FILE COPY

IN THE

Supreme Court of the United States

October Term, 1971
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,
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' MEMORANDUM ON CHOICE OF SUBSTANTIVE LAW AND BRIEF IN REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

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Introductory Statement

The Supreme Court has directed all parties in this action to file simultaneous memoranda on the issue: Would federal or state law govern the substantive issues sought to be presented for decision in original actions such as this one?

The question of whether federal or state law is applicable was treated briefly in plaintiffs' supplemental memorandum of law dated February 12, 1971 (in respect to Count III, the nuisance count) and in the brief of sixteen states and the City of New York as *amici curiae* (in respect to Count I, the alleged Sherman Act violation). For reasons explained in Part I, *infra* at p. 4, the choice of law issue respecting Count III is now moot.

On December 24, 1971 defendants filed a supplemental memorandum in opposition (Def. Supp. Mem.) to plaintiffs' motion for leave to file complaint. Part II, beginning at p. 8, *infra*, replies to that supplemental memorandum

Pertinent recent developments in the multidistrict motor vehicle pollution cases, MDL No. 31, transferred to Judge Manuel Real, Central District of California at Los Angeles, pursuant to 28 U.S.C. § 1407 are called to this Court's attention in Part III, beginning at 20, *infra.*

ARGUMENT

PART I.

CHOICE OF SUBSTANTIVE LAW

1. Federal Law Governs the Substantive Issues in This Action.

The gravamen of plaintiffs' complaint is Count I, charging a federal antitrust violation. Plaintiff states allege a classic antitrust conspiracy to suppress technology and marketing of effective motor vehicle pollution control devices. See report of Attorney General's Comm. to Study Antitrust Laws, 230-231 (1955) and cases cited.

Specifically, these plaintiff states allege in their proposed complaint (Comp.) that beginning at least as early as 1953 and continuing until at least September 1969, the defendants combined and conspired among themselves and with other co-conspirators to suppress and retard research, development, manufacture and installation of effective motor vehicle air pollution control equipment (Comp. ¶ 16, p. 5).

The complaint alleges certain specific actions taken in concert and in furtherance of the alleged conspiracy including:

1. The restriction and suppression of pollution control technology (Comp. ¶ 17(a), 18(a), (b)).

2. Delayed installation of "positive crank case ventila-

tion, both inside and outside the state of California" (Comp. ¶ 17(c)(1) and (2)).

3. The restriction and suppression of publicity, which in fact includes a persistent pattern of alleged misrepresentations to governmental bodies and administrative agencies relating to research and development efforts concerning motor vehicle air pollution (Comp. ¶ 17(d)).

The conspiracy alleged and the specific acts in furtherance of the conspiracy describe violations of the Sherman Act.

This case arose directly out of the 1969 Justice Department civil complaint charging defendants with the same conspiracy alleged in plaintiffs' proposed complaint.

The proposed complaint also includes a count alleging common law conspiracy (Count II) and a count alleging nuisance (Count III), in addition to the antitrust violations. However, these counts were included *only* to supplement and support Count I.

Defendants had argued in the multidistrict proceedings that, even if plaintiffs in these actions could establish antitrust violations as alleged, the equitable relief sought was beyond that permitted by Section 16 of the Clayton Act.

Count II was added to authorize use of this Court's general equitable powers so that relief could be afforded in one case in the unlikely event defendants' narrow construction of Section 16 of the Clayton Act prevailed. The choice of law applicable to Count II, should Count II become relevant, is discussed below.

2. Plaintiffs Strike Count III.

Count III was included to give additional support to the Count I antitrust claim. While the wrong for which these states seek relief was a conspiracy in restraint of trade, plaintiff states recognized the possibility that the facts might also establish another actionable wrong, namely, the tort of nuisance. Before they had seen the evidence available to them through the multidistrict proceedings, plaintiffs were concerned that they might possibly fail to prove a conspiracy in restraint of trade, but, at the same time might establish another actionable wrong entitling them to similar relief. For that reason, Count III was included as a secondary claim.

Now, having had the opportunity to review documentary evidence available to them under a protective order in MDL Docket No. 31, plaintiffs are confident that the conspiracy alleged can be proved. Rather than encumber this case with an additional and broader nuisance claim, they prefer to simplify the issues in deference to the urgent need for speedy resolution and relief based only upon the antitrust claim. Accordingly, plaintiff states hereby strike Count III from their proposed complaint.

3. Count II Will Probably Not Be Reached. If It Is, It Is Controlled by State Common Law, and Is a Claim Pendent to Count I.

The principal equitable relief plaintiffs seek is a mandatory injunction requiring defendants, at their expense, to retrofit all pre-1968 cars with effective pollution control devices (Comp., Prayer ¶ 4). Defendants' argument, based on a narrow and untenable reading of § 16 of the Clayton Act, is both totally premature at this stage of the litigation,

and wrong. Accordingly, choice of law under Count II has only remote and contingent significance.

Moreover, it is an easy question. Count II is a classic pendent jurisdiction claim seeking relief under state law for the same acts alleged in Count I to be wrongful under the Sherman Act. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 721-729 (1966). See also defendants' Brief in Opposition at page 12.

