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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2013

1110996

South Alabama Gas District

v.

Kerry W. Knight et al.

Appeal from Clarke Circuit Court
(CV-10-900050)

MOORE, Chief Justice.

South Alabama Gas District appeals to this Court from an order of the Clarke Circuit Court enjoining it from selling liquified petroleum ("LP") gas and related appliances outside

its member cities. We dismiss the appeal and order the trial court to vacate the injunction.

I. Facts and Procedural History

To facilitate the provision of natural gas to rural areas in Alabama, state law authorizes two or more municipalities to create a "gas district." § 11-50-390 et seq., Ala. Code 1975. These districts have significant competitive advantages over private providers of natural gas. As a condition for operating outside the cities composing the gas district (known as "member cities"), a gas district must provide notice and a buy-out offer to any preexisting "plant and system" with which it might compete. See § 11-50-266, Ala. Code 1975, made applicable to gas districts by § 11-50-399, Ala. Code 1975. In 1961, the cities of Evergreen and Monroeville formed the Conecuh-Monroe Counties Gas District, which in 2001 changed its name to South Alabama Gas District ("SAG"). In 1999, SAG began selling LP gas outside its member cities. SAG, however, did not provide notice and buy-out offers to competitors.

On May 18, 2010, four individual taxpayers and Fletcher Smith Butane Co., Inc., sued SAG, seeking both an injunction and damages for SAG's alleged violation of § 11-50-266, as

made applicable to gas districts by § 11-50-399. The trial court bifurcated the claim for injunctive relief and the damages claim and on October 7, 2011, held a bench trial on the claim for injunctive relief. SAG argued that the notice and buy-out provisions did not apply to it because LP gas is not a "manufactured gas" within the terms of the statute. The trial court found otherwise and enjoined SAG from selling LP gas and related appliances outside its member cities if it did not comply with § 11-50-266.[1] SAG appealed the injunction to this Court.

We first address the claims of the individual taxpayers.

II. The Taxpayer Plaintiffs

In their amended complaint plaintiffs Kerry W. and Christy Knight and Kirklyn and Regina Gwin identify themselves as adult residents of the City of Thomasville and of Clarke County. They allege "standing to bring this claim contesting

[1]On April 27, 2012, pursuant to Rule 62(c), Ala. R. Civ. P., the trial court stayed, pending appeal, that "portion of the injunction prohibiting SAG from conducting LP gas sales outside its member cities," subject to two conditions: "1. SAG must pay into an interest-bearing escrow account 5% of its gross revenues from its sales of LP gas outside its member cities. 2. SAG is prohibited from paying any member city or franchised city any payment from the sale of LP gas pending the outcome of the appeal."

the legality of South Alabama Gas' activities because the City of Thomasville and Clarke County are deprived of the tax and other revenue to which they are entitled." In particular, they claim harm resulting from the tax advantages provided to SAG as a public corporation. See Henson v. HealthSouth Med. Ctr., Inc., 891 So. 2d 863, 868 (Ala. 2004) (noting that "a taxpayer has standing to challenge a tax abatement conferred upon another taxpayer ... so long as the taxpayer can demonstrate a probable increase in his tax burden from the challenged activity").

The trial court in its order of April 2, 2012, found that the taxpayers had failed to carry their burden of proving that "tax increases probably resulted from SAG's tax reduction." Thus, they "lack[ed] standing to challenge SAG's appliance sales." Although the trial court limited its findings to the topic of appliance sales, logically the taxpayers' failure to prove harm requires dismissal of all their claims.

III. Fletcher Smith Butane Co., Inc.

A. Fletcher Smith's Admissions

On April 5, 2012, SAG appealed the injunction to this Court. See Rule 4(a)(1)(A), Ala. R. App. In its opening brief

SAG argues, among other things, that Fletcher Smith no longer has standing because it has "sold its assets and is no longer engaging in the LP gas business." SAG's brief, at 54.[2] As proof, SAG cites Fletcher Smith's October 10, 2012, response to "Requests for Admissions of Fact," which is included in the record on appeal. The relevant requests and Fletcher Smith's responses are as follows:

> "1. Admit that Plaintiff Fletcher Smith Butane Co., Inc., a corporation, is no longer in the business of selling or distributing propane gas.
>
> "RESPONSE: ... [Fletcher Smith] states that it is not currently selling or distributing propane gas due to the asset sale described herein.
>
> "2. Admit that the assets of Fletcher Smith Butane, Co., Inc., have been recently sold and assigned.
>
> "RESPONSE: [Fletcher Smith] admits that it has sold assets to Parden Gas.
>
> "3. Admit that the sales agreement for Fletcher Smith Butane Co., Inc., listed the assets sold with assigned value to each asset.
>
> "RESPONSE: ... [T]he sales agreement speaks for itself. ...

