Rev.*, 665 at 684, N. 131 (1966).

Since a State is not a citizen for diversity purposes, *Arctic Maid v. Territory of Alaska*, 297 F.2d 28 (9th Cir. 1961); *Krisel v. Duran*, 386 F.2d 179 (2d Cir. 1967), cert. denied, 390 U.S. 1042 (1968), the original jurisdiction of this court is the only federal forum available to plaintiffs in respect to Count III.

(3) Even if plaintiff States were not entitled to a national tribunal for Count III, no single state court could adjudicate Count III

Count III states a claim against the defendants for creating and maintaining a public nuisance. In state courts, nuisance actions are generally treated as local actions which must be brought in the district where the nuisance is to be abated. See, e.g., *Ladew v. Tennessee Copper Co.*, 179 Fed. 245 (C.C.D. Tenn), aff'd 218 U.S. 357 (1910); *Engle v. Scott*, 57 Ariz. 383, 114 P.2d 236 (1941); *Mississippi and M.R. Co. v. Ward*, 67 U.S. (2 Black) 485 (1862); *State v. Reynolds*, 113 Ohio App. 469, 178 N.E.2d 842 (1960); *People v. City of St. Louis*, 10 Ill. 351 (1848); *People ex rel. Cunningham v. Lewis*, 43 Ill. App. 2d 295, 193 N.E.2d 473 (1963). Annotation, *Venue of Suit to Enjoin Nuisance*, 7 A.L.R.2d 473 (1949).

A number of the plaintiff States have statutes to the same effect. See, *e.g.*, Kansas Statutes Ann. 1964, §60-908; West Virginia Code, §20-5A-17; Baldwin's Ohio Revised Code Ann., Ch. 3707.01, 3707.51; T.18 Vermont Statutes Ann., §610.

If Count III would have to be brought in seventeen different state courts by each of the seventeen plaintiff States, then it cannot be said that there is *a* suitable alternative forum, even in state court.[5]

C. *No Other Forum Can Expedite This Case As Efficiently.*

The defendants make no answer to the compelling con-

5. Possibly all seventeen plaintiff States could sue to enjoin the alleged nuisance in state court in Michigan, the home state of the defendants. That is precisely the type of situation which Article III, section 2 was designed to avoid. See *supra* at p. 11.

sideration of time in this case. In view of their decision to seek interlocutory appeal, it is clear that bypassing the Court of Appeals will save considerable time as this case progresses.

The need for prompt relief, if plaintiffs can prove their case, has been made even more apparent by recent findings set forth in the Report of the Committee on Public Works of the United States Senate on the National Air Quality Standards Act of 1970, dated September 17, 1970.

The report states:

> Based on data contained in air quality criteria documents already issued (for carbon monoxide and photochemical oxidants) or in preparation (for nitrogen oxides) and on requirements for margins of safety, it has been concluded that the following ambient air quality levels must be attained to insure protection of public health:
>
> Carbon monoxide, 9 ppm/8-hour average.
>
> Photochemical oxidants, 0.06 ppm/1-hour average.
>
> Nitrogen dioxide, 0.10 ppm/1-hour average.

It then lists the following statistics showing present maximum ambient air levels related to direct health effects.

> Carbon monoxide: 44 parts per million/8-hour average, Chicago.
>
> Nitrogen dioxide: 0.69 parts per million/1-hour average, Los Angeles.
>
> *Maximum Ambient Air Levels of Oxidant Precursors*
>
> Hydrocarbons: 5.3 parts per million/6 to 9 a.m. average, Los Angeles.
>
> Nitrogen dioxide: 0.62 parts per million/6 to 9 a.m. average, Los Angeles.
>
> (These hydrocarbon and nitrogen dioxide measure-

ments are associated with Los Angeles peak values for oxidants.)

The report then states that under existing law the health related air quality levels could be attained in *1990* if all new cars produced after 1980 achieved the calculated emission-reduction goals. Senate Report, NAQSA of 1970, S. 4358, pages 25-27.

Existing legislation does not propose standards for pre-1968 vehicles, and even the bill presently in conference committee does not apply its mandatory standards for cars prior to the 1975 model. If the defendants did as alleged conspire to suppress technological development, a fact not before the Congress now nor when it enacted the existing air quality laws, plaintiff States will be entitled to equitable relief which could, if shown to be feasible, achieve the health related air quality levels well in advance of 1990. The time saving which this Court's exercise of its original jurisdiction can effect is essential to complete relief in this case.

