WASHINGTON SUPREME COURT RULES STATUTES OF LIMITATIONS DO NOT APPLY TO ATTORNEY GENERAL'S *PARENS PATRIAE* CLAIMS: CAN OTHER STATES FOLLOW?

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In *Washington v. LG Electronics, Inc.*,[1] the Washington Attorney General brought *parens patriae* claims against multiple foreign electronics manufacturers for allegedly agreeing to raise price and set production levels for cathode ray tube displays under its state antitrust laws.[2] Defendants moved to dismiss the claim by arguing it was time barred under the state's statute of limitations for state antitrust claims or broader catchall statutes of limitations.

The Washington Supreme Court concluded *en banc* that the state attorney general's *parens patriae* claims were not time barred under the *nullum tempus* doctrine – a statute of limitations does not run against a sovereign without its consent. Our article analyzes the decision and its potential application in other states that have similar statutes of limitations for state antitrust claims.

Washington v. LG Electronics, Inc.

The Washington Attorney General brought state antitrust claims on behalf of its citizens against over twenty foreign companies for allegedly orchestrating a worldwide conspiracy to elevate prices and restrain production of cathode ray tube (CRT) displays.[3] The state alleged that defendants conspired from at least March 1, 1995 to November 25, 2007 in violation of its unreasonable restraint of trade statute.[4] The attorney general's lawsuit sought, among other things, restitution for consumers under its *parens patriae* authority.

"Washington v. LG Electronics, Inc. confirms the Washington Attorney General's authority to bring parens patriae antitrust claims outside of the state's four year statute of limitations on private actions. This enables the state to protect consumers by securing redress for antitrust violations that has not otherwise been obtained. Oregon lower courts appear similarly amendable to such claims."

Ten defendants moved to dismiss by alleging Washington's *parens* claims were time barred by the state antitrust statute's four year statute of limitations in RCW § 19.86.120. The statute of limitations states that "[a]ny action to enforce a claim for damages under RCW § 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues…"[5] In the alternative, defendants argued that various catchall provisions applied.[6] The State responded by contending that the statute of limitations did not apply to its *parens patriae* claims brought under RCW § 19.86.080 and that in any event its action was not time barred under any of the catchall provisions.

The state court of appeals concluded that the statute of limitations did not apply. The Washington Supreme Court granted review to determine whether (1) the four-year state antitrust statute of limitation in RCW 19.86.120 applies to the state's *parens* claims under RCW 19.86.080; and (2) whether any catchall state statute of limitations applies.

State Antitrust Statute of Limitations

The Washington Supreme Court first contrasted the private right of action bestowed by .090 with the Attorney General's right to recover on behalf of itself and its citizens under RCW § 19.86.080. Next, the court found the .080 *parens patriae* action was not expressly time barred within the statute. Because the statue expressly barred .090 claims, the court concluded that .080 claims were intentionally omitted from the statue under the *expressio unius est exclusio alterius* doctrine and the statute's legislative history.[7] The court thus concluded that "by its plain language, RCW 19.86.120 does not apply to .080 claims."[8]

Next, the court considered whether the state's antitrust harmonization statute requires the court to adopt a four-year statute of limitations consistent with the federal antitrust laws under 15 U.S.C. §§ 15b, 15c. The harmonization statute instructs courts to –

> be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct re-

> strains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.[9]

The court determined that, although the Clayton Act enables state attorneys general to bring *parens* claims, "the statutory parallel turns perpendicular at this point" because federal *parens patriae* claims are expressly time barred.[10] In contrast, the state legislature chose to only place .090 claims under a statute of limitations. The court thus declined to apply the four-year statute of limitations to state *parens patriae* claims.

Catchall Statutes of Limitations

Defendants also averred that two catchall statutes of limitations apply. The first, RCW § 4.16.080(2), provides a three-year statute of limitations for actions seeking recovery for "any other injury to the person or rights of another." The state's broader two-year statute of limitations, RCW § 4.16.130, applies to "[a]n action for relief not hereinbefore provided."

In determining that neither statute of limitations applied, the Supreme Court relied on the common law *nullum tempus occurrit regi* doctrine. The *nullum tempus* doctrine prevents statutes of limitation from running against the sovereign "unless the State expressly consents to the limitation on its sovereign powers."[11]

This common law axiom is codified in RCW § 4.16.160 –

> The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That … ***there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state.***

The *nullum tempus* doctrine "is related to the doctrine of sovereign immunity and the age-old principle that the sovereign's rules do not bind the sovereign itself unless the sovereign explicitly consented to be bound."[12] Thus, the court concluded *parens patriae* actions are "to benefit the public generally" and that the attorney general's .080 action was "'in the name of or for the benefit of the state' for purposes of RCW 4.16.160."[13] Furthermore, the court rejected defendants' arguments that the state was merely a nominal plaintiff because it sought monetary restitution for Washington consumers, noting that "safeguarding the public by prohibiting business practices that undermine fair and honest competition is well within the State's police power."[14] After hearing arguments, the Washington Supreme Court held that the State was not bound by the general statute of limitations and affirmed denial of the defendants' motion to dismiss.[15]