[2]"If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 98 (1993).

> "....
>
> "6. Admit that Fletcher Smith Butane Co., Inc., present [sic] has no tangible assets.
>
> "RESPONSE: ... [T]he Company has no current real or personal property.
>
> "....
>
> "10. Admit that Fletcher Smith Butane Co., Inc., is not in competition with South Alabama Gas.
>
> "RESPONSE: Denied."

These admissions raise a question we must examine as to whether the necessary adversity of interests still exists between Fletcher Smith and SAG for this action to continue. "A plaintiff must be so situated that he or she will bring the requisite adverseness to the proceeding. A plaintiff must also have a direct stake in the outcome ...." Hamm v. Norfolk Southern Ry., 52 So. 3d 484, 500 (Ala. 2010) (Lyons, J., concurring specially). If Fletcher Smith, having left the propane business, can no longer benefit from prospective relief against SAG, the injunction is moot. "[W]e must inquire, as a threshold matter ... whether this case involves a justiciable controversy or whether it has been mooted ...." Underwood v. Alabama State Bd. of Educ., 39 So. 3d 120, 126 (Ala. 2009).

Fletcher Smith in its response brief in this Court does not deny the existence of the admissions. It instead attempts to mitigate their effect, stating that "these responses [to requests for admissions] do not state that [Fletcher Smith] is no longer in [the LP gas] business. Instead, the responses state that [Fletcher Smith] is not currently selling LP gas." Fletcher Smith's response brief, at 50. Fletcher Smith also refuses to admit that it is no longer in competition with SAG. Id. We do not consider these responses adequate to rebut the allegation of mootness. Although Fletcher Smith did not directly admit that it "is no longer in the business of selling or distributing propane gas," its response that "it is not currently selling or distributing propane gas due to the asset sale described herein" indicates that it lacks prospective injury from SAG's sales of propane, i.e., LP gas. Its bare denial that it is not in competition with SAG hardly counterbalances its admissions that it sold its assets to Parden Gas via a sales agreement that left it with "no current real or personal property."

B. Effect of the Admissions

When an action becomes moot during its pendency, the court lacks power to further adjudicate the matter.

> "'The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties.' Crawford v. State, 153 S.W.3d 497, 501 (Tex. App. 2004) (citing VE Corp. v. Ernst & Young, 860 S.W.2d 83, 84 (Tex. 1993)). 'A case becomes moot if at any stage there ceases to be an actual controversy between the parties.' Id. (emphasis added) (citing National Collegiate Athletic Ass'n v. Jones, 1 S.W.3d 83, 86 (Tex. 1999))."

Chapman v. Gooden, 974 So. 2d 972, 983 (Ala. 2007) (first emphasis added). See also Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

Although Fletcher Smith may have viable legal claims based on SAG's past actions, it is not entitled to injunctive relief if SAG's future sales of LP gas can cause it no harm. See American Fed'n of State, Cnty. & Mun. Emps. v. Dawkins, 268 Ala. 13, 18, 104 So. 2d 827, 830 (1958) ("To be entitled to claim equitable relief, the complainant must show a controversy which will cause actual harm to him."). See also O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present

case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects."). The trial court's injunction order indicates that it desired to mitigate the adverse effects upon Fletcher Smith of SAG's tax advantages and also to require SAG to follow the notice and buy-out provisions of the gas-district statutes. This relief is meaningless if Fletcher Smith is no longer a participant in the LP gas market.

> "'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'"

King v. Campbell, 988 So. 2d 969, 976 (Ala. 2007) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)).