The state law applicable is "the general doctrine of the common law that contracts restraining competition . . . are void." *United States v. Addyston Pipe and Steel Co.*, 85 Fed. 271, 285 (CCA 6th, 1898) aff'd. 175 U.S. 211 (1899). In his opinion, Judge Taft carefully reviewed the common law in at least 16 different states, as well as England and Canada, regarding contracts in restraint of trade, and concluded

> . . . that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade and tending to a monopoly. *United States v. Addyston Pipe and Steel Co., supra,* at 291.

Thus, inclusion of Count II in no way complicates this case. It raises no new or different facts; and it presents no difficult question on choice of law.

4. The Federal Law Questions Require Determination By This Court.

Contrary to defendants' assertion, this is not principally a fact case. To the extent there are factual questions, they will turn primarily upon documentary evidence. Judge

Real, who has supervised the multidistrict proceedings since their commencement in April 1970, and who attended a portion of the one deposition taken in the multidistrict actions to date, recently observed:

> "I saw the deposition of Mr. Caris and read it all or with that part of it, *it does boil down to a document case* because that is all that came out of Mr. Caris' deposition was basically reading documents." Transcript of Proceedings, Los Angeles, California, January 11, 1972, p. 8

Appellate review of factual findings has always been broader when those findings were not based upon oral testimony.[1] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948) (Oral testimony conflicting with contemporaneous documents); *Grove Laboratories v. Brewer & Co.*, 103 F.2d 175 (1st Cir. 1939) (depositions); *Bowles v. Carnegie-Illinois Steel Corp.*, 149 F.2d 545 (7th Cir. 1945) (affidavits). The essentially documentary nature of the evidence will greatly facilitate trial by this Court of such limited fact issues as this case presents.

This case will not, however, turn primarily upon disputed questions of fact but upon the resolution of important questions of federal law. Cf: *Oregon v. Mitchell*, 400 U.S. 112 (1970) (18 year old vote case).

Both here and in the multidistrict cases, including the interlocutory appeals to the Ninth Circuit, defendants have raised certain fundamental questions about the Sherman and Clayton Acts. The first question, presently *sub judice* in the Ninth Circuit on interlocutory appeal from an order of Judge Manuel Real denying defendants' motion to dis-

1. This same point disposes of defendants' reliance upon *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) regarding the value of intermediate appellate review. (Defs. Supp. Memo, p. 13).

miss, is whether or not plaintiff states have standing to sue on behalf of their citizens for relief under the federal antitrust laws in the absence of a "commercial relationship" between the victim and the perpetrator of the alleged antitrust conspiracy.

The second question, which defendants have suggested here, is whether or not plaintiffs can legally obtain the injunctive relief for which they have prayed. Specifically, defendants challenge the power of a federal court under Section 16 of the Clayton Act to grant the retrofit relief sought by these plaintiffs and *amici*. As we shall show below, both of these questions are prematurely raised by defendants at this juncture.

Irrespective of that, however, these vital questions of federal law must ultimately reach and be resolved by this Court, whether it accepts original jurisdiction or permits the questions to reach this Court in the traditional appellate fashion.

PART II.

REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

5. *Georgia v. Pennsylvania R. Co., and Ohio v. Wyandotte Chemicals Corp.*, Support an Exercise of Original Jurisdiction in This Case. (Reply to Def. Supp. Mem. pp. 5-8)

In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1949) the standards for exercising original jurisdiction in controversies between a state and citizens of another state were first announced as follows:

> The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice. *Georgia v. Chattanooga*, supra; *Massachusettts v. Missouri*, supra. 324 U.S. 464-465.

The availability of a more suitable alternative forum, namely the courts of Ohio, was clear in *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493 (1971). As this Court stated and indeed, as counsel for the State of Ohio admitted in oral argument:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest. 401 U.S. at 500

However, there is no alternative forum more suited to trial of the present case.

Defendants urge that granting plaintiffs' motion would impose insuperable burdens on this Court and detract from its paramount role as the supreme federal appellate

court. Def. Supp. Mem. p. 39. Indeed, they charge plaintiff states with disregard for "this Court's other manifold responsibilties."

But, in fact, while defendants' approach might spare this Court some additional effort in the short run, at the same time, by delaying a final resolution of this matter, defendants' approach would actually impose far greater burdens on this Court and indeed on the entire federal judicial system. If original jurisdiction is not exercised, and if plaintiff states must pursue their remedies in the district courts, there could be as many as 23 separate district court trials with appellate review in all 10 circuits.[2]

As implicitly recognized by the Chief Justice in his two State of the Federal Judiciary addresses, the current role of this Court in the federal system is not limited to functioning as the supreme federal appellate court, but includes ultimate responsibility for maintaining and assuring overall efficiency and viability of the entire federal judicial system. Accordingly, weighing alternative available forums against this forum by standards of convenience, efficiency and justice, this Court must consider the effect of its choice upon the entire federal judicial system, not simply upon the workload of this Court. Precisely this point was made by Mr. Justice Harlan in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 499, when he said: "Protecting this Court *per se* is at best a secondary consideration."

The present case is indeed unique in the history of federal court litigation. It alleges a nationwide conspiracy in restraint of trade, most susceptible of remedy by nation-

2. As discussed *infra* at 24, plaintiffs are attempting to expedite the multidistrict litigation, but there is no assurance those efforts will succeed.

wide, uniform equitable relief. While monetary damages may lie, and may be the only meaningful relief if trial is delayed, such damages are not an adequate or the most appropriate remedy. Plaintiffs seek clean air, not money. The scope of this problem results from the way automobiles have altered our society.

