

Post-*Cuno* Limitations on State Taxpayer Standing¹

By Douglas R. Cole

In *Daimler Chrysler v. Cuno*² (2006), decided last term, the United States Supreme Court affirmed that in all but narrow circumstances plaintiffs cannot rely on their status as state taxpayers to show standing to challenge state expenditures of tax dollars. The Court had long held that as a general matter federal taxpayers lacked so-called taxpayer standing,³ and *Cuno* stated that this logic “applies with undiminished force to state taxpayers.”

Now, the effects of the *Cuno* decision are being seen in lower courts. One of the first such cases is a Ninth Circuit case *Arakaki, et al. v. Lingle, et al.*, 477 F.3d 1048 (9th Cir., February 9, 2007). There, the Ninth Circuit had originally found that the plaintiffs had taxpayer standing. After the Supreme Court issued its decision in *Cuno*, though, the Supreme Court also granted certiorari in *Arakaki*, vacated the decision and remanded the case to the Ninth Circuit (a so-called GVR order) to allow that court to reconsider its earlier decision in light of the Supreme Court’s new precedent.

On February 9, 2007, the Ninth Circuit completed its second look. Its verdict? The court concluded that *Cuno* had implicitly overruled the Ninth Circuit’s established standing precedent, precedent that the Ninth Circuit had relied on in its first pass at *Arakaki*. On this go around, the court determined that the plaintiffs could not rely on their status as taxpayers to show standing. It remanded the case to the district court to see if the plaintiff had any viable standing theories.

In *Arakaki*, the plaintiffs, who were Hawaiian citizens, but not “native Hawaiians,” alleged that various state programs preferentially treated persons of Hawaiian ancestry (*i.e.*, native Hawaiians). The plaintiffs sued under §1983, claiming that this preferential treatment based on ethnic classification violated the equal protection component of both the Fifth and Fourteenth Amendments. The defendants included the Department of

Hawaiian Home Lands (DHHL), the Hawaiian Homes Commission (HHC), the Office of Hawaiian Affairs (OHA), various state officers (including Linda Lingle, Hawaii’s Governor), and the United States.

The three agencies are each charged by state and/or federal law with managing certain property that the state government holds in trust for the Hawaiian people. More precisely, the DHHL and HHC jointly manage the 200,000 acres that Congress ceded to Hawaii to hold in trust shortly after its establishment as a Territory. The agencies’ charge is to lease those lands on very favorable terms to “native Hawaiians” a term defined to include “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778” (the year in which Captain Cook first landed in Hawaii). The OHA, on the other hand, administers an additional 1.2 million acres of land that the United States ceded to the Hawaiian government in the Hawaii Statehood Admission Act in 1959. The OHA holds title to all property “held in trust for native Hawaiians and Hawaiians.” The term “native Hawaiians” is defined the same way as it is for the DHHL program, while the term “Hawaiian” is a broader term that includes all persons descended from anyone who inhabited the Hawaiian Islands prior to 1778, irrespective of what percentage of their lineage they can trace back to those original inhabitants. The plaintiffs in *Arakaki* qualified as neither “native Hawaiians,” nor “Hawaiians,” and so were not in the favored group under either of these two programs.

In order to establish standing to pursue their claims against the state entities and officers, the plaintiffs relied in large part on their status as taxpayers challenging illegal expenditures of state funds. Existing Ninth Circuit case law at the time gave them a realistic prospect of success. In an earlier Ninth Circuit case,⁴ Hawaiian residents, relying on their status as state taxpayers, had similarly sought to challenge programs administered by the OHA to the extent that those programs favored Hawaiians. The Ninth Circuit had held in *Hoohuli* that

Douglas R. Cole is an Attorney with Jones Day in Columbus, Ohio.

at least some of the taxpayers had standing to seek an injunction prohibiting the “appropriating, transferring, and spending” of taxpayers’ money. According to the *Hoohuli* court, to show standing, a state taxpayer need only to show three elements: (1) taxpayer status, (2) the funds in question were appropriated from the state’s general funds, and (3) the state was spending the funds for an unlawful purpose—a relatively broad approach to defining standing. Applying that precedent in the first *Arakaki* case (*i.e.*, before *Cuno* was decided) the court, not surprisingly, ruled that the taxpayers indeed had standing.