C. Mootness on Appeal

Events occurring subsequent to the entry or denial of an injunction in the trial court may properly be considered by this Court to determine whether a cause, justiciable at the time the injunction order is entered, has been rendered moot on appeal. "[I]t is the duty of an appellate court to consider lack of subject matter jurisdiction ...." Ex parte Smith, 438

So. 2d 766, 768 (Ala. 1983). "[J]usticiability is jurisdictional." Ex parte State ex rel. James, 711 So. 2d 952, 960 n.2 (Ala. 1998). A justiciable controversy is one that "is definite and concrete, touching the legal relations of the parties in adverse legal interest, and it must be a real and substantial controversy admitting of specific relief through a decree." Copeland v. Jefferson Cnty., 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969). A case lacking ripeness has yet to come into existence;[3] a moot case has died.[4] Between the two lies the realm of justiciability. See 13B Charles Alan Wright et al., Federal Practice and Procedure § 3533 (3d ed. 2008) ("It is not enough that the initial requirements of standing and ripeness have been satisfied; the suit must remain alive throughout the course of litigation, to the moment of final appellate disposition.").

[3]Ripeness is "[t]he state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made." Black's Law Dictionary 1442 (9th ed. 2009).

[4]A mootness analysis "concentrate[s] attention on the peculiar problems of a suit's death, rather than its birth." 13B Charles Alan Wright et al., Federal Practice and Procedure § 3533.1 (3d ed. 2008).

Fletcher Smith's admissions, although entered into the record on appeal after the trial court entered its order granting the request for the injunction, are properly before us for consideration of the question of mootness. "[B]ecause mootness is a jurisdictional issue, we may receive facts relevant to that issue; otherwise there would be no way to find out if an appeal has become moot." Clark v. K-Mart Corp., 979 F.2d 965, 967 (3d. Cir. 1992). See also Jeffrey C. Dobbins, New Evidence on Appeal, 96 Minn. L. Rev. 2016, 2030 (2012) ("[A]llegations that a case is moot on appeal will often require an appellate court to consider what is technically new evidence.").

1. Cases dismissing appeals for mootness

We have previously dismissed appeals when events occurring subsequent to the entry of the order or judgment being appealed rendered the controversy moot. After granting a petition for a writ of mandamus that provided the same relief sought in a pending appeal, this Court dismissed the appeal, noting that "[a]n action that originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised in it have become moot by subsequent

acts or events." Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006). This Court thus took notice of a fact occurring six months after entry of the trial court's judgment to dismiss the appeal as moot. In Woods v. Suntrust Bank, 81 So. 3d 357 (Ala. Civ. App. 2011), the court held as alternative grounds for dismissing an appeal from the denial of an injunction to prevent a foreclosure that the matter was moot as a result of occurrence of the foreclosure "[a]fter the trial court entered its order." Id. at 363. The court thus took cognizance of an event occurring subsequent to entry of the order being appealed to hold that the appeal had become moot.

In Employees of Montgomery County v. Marshall, 893 So. 2d 326 (Ala. 2004), based on a fact first disclosed in a footnote in the appellant's opening brief, this Court dismissed as moot an appeal from the denial of an injunction. "This Court will dismiss an appeal from the denial of an injunction," the Court stated, "when an event occurring after the denial of the injunction renders the appeal moot." 893 So. 2d at 330. Similarly, in Masonry Arts, Inc. v. Mobile County Commission, 628 So. 2d 334 (Ala. 1993), this Court dismissed

an appeal as moot based on the award of a contract after the entry of the order being appealed. See also Morrison v. Mullins, 275 Ala. 258, 259, 154 So. 2d 16, 18 (1963) ("[I]f an event happening after hearing and decree in circuit court, but before appeal is taken, or pending appeal, ... renders it clearly impossible for the appellate court to grant effectual relief, the appeal will be dismissed." (emphasis added)). Thus, events occurring subsequent to an order granting or denying an injunction in the trial court may properly be consulted by this Court to determine whether a cause, justiciable at the time of entry or denial of the injunction, has been rendered moot on appeal. The filing of the record on appeal containing Fletcher Smith's admissions is such an event.