II. This Court Is Not Precluded From Proceeding in This Case Because of Concurrent Legislative or Administrative Activity

Defendants devote a substantial portion of their brief (pp. 18, 20-24) to the argument that no court should hear this case or grant the equitable relief sought by the plaintiff States because the subject of motor vehicle air pollution is more appropriate for legislative and administrative controls and because Congress and the Department of Health, Education and Welfare are presently engaged in evolving standards and imposing such controls. In short, defendants imply that the area has been "preempted," and that courts

in the exercise of their equitable powers should not enter it. Defendants' argument is not well taken.

The present federal legislation on the subject is the National Emission Standards Act, enacted in 1965, and amended by the Air Quality Act of 1967. Under that law, the federal standards apply only to 1968 and later models. In no way does existing federal law prevent a state from requiring that 1967 and earlier model cars be equipped with pollution control equipment. See Currie, "Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption," 68 Mich. L. Rev. 1083, at 1095. Thus, even if defendants' "preemption" argument were applicable to this legal action by the States, it would not affect the equitable relief sought in respect to pre-1968 vehicles. The fact is, however, that the argument is totally inappropriate. There is no showing that the standards enacted or presently under consideration by Congress will eliminate motor vehicle produced air pollution as effectively and as quickly as one or more of the defendants could have done but for the conspiracy alleged in the complaint.

It should be clear on the face of the complaint that plaintiff States are not asking this Court to invade a field reserved more properly for Congress or the Executive.

The equitable relief which plaintiff States seek is designed only to remedy the damage caused now and in the future by defendants' alleged violations of law.

Plaintiffs allege that the defendants conspired and agreed to eliminate all competition among themselves in the research, development, manufacture and installation of Motor Vehicle Air Pollution Control Equipment, thus causing hindrance and delay in the research, development,

manufacture and installation of such Motor Vehicle Air Pollution Control Equipment (Complaint, par. 16(a), 18(a)). Plaintiff States allege they have no adequate remedy at law through monetary damages (Complaint, par. 18(1)). Accordingly, plaintiff States seek the only type of relief which can repair the damage caused by the alleged conspiracy, namely a decree requiring defendants to adopt a program of accelerated spending and research which will produce effective pollution control equipment or a "clean" engine by that date on which such equipment or engine would have been produced by one or more of the defendants but for the conspiracy alleged in the complaint, and to install such equipment at defendants' cost, on all cars manufactured by defendants back to the date when such equipment would have been available but for the conspiracy. The purpose of such equitable relief is clearly to give plaintiff States and their citizens the pollution-reduced or pollution-free motor vehicles which would have been available but for the conspiracy. Whether and to what degree such relief is feasible can only be determined when all the evidence necessary to the fashioning of such a decree is before the Court. To challenge a decree directly fashioned to remedy the damage allegedly done at this time is premature and unwarranted. For purposes of defeating defendants' argument, it is enough to show that the equitable relief sought is designed to remedy damage caused by defendants' alleged violation of the anti-trust laws, a subject which Congress was in no way concerned with in providing Motor Vehicle Emission Standards.

Defendants made the same argument in respect to the equitable relief sought by plaintiffs in the Multi-district

cases. Judge Real disposed of that argument summarily, stating *inter alia*:

> Plaintiffs may fail in their proof, but until then they should be given the benefit of employing "any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). Memo Order (Re Motion to Dismiss) p.3.
>
> It may well be that a trial judge, after hearing the evidence may determine that the grant of an injunction which parallels the relief of the consent decree in action 69-75-JWC is unwarranted. But pre-judging at this stage of the litigation, that plaintiffs may not be able to present some peculiar need for further injunctive relief is not the function of this Court. The prayers for relief are within the jurisdiction of this Court grant given the proof of facts alleged. Whether it is necessary or desirable is for the trial judge or development of these cases to where they may be subject to disposition without trial. Memo Order (Re Motion to Dismiss) p. 4.

This Court should dispose of defendants' argument as readily as did Judge Real.

CONCLUSION

For the reasons stated in plaintiffs' opening brief and in this reply brief, this Court should exercise its original jurisdiction and grant the plaintiff States leave to file their complaint.

