

CASE No. 97023

IN THE
SUPREME COURT OF ILLINOIS

Raymond G. SCACHITTI, Patrick J. HOULIHAN and Robert F. RIFKIN,

Plaintiffs-Appellants,

v.

UBS FINANCIAL SERVICES AND DELOITTE & TOUCHE, LLP,

Defendants-Appellees.

On Direct Appeal from Cook County Circuit Court, Case No. 02 CH 21121
The Honorable Stephen Schiller, Judge Presiding

REPLY BRIEF OF *AMICI CURIAE* AARP AND TAXPAYERS AGAINST FRAUD
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

The fundamental flaw with appellees’ argument is that it seeks to, and depends on, “lumping” together the Illinois Whistleblower Reward and Protection Act (“IWA”) and Article XX, ignoring the critical distinction between a valid legislative assignment of interest and an unconstitutional delegation of duty. In enacting the IWA, the legislature assigned to private parties or relators (also “whistleblowers”) a property interest sufficient to grant them individual standing to sue. Plaintiffs under Article XX had no such rights and were not granted individual standing, but merely “substituted” as the Attorney General where she declined to act. These legislative enactments differ vastly in both form and function. By failing to even address the critical issue of a *qui tam* relator’s individual standing, appellees failed to meet their heavy burden in asking this Court to undo what the legislature deemed essential in the State’s fight against fraud.

I. THE PARTIES’ BRIEFS FAIL TO ADDRESS THE SPECIFIC PURPOSE AND PROVISIONS OF THE IWA

Amici AARP and Taxpayers Against Fraud (“AARP/TAF *Amici*”) respectfully submit that the parties missed the point. Appellants, appellees, and some *amici* analyze this as a case of “taxpayer” or “citizen” standing. This misconstruction led the Circuit Court to strike the IWA as unconstitutional. Yet nothing in the statute requires the relator to be a taxpayer or even an Illinois citizen. The legislature constitutionally *assigned* part of the State’s claim to the relator.

As set out in our opening brief (pp. 20-21), the Act is reasonably construed as follows:

1. The purpose of the Act is to reward whistleblowers who provide non-public information concerning fraud on the State with an amount commensurate with the size of the fraud exposed.

2. To secure the reward, and assure whistleblowers (who may be providing the information in the face of significant personal risk) that the reporting of a *bona fide* fraud will not go unrewarded, the State assigns a portion of its damages claim to the whistleblower.
3. Notwithstanding the assignment, the whistleblower's rights are nevertheless subordinated to any legitimate State interest.
4. However, the State cannot exercise its paramount rights to arbitrarily and capriciously deprive the relator of the property interest assigned.

This construction is supported by the legislature's inherent control over state property and by the United States Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). No opposing brief discussed the distinct purpose of the Act in relation to its validity. Nor have they attempted to assist this Court's analysis by attempting to construe the statute as a whole.

As this Court has noted, “[constitutional] challenges to legislative acts are the most difficult challenges to mount.” *People v. Greco*, 204 Ill.2d 400, 407, 790 N.E.2d 846, 851 (2003). Indeed, a challenger “must establish that *no* set of circumstances exists under which [the statute] would be valid.” *Id.* (emphasis supplied). This is a heavy burden that has not been met.

By treating the IWA as simply an improved version of Article XX, appellees fail to meet their burden of showing this specific Act is unconstitutional under *Lyons v. Ryan*, 201 Ill.2d 529, 780 N.E.2d 1098 (2002). But on a key point, AARP/TAF *amici* must part company with appellants as well. Unlike appellants, AARP/TAF *Amici* do not contest *Lyons*. The distinction between *amici*'s argument and appellants' is that where appellants argue that traditional taxpayer standing has always co-existed with the powers of the Attorney General, *amici* argue that the standing of assignees and other private co-owners of causes of action have always co-existed with the powers of the Attorney General. It is the relators' status under the IWA as real parties in interest, *in addition to* the State, that affords them standing to bring suit. But, as the IWA is

patently *not* a taxpayer statute, and as Article XX is *not* an “informer statute,” lumping them together does not aid this Court’s analysis.

The *Lyons* Court held that where the state is *the sole* party in interest, it is unconstitutional for private taxpayers to litigate on behalf of the state, as the Illinois Constitution reserves that right for the Attorney General. *Id.* at 541, 780 N.E.2d at 1105-06. Unlike Article XX, however, under the IWA *both* the State *and* the whistleblower are real parties in interest – the whistleblower’s interest derives from its status as an assignee. Furthermore, unlike Article XX, the IWA has a permissible (and critically important) legislative purpose – exposing fraud against the State of Illinois. Finally, contrary to assertions set forth by appellees and Cook County *Amici*, the IWA (again unlike Article XX) gives the Attorney General ongoing authority to control a *qui tam* action brought by a whistleblower at every stage of the litigation.

