PARENS PATRIAE STANDING OF ATTORNEYS GENERAL: A CASE OF MISTAKEN IDENTITY

BY JENNIFER L. PRATT[1]

1 Section Chief, Antitrust, Office of the Attorney General of Ohio.

I. INTRODUCTION

In a strange way, the *parens patriae* standing of the states to bring actions – through their attorneys general – on behalf of their citizenry is like a person who has the misfortune of being a "dead ringer" for a wanted criminal. Like the misidentified innocent party, *parens patriae* standing is often mischaracterized in litigation, especially in settlement negotiations. In either situation, a mistaken identity problem can result in confusion, inefficiency, and other negative consequences.

In this article, I discuss what *parens patriae* is, and perhaps more importantly, what it is not. I offer tips for private litigants designed to assist them in avoiding common misidentification errors in settlement negotiations where *parens patriae* standing is at issue.

II. BACKGROUND: WHAT IS *PARENS PATRIAE?*

No case of mistaken identity can ever be remedied without delving into the true identity of the innocent victim of the mistake. Here, that task requires at least a brief excursion into several centuries of legal history.

Translated from the Latin, *parens patriae* means "parent of the country." The concept originated in England, where it was the prerogative of the monarch to act as guardian for persons with the legal disabilities of age or mental incapacity, and to oversee all "charitable uses" in the country.[2] The focus was on the power of the national sovereign to care for those unable to care for themselves. When the concept was adopted into the legal system of the United States, it underwent some significant changes. First, the authority to act was invested not in a *national* governing body or person, but rather in the individual states through their chief legal officers – the attorneys general.[3] Some courts have opined that this grant of authority to the states was made as compensation for the authority that the states ceded under the federal system.[4] Second, the United States' version of *parens patriae* made a significant shift away from the guardianship concept of its English roots.

2 George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DePaul L. Rev. 895, 896-98.

3 But see *id.* at 911 n. 71 (United States as *parens patriae* in disposition of Native American lands).

4 See *D.C. v. ExxonMobil Oil Corp.*, 172 A.3d 412, 420 n.11 (D.C. 2017) (citing *Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332, 337 (1st Cir. 2000)).

Beginning in the early 1900s, attorneys general used *parens patriae* predominantly to protect the general population from harm caused by environmental issues.[5] Pollution and riparian rights were the most common subjects of these cases, which were most often brought to protect the citizens of the plaintiff state against those of another (usually neighboring) state.[6]

Today, the leading statement on the states' *parens patriae* standing is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). In *Snapp*, Puerto Rico's Attorney General filed suit against Virginia apple producers that had advertised for temporary labor to help harvest their current fruit crop, but refused to hire most of the Puerto Rican citizens that applied for those jobs. Acknowledging the Commonwealth's authority to bring this action, the Court expressly rejected the idea of *parens patriae* as a means to care for those who cannot act on their own behalf. Rather, the Court held, a state has *parens patriae* standing to act on behalf of its citizens if it can allege an injury to a quasi-sovereign interest, rather than simply litigating the personal claims of the individual citizens.[7]

Snapp defines a quasi-sovereign interest as an interest affecting a "sufficiently substantial segment" of the state's population, not merely an "identifiable group of individual residents."[8] Quasi-sovereign interests fall into two general categories: the physical and/or economic health and well-being of the state's residents, and the state's interest in guarding against discriminatory denial of its rights within the federal system.[9] Early twentieth century *parens* cases alleging air or water pollution or the wrongful diversion of water provide clear examples of injury to the physical well-being of the populace. Another case from that era, *Louisiana v. Texas*, 176 U.S. 1 (1900), illustrates *parens patriae* standing on the basis of injury to economic welfare. There, Louisiana challenged Texas's moratorium on imports from Louisiana businesses. Louisiana alleged that the stated public health rationale for the import ban was a subterfuge designed to conceal Texas's true desire to give the City of Galveston a commercial advantage over the City of New Orleans. While the case ultimately failed on jurisdictional grounds, the Court acknowledged that states have *parens patriae* standing to bring actions to prevent economic harm to their "citizens at large."[10]