Respectfully submitted,

DATED: November 2, 1970

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APPENDIX 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: MULTIDISTRICT PRIVATE CIVIL TREBLE DAMAGE ANTITRUST LITIGATION INVOLVING MOTOR VEHICLE AIR POLLUTION CONTROL EQUIPMENT	M.D.L. Docket No. 31 Memorandum Order (Re Motion to Dismiss)

Defendants have brought motions to dismiss 15 of the 16 complaints filed in this matter. Defendants have classified the grounds as 1. No Antitrust Injury; 2. No Parens Patriae Claims; 3. No Injunctive Relief; and 4. The Handy Complaint and they will be dealt with herein in that order.

BACKGROUND

January 10, 1969 the United States of America filed its complaint alleging against the major defendants herein violation of Section 1 of the Sherman Act (15 U.S.C. §1). The acts of conspiracy alleged therein are, without change, the acts alleged in the actions herein. The action by the United States resulted in a consent decree approved by Judge Jesse W. Curtis of the Central District of California in *United States of America v. Automobile Manufacturers Association, Inc., et al.*, No. 69-75-JWC.

The conspiracy enjoined in the consent decree includes as pertinent to the actions filed herein:

1. To prevent, restrain or limit the development, manufacture, installation, distribution or sale of air pollution control equipment for motor vehicles;

2. Adhering to agreements with reference to patents and patent rights.

After attempts to intervene in action No. 69-75-JWC met with failure, actions have been filed by plaintiffs herein variously in individual, class and parens patriae capacities.

ANTI-TRUST INJURY

Title 15, United States Code, Section 1, provides in its pertinent part:

> "§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty. Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

Title 15, United States Code, Section 15 provides in its pertinent part:

> "§15. Suits by persons injured; amount of recovery. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Defendants' thrust upon the motion to dismiss is that there is not alleged, nor can there be alleged a "commercial relationship" between plaintiffs and defendants permitting compensation for the claimed damages. For purposes of the motion to dismiss the court must assume the "injury" alleged.[1]

In terms of the development of the antitrust laws, the concept of source of injury alleged herein is rather new. It was not until 1947, that any recognition of pollution as anything more than a seasonal and infrequent nuisance like hay fever or summer cold came to the public of the United

States. It was not until 1952, that any claim was laid at the door of the automobile industry and not until 1969, that anyone recognized that allegedly something could be done about it except for the conspiracy of defendants alleged in action No. 69-75-JWC. We are now concerned with the phrase "injured in his business or property *by reason of anything* forbidden in the anti-trust laws" in the light of the allegations of these complaints, rather than the traditional, legalistic approach defined by the cases cited by defendants in their motion to dismiss. Each of the plaintiffs allege injury to their respective business or property *by reason* of anti-trust violations of the defendants.

Plaintiffs may fail in their proof, but until then, they should be given the benefit of employing "any available remedy to make good the wrong done."[2]

PARENS PATRIAE CLAIMS

The status of parens patriae cannot be used to substitute for a class action as to individual claims of the residents of political subdivision.

The question of validity of the parens patriae suit as applied to the economy of the governmental entities herein is answered in *State of Georgia v. Pennsylvania Railroad Company,* 324 U.S. 439 (1944) and *State of Hawaii v. Standard Oil Company of California,* 301 F. Supp. 982 (D. Hawaii, 1969) and needs no amplification here.

INJUNCTIVE RELIEF

The function of the judge assigned cases pursuant to Title 28, United States Code, Section 1407, is to coordinate pretrial proceedings with the view of returning cases to

the transferor judge in condition to be tried expeditiously to the benefit of all parties to the litigation. Defendants' attack upon the prayer for injunctive relief in 14 of the 15 complaints to which the motion to dismiss has been addressed is, at this point in this litigation, premature.

The Court has not been advised nor can it conjure any situation in which discovery will be delayed or, more onerous, simply because of the request for additional relief by way of injunction, prohibitory or mandatory.

It may well be that a trial judge, after hearing the evidence may determined that the grant of an injunction which parallels the relief of the consent decree in action 69-75-JWC is unwarranted. But pre-judging at this stage of the litigation, that plaintiffs may not be able to present some peculiar need for further injunctive relief is not the function of this Court. The prayers for relief are within the jurisdiction of this Court grant given the proof of facts alleged. Whether it is necessary or desirable is for the trial judge or development of these cases to where they may be subject to disposition without trial. We have not yet reached that posture of the cases. If we ever do depends upon the parties.