> In this 20th Century, wars, social upheaval, and the inventiveness of Man have altered individual lives and society. The automobile, for example, did more than change the courting habits of American youth—it paved the continent with concrete and black top; it created the most mobile society on earth with all its dislocations; it led people from rural areas to crowd the unprepared cities. Chief Justice Burger, *State of the Federal Judiciary,* 90 S.Ct. 2381, 2383 (1970).

If future cases combine a national wrong with a need for national injunctive relief as in this case, Congress may fashion a national forum alternative to the original jurisdiction of this Court. At this juncture, however, the original jurisdiction of this Court is the only "adequate machinery" available for meaningful determination of this dispute between thirty-four states and the citizens of another state. See *Georgia v. Pennsylvania R. Co.,* 324 U.S. at 450.

6. There Is No Right to a Jury Trial in This Case. (Reply to Def. Supp. Mem. p. 14)

Defendants express concern in their supplemental memorandum that a non-jury trial by this Court would have "powerful and perhaps controlling effect" upon subsequent jury trials of damage claims in related district court actions (Defs.' Supp. Mem., p. 15). Defendants attempt to rely on *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959)

and *Blonder-Tongue v. University Foundation,* 402 U.S. 313, 320-27 (1971).

Exercise of original jurisdiction by this Court would result in a single trial of the equitable relief cases brought by 37 of the 40 governmental plaintiffs. Left to be tried in appropriate district courts would only be a maximum of six cases.[3] These are, of course, different cases from those brought by plaintiffs and *amici* here.

Nobody in this case has any right to a jury trial. Similarly, where a plaintiff seeks damages, a jury trial right exists for either party. Yet, no defendant has a right to a jury in one plaintiff's equitable case simply because another plaintiff has a separate case seeking damages upon similar allegations. Nor can it be seriously argued that a defendant has a right to delay trial of the equitable case until after the separate damages case has been tried, especially where such delay may render relief in the equitable case meaningless.

Because separate cases by separate plaintiffs are involved here, the principles underlying such decisions as *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), relied on by defendants are wholly inapplicable.[4]

3. Plaintiffs in these cases are California; the City of Philadelphia, *et al.;* a cropfarmer class action entitled *Morgan;* a Chicago consumers class action entitled *Keane*; AMF Inc., a third party manufacturer; and Sturtz, a third party inventor. The *Morgan* class was approved by Judge Real and the *Keane* class was dismissed. The appropriateness of both these classes is *sub judice* in the 9th Circuit.

4. Thus, there is no occasion to consider whether in a single case separate trials first on equitable and then on legal counts would be warranted under the exceptional circumstances of this litigation. *Beacon Theatres* notes that there may be "imperative circumstances" where a prior determination of an equitable claim may be permissible in the trial court's discretion even though that would be binding in a subsequent jury trial on another claim in the same case. 359 U.S. at 510-511; see also *Dairy Queen Inc. v. Wood,* 369 U.S. 469, 472-473, 479 n.20

7. Collateral Estoppel Will Not Impair the Right to Jury Trial. (Reply to Def. Supp. Mem. p. 14)

A decree entered in this non-jury equitable case would have no res judicata or collateral estoppel effect in subsequent jury trials. This precise situation was faced in *Rachal v. Hill,* 435 F.2d 59 (5th Cir. 1970), *cert. denied,* 403 U.S. 904 (1971), where plaintiff in an action before a jury seeking damages under federal securities laws asserted that defendants were collaterally estopped by the judgment in a prior non-jury action brought by the Securities and Exchange Commission respecting the same subject matter.

Defendants first contended that plaintiff could not rely upon collateral estoppel, since plaintiff was a stranger to the S.E.C. injunction action. Secondly, defendants contended that collateral estoppel could not be invoked to deprive them of a jury trial on the liability issue.

The court rejected the first contention, following the modern view that lack of "mutuality" does not bar application of res judicata and collateral estoppel. But it accepted the second proposition, holding that, in light of *Beacon Theatres,* the order of trial could not deprive defendants of their right to a jury on the damage claims against them. The court reasoned (435 F.2d at 64) that:

> had Hill [the plaintiff] been a party plaintiff in the S.E.C. injunction action and there presented his claim for damages, the appellants would have received a jury trial on the issue of liability. It hardly makes sense

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(1962). The desperate need for a retrofit remedy to diminish continuing air pollution pending a necessarily more distant trial on damages would, we believe, be an "imperative circumstance" calling for a prior equitable trial even if separate trials on legal and equitable claims brought by the same plaintiffs were involved here.

> that Hill can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case. . . .

Rachal was followed in *Lynne Carol Fashions, Inc. v. Cranston Print Works Co., Inc.*, No. 19,599 (3d Cir., Jan. 17, 1972) and *Cannon v. Texas Gulf Sulphur Co.*, 323 F. Supp. 990 (S.D.N.Y. 1971), and we are aware of no conflicting authority.