The *Snapp* case illustrates the second category of quasi-sovereign interest: the state's interest in ensuring that federal statutes, programs, and benefits are administered equitably to its citizens *vis-à-vis* the citizens of other states. Courts, however, do not permit states to use *parens patriae* standing to challenge the *validity* of federal laws, only their *enforcement*.[11]

III. *PARENS PATRIAE* STANDING IN FEDERAL AND STATE ANTITRUST CASES

Although *parens patriae* is, at its core, a common law concept, no discussion of this topic (especially in the context of U.S. antitrust enforcement) would be complete without a mention of the interplay between *parens patriae* principles and the federal and state antitrust statutes. Sections 4 and 16 of the Clayton Act empower "any person" to sue for damages and/or injunctive relief, respectively, for injury suffered as a result of an antitrust violation.[12] Is a state proceeding in its capacity as *parens patriae* such a "person"?

In 1945, the United States Supreme Court considered the Georgia Attorney General's claim that he had not only the authority to bring a price-fixing action under the Sherman Act against allegedly colluding railroads on behalf of the state in its proprietary capacity, but also that he had standing as *parens patriae* to bring claims for injunctive relief and damages for harm to the general economy of Georgia.[13] The Court held that the state had standing to proceed as *parens patriae* under Section 16 of the Clayton Act for injunctive relief, finding the results of price-fixing

5 Jay L. Himes, *State Parens Patriae Authority: The Evolution of the State Attorney General's Authority*, The Inst. for L. & Econ. Policy Symposium, 3 (2004).

6 See, e.g. *Missouri v. Illinois,* 180 U.S. 208 (1901) (discharge of sewage into the Mississippi River); *Kansas v. Colorado,* 206 U.S. 46 (1907) (diversion of water from the Arkansas River).

7 *Snapp,* 458 U.S. at 607.

8 *Id.*

9 *Id.* at 609-10.

10 *Id.* at 603.

11 *Kansas ex rel. Hayden v. United States,* 748 F.Supp. 797 (D.Kan. 1990) (Kansas attorney general's challenge to FEMA denial of benefits was appropriate use of *parens* standing because the challenge was to the enforcement, not the validity, of federal law).

12 Section 4 of the Clayton Act, 15 U.S.C. §15; Section 16 of the Clayton Act, 15 U.S.C. §26.

13 *Georgia v. Pennsylvania R.R.,* 324 U.S. 439 (1945).

to be "matters of grave public concern."[14] It found nothing in the Act's legislative history that indicated that Congress meant to restrict the ability of state attorneys general to bring civil antitrust suits to those solely based upon proprietary interests.[15]

But the Court in *Pennsylvania R.R.* addressed only the issue of *parens* standing to seek injunctive relief, leaving damages for another day. That day came in 1972 in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Hawaii's complaint sought injunctive relief and damages against allegedly colluding oil companies that it claimed had injured the state through loss of tax revenue, curtailment of manufacturing opportunities, and acts that held the economy in a "state of arrested development."[16] Taking up where it had left off in *Pennsylvania R.R.*, the Court addressed whether harm to the general economy could form the basis of *parens* standing to sue for damages under Section 4 of the Clayton Act. The key consideration, it found, was whether the injury alleged was to a person's "business or property."[17] Under that analysis, the Court held that because states can sue for proprietary damages, and natural person consumers can sue for harm to their "business and property," to allow suits by states for damages to the general economy would mirror harm to individual citizens and cause duplicative recovery.[18]

The final piece of the statutory *parens patriae* structure was added in response to the Ninth Circuit decision the following year in *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973). There, the State of California attempted to recover damages under Section 4 of the Clayton Act as *parens patriae* on behalf of consumers who purchased snack foods subject to a price-fixing scheme. The Court rejected the attempt, saying that the state was attempting to revert to the English common law version of *parens patriae* in acting as a guardian for citizens who could not take care of themselves.[19] If attorneys general were to be permitted to sue for damages on behalf of consumers under Section 4, it said, the legislature would have to give them that permission. Three years later, Congress responded by passing Section 4C of the Clayton Act, authorizing any state attorney general to bring a civil *parens* action for damages on behalf of "natural persons" in that state.[20]