2. Mootness caused by going out of business

Other jurisdictions have dismissed appeals as moot based on facts similar to those in this case. In particular, a plaintiff's action for an injunction becomes moot on appeal when it leaves the business whose alleged injury gave rise to the cause of action. "[A] case on appeal normally is rendered moot when the appellant closes its business and, as a result,

no longer has a cognizable interest in the outcome of the dispute." Munsell v. Department of Agric., 509 F.3d 572, 582 (D.C. Cir. 2007). See also City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 283 (2001) (learning after issuance of writ of certiorari that petitioner "has ceased to operate as an adult business," the Court dismissed the writ, holding that the case "no longer qualifies for judicial review"); Board of License Comm'rs of Tiverton v. Pastore, 469 U.S. 238, 240 (1985) (dismissing writ of certiorari as moot after briefing and oral argument upon learning that liquor lounge had gone out of business, thus "depriving the Court of jurisdiction due to the absence of a continuing case or controversy"); and Lucero v. Trosch, 121 F.3d 591, 596 (11th Cir. 1997) (holding that sale of abortion business rendered moot an action for injunction as to former owner).

The same principle applies to a sale of assets. See Young's Realty v. Brabham, 896 So. 2d 581, 583 (Ala. Civ. App. 2004) (granting motion to dismiss after appellate briefs had been filed because sale of condominium unit "rendered nonjusticiable" declaratory-judgment action seeking relief against condominium owners' association); R.M. Inv. Co. v.

United States Forest Serv., 511 F.3d 1103 (10th Cir. 2007) (upholding district court's dismissal for mootness when plaintiff sold property the use of which was at issue in case).

3. Assessing whether a live controversy still exists

Fletcher Smith argues that its admissions that it sold all of its assets, that it has no current real or personal property, and that it is no longer selling LP gas do not mean that it is no longer in the LP gas business or in competition with SAG. However, "a live controversy is not maintained by speculation that claimant might reenter a business that it has left." Munsell, 509 F.3d at 582. A matter is moot if a court decision will not have "a more-than-speculative chance" of affecting a party's rights in the future. Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990). Likewise, a claim for injunctive relief is moot when the future resumption of business is "'purely a matter of speculation.'" JSLG, Inc. v. City of Waco, 504 Fed. Appx. 312, 315 (5th Cir. 2012) (unpublished) (quoting Spencer v. Kemna, 523 U.S. 1, 16 (1998)). See also Hall v. Beals, 396 U.S. 45, 49-50 (1969) (noting that "speculative contingencies" are

insufficient to avoid mootness). In short, "[m]atters that may or may not occur in the future are not matters in controversy." Case, 939 So. 2d at 884. See also Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 71 (1983) ("Future positions taken by the parties might bring such issues into controversy, but that possibility is simply too remote from the present controversy to keep this case alive."). Fletcher Smith cannot maintain its status on appeal as a party for whose benefit the injunction was entered when by its own admissions it can no longer show "sufficient immediacy and reality" of future injury to warrant invocation of the judicial process. O'Shea v. Littleton, 414 U.S. at 497.

IV. Conclusion

Under the reasoning of Henson, 891 So. 2d 868, the taxpayer plaintiffs lack standing. Alternatively, their claims fail on the merits, as the trial court stated in its order. They therefore are not entitled to injunctive relief. Based on its admissions, Fletcher Smith's claims for prospective relief have become moot. "Because mootness goes to justiciability, this Court will not consider the merits of a claim that is moot." Town of Elmore v. Town of Coosada, 957 So. 2d 1096,

1100 (Ala. 2006). The appeal is dismissed as moot, and the Clarke Circuit Court is directed to vacate as moot the injunction entered in this cause.

APPEAL DISMISSED.

Stuart, Bolin, Parker, Main, and Wise, JJ., concur.

Shaw and Bryan, JJ., concur in the result.

Murdock, J., concurs in the rationale in part and concurs in the result.

MURDOCK, Justice (concurring in the rationale in part and concurring in the result).

I concur in the result reached by the main opinion and in part of the analysis by which it reaches that result. I write separately for three reasons. First, there are significant substantive questions concerning the statutory regulation of municipal gas districts suggested by this case, and in some instances raised by the parties, that I do not wish to be understood as implicitly addressed by my vote. Secondly, I write to explain the unique nature of this case that I believe makes appropriate the invocation of the concept of standing despite my view that our courts have overused this concept. Finally, although I conclude that the individual taxpayer plaintiffs lack standing, I do not do so based on the same rule of decision upon which the main opinion relies.