Potential Extraterritorial Applications

The *Washington v. LG Electronics* decision raises interesting questions regarding whether other states may be able to pursue *parens patriae* enforcement actions beyond their private state antitrust action statutes of limitation. Today, at least thirty-five states and the District of Columbia empower their attorney general to bring *parens patria* claims for state law violations.[16] In addition to Washington, there are at least three additional states – Connecticut, Oregon, and Virginia – that lack express limitations on *parens patriae* state antitrust claims.[17]

Whether Connecticut, Oregon and Virginia *parens patriae* claims are subject to statutes of limitations may now be open questions of law. We highlight and briefly discuss the governing statutes from these states.

Connecticut

The Connecticut attorney general is authorized to bring *parens patriae* antitrust actions on behalf of "persons residing in the state with respect to damages sustained by such persons" or for "damages to the general economy of the state…"[18] Similar to Washington's, the Connecticut statute of limitations specifically identifies certain claims while excluding *parens patriae* actions.[19] Connecticut's harmonization statute instructs its courts to "be guided by interpretations given by the federal courts to federal antitrust statutes."[20]

Connecticut courts have not opined on whether state *parens* claims must be harmonized with the federal antitrust statutes of limitations. However, the Connecticut Supreme Court has held that "statutes limiting rights . . . are not to be construed to embrace the government or sovereignty unless by express terms or necessary implication . . . [and] the rights of the government are not to be impaired by a statute unless its terms are clear and explicit and admit of no other constriction."[21] This approach was reaffirmed by the Connecticut Supreme Court in a recent decision where the court applied the *nullum tempus* doctrine to conclude that "statutory language generally purporting to affect rights and liabilities of all persons *will not be deemed to apply to the state in the absence of an express statutory reference to the state*."[22]

Furthermore, in *Connecticut v. Marsh & McLennan Cos.* the Connecticut Supreme Court declined to preclude the attorney general from bringing a *parens patriae* claim for damages to the state's economy despite the cause of action not being available under the federal antitrust laws.[23] The court concluded that the state's harmonization statute "does not deprive the state of standing to pursue *parens patriae* actions for antitrust damages to its general economy… or, put differently, require us to incorporate the federal preclusion of general economy damages into the state antitrust statute."[24] Based on its reasoning in *Marsh*, and because the limitations period provided for in Conn. Gen. State § 35-40 does not reference *parens patriae* actions by the Attorney General, the Connecticut Supreme Court may prove amendable to *parens patriae* restitution actions beyond the general antitrust statute of limitations.

Oregon

Oregon's attorney general is authorized to bring *parens patriae* antitrust claims "on behalf of a natural person… to secure equitable and monetary relief."[25] Oregon can also bring *parens* claims under its common law powers because its *parens patriae* statute grants powers "in addition to and not in derogation of the common law powers of the Attorney General to act as *parens patriae*."[26] Oregon's state antitrust statute

of limitations does not appear to apply to either the statutory or common law *parens* claims.[27]

Oregon's antitrust harmonization statute stipulates federal precedent "shall be persuasive authority" for construing its state antitrust laws.[28] However, in *Oregon v. LG Electronics* the state circuit court similarly held that a *parens patriae* action brought by the Oregon Attorney General against manufactures of cathode ray tubes was not time barred under the statute of limitations.[29] Based on the lower court's decision and Oregon having two separate *parens* causes of action, there is a strong likelihood that the state supreme court would affirm that a state *parens* claim is not time barred, under the *nullum tempus* doctrine, by the federal antitrust statute of limitations.

Virginia

The Virginia attorney general is authorized to bring *parens patriae* actions "to recover damages and secure other relief … as parens patriae respecting injury to the general economy of the Commonwealth."[30] The state antitrust statute of limitations bars actions "not commenced within four years after the cause of action accrues."[31] However, the statute does not apply to the state *parens* claims subsection, Va. Code Ann. § 59.1-9.15(d).

Virginia has a harmonization statute that requires the state's antitrust laws to "be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions."[32] To date, Virginia courts have not opined on whether the harmonization statute requires limiting state *parens* antitrust claims. As such, this appears to be a genuine open question of law. If the courts apply the *LG Electronics* rationale, the state attorney general may be able to bring *parens* claims to recover consumer damages for cause of actions that have accrued more than four years ago.

Conclusion

Washington v. LG Electronics, Inc. confirms the Washington Attorney General's authority to bring *parens patriae* antitrust claims outside of the state's four year statute of limitations on private actions. This enables the state to protect consumers by securing redress for antitrust violations that has not otherwise been obtained. Oregon lower courts appear similarly amendable to such claims. Although it is an open question of law whether Connecticut and Virginia can also bring similar claims, our high-level review indicates that their courts may also be amenable to similar *parens patriae* claims.