8. This Court Can Handle This Case Efficiently and Expeditiously With a Special Master. (Reply to Def. Supp. Mem. pp. 13-14)

The Constitution, statutes, court rules, and previous decisions give this Court wide latitude and discretion over the manner in which it can function appropriately as a trial court. If this Court exercises original jurisdiction here, a special master should be appointed to preside over the pretrial and trial proceedings.

While this Court could give broad powers to such a special master without abdicating its judicial duties, guidelines for use of masters by district courts could be followed here. For example, Federal Rule of Civil Procedure 53(e)(2) states: "In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous."

In discussing the scope of review of a master's findings, Professor Moore states:

> Since mere objections [to the master's report] *would compel the court to review the whole case, and thus would defeat the very purpose of reference,* such

> vague and general objections should be overruled. 5A MOORE, FEDERAL PRACTICE 2994 (2nd ed. 1971). (Emphasis added)

In fact, the clearly erroneous rule stated in Rule 53(e)(2) has the same meaning as in Rule 52(a) relating to appellate review of district court findings of fact. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 689 (1946); *Dyker Bldg. Co. v. United States*, 182 F.2d 85 (D.C. Cir. 1950); *Lupton v. Chase National Bank of City of New York*, 89 F. Supp. 393 (D.C. Neb. 1950).

Thus, traditional standards for using a special master provide an excellent framework whereby this Court can expedite proceedings. The taking of evidence and determination of factual disputes can be done by the master and reviewed by this Court on the same basis that an appellate court normally reviews factual findings by a trial judge, and on the same basis that this Court normally reviews findings of fact by lower courts on direct appeals. Meanwhile, this Court would decide all critical motions and grant or deny the ultimate relief sought. Such an arrangement would eliminate inconsistent and conflicting results and would expedite the final determination of this litigation by avoiding the interlocutory appeals and similar delaying tactics prevalent in these cases from their inception.

LaBuy v. Howes Leather Co., 352 U.S. 249 (1937), relied upon by defendants, supports rather than detracts from plaintiffs' proposal for a master in the present case. In *LaBuy*, this Court held that a district judge, clearly competent to handle an antitrust case, abused his judicial powers by delegating the trial to a practicing lawyer who was not an experienced trial judge, particularly where the

judge himself was already familiar with the case because of extensive pre-trial proceedings. The Court observed that appointment of a busy lawyer as master usually results in a delayed decision, and emphasized that complex cases require trial judges rather than *ad hoc* inexperienced substitutes.

For this reason and for the reasons stated in Part III, plaintiffs believe that this Court should select as master an experienced trial judge, already familiar with the issues because of extensive pre-trial proceedings, and whose efforts will contribute to expedition, not delay, of the final decision. Plaintiffs previously suggested, and now urge that Judge Manuel Real be appointed special master by this Court for the fair, efficient and expeditious processing this case requires.

9. The Equitable Relief Sought by Plaintiff States Is the Most Appropriate Remedy for the Continuing Loss or Damage Caused by Defendants' Alleged Sherman Act Violations. The Clean Air Amendments of 1970 in No Way Detract From the Traditional Powers of an Equity Court Sitting in an Antitrust Case. (Reply to Def. Supp. Mem. pp. 15-33)

Defendants' argument that this case involves "political" considerations (see Def. Supp. Memo *e.g.*, p. 8, heading p. 9, and p. 24) requiring "policy decisions" (*e.g.*, pp. 10, 21) completely and deliberately misapprehends the nature of this lawsuit.

The principal relief sought is a mandatory injunction requiring defendants to cause to be installed at their expense effective antipollution control equipment on all pre-1968 motor vehicles in the United States (Comp. p. 13 Prayer, ¶4). The "disputed question of the power of any

court to grant such novel equitable relief" (Def. Supp. Mem. p. 10) is no less a question appropriate for judicial decision than is the appropriateness of a remedy in any other suit where Section 16 of the Clayton Act is invoked or in which a court of equity is asked to remedy a breach of law. The power of a federal court sitting in equity has been applied numerous times to fashion decrees uniquely designed to remedy wrongs caused by antitrust defendants.

Thus in *United States v. DuPont & Co.*, 366 U.S. 316 (1961), this Court ordered complete divestiture of all General Motors stock held by DuPont, despite adverse tax and market consequences. At 366 U.S. 323-34 it said:

> The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. . . . If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.

And see *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) where defendants, who leased equipment, were directed to sell on nondiscrimnatory terms, so that the product market would be opened to competition.

Moreover, retrofit is precisely the kind of "reparative" mandatory injunction equity courts have historically granted. See *Vane v. Lord Barnard*, Court of Chancery, 1716 2 Vernon 738, also reported in Prec. Ch. 454, Gilb. Eq. 127, and 2 Salk. 161, abstracted in CHAFEE & RE, CASES AND MATERIALS ON EQUITY 823 (5th Ed., 1967); *Kennard v. Cory Brothers & Co.* [1922] L.R. 1 Ch. 265 (C.A.); 4 Restatement of Torts, Note on Terminology, at 680-81 (1939).