I find it necessary to briefly explain my understanding of the limited purpose of and the mechanics of the statutory scheme outlined in Ala. Code 1975, §§ 11-50-266 through -270, as made applicable to gas districts by § 11-50-399, Ala. Code 1975.

Article 12 of Chapter 50, Title 11, Ala. Code 1975, authorizes the creation of and governs the operation of

municipal "gas districts." See Ala. Code 1975, § 11-5-390 et seq. Section 11-50-399 restricts the ability of municipal gas districts to compete with other entities already engaged in the business of manufacturing, distributing, and/or selling natural gas and/or "manufactured gas" by adopting for application to such gas districts certain provisions of Article 8 of Chapter 50:

> "All districts incorporated under the provisions of this article shall have all powers and be subject to all limitations with respect to the acquisition of competing gas systems and the duplication of existing privately owned gas systems to the same extent as boards under the provisions of Sections 11-50-266 through 11-50-270."

The sole function of §§ 11-50-266 through 11-50-270[5] is to require any municipal gas district that wishes to compete with an existing producer or supplier of manufactured natural gas to pursue a regulatory process by which it gives the existing "owner" the opportunity, before being confronted with such competition, to sell all or part of its business assets to the gas district.

[5]Based on the quoted provision, and for ease of discussion, I hereinafter will treat the references to waterworks boards in §§ 11-50-266 through 11-50-270 as references to gas districts.

The first step in this process is the giving of notice to the owner that the gas district intends to compete with it. § 11-50-266, Ala. Code 1975. Thereafter, §§ 11-50-267 through -270 provide for a multistep process by which the parties can attempt to agree upon the terms and conditions of a sale or, failing that, can involve the Alabama Public Service Commission in determining such terms and conditions. If at any point along the way, the owner communicates a decision by it not to engage in a sale, the process is at an end, and the gas district is free to begin competing against that owner. (So long as the owner continues to pursue the process, then so too must the gas district as a prerequisite to entering the owner's market as a competitor.) See §§ 11-50-267, -268, and -270.

Whether the process described above even applies in the present case depends on whether the product at issue in this case, liquified petroleum gas or "LP gas," is to be considered a "manufactured gas" within the meaning of the aforesaid statutory provisions. A valid question has been raised by the defendant, South Alabama Gas District ("SAG"), as to whether these provisions lend themselves to an affirmative answer to

this question. (Section 11-5-396(18), for example, appears to addresses LP gas separately from other provisions in the statute. Also, LP gas is separately regulated by the Alabama LP Gas Board. See Ala. Code 1975, § 9-17-100 et seq.) On the other hand, it appears that SAG may have taken the position before the trial court, at least for purposes of the injunctive relief at issue, that LP gas is to be considered a manufactured gas. Given the grounds upon which this Court decides the appeal before us today, however, it is not necessary for us to decide in this appeal whether LP gas is a manufactured gas within the meaning of these statutes. Nor is it necessary for us to decide whether SAG conceded this issue for purposes of this appeal (or for purposes of any claims that remain pending in the trial court).

It also appears that a question exists as to whether the legislature intended with its enactment of Article 12 of Chapter 50 of Title 11, and the application to municipal gas districts of the procedures outlined in §§ 11-50-266 through -270, to provide existing owners such as Fletcher Smith Butane Co., Inc. ("Fletcher Smith"), with a private right of action in the courts of this state in the event a municipal gas

district competes against it without first pursuing the process outlined in §§ 11-50-266 through -270.[6] Even if there exists a private judicial action by the owner of an existing gas business, a more substantial question has been raised in this case as to whether Alabama law recognizes a private cause of action by the individuals who have sued in their capacity as taxpayers in this case. These issues, however, were not presented in the trial court.