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[1] *Washington v. LG Electronics, Inc.*, 186 Wn.2d 1 (July 14, 2016) (hereinafter "*LG Elects.*").
[2] The action was commenced under Washington's Consumer Protection Act, Revised Code of Washington (RCW) 19.86 *et seq.*
[3] The action was brought under RCW 19.86.080 which authorizes the Attorney General to "bring an action in the name of the state, or as *parens patriae* on behalf of persons residing in the state . . . to restrain and prevent the doing of any act herein prohibited or declared to be unlawful."
[4] RCW § 19.86.030 ("Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.").
[5] RCW § 19.86.120.
[6] RCW § 4.16.080(2) and RCW 4.16.130.
[7] *LG Elects.* at 9.
[8] *Id.* at 8.
[9] RCW § 19.86.920.
[10] *LG Elects.* at 10.
[11] *Id.*
[12] *Id.* at 12.
[13] *Id.* at 13.
[14] *Id.* at 16.
[15] *Id.* at 15. Justice Gordon dissented in part, asserting that the *parens patriae* action effectively circumvented the statutory scheme by enabling consumers to recover for otherwise time-barred claims. While agreeing with the majority that the action was not barred under RCW 19.86.120, Justice Gordon concluded that the catchall statutes of limitations apply because "RCW 4.16.160 … has never been literally followed" and the a "well founded" rule prevents the State from using .160 "to revive time-barred private actions." *LG Elects.* at 18 (*quoting U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wn.2d 85, 89 (1981)).
[16] *See* ALASKA STAT. ANN. § 45.50.577(B); ARK. CODE ANN. § 4-75-212(B), § 4-75-315; CAL. BUS. & PROF. CODE § 16750; COLO. REV. STAT. § 6-4-111 (3); CONN. GEN. STAT. § 35-32; DEL. CODE ANN. tit. 6, § 2108; D.C. CODE ANN. § 28-4507; FLA. STAT. ANN. § 542.22; HAW. REV. STAT. § 480-14; IDAHO CODE ANN. § 48-108; 740 ILL. COMP. STAT. 10/7; KAN. STAT. ANN. § 50-103; MD. CODE ANN., COM. LAW § 11-209; MASS. GEN. LAWS ANN. CH. 93 § 9; ME. REV. STAT. ANN. § 1104(3)(A); MICH. COMP. LAWS § 445.777; MINN. STAT. ANN. § 325D.59; NEB. REV. STAT. § 84-212; NEV. REV. STAT. § 598A.160; N.H. REV. STAT. ANN. § 356:4-A; N.M. STAT. ANN. § 57-1-7(A); N.Y. GEN. BUS. LAW § 342; N.C. GEN. STAT § 114-2(8)(A); OHIO REV. CODE ANN. § 109.81(A); OKLA. STAT. ANN. tit. 79, § 646.775; OR. REV. STAT. § 646.775; 73 PA. STAT. ANN. § 201-4; R.I. GEN. LAWS § 6-36-12(G); S.C. CODE ANN. § 39-3-310; S.D. CODIFIED LAWS § 37-1-23; TEX. BUS. & COM. CODE ANN. § 15.20(A); UTAH CODE ANN. § 76-10-916; VT. STAT. ANN. tit. 9 § 2458; VA. CODE ANN. § 59.1-9.15; WASH. REV. CODE ANN. § 19.86.080; W. VA. CODE § 47-18-17.
[17] *LG Elects.*, at 19.
[18] Conn. Gen. Stat. § 35-32(c).
[19] *See* Conn. Gen. Stat. § 35-40 ("Any action under sections 35-34 and 35-35, shall be forever barred unless commenced within four years after the cause of action shall have accrued. For the purpose of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation.").
[20] Conn. Gen. Stat. § 35-44.
[21] *Connecticut v. Goldfarb*, 160 Conn. 320, 323-24 (1971).

[22] *See Connecticut v. Lombardo Bros. Mason Contractors*, 307 Conn. 412, 439–40 (2012) (emphasis in original).
[23] *Connecticut v. Marsh & McLennan Cos.*, 286 Conn. 454 (2008).
[24] *Id*. at 470.
[25] Or. Rev. Stat. § 646.775(1)(a).
[26] *Id.* at § 646.775(6).
[27] *Id.* at § 646.800.
[28] *Id.* at § 646.715.
[29] *Oregon v. LG Electronics, Inc.*, No. 120810246 (Or. Cir. Ct. Aug. 16, 2012).
[30] Va. Code Ann. § 59.1-9.15(d).
[31] *Id.* at § 59.1-9.14.
[32] *Id.* at § 59.1-9.17.

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