

Proposed Amendment to Illinois Antitrust Act Confirms Attorney General *Parens Patriae* Standing

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A bill was introduced in the Illinois State Senate on February 15th, 2008 urging the state to amend the Illinois Antitrust Act (“Act”) to provide for *parens patriae* action on behalf of Illinois residents. The bill was overwhelmingly approved by both houses of the Illinois legislature in late May.¹

The bill called for several changes to the current version of the Act; most importantly, explicitly confirming that the Attorney General is able to bring *parens patriae* actions. Under the current version of the Act² the Illinois Attorney General is authorized to “bring suit in the Circuit Court to prevent and restrain violations of Section 3 of [the Act].”

At first glance, this appears to already authorize the Attorney General to bring *parens patriae* actions; however, the statute never explicitly states such a power. It appears that section one of the Act is directed at situations where Illinois is, itself, a victim of Antitrust violations. Thus, where Illinois, as a purchaser or consumer, has been injured by a violation of section three of the current Act, the Attorney General may bring suit to prevent or recover for such violations.

The proposed amendment adds the following language to the beginning of section two of the Act:

The Attorney General may also bring an action in the name of this State, as *parens patriae* on behalf of persons residing in this State, to recover the damages under this subsection or any comparable federal law. The powers granted in this Section are in addition to and not in derogation of the common law powers of the Attorney General.

The doctrine of “*parens patriae*” states that a state has standing to represent its citizens when the matter involves a matter of sovereign or quasi-sovereign interest.³ The main advantage of a *parens patriae* action is the lack of any statutorily required requirements before standing will

¹ The full text of the bill is available at

<http://ilga.gov/legislation/billstatus.asp?DocNum=2872&GAID=9&GA=95&DocTypeID=SB&LegID=37632&SessionID=51>. The original bill was passed in both houses of the legislature on May 21, 2008. The Governor issued an amendatory veto on August 18 recommending approval of the bill with some minor changes. For this amended legislation to become law, both houses of the General Assembly will need to vote to accept the changes. First, the Senate sponsor (Sen. John J. Cullerton) must file a motion to accept the amendatory veto, and then the Senate has 15 days to accept the amendatory veto by a simple majority. If the Senate fails to act, the improvements to the legislation, and the original bill, will die. If the Senate accepts the amendatory veto, the House will need to repeat the process in their chamber. See ILCS Const. Art. 4, § 9.

² 740 ILCS 10/7.

³ *State of N.J. v. State of N.Y.*, 345 U.S. 369, 73 S. Ct. 689 (1953).

be granted. Unlike a class action, where the class must meet relatively strict requirements,⁴ a *parens patriae* action can be brought much more easily.⁵

Recognized in the US over one hundred years ago, the doctrine of *parens patriae* standing originated out of the powers held by the King during the early development of the English constitutional system.⁶ The King's powers, as "father of the country," were referred by the latin phrase "*parens patriae*." In 1900 the U.S. Supreme Court first recognized the concept of *parens patriae* standing as a means for a state to seek redress for wrongs committed against its residents.⁷ The Court held that for a state to have standing under *parens patriae*, the affected interest must be sufficiently connected to obligations of the state to its citizens. Moreover, the wrong must "affect the public at large," rather than merely private individuals.⁸

Parens patriae standing does not empower a state to sue on the basis of personal claims assigned to it by individual citizens. Additionally, the state does not have *parens patriae* standing if the chief thrust of the alleged wrong is one affecting a narrow class of individuals and the injury to the state economy as a whole is inconsequential by comparison.⁹ Therefore, in order to maintain a suit as *parens patriae*, the state must articulate an interest apart from the interests of individual private parties. The state, then, must be more than just a nominal party.¹⁰ This quasi-sovereign interest, must fall into either one of two categories: (1) the physical and economic health and well-being of the states residents in general is being harmed, or (2) the state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.¹¹