Many states have enacted statutes that contain express authorization for their attorneys general to bring actions as *parens patriae* under the state's antitrust law.[21] In the absence of statutory authorization, however, states' abilities to utilize *parens* standing in cases under state antitrust law are the subject of conflicting decisions. One such opinion authorized *parens patriae* standing because the continued integrity of the marketplace is a fundamental quasi-sovereign interest.[22] On the contrary, another state court held that if the state legislature had wanted the attorney general to be able to pursue damages on behalf of the state's citizens in antitrust cases, it could have done as Congress did in enacting Clayton Act Section 4C.[23]

14 *Id. at 451.*

15 *Id.* at 447.

16 *Hawaii*, 405 U.S. at 255-56.

17 *Id.* at 264-65.

18 *Id.* at 260-64.

19 *Id.* at 776.

20 15 U.S.C. §15c.

21 See, e.g. Conn. Gen. Stat. §35-32; 6 Del. C. §2108; Md. Code Ann., Com. Law §11-209; Ohio Rev. Code §109.81.

22 *State of Michigan v. Detroit Lumberman's Ass'n, Inc.,* 1979-2 Trade Cas. (CCH) ¶ 62,990 (Mich. Cir. Ct. October 29, 1979).

23 *State of Tennessee v. Levi Strauss & Co.,* 1980-2 Trade Cas. (CCH) ¶ 63,558 (Tenn. Ch. September 25, 1980).

IV. AVOIDING THE *PARENS PATRIAE* MISTAKEN IDENTITY PROBLEM IN SETTLEMENT NEGOTIATIONS

As the foregoing discussion illustrates, *parens patriae* sits perched precariously at the intersections of common law and statutory enactments, of federal and state law enactments, and of standing and jurisdiction. It is little wonder that the concept is frequently misinterpreted, and that the case law in this area is full of nuance and at least apparent inconsistencies.

A. Settlements of Government Investigations or Litigation

When government enforcers and the private parties that are the targets of their investigations or the defendants in an enforcement action reach an agreement in principle to resolve the dispute, the real work is just beginning. Because the "devil is in the details," the process of reducing the parties' (presumed) mutual understanding to writing can be arduous.

One common sticking point is the language of the release that the state attorney general will give in exchange for the settling party's payment, promises, or other consideration. While private litigants have only their own private rights to surrender in settlement, attorneys general frequently litigate in multiple capacities, and thus have multiple rights with which to bargain. For example, an attorney general might bring an antitrust action as: (1) the chief enforcer of the antitrust laws of the state, (2) the attorney for the state in its proprietary capacity (i.e. the state as purchaser of the goods or services at issue), and (3) *parens patriae* for natural persons residing in the state, or any combination of the three.

In the foregoing example, the attorney general can clearly agree to forego the right to bring (or continue) an action for injunctive or other equitable relief under the attorney general's law enforcement authority. The attorney general can release the state's proprietary claims as well. But what about the frequent request by defendants and investigative targets that the state release "*parens patriae* claims"? Although that phrase has found its way into settlement agreements in the past, it is a troubling and inartful way of describing what is truly being surrendered.

As described above, *parens patriae* is not a type of claim, but rather it is a procedural vehicle that allows the state to pursue an interest that exists in natural persons residing in that jurisdiction. In describing the *parens patriae* standing of attorneys general under Clayton Act Section 4C, the Supreme Court emphasized that the statute "did not establish any new substantive liability," but rather merely created "a new procedural device to enforce existing rights of recovery."[24] In other words, *parens patriae* standing allows a state to pursue only those rights its citizens already possess.

While *parens patriae* is not a claim that can be released, it does have a legitimate place in settlement agreements that resolve state enforcer actions. State attorneys general can covenant not to pursue or to cease pursuing the claims of citizens of the state as *parens patriae* for those citizens. This approach will accomplish the goals of the settling defendant or target far more effectively than asking a state to release a "claim" that it does not possess.