Defendants' arguments that "the national failure to appreciate the environmental implications of vehicle and other emissions at an early date is plainly a social and political one" is irrelevant in the extreme when plaintiff states are charging these defendants with long-standing violations of the Sherman Act and fraudulent concealment of those violations. (Comp. ¶19, p. 9)

Defendants rely heavily on the Clean Air Act Amendments of 1970 to argue that the equitable remedy sought by plaintiffs would amount to judicial usurpation of congressional responsibility. In fact, however, the Clean Air Act amendments forcefully dramatize the sharp contrast between the type of political decision with which Congress was faced and to which defendants allude, and the *judicial remedy* which plaintiff states seek here. As is true with most legislation, the 1970 act was a result of political compromise. It was not based on a judicial finding that the automobile manufacturers were guilty of any wrongdoing. By contrast, the duty of this Court or any court is to decide whether a particular remedy is necessary to redress an injury proved and, if so, to consider whether it is appropriate, given the nature and seriousness of the violation. In short, contrary to defendants' assertion, "case by case decisions of the judiciary" (Def. Supp. Mem., p. 21) are completely appropriate, indeed, essential, to remedy past violations of law.

As we have pointed out previously, (Pls.' Reply Br., p. 15; and see *Amici* brief, p. 15, n. 6), the federal law establishes standards for new cars. The remedy which plaintiff states seek deals with pre-1968 cars, namely, those cars manufactured and sold during the period of the

alleged antitrust conspiracy. Thus, plaintiffs are not attempting to "replace, modify or accelerate the imposition of the standards mandated by" the 1970 act (Def. Supp. Mem., p. 20). We only seek to have defendants produce the cars which they "would have produced" but for the illegal conspiracy. The discussion at pages 22 through 25 of defendants' supplemental memorandum on sources of air pollution and the responsibility of other polluters is totally out of place in this case. It is, however, indicative of the whole thrust of defendants' argument. Defendants would persuade this Court that, like *Ohio v. Wyandotte, supra,* this case represents an effort by the states to fight air pollution. Indeed, in their supplemental brief they argue this case as if it were another version of *Ohio v. Wyandotte.* Yet it is unmistakably clear from the complaint and our arguments to date, that this is an antitrust case. Liability depends entirely on antitrust principles and the relief sought depends entirely on equitable powers employed to mold antitrust remedies. True, the subject matter of the violation is motor vehicle air pollution. But this case is an air pollution case only in the sense that another major anti-trust case, *Associated Press v. United States,* 326 U.S. 1 (1945), was a newspaper case, as the defendants in that case, invoking the First Amendment, unsuccessfully argued.

Defendants argue as well that this case deals with matters of "an unusually complex and technical nature" (Def. Supp. Mem., p. 11) and "with the frontiers of an arcane and still imperfectly understood technology" (Def. Supp. Mem., p. 11). But plaintiffs are prepared to prove that time and again throughout the fifteen-year history of the alleged conspiracy, defendants, who controlled most of the

technology in the field, misled and misrepresented the facts to various state, federal and local government agencies. Until this evidence can be made public, it will be impossible to know whether defendants are now accurately representing the facts to this Court or any court or even accurately represented the facts to Congress when it enacted the Clean Air Amendments of 1970.

10. In Any Event, Defendants' Argument Regarding Relief Is Totally Premature. (Reply to Def. Supp. Mem. pp. 15-33)

In support of their motion to dismiss in MDL Docket No. 31, defendants made the same argument respecting equitable relief sought which they make here. 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 reasoning applies equally here.

PART III.

RECENT DEVELOPMENTS

11. Recent Developments Confirm the Need for Original Jurisdiction to be Exercised.

This original action is integrally related to the actions pending before Judge Manuel Real in MDL No. 31. From the beginning, the position of plaintiff states in this action has consistently been to seek *one* trial of the equitable issues, and *one* nationwide injunction in the *speediest* possible manner. The goals of one speedy trial and one nationwide injunction were and are the reasons for urging this Court to exercise its original jurisdiction. (See Pl. Br. in Supp. of Motion, pp. 19 and 22; Pl. Supp. Mem., p. 8; Reply Br., p. 14.)

The remaining governmental plaintiffs equally desire a speedy unified trial on the equitable issues and, with the exception of California and Philadelphia, have agreed to withdraw their claims for damages in the district court proceedings, if they can obtain that result. The positions of California and Philadelphia are not final.

Conversely, defendants have been engaged from the outset in a program of proliferation and protraction. They oppose unified trial of the antitrust issues both here (Br. in Opp. pp. 19-20; Def. Supp. Mem., p. 35) and in MDL No. 31.

Defendants are equally resistant to an early trial. In their Supplemental Memorandum (page 11) the threat of lengthy proceedings is scarcely veiled. After observing that "major antitrust cases usually require *years* of pretrial and trial proceedings," they complain about how the present case is allegedly even more complex and diffi-

cult. The implication left about how long this case will take is clear.

It becomes apparent, however, why these prophecies of interminable litigation are cultivated. After criticizing retrofit for pre-1968 cars as an unfeasible remedy, defendants observe (at page 31) that uncontrolled used vehicles on the road are a "constantly shrinking number." It is their goal to delay resolution of the issues raised by these cases until the effectiveness of retrofit and, consequently, the expense to defendants if plaintiffs obtain the equitable relief sought will have dissipated through the passage of time.

Defendants are aware that an effective retrofit is available. A statement by Chrysler Corporation, packaged with a retrofit device it is now marketing, states:

> Combined with an engine tuneup, the device cuts emissions on older vehicles by an average of 50% in hydrocarbon, 50% in carbon monoxide, and about 30% in oxides of nitrogen.