This Court should resist efforts to conflate the IWA with Article XX, whether done in the hopes of revisiting *Lyons* and finding Article XX constitutional (as appellants seek to do) or in the hopes of sinking the IWA along with Article XX (as appellees and Cook County *Amici* seek to do). “If reasonably possible, a statute must be construed so as to affirm its constitutionality and validity.” *Greco*, 204 Ill.2d at 406, 790 N.E.2d at 851. As it is more than “reasonably possible” to preserve the legislature’s efforts to combat fraud against the State and protect whistleblowers, AARP/TAF *Amici* respectfully assert that this Court should uphold the IWA.

A. Through the IWA, the Legislature Properly Assigned a Portion of the State’s Interest to the Relator.

AARP/TAF *Amici*’s reasoning is very simple: The Attorney General has the right to represent the State with respect to property belonging to the State. But here, the Attorney General does not own the property, the State does. When that property is duly transferred by the legislature, it is no longer property belonging to the State, and the Attorney General’s exclusive

powers no longer apply. The new owner has the right to represent the property. This is inherently true in *every* State transfer of property. Hence, there must be a reason beyond this natural result to invalidate a transfer of property by the legislature.

Yet, appellees provide none. The parties simply misconstrue the statute as an attempt to delegate “citizen-taxpayer” standing.¹ For example, appellee UBS writes:

Amici ...note that the relator's bounty is bestowed by the General Assembly using its power over the State's property. This argument merges two distinct concepts: the right to exercise power over property and the right to act as the State's chief legal officer and exclusive representative in court. Whether the General Assembly has authority over property is irrelevant to the question of whether it may appoint someone to represent the State in court.

Brief of UBS Financial Services (“UBS”), p. 19.

Amici agree that there are two distinct concepts here, yet it is UBS which merges them. As this Court held, “an assignment... involves only a transfer of rights, a delegation involves the appointment of another to perform one's duties.” *Olson v. Etheridge*, 177 Ill.2d 396, 406, 686 N.E.2d 563, 567 (1997). In other words, the “intent to grant authority to take action with respect to ... property is not the same as the intent to permanently alienate or transfer an ownership interest.” *Eychaner v. Gross*, 202 Ill.2d 228, 258, 779 N.E.2d 1115, 1134 (2002) (*citing Olson, supra*). If the General Assembly’s intent was to appoint the relator to represent the State’s interests, instead of making a permissible transfer of property, then dressing it up as a “transfer” might not make it permissible. However, merely assuming that the legislature so intended, without fact, authority or reasoning supporting the conclusion, does nothing to fulfill appellees’ burden to challenge the constitutionality of the statute. That is why the specific provisions of

¹ See, e.g. Brief of UBS Financial Services, p. 6 (“...the Whistleblower Act...purport[s] to authorize taxpayers to sue on behalf of the State of Illinois);” Brief of Morgan Stanley, p.1 (characterizing suits under the IWA as “citizen suits”).

this statute distinguishing it from Article XX are so important, and why appellees' request that the Court ignore the relator's standing as a factor in its decision should be rejected. When construing a statute "all of the provisions of an enactment are to be viewed as a whole." *Burger v. Lutheran Gen. Hosp.*, 198 Ill.2d 21, 41, 759 N.E.2d 533, 545 (2001).

The sole purpose of Article XX was quite clearly to supplant the Attorney General's prosecution of fraud with suits filed by self-appointed concerned citizens — a direct invasion of her powers, and a facially improper purpose. The purpose of the IWA is to provide sufficient motivation for insiders to come forward with knowledge of fraud that would not otherwise be exposed. No brief has argued that the *purpose* of the IWA is anything but a legitimate, permissible and desirable legislative goal. Nor have any suggested any alternative means by which the same calibrated incentive to expose fraud can be achieved. And none have claimed that the General Assembly does not have the power to assign State property to secure a reward for whistleblowing.

A relator's standing can be reasonably construed as the legitimate exchange of property for information.² As AARP/TAF *Amici* pointed out in our initial brief: (1) the partial assignment of the State's cause of action is ancillary to, and in aid of, securing the consideration given by the legislature to reward persons coming forward with non-public information of fraud, and (2) the possessor of the information, unlike a member of the general public, has a nexus with the subject matter of the action.

That this strategy has been successful cannot be denied; the Attorney General herself attests the IWA has resulted in many successful prosecutions by the Attorney General that

² This distinguishes it from appellants' self-wounding criticism that misreads *Stevens* to suggest that the assignment creates an interest on the order of "someone who has placed a wager upon the outcome." (Appellants' Brief, pp. 27-28). As the *Stevens* Court held, it is the *assignment* which distinguishes the

otherwise would never have been brought (Atty. Gen.'s Brief, p. 13). Likewise, according to a survey of the Attorney General offices across the nation, *the lack of* a state false claims statute such as the IWA substantially limits these States' abilities to effectively investigate and prosecute fraud. *See August 8, 2004 letter from U.S. Senator Charles Grassley to Health & Human Services Director Thompson and CMS Administrator McClellan* (copy attached).

