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In the Aftermath of *Parens Patriae*: Can Private Copycats Still Sue?

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I. INTRODUCTION & BACKGROUND

Pharmaceutical manufacturers and other state contractors are increasingly subject to suits brought by state attorneys general (AG). Such suits may claim a variety of alleged misdeeds, but frequently concern scientific statements about the effectiveness of off-label uses, regardless of the scientific accuracy of the information.[1] Because state attorneys general act on behalf of the population of an entire state, their litigation inherently carries with it the coercive potential of large damages. Thus, the pressure to settle such actions can be extreme.

A recent decision, however, demonstrates that there can be a silver lining, at least potentially, around at least some of those big, dark clouds of state attorney general litigation. Companies considering the settlement of such actions should be cognizant of the recent Minnesota Supreme Court decision, Curtis v. Altria Group, Inc.[2] The legal principles underlying the Curtis decision, under analogous facts, should be applicable to all attorney general actions, with respect to both the state litigation and subsequent private copycat actions, no matter the product or other allegations upon which such suits might be based.[3]

POLICY RECOMMENDATIONS:

Since state attorneys general act on behalf of the public in the capacity of "*parens patriae*," their monetary settlements using general release language should also bind individual copycat plaintiffs, thus precluding relitigation of those claims.

II. RESEARCH & RESPONSE

A. Defining *Parens Patriae*

The relevant legal rule recognized in Curtis is that, since a state attorney general acts on behalf of the citizens of that state—that is to say in the capacity of "*parens patriae*"—any resolution (which usually means a settlement of some sort) of a state attorney general action will preclude private copycat plaintiffs from later suing the same defendant over the same alleged wrongdoing. Parens patriae actions are one of several methods of aggregating litigation.[4] In this type of action, a "[g]overnmental actor" has "authority to speak for citizens on matters of public concern,"[5] and in many ways resembles class actions—including their preclusive effect on subsequent actions by individual citizens. As discussed in the ALI's principles:

> Where the interest to be protected is one held by members of the public at large, an action by a public official in behalf of that interest may be held

> preemptive of private remedies and preclusive effects accordingly given to a judgment in an action involving the official…. The existence of such an interest is clearest when a government or public official sues *parens patriae*.
>
> ****
>
> The right to sue *parens patriae* being established…, it remained to be considered whether a judgment in a *parens patriae* action precludes a subsequent civil suit by a citizen brought to vindicate the same public interest. The U.S. Supreme Court answered affirmatively…. In principle, *parens patriae* actions can preclude large numbers of individuals from suing. In this respect, they resemble class actions.[6]

B. Application to *Curtis v. Altria Group, Inc.*

The above is precisely what happened in Curtis.[7] In 1994, the Minnesota state AG brought a consumer fraud action against the defendants over alleged false advertising pertaining to "light" cigarettes, seeking among other things, restitution and damages.[8] This litigation action settled a few years later for over $100 million.[9] Several years later, copycat Minnesota private plaintiffs brought duplicative suits asserting violations of the same consumer protection statutes, alleging the same purportedly violative conduct. They also sought the same recovery—restitution and damages.[10]

The trial court granted partial summary judgment on the ground that the copycat action was barred by the release that settled the prior attorney general action.[11] The copycat plaintiffs appealed, and the Minnesota intermediate appellate court reversed, finding the release to be inapplicable, notwithstanding the repetitive nature of the litigation.[12]

The Minnesota Supreme Court took the case and reversed, reinstating summary judgment. The basis for reversal, well-stated in the Supreme Court's syllabus, was the *res judicata* effect of the state attorney general's litigation and ultimate settlement of prior litigation brought in a parens patrie capacity:

> Under [the Minnesota act], the Minnesota Attorney General (State AG) has the authority to bring a lawsuit…and to seek not only the relief available to the State…, but also the relief available to a private litigant…. It logically follows that **the State AG has the authority to settle and release a private litigant's claims.**
>
> The 1998 Settlement Agreement entered into by the State AG and [defendant] **expressly release**d and barred [copycat plaintiffs'] consumer protection claims…and **is binding on [those plaintiffs].**[13]

C. Other Cases Binding Subsequent Private Plaintiffs

Curtis is only the latest example of the *res judicata* effect of parens patrie actions binding subsequent private plaintiffs. The Supreme Court ruled, in a dispute over riparian rights, that a final judgment against the state "was effective, not only against [it], but also against its citizens…for they, in their common public rights as citizens…were represented by the State in those proceedings, and, like it, were bound."[14] The *res judicata* effect of *parens patriae* actions arises particularly frequently in tobacco actions, since cigarettes were the first product to be targeted in attorney general actions. Thus, in Georgia, an action to recover punitive damages was barred by the *res judicata* effect of a consent judgment with the state's attorney general.