In short, *Cuno* has arguably raised the bar that state taxpayers face when they seek to rely on their taxpayer status to challenge state expenditures.

When *Arakaki* was remanded for reconsideration after *Cuno*, the court arrived at a different result. According to the Ninth Circuit, the *Cuno* decision “effectively overrules *Hoohuli*.”⁵ As the circuit court noted, the *Cuno* case involved taxpayers claiming that a state tax credit program depleted the funds available for other uses and imposed disproportionate burdens on them by reducing the tax burden on the taxpayers who received the credits. But the Supreme Court had rejected standing in that setting, finding that the plaintiff taxpayers’ alleged injury was not “concrete and particularized but instead a grievance the taxpayer suffers in some indefinite way in common with people generally.”⁶ Such injuries are “conjectural or hypothetical” in that they depend on how legislators “respond to a reduction in revenue, if that is a consequence of the credit.”⁷ Merely establishing that the state appropriated money from its general funds and spent it on unlawful purposes, *i.e.*, the factors that the Ninth Circuit had detailed in *Hoohuli*, is no longer enough. *Cuno*, “by contrast [to *Hoohuli*], requires that state taxpayers establish a particularized, concrete injury that is redressable by the court’s judgment.”

Applying *Cuno*’s standing requirements, the court determined that the plaintiffs had not suffered a particularized injury. Plaintiffs asserted they suffered a particularized injury in that they were being “re-

quired to pay taxes to support racial discrimination against themselves,” a harm that, by definition, no non-taxpayer would suffer. The court found that claim insufficient to establish standing, as it would essentially allow a taxpayer to “challenge any governmental expenditure he does not like and for which he has not applied,” a result the court said was inconsistent with the Supreme Court’s reasoning in *Cuno*. The court further noted that there was a lack of redressability as it was not at all “certain that even if all funding for OHA were terminated, that the Legislature would pass the savings on to the Plaintiffs

in the form of tax breaks.” Accordingly, the court found that plaintiffs lacked standing in their capacity as taxpayers, and remanded the case to allow the district court to explore if there were any other potential standing theories.

In short, *Cuno* has arguably raised the bar that state taxpayers face when they seek to rely on their taxpayer status to challenge state expenditures. At least one lower court has responded by ratcheting up its standards for taxpayer standing as well. Accordingly, taxpayers considering challenges to state expenditures would be well-advised to carefully identify and articulate the particularized injury that they will suffer as a result of the state expenditures they are challenging. A generalized claim that a state is illegally expending its tax revenues may not cut it in the post-*Cuno* world.

ENDNOTES

- ¹ This article was originally published in the June 2007 Volume 14 Number 6 edition of the Jones Day State Tax Return on June 22, 2007.
- ² S.Ct., 126 S.Ct.1854 (2006).
- ³ See *Frothingham v. Mellon*, decided with *Massachusetts v. Mellon*, 262 U.S. 447, 486-87 (1923).
- ⁴ See *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984).
- ⁵ See *Arakaki, et. al. v. Lingle, et. al.* CA-9, 477 F.3d 1048, 1061 (2007).
- ⁶ See *Arakaki, et. al. v. Lingle, et. al.*, CA-9, 477 F.3d 1048, 1062 (2007) (quoting *DaimlerChrysler Corp. v. Cuno* 126 S.Ct.1854, 1862 (2006)).
- ⁷ *Id.*

This article is reprinted with the publisher’s permission from the CORPORATE BUSINESS TAXATION MONTHLY, a monthly journal published by CCH, a Wolters Kluwer business. Copying or distribution without the publisher’s permission is prohibited. To subscribe to the CORPORATE BUSINESS TAXATION MONTHLY or other CCH Journals please call 800-449-8114 or visit www.CCHGroup.com. All views expressed in the articles and columns are those of the author and not necessarily those of CCH.