Similarly, General Motors advertises a "low-cost emission control system" for pre-1967 cars, which, together with an engine tune-up, will reduce emissions by 50 percent. Washington Post, April, 1970.

If a speedy trial on the equitable issues is denied plaintiff states, such devices will probably never be installed at defendants' expense on a nation-wide basis, and the injury caused by defendants' conspiracy will go unremedied. Such a result will be particularly unfortunate when defendants themselves have conceded that "[i]f every car produced before 1969 had [available retrofit devices], our air would be as pure as it was 30 years ago." (John DeLorean, Vice President of General Motors in charge of Chevrolet Division, Look Magazine, p. 57, August 25, 1970).

Recent developments in MDL No. 31 show that, if certain legal hurdles are cleared, a speedy trial, specifically, a trial starting in December 1972, on the equitable issues only, can be achieved.

To show the significance of these recent developments in MDL No. 31 and their direct relationship to the motion of plaintiff states for leave to file their proposed complaint here as an original action, a summary recapitulation of the Motor Vehicle Air Pollution Antitrust litigation is necessary.

In early 1969 the Justice Department filed a civil action charging defendants with conspiracy to eliminate competition in research, development, manufacture and installation of motor vehicle air pollution control equipment. That case was settled by a consent decree which simply forbade continuance of the alleged illegal combination, despite strenuous objections from many major public bodies that the consent decree relief was inadequate. *United States v. Automobile Manufacturers Ass'n.*, 307 F. Supp. 617 (C.D. Cal. 1969), affd. sub. nom. *City of New York v. United States,* 397 U.S. 248 (1970).

Following entry of that decree, a number of states and other governmental entities filed antitrust suits similar to Count I of the present case in federal district courts throughout the United States.

The actions filed in the district courts by the governmental entities are suits for equitable relief and treble damages. The state plaintiffs in the district court actions have sued both in their capacity as *parens patriae* and pursuant to Rule 23 of the Federal Rules of Civil Procedure as representatives of a class consisting of all political subdivisions within their state. These actions were all transferred

to the United States District Court for the Central District of California, Judge Manuel Real, as MDL No. 31, pursuant to 28 U.S.C. §1407.

The present action was filed in this Court by fifteen states on August 5, 1970. Three additional states were subsequently granted leave to join as plaintiffs. See 91 S. Ct. 2272. This action was brought by plaintiffs in their capacity as *parens patriae* on behalf of the citizens of their respective states for equitable relief only. The proposed complaint does not claim to be a class action. It does not seek monetary damages. The sole purpose of this action was and is to obtain equitable relief in the form of a mandatory (reparative) injunction for the continuing "loss or damage" inflicted upon the citizens and property of the plaintiff states by defendants' antitrust conspiracy.

While plaintiffs' motion was pending it became evident that applicable statutes of limitation might run. To foreclose that risk, in March 1971 plaintiff states herein filed "standby" district court actions. See telegram to Clerk of Supreme Court dated April 15, 1971, Appendix A. Eleven of these states filed separate antitrust actions in their own districts. The remaining seven plus Nevada filed one consolidated action in the Central District of California.

These "standby" actions were added to all the other district court actions previously transferred to Judge Real, as MDL Docket No. 31. These MDL actions include complaints filed by a total of thirty-four states and six other governmental entities in twenty-three federal districts in all ten circuits.

In August 1971 sixteen states and the City of New York which had all initially filed district court actions urged

this Court, as *amici curiae,* to assume original jurisdiction of this case and stated their intention to seek leave to join this action as plaintiffs if that jurisdiction is exercised.[5]

On January 24, 1972, all of the multi-district plaintiffs, including plaintiffs herein, submitted to Judge Real a proposed program of further pretrial and trial proceedings in which they stated that the plaintiffs in all but two of the governmental cases would drop all claims for damages if a consolidated trial before Judge Real on the remaining equitable claims would be scheduled not later than December 1972. Defendants uniformly opposed this program.

Plaintiffs in the present case informed Judge Real that their need for an exercise of original jurisdiction by the Supreme Court would no longer exist if a firm and preservable consolidated trial date before Judge Real could be set for December 1972. They further stated:

> If, however, this court cannot assure a preservable 1972 trial date because of issues *sub judice* in the Ninth Circuit, other possible interlocutory appeals or petitions for certiorari which defendants might pursue, or any other reason, then these plaintiffs, to accomplish their original purpose of a speedy trial on the equitable issues, will continue to pursue actively their original action before the Supreme Court. That pursuit will obviously not be designed to preclude further actions by this court, but rather, as we have earlier suggested to the Supreme Court, to expedite resolution of both this multidistrict litigation and the original action. Toward that end, we support a December 1972 trial date by this court in any event.

One other aspect of this litigation is crucial in determin-

5. This Court has previously indicated that intervention of non-state plaintiffs would be permitted in an original action under appropriate circumstances. See *New Jersey v. New York,* 345 U.S. 369, 373 (1953).

ing whether this Court should exercise its original jurisdiction. In MDL No. 31, defendants moved to dismiss the governmental complaints based upon defendants' interpretations of the antitrust laws set forth at 6-7, *supra.* Following denial of these motions, six cases were certified for appeal pursuant to 28 U.S.C. §1292(b). Oral argument in the Ninth Circuit occurred on January 13, 1972, where the issues are now *sub judice.*

A hearing was held before Judge Real on February 17, 1972, (five days before the filing of this brief) on the question of whether plaintiffs' proposed program for expedited pretrial proceedings and a December 1972 trial date should be adopted.