The legal question of the cognizability of an alleged cause of action under state law goes to the merits of a lawsuit asserting that cause of action rather than the subject-matter jurisdiction of the court to decide that legal question. See, e.g., Wyeth, Inc. v. Blue Cross & Blue Shield

[6]Perhaps a judicial action exists merely to enable a pre-existing owner to force a gas district to engage in that process before the gas district is permitted to begin competing against the owner. In this case, the gas district never gave the notice allegedly required by § 11-50-266 to initiate that process. Nonetheless, the owner had actual knowledge of the gas district's coming into its jurisdiction in 2003 and beginning to compete against it. Despite this fact, the owner did not object to this competition at that time, either through a challenge in the courts or before the Alabama Public Service Commission; instead, the owner allowed seven years to pass before filing the present action in 2010. We are not presented here with an argument that no private right of action is available to the owner based on a defense of waiver or laches.

of Alabama, 42 So. 3d 1216, 1219 and 1220 (Ala. 2010) ("[O]ur courts too often have fallen into the trap of treating as an issue of 'standing' that which is merely a failure to state a cognizable cause of action or legal theory, or a failure to satisfy the injury element of a cause of action."; "[W]hether [the plaintiff] has seized upon a legal theory our law accepts is a cause-of-action issue, not a standing issue."); Steele v. Federal Nat'l Mortg. Ass'n, 69 So. 3d 89, 91 n.2 (Ala. 2010) (citing Wyeth, 42 So. 3d at 1220, for the proposition that the appellee has "confused standing with failure to state a claim"); Hamm v. Norfolk Southern Ry., 52 So. 3d 484, 499 (Ala. 2010) (Lyons, J., concurring specially) (urging this Court to think of standing in "justiciability" terms); Ex parte McKinney, 87 So. 3d 502, 512-13 (Ala. 2011) (Murdock, J., dissenting) (citing 13A Charles Alan Wright et al., Federal Practice & Procedure § 3531 (3d ed. 2008), for the proposition that "[o]ur courts too often have treated as a matter of subject-matter jurisdiction that which does not go to the fundamental authority of the courts to decide a case," i.e., the fundamental authority of a court to decide both the legal and the factual issues presented by that case); see also

Jerome A. Hoffman, The Malignant Mystique of "Standing", 73 Ala. Lawyer 360 (2012). Such questions, not having been raised in the trial court, provide no basis for vacating the trial court's order in this case.

Our inability to dispose of this case on the ground that the causes of action alleged are not cognizable under Alabama law leads me to consider the standing issue that is presented in the main opinion as the ground for disposing of the individual taxpayer plaintiffs' claims against SAG. I wish to explain that I vote to concur in the result reached by this portion of the main opinion despite being of the view that the notion of "standing" recognized by federal courts in relation to "public law" cases, see generally, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), has no place in traditional civil actions. See Hoffman, supra; 6A Charles Alan Wright et al., Federal Practice & Procedure § 1542 (3d ed. 2010) (noting the use of standing as a gate-keeping device "[i]n the realm of public law, when governmental action is attacked on the ground that it violates private rights or some constitutional principle"). I share the concern of many that the fascination and complexity of the doctrine of standing has

led this and other courts on far too many occasions to view and resolve questions of private rights through the inappropriate invocation and application of distinctive public-law concepts.[7]

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[7]In many cases decided by this and other courts, the concerns raised have not involved matters that turn on the special justiciability concerns surrounding public-interest litigation; instead, such cases, both legally and practically, simply implicate such private-law concepts as cause of action, proof of damage (or some other element of the cause of action), real party in interest, capacity, necessary and indispensable parties, and like notions. As a leading treatise has noted,

> "[i]n its flowering, subsequent withering, eventual revival, and occasionally complex application, the standing concept that there is a need to establish an entitlement to judicial action, separate from proof of the substantive merits of the claim advanced, has been largely a creature of twentieth century decisions of the federal courts. More importantly, it has been very much tied to litigation asserting the illegality of governmental action. The assertion may be that executive or administrative action goes beyond the limits of statutory authorization or constitutional limits, or that a statute exceeds constitutional limits. Claims of private wrongdoing ordinarily are asserted by persons obviously having the enforceable interest, if anyone has; such problems as arise commonly are handled in terms of defining private causes of action or of identifying the real party in interest.
>
> "....
>
> "At times —- and perhaps with increasing frequency —- courts are tempted to move beyond the public-law arena, invoking Article III principles to

Although most of the actions addressed on a daily basis by this and other Alabama courts involve established private causes of action with time-honored elements that, if proven, address the very concerns for which a separate consideration of "standing" is necessary in public-law cases, that is not the case here. Instead, the individual plaintiffs in this

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> address questions of private right. ... [S]tanding decisions are invoked to address the existence of a cause of action, capacity, intervention, and even the procedural rights of bankrupts. Although such decisions may be aided by reference to standing doctrine, they involve other matters that do not turn on the special justiciability concerns surrounding public-interest litigation."