THE HANDY COMPLAINT

Defendants' motion to dismiss attacks Count II of the Handy complaint. Count II alleges violation of "plaintiffs' right to clean air and to a safe and healthy environment, free from the contaminants and pollutants which have resulted, and continue to result, from the operation of automotive vehicles, and the use therein of gasoline, which vehicles and gasoline were, and still are, manufactured,

distributed and sold by defendants," all protected by the Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, Section 1983 and Section 1988 (Civil Rights Act).

Plaintiff Handy would have this Court establish a right to clean air and a safe and healthy environment within the penumbra of the United States Constitution and its amendments. Clearly no extensions have been made by the courts except where there has been governmental intrusion into the privacy of its citizens.

The invitation to the Court to now rule that private corporations, though drawn to gigantic proportions, are public utilities or have the functions of a government is declined. These constitutional and statutory provisions do not create or permit any cause of action for a solely private intrusion.

Dated: September 4, 1970.

MANUEL L. REAL
United States District Judge

FOOTNOTES

1./ *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir., 1967); *Knuth v. Erie-Crawford Dairy Coop. Association*, 395 F.2d 420 (3d Cir., 1968).

2./ *Bell v. Hood*, 327 U.S. 678, 684 (1946); *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

APPENDIX 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: MULTIDISTRICT PRIVATE CIVIL TREBLE DAMAGE ANTITRUST LITIGATION INVOLVING MOTOR VEHICLE AIR POLLUTION CONTROL EQUIPMENT	M.D.L. Docket No. 31 All Cases Except Sturtz v. General Motors Memorandum Order (Re Class Actions)

The propriety of the maintenance of class actions or class action claims is questioned by defendants in 15 of the 16 cases pending before this Court for consolidated pre-trial proceedings.

The broadest claims of class representation are found in the *Gorssman, Philadelphia, Lackawanna* and *Handy* complaints.[1] These complaints purport to represent all persons in the United States.

The *Morgan* case[2] alleges class claims by all the farmers of the United States.

Complaints of *Illinois, New Jersey, New Mexico, Connecticut* and *Wisconsin*[3] claim classes of all people within their respective states and their political subdivisions.

Political subdivisions, public corporations and authorities within the state are represented in the *New York* complaint.[4]

Residents are represented in the *City of New York, City and County of Denver* and *Keane* complaints.[5]

California's[6] representation is narrowed to "all persons who own property, real or personal, or who conduct a business within the State of California damaged as the result of air pollution caused by automobiles."

Each of the class actions are attacked by defendants on the failure to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Federal Rules of Civil Procedure Rule 23 provides in its pertinent part:

"Rule 23. Class Actions.

(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.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Defendants primary attack on the class action status of this litigation is directed to the absence of common questions of law and fact which predominate over questions individual to the class members and the unmanageability of the classes alleged.

COMMON QUESTIONS OF LAW AND FACT

Classically the visceral issues of any litigation are liability on the part of a defendant and damage on the part of a plaintiff. Certainly one can, within the framework of these basic issues, conjure a plethora of factual and legal issues which must be resolved before a decision can be reached in the trial of a case. Unlike most litigation, treble damage (private) anti-trust liability presents the determination of three issues, (1) conspiracy (monopolization, etc.), (2) impact and (3) damage.[7] Certainly the

question of conspiracy is one which, as alleged herein, is common not only to the class within each separate action but also to all of the actions filed. This is an issue which should, in the interest of justice, need be litigated only once.

The instrusion of impact into the consideration of the liability aspect of these cases create a difficulty which cannot be easily answered. *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa 1968); *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Water Meters,* 304 F. Supp. 873 (J.P.M.L., 1969), if they are authority for the separation of issues are clearly distinguishable. All of the cases herein allege a peculiar type of anti-trust injury, i.e., injury resulting from a pollution caused by the conspiracy to hinder and delay the research, development, manufacture and installation of effective motor vehicle air pollution control equipment. It is in effect a conspiracy to maintain a public nuisance—smog. Impact is as varied as the public itself. In *Philadelphia Electric Co. v. Anaconda American Brass Co., supra, State of Illinois v. Harper & Row Publishers, Inc., supra,* and *In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Water Meters, supra,* the courts are considering price fixing conspiracies in violation of the anti-trust laws—where "impact" and "buyer" become almost synonomous. If you qualify as a "buyer" of the commodity in question the liability—damage issues—except as to *amount* of damage—lend themselves to common determination.