At the conclusion of that hearing, Judge Real adopted the following program:[6]

1. He ruled that "at least until the order of the Court of Appeals comes down" he would limit discovery and proceed with the schedule basically as proposed by plaintiffs on the equity issues only at this time.[7]

2. He set a further pre-trial hearing for March 7, 1972 for consideration of proposed notices to the classes that have been allowed in MDL No. 31, indicating plaintiffs' intention to withdraw their damage claims, contingent upon setting a December 1972 trial date and giving class members a right to opt out of that decision.

3. He denied the motion of plaintiffs to sever [or with-

6. Pertinent portions of the transcript of that hearing before Judge Real held at Los Angeles, California on Thursday, February 17, 1972, are attached as Appendix B.

7. Plaintiffs' proposed pre-trial schedule calls for completion of first wave discovery by June 30, 1972; and commencement of second wave discovery on August 15, 1972; and commencement of trial on December 4, 1972.

draw] their damages claims, without prejudice to renew after a hearing upon the proposed class notices, and a determination of the class action.

4. He deferred until after resolution of the class questions a proposal to issue an order to show cause why the actions filed in other districts should not be transferred to the Central District of California under 28 U.S.C. §1404.

Thus, in light of Judge Real's ruling on February 17, 1972, the case is proceeding with a discovery program tentatively geared to a target trial date in December 1972 on the equitable claims only.

There are, however, at least four roadblocks which must be cleared before the December trial date becomes a reality. They are: (1) the requirement of notice to the governmental classes and responses by the class members; (2) defendants' vigorous resistance to any transfer of all equity cases to the Central District of California under 28 U.S.C. §1404 (Transcript of Proceedings, February 17, 1972, p. 51.); (3) the possibility of certiorari to this Court and a request for stay of the trial date by defendants if they lose their interlocutory appeal now *sub judice* in the Ninth Circuit; (4) the possibility that defendants will seek interlocutory appeal or mandamus, coupled with a stay, if Judge Real transfers pending cases to his district under 28 U.S.C. §1404.

Moreover, even if a December 1972 trial is obtained before Judge Real, but not under the original jurisdiction of this Court, the possibility of protracted appeals could delay relief at least an additional year.

CONCLUSION

The reason all governmental plaintiffs conditioned their decision to withdraw damages claims upon a speedy equitable trial is crucial. This conditional withdrawal of damages is not, as defendants argue, an effort to bargain with the trial court. Rather, it represents a difficult but realistic decision about the most effective remedy for the wrong committed by defendants. This decision was inextricably tied to the realities of automotive air pollution.

As stated by the Secretary of Health, Education and Welfare in his March 1970 report to Congress in compliance with Public Law 90-148 (The Air Quality Act of 1967), atmospheric changes caused by pollution are occurring,

> . . . at least in part, because the planetary atmosphere in toto is a closed system, and the natural atmospheric cleansing mechanisms are incapable of dealing with the great quantity of contaminants emitted. This is in contrast to a regional environment, where polluted masses of air frequently are swept away by the free movement of weather systems. Report, p. 73.

Defendants estimate that 50 million pre-1968 cars now on the road would be subject to retrofit if plaintiffs obtain the relief they seek. Approximately 8 million of these pre-1968 cars leave the road each year and that rate may accelerate in the future. Thus, irreparable harm to the atmosphere and to health not only continues, but the "res" of the equitable claims is rapidly disappearing while the harm it caused remains in the air indefinitely.

If equitable relief can be obtained during 1973, then the equitable remedy sought will be effective, invoked in sufficient time to reduce substantially or eliminate air

pollution from pre-1968 vehicles. However, if defendants succeed in delaying a trial, the relative value of retrofit will be diminished. And at some point, as more and more pre-1968 cars leave the road, money damages for past injuries will be the only available remedy. If that occurs, numerous jury trials in many district courts and appeals to this Court through a number of circuits will probably result.

This *parens patriae* action for equitable relief only, presents none of the obstacles raised by defendants in MDL 31. There are no problems of class notification and no problems of transfer by a §1407 transferee judge to himself under 28 U.S.C. §1404.[8] The other state plaintiffs have stated that they would intervene in this action if original jurisdiction is exercised. By exercising that jurisdiction and appointing Judge Real master with instructions to proceed with trial as expeditiously as possible, this Court can eliminate the possibility of protracted jury trials, difficult legal and factual questions relating to measuring and allocating money damages, diverse appeals, and most importantly, this Court can preserve the possibility of the one remedy most fitted to the wrong charged.

Respectfully submitted,

Dated February 22, 1972.