> Because punitive damages serve a public interest and are intended to protect the general public, as opposed to benefitting or rewarding particular private parties, we find the State, in seeking punitive damages in the suit against [defendant], did so as *parens patriae* and in this capacity represented the interests of all [of the state's] citizens, including plaintiffs here. Accordingly, we conclude that the State and plaintiffs were privies in that action.[15]

III. POLICY IMPLICATIONS

Attorneys general have now focused their *parens patriae* powers squarely on manufacturers of prescription drugs and medical devices. Thus, the precedents from the tobacco and environmental fields now are equally applicable to drugs and medical devices. To the extent that such manufacturers have the misfortune to be sued by one or more state attorneys general, and they elect to settle such actions, those settlements should likewise preclude copycat private litigation involving the same allegations. Particularly, since state attorneys generals can assert the public's consumer protection rights, the court in Curtis concluded that private consumer protection litigation was merely "part of the broader authority of the State AG to bring a lawsuit…to enforce all remedies available to it," including those remedies also provided to private litigants.[16] "[I]t logically follows" that since the attorney general can pursue private as well as public remedies, that office "has authority to settle and release" those claims, including those of subsequent private litigants.[17]

That "release," in Curtis, moreover, was a broad, general one – including "all claims that the State of Minnesota made, or could have made."[18] The release had the usual "broad and comprehensive" provisions that are ordinarily included in general releases: "any and all manner,""known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable or statutory,""relating to the subject matter,""directly or indirectly based on, arising out of or in any way related to."[19] The court in Curtis accorded the general release language its ordinary broad scope. The copycat plaintiffs' claims easily satisfied the "related to" test since they "assert[ed] violation of the same consumer protection statutes arising from the same fraudulent and deceptive misrepresentations."[20]

The copycat litigants' last stand in Curtis was a provision in the settlement providing that "no portion …shall bind any non-party."[21] Because the state attorney general was acting on behalf of the public, members of the public could not be heard to claim they were "nonparties":

> We read the words "representatively" and "derivatively" to encompass [private copycats'] right as private litigants to bring [monetary] claims against [defendant]. Because the State AG brought and released those claims, including [monetary] consumer protection claims that could have been brought on behalf of private litigants, the release expressly determined [private copycats'] right to bring a [monetary] consumer protection claim.[22]

IV. CONCLUSION

Since prescription drug and medical device manufacturers are increasingly finding themselves on the receiving end of *parens patriae* litigation—both state attorney general actions and follow-up copycat litigation—Curtis provides reason to believe that the same silver lining to the dark cloud of such litigation should be equally available against copycat drug/device plaintiffs. The relevant state law would have to allow the state attorney to recover the same consumer protection damages as private litigants, but once that happens, the rest should flow. Since attorneys generals are acting on behalf of the public, their monetary settlements using general release language should also bind individual copycat plaintiffs and thus preclude relitigation of those claims.

ENDNOTES

1. *E.g.*, *Caldwell v. Janssen Pharmaceuticals, Inc.,* 100 So. 3d 865 (La. App. 2012); *In re Zyprexa Products Liability Litigation*, 671 F. Supp.2d 397 (E.D.N.Y. 2009).
2. 813 N.W.2d 891 (Minn. 2012).
3. *Id.*
4. *See* Principles of the Law of Aggregate Litigation §1.02 & Reporters notes to comment b(1)(B) (ALI 2010).
5. *Id.*
6. *Id.* Reporters' Notes at pp. 20-21.
7. *See supra*, note 1.
8. *See id.* at 896-97.
9. *See id.* at 897.
10. *See id.*
11. *Id.*
12. *Id.* at 898.

13. *Curtis*, 813 N.W.2d at 894, syllabus points 1, 3 (emphasis added) (syllabus point 2 dealt with the reverse situation, and thus was not relevant to the *res judicata* issue).

14. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958).

15. *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 552 (Ga. 2006); *accord Fabiano v. Philip Morris Inc.*, 862 N.Y.S.2d 487, 490 (N.Y.A.D. 2008) (*parens patriae* action *res judicata* as to punitive damages because "punitive damages claims are quintessentially and exclusively public in their ultimate orientation and purpose"). *See also Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) ("governments may act in their *parens patriae* capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest"); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) ("[w]hen a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment"); *Badgley v. City of New York*, 606 F.2d 358, 364 (2d Cir.1979) (private citizens' riparian rights were "conclusively determined by the terms of the [state consent d]ecree" because the rights of private "citizens cannot exceed those of [the state] itself"); *EPA v. City of Green Forest, Arkansas*, 921 F.2d 1394, 1401 (11th Cir. 1990) (pollution plaintiffs bound *parens patriae* settlement even though the governmental action was subsequently filed).

16. *See supra,* note 1 at 899.

17. *Id.* at 900.

18. *Id.* at 902.

19. *Id.*

20. *Id.* at 903 (emphasis original).

21. *Id.* at 904.

22. *Id.*

ABOUT THE AUTHORS

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