B. Settlements of Private Litigation

It may seem curious to discuss the release of *parens patriae* authority in the context of strictly private litigation. On occasion, however, the settlement negotiations of private parties stray into this area when defendants seek to secure for themselves the most complete release possible of the claims that plaintiffs might bring against them. In their quest for thoroughness, defendants at times ask that private plaintiffs release their "*parens patriae* claims." As discussed above, this phrase is an inaccurate description of what is truly being sought. "*Parens patriae*" is not an adjective that can legitimately modify "claim."

But such a request made in the context of strictly private litigation is problematic for a more fundamental reason. Even though the underlying entitlement to recover damages for harm inflicted – the "claim" – belongs to the private plaintiff, the authority to file an action to redress such harms suffered by members of the public by using *parens patriae* standing belongs solely to the state. At least two federal district courts have ruled that any language inserted in a private settlement by private parties cannot, under any logical interpretation, extinguish the power of the state to exercise *parens patriae* authority.

24 *Kansas v. Utilicorp United, Inc.,* 497 U.S. 199, 218-19 (1990).

In one such decision, *In re Am. Investors Life Ins. Co. Annuity Mktg & Sales Practices Litig.*,[25] the court held that regardless of the breadth or wording of the release language in a private settlement, the release can have no impact on the ability of a state attorney general to bring an action as *parens patriae*. The court emphasized that the "attorneys' general law enforcement powers are not claims the plaintiffs have," and thus those powers cannot be released or restricted by a private settlement.[26]

In *Zepeda v. PayPal, Inc.*,[27] the litigants sought final approval of a nationwide class action settlement that defined "Released Claims" as those that have been or could be "asserted in any individual, class, private attorney general, representative, parens patriae or any other capacity…"[28] The court flatly rejected an objector's assertion that the release language extinguished states' powers to bring claims as *parens patriae* on behalf of injured citizens, saying that "[s]ince class members do not possess the State's parens patriae power, it is axiomatic that they cannot release such claims."[29]

It is important to note that the proposed release language in *Zepeda* correctly identified *parens patriae* as a "capacity" under which class members' claims could be asserted in the future. Such language, therefore, extinguishes the right of class members who remain in the class upon consummation of the settlement to recover in any subsequent *parens* action filed by the state. It does not foreclose the filing of such an action.[30] For cases brought by a state attorney general under Clayton Act Section 4C, this extinguishment of a settling class member's right to participate in a later *parens patriae* recovery is consistent with (although arguably somewhat broader than) the language of §4C that requires a court to exclude from the award "any amount of monetary relief… which duplicates amounts which have been awarded for the same injury…"[31]

V. CONCLUSION

The *parens patriae* concept is the subject of frequent mischaracterization. This problem is due, in large part, to the twists and turns of its development – from centuries-old English common law, to its import into the American legal system, to its current status as a creature of both common law and statute. Its identity problem manifests itself in many ways, but one of the most problematic is the confusion it causes in connection with settlements of antitrust enforcement actions and private class action settlements.

These thorny problems, however, can be eased by condensing this nuanced and complex concept down to two simple points. (1) *Parens patriae* is a vehicle for bringing a claim; it is not the claim itself, and (2) An individual or group of individuals may release their claims (and thus alter or eliminate their ability to participate in a future *parens* recovery), but they cannot release or extinguish the authority of the attorney general to bring a future *parens patriae* action.

25 *In re Am. Investors Life Ins. Co. Annuity Mktg. &. Sales Practices Litig.*, 263 F.R.D. 226 (E.D. Pa. 2009).

26 *Id.* at 241.

27 *Zepeda v. PayPal, Inc.*, 2017 U.S. Dist. LEXIS 43672 (N.D. Cal. 2017).

28 *Id.* at *54 n.18 (quoting the settlement agreement).

29 *Id.* at *55.

30 *Id.*

31 15 U.S.C. §15c(a)(1). I contend that the set-off provision of §4C would reduce a *parens* recovery only to the extent that it was duplicative of amounts distributed in the class action settlement.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.