STATE OF WASHINGTON
SLADE GORTON, Attorney General

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8. Judge Real, apparently seeking a way to avoid these problems, suggested to plaintiffs' counsel that plaintiffs consider filing new cases in the Central District of California as *parens patriae* suits for equitable relief only. Unfortunately, as recognized by plaintiffs' counsel, this "solution" would raise serious, probably fatal, statute of limitations questions. (Transcript of Proceedings, p. 181)

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APPENDIX A

Telegram Dated April 15, 1971

Honorable E. Robert Seaver, Clerk
Supreme Court of the United States
Washington, D. C. 20543

Dear Sir:

Re: State of Washington, et al., Plaintiffs,
v. General Motors Corporation, et al.,
Defendants, O.T. 1970, No. 45 Original

We did not receive the April 7, 1971 letter of Howard P. Willens, attorney for defendant Automobile Manufacturers Association, Inc., in the above entitled matter until April 14, 1971, it having been mailed with his letter to the Court dated April 12, 1971 and postmarked in Washington, D. C. on April 12. We respectfully request that the facts stated in this telegram be called to the attention of the Court at the same time that you present the facts stated in Mr. Willens' letters.

Fifteen of the seventeen actions to which Mr. Willens refers were filed in various federal district courts by the states which are plaintiffs in the above entitled original action during the weeks of March 8 and March 15, 1971. These actions were all filed as "standby" actions solely for the purpose of protecting the rights of said states against any argument that the one year limitations period provided by 15 U.S.C. § 16(b) had expired while the Supreme Court was considering the states' motion for leave to file a complaint in original action No. 45.

While we are of the opinion that the pendency of plaintiffs' motion for leave to file the complaint would toll the

running of the pertinent statute of limitations and while we further believe that our arguments in favor of the Court's exercising its original jurisdiction are sound, in the absence of a case precisely on point in respect to the statute of limitations question, we concluded that the substantive issues presented by this litigation are too important to take any risk, no matter how minimal, that a statute of limitations argument could be urged by the defendants if this Court does not exercise its original jurisdiction.

We further request that you call to the attention of the Court the fact that the cases filed by the seventeen plaintiff states as "standby" actions have been filed in twelve different federal districts. While, as counsel for the defendant Automobile Manufacturers Association, Inc. points out, each of these cases is in the process of being transferred, pursuant to Section 1407 of the Judicial Code, to the Central District of California for pretrial proceedings, the eleven cases filed in districts other than the Central District of California will, pursuant to Section 1407, all be returned to their original districts for trial. Thus, if the Supreme Court refuses to exercise its original jurisdiction in the above entitled case the burden on the total federal judicial system of multiple trials referred to at pages 4-8 of Plaintiffs' Reply Brief In Support Of Motion For Leave To File Complaint are even more extensive than was the case when that reply brief was filed.

Furthermore, as pointed out in Plaintiffs' Reply Brief, pages 8-10, it is by no means clear that the District Court for the Central District of California would exercise pendent jurisdiction of Count III, the nuisance count.

On behalf of the plaintiff states in the above entitled case we request that the Court be informed that all plaintiff states reaffirm and renew their motion for leave to file complaint as an original action in the above entitled matter. If the Court seeks further explanation of the filing of the "standby" actions, we request the opportunity to file a brief or an extended statement of reasons.

Copies of this telegram are being sent by mail to all defense counsel and to co-counsel for Plaintiff States.

Fredric C. Tausend
Special Assistant Attorney General
State of Washington
One of the attorneys for Plaintiff States
in Original Action No. 45

APPENDIX B

Transcript of Proceedings, February 17, 1972

"THE COURT: All right, 2:00 P.M. on March 6, 1972 for consideration of notice to the classes that have been allowed by this Court thus far so that I have that in mind, and that is to be submitted by each of the plaintiff representatives on the class which they represent, the kind of notice that would indicate that there is the proposed dismissal. General notice of the class, why, I think we can get that done at the same time and not waste a notice. General notice of the class, the right to opt out and the question that there has been presented to the Court a situation in which damage actions are proposed to be dismissed upon the determination of a trial date no later than December 4, 1972, or whatever that date is—that kind of a date. So that we have in mind what we are talking about in terms of the class.

The motion to sever, so the record will be clear, is denied at this time without prejudice to the plaintiffs after the determination of the class action and hearing upon the proposal of the class on the notice. . . .

"THE COURT: No. The proposed notice should indicate that the hearing upon that notice in terms of the declaration of the class opting out will be at a certain time and for the dismissal of the damage actions upon the condition that a trial date be set.

"MR. SHAPIRO: And I assume that the trial date will be December 4, as we indicated?

"THE COURT: At least that indication can be put in the notice. Maybe at that time there may be some modification of that, but we can decide that before the notices go out. . . .

"THE COURT: I propose in any circumstance, Mr. Shapiro, at least until the order of the court of appeals comes down, to at least limit the discovery and proceed with the schedule basically as proposed by the plaintiffs on the equity issue only at this time.

"MR. SHAPIRO: All right, your Honor. The only thing I was concerned about, however, was the order to show cause with regard to transferring the cases here. That is the only other remaining thing that has not been touched on.

"THE COURT: Okay. The defendants have raised a question. As long as you are going to injunctive relief, Mr. Shapiro, you might think about the fact that you can file the cases in this district without any problem.

"MR. SHAPIRO: My problem is this. I may have—may have—this is my problem—I may have a very serious problem with regard to that with regard to the question of the limitations. How do I stop a case and start it all over again? That would be a perfect solution.