13A Charles Alan Wright et al., Federal Practice & Procedure § 3531 (3d ed. 2008) (emphasis added). See also, e.g., K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1154 n.7 (10th Cir. 1985):

> "'"The standing question arises in the realm of public law, when governmental action is attacked on the ground that it violates private rights or some constitutional principle ...."....' C. Wright, The Law of Federal Courts 452-53 n.2 (4th ed. 1983) (quoting Kent v. Northern California Regional Office of American Friends Service Committee, 497 F.2d 1325, 1329 (9th Cir.1974))."

The use of standing to challenge the cognizability of a cause of action or the proof of one of its elements (e.g., damage), raises the specter of unwarranted and unnecessary collateral challenges to the subject-matter jurisdiction of a court and to the finality and reliability of judgments in private-law actions.

case have brought the relatively uncommon public-law case in which the concept of standing appears to be appropriate as a gate-keeping mechanism. Specifically, they have sued, not upon some established private cause of action in their favor, but to address SAG's failure to fulfill its alleged obligations under a regulatory scheme intended for the protection of private entities (other than the individual plaintiffs themselves) engaged in providing a utility service and, ultimately, for the benefit of the public that relies upon that utility service. The defendant they have sued is a public corporation organized and controlled by municipal governments for the purpose of supplying this service to the public pursuant to authority granted by the legislature. The individual plaintiffs seek injunctive relief against this public corporation on the ground that its activities are prohibited by Alabama constitutional and statutory law. There is sufficient similarity, therefore, between this case and those public-law cases in which federal courts have relied upon the concept of standing to ensure the presence of a justiciable "case." I therefore see no problem in applying

the notion of standing to the claims of the individual plaintiffs.

That said, the individual plaintiffs have not shown that, as a result of the complained-of omissions of the defendant, they have suffered a sufficient present, or threatened, particularized injury to justify a conclusion that they have "standing."

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'"

Flast v. Cohen, 392 U.S. 83, 99 (1968) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

Moreover, "the controversy" at issue here is over the enforcement of a regulatory scheme intended for the protection of existing suppliers of certain products and, indirectly, for the public that depends upon a reliable supply of those products. To have standing, a plaintiff "must establish a nexus between [his or her] status and the precise nature of the ... infringement alleged." Flast v. Cohen, 392 U.S. at

102. I specifically cannot conclude that this nexus requirement is met in the present case.[8]

In support of its conclusion that the individual plaintiffs lack standing, the main opinion relies upon the rule of decision articulated in Henson v. HealthSouth Medical Center, Inc., 891 So. 2d 863, 868 (Ala. 2004): "'[A] taxpayer has standing to challenge a tax abatement conferred upon another taxpayer ... so long as the taxpayer can demonstrate a probable increase in his tax burden from the challenged activity.'" ___ So. 3d at ___. I decline to express any view as to the correctness generally, or for that matter the practicality, of this standard as a rule of decision.

Moreover, even if the rule of decision articulated in Henson is a correct and workable one insofar as it goes, I question whether it goes far enough. The test in Flast (or at least the test espoused in Flast) is not merely whether a plaintiff can demonstrate a nexus between his or her status and "the challenged activity," but whether he or she can

[8]We do not have before us individual plaintiffs who seek relief because they are potential competitors or consumers for whose benefit was enacted the regulatory scheme that SAG did not follow.

demonstrate a nexus between his or her status and "the controversy" over that activity. That is, there must be a nexus between the plaintiff's status and the "precise nature of the infringement" at issue. See Flast, 392 U.S. at 102. As explained above, I do not see such a nexus between the individual plaintiffs' status as taxpayers and the regulatory purposes that their lawsuit, if successful, would vindicate.