Grossman, Philadelphia, Lackawanna, Handy, City of

New York, City and County of Denver and *Keane* cannot be maintained as class actions.

Although there may be some differences in the effect of smog on various crops or the fauna and flora of a state, political subdivision, public corporation or public authority, the pleadings as they now stand do allege a class properly represented in *Morgan, Illinois, New Jersey, New Mexico, Connecticut, Wisconsin, New York* and *California* with respect to common issues of law and fact which predominate over questions affecting only individual members.

MANAGEABILITY OF THE CLASSES

Manageability of the classes alleged herein may certainly tax the imagination and ingenuity of the litigants, counsel and the court. But until management is recognized as impossible or near impossible, the Court will depend upon the ingenuity and aid of counsel to solve the complex problems this litigation may bring. If successful, the economics of time, effort and expense will more than compensate the effort.

REPRESENTATION OF THE CLASSES

The complaints of *Illinois, New Mexico, California, Wisconsin, New York, Connecticut, New Jersey, Philadelphia* and *Lackawanna* allege representation by a governmental entity of the individual residents within its jurisdiction. Putting aside the status of parens patriae for a moment, the question raised is the adherence to the principle that a plaintiff representative must be a member of the class purportedly represented.[8] It is conceivable that a governmental agency might, with reference to a particular act or

series of acts, stand in the same position as an individual resident within its jurisdiction. But in the context of the acts alleged herein and any impact and/or damage resulting therefrom a governmental agency raises issues which are peculiar only to its status as a governmental agency. It cannot, therefore, be a member of the class of citizens or residents and cannot maintain a class action on behalf of individual plaintiffs.

The representation of governmental agencies as a class is, of course, properly the subject of a class action. Since more than one action alleges representation of the class, determination of *the* representative governmental agency must be made. That question, or its resolution, does not at this juncture affect the proceedings herein and is left for later determination by agreement of the parties and failing that, hearing and determination by the Court.

Dated: September 4, 1970.

MANUEL L. REAL
United States District Judge

APPENDIX A

1. *Marshall B. Grossman, et al. v. Automobile Manufacturers Association, Inc., et al.* 69-1855-R

   City of Philadelphia, etc. v. Automobile Manufacturers Association, Inc., et al. 70-846-R

   County of Lackawanna, Pa., et al. v. Automobile Manufacturers Association, Inc., et al. 70-858-R

   C. Jon Handy, et al. v. General Motors, Inc., et al. 69-1548-R

2. *Robert Morgan, etc. v. Automobile Manufacturers Association, Inc., et al.* 70-1137-R

3. *The State of Illinois v. Automobile Manufacturers Association, Inc., et al.* 70-1042-R

   State of New Jersey v. American Motors Corporation, et al. 70-1041-R

   State of New Mexico v. American Motors Corporation, et al. 70-1040-R

   State of Connecticut v. American Motors Corporation, et al. 70-1043-R

   State of Wisconsin v. General Motors Corporation, et al. 70-806-R

4. *The State of New York v. Automobile Manufacturers Association, Inc., et al.* 70-1137-R

5. *The City of New York, etc. v. Automobile Manufacturers Association, et al.* 70-1477-R

City and County of Denver v. American Motors Corporation, et al. 70-1044-R

Thomas E. Keane, et al. v. General Motors Corporation, et al. 70-1039-R

6. *State of California, et al. v. Automobile Manufacturers Association, et al.* 70-541-R

FOOTNOTES

1./See Appendix A (1).

2./See Appendix A (2).

3./See Appendix A (3).

4./See Appendix A (4).

5./See Appendix A (5).

6./See Appendix A (6).

7./*Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 803 (1st Cir., 1964), cert. denied 379 U.S. 931 (1965); *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc.*, 346 F.2d 1012, 1041n1 (9th Cir., 1965).

8./*Rock Drilling Local Union No. 17 v. Mason & Hangar Co.*, (S.D. N.Y., 1950) 90 F. Supp. 539.