A state's quasi-sovereign interests consist of a set of interests in the well-being of its citizens that are material enough to create an actual controversy between the state and the defendant.¹² Although it is nearly impossible to articulate all of the economic interests that can be protected by a state as *parens patriae*, three factors usually determine whether a quasi-interest is sufficient to allow standing are (1) the size of the segment of the population that has been adversely affected, (2) the magnitude of the harm inflicted, and (3) the practical ability of those injured to obtain complete relief without intervention by the sovereign.¹³

This proposed amendment in Illinois has no effect on the Illinois Attorney General's ability to bring *parens patriae* actions under **federal** antitrust law. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ["HSR Act"] expressly grants states *parens patriae* authority to sue under the Sherman Act. It further authorizes each state's attorney general to sue for treble damages suffered by natural persons who reside in that particular state.

The federal *parens patriae* authority under the HSR Act, however, is quite limited. A certain number of requirements need be met before pursuing *parens patriae* authority under the

⁴ See 735 ILCS 5/2-801 for requirements of class action standing under Illinois law.

⁵ *Pennsylvania v. Budget Fuel Co.*, 122 FRD 184, 1988-2 CCH Trade Cases ¶68229 (E.D. Pa. 1988); *Lohse v. Dairy Com'n of State of Nev.*, 25 Fed. R. Serv. 2d 1018, 1977-2 Trade Cases ¶61,805 (D. Nev. 1977); see also *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557 (1983) (holding that the HSR Act exempted *parens patriae* suits from the requirements of Fed. R. Civ. P. Rule 23).

⁶ *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).

⁷ *Louisiana v. Texas*, 176 U.S. 1 (1900).

⁸ *Louisiana*, 176 U.S. at 19.

⁹ *Com. of Pa., by Shapp v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976).

¹⁰ *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592 (1982).

¹¹ *Id.*

¹² *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir. 2000).

¹³ *Com. of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc.*, 632 F.2d 365 (4th Cir. 1980), *aff'd*, 458 U.S. 592 (1982).

HSR Act. First, the damages incurred must be from violations of the Sherman Act.¹⁴ In addition, the damages must also have been incurred by natural persons.¹⁵ This means that corporations, partnerships, and similar entities cannot benefit from federal parens patriae authority under the HSR Act. Perhaps most significantly, federal parens patriae authority, in accordance with the *Illinois Brick* decision, does not permit actions on behalf of **indirect purchasers**.¹⁶ State parens patriae authority, however, is not limited by the *Illinois Brick* decision.

Like with class actions, the HSR Act forces a state utilizing parens patriae standing to notify the natural persons on whose behalf it is suing and must give them an opportunity to opt out of the action.¹⁷ Failing to opt out of the parens patriae action will preclude any natural person who was covered by the lawsuit from suing for damages under Section 4.¹⁸ Similarly, any damages previously awarded to a natural person cannot also be recovered under the parens patriae action for the same injuries.¹⁹

The Illinois' Antitrust Act also permits the state's attorney general to bring class actions on behalf of indirect purchasers. The Act's proposed amendment also includes a provision insuring that only the state's parens patriae standing would be utilized for indirect purchasers. The Act now states that "no person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act." The Act's proposed amendment states the following:

[N]o person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae as provided in this subsection.

The proposed amendments to the Illinois Antitrust Act would put to rest any question of whether the Illinois Attorney General has standing to bring actions on behalf of Illinois citizens for state antitrust violations.²⁰ Although the attorney general in Illinois already has the ability to bring class actions arising under the state's antitrust laws, the amendments would clarify the attorney general's power to more easily bring actions for large groups of Illinois citizens, whether they are direct or indirect purchasers.

¹⁴ 15 U.S.C. § 15c(a)(1).

¹⁵ *Id.*

¹⁶ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733, n. 14 (1977).

¹⁷ 15 U.S.C. § 15c(b)(1), (2).

¹⁸ 15 U.S.C. § 15c(b)(3).

¹⁹ 15 U.S.C. § 15c(a)(1)(A).

²⁰ *See In Re Rusty*, 128 B.R. 1001 (Bkrcty. N.D. Ill. 1991) (discussing the state's ability to bring class actions and parens patriae actions on behalf of Illinois consumers).