Indeed, the IWA's mechanisms for exposing fraud on the State have a value separate and distinct from pure monetary recovery. While the reported practice might be too small a fraud, or too small in relation to the difficulty of proving it, to commit prosecutorial resources, it still benefits the State by inducing a halt to the exposed practice, and making State agencies aware of the practice such that administrative controls can be introduced to prevent it in the future. Moreover, the *threat* of exposure of the fraud by an insider induced by the offered reward is a powerful deterrent by itself.³

B. The Assignment of Property For A Permissible Public Purpose Is Not An Impermissible Delegation of Duty.

Transfers of State property to private parties have always been upheld, so long as they are for a permissible public purpose. *See, e.g., Cremer v. Peoria Housing Authority*, 399 Ill. 579, 586, 78 N.E.2d 276, 280 (1948). If the U.S. Supreme Court's construction of the language contained in the IWA is reasonable, and the reason for the transfer of property is permissible, then both the State and the relator own a part of the action. They are not each other's agents. Neither one has "delegated" anything to the other. They are co-owners. The "representational"

relator's reward from such a situation. 595 U.S. at 773. Only appellants' patent misanalysis and misdesignation of the IWA as relying in any way on "taxpayer standing" leads them to this conclusion.

³ It should also not be forgotten that the State's options are not limited to either joining the relator's suit or doing nothing. It may handle the matter informally or through administrative channels. 740 ILCS 175/4(c)(5).

quality of the relationship is a mechanical function of their unity of interest, not a delegation of duty. This type of representation of the State has always been approved, and has not even been challenged since *Cairo & St. Louis R.R. Co. v. Warrington*, 92 Ill. 157, 1879 WL 8493, *2-3 (1879) – where it was swiftly rejected.

Moreover, *every* partial transfer or acquisition of a property interest by the State carries with it the potential of an action by a co-owner under the rights transferred, independent of the State's interests.⁴ In order for relators to prove *their right to the reward* for their exposure of fraud, it is necessary for them to prove liability and damages against the defendant. The fact that such proof creates a “common fund” available to the State should not bar relators from vindicating their own property interest. Indeed, as is undisputed, litigants in this State have always had the right to vindicate the State's rights, so long as they, too, have a stake in the action.⁵ Appellees have cited no authority to the contrary. As the U.S. Supreme Court pointed out, the courts have “routinely” accepted the “representational standing” of assignees and subrogees (a/k/a “equitable assignees”). *Stevens*, 529 U.S. at 773-74.

Opposing briefs attempt to distract the Court by equating a valid assignment to a party with a nexus with the subject matter under the IWA with unlimited delegation of the Attorney General's powers to the general public. For example, Morgan Stanley asserts that if the IWA is held constitutional, the General Assembly could “delegate enforcement of any or all other violations.” (Morgan Stanley Brief, p. 22). This is not correct. The transfer of property

⁴ As pointed out in AARP/TAF *Amici*'s, opening brief, such transfers are expressly allowed by statute, for example, with regard to interests in intangible property. 30 ILCS 500/53-10.

⁵ Indeed, historically, numerous such cases have been brought by “relators” on behalf of, and in the name of the State, including mandamus and *quo warranto* actions, not to mention the right of unpaid subcontractors on State construction projects to invoke the State's contract rights in the State's name to collect on the prime contractor's performance bond. *See* 30 ILCS 550/2 (2004). (this assignment of the State's right to sue under performance bonds has been continuously in place since 1931).

involved in partial assignment of the State's cause of action must be for a permissible public purpose, as it is under the IWA. No such transfer of property could be done, for example, merely as a mechanism to empower prosecution in place of the Attorney General. The Court need not uphold mere "naked assignments" of a cause of action. The courts of this State have long been able to differentiate between legitimate assignments of causes of action and those which offend public policy. *See, e.g., Kleinwort Benson N. Am., Inc. v. Quantum Fin. Servs., Inc.*, 181 Ill.2d 214, 226-27, 692 N.E.2d 269, 275 (1998). Thus, Illinois courts are well-equipped to restrain the "legislative champerty" which Morgan Stanley imagines.

Furthermore, opposing briefs are unable to even quibble with the litany of situations and long history at common law where individuals do share ownership of a cause of action with the State (*see* AARP/TAF *Amici* opening brief, pp. 16-17). Nor do they provide any analytic distinction between this case and the situations and history cited. For example those arguing against the validity of the IWA nowhere explain why personal injury claimants are constitutionally allowed to represent the State's subrogation interests in medical and pension payments, when the State, despite its right to do so, declines to file suit directly against the tortfeasor, or at least intervene, to vindicate its interests. *See* 305 ILCS 5/11-22a; 40 ILCS 5/13-312. Under appellees' position, the personal injury plaintiffs simply have no right to litigate "on behalf of the State" in asserting a claim for recovery of those payments. Under appellees' position, subrogation clauses in any insurance policies purchased by State agencies would be ineffective to allow the carriers to recover their losses by right of an assignment of the State's cause of action. This cannot be the law.

At best, then, appellees fail to sustain their burden to show that this assignment contains some constitutional infirmity not present in these other situations. Assignment law suggests, and

constitutional law compels, the presumption that the legislature's assignment of a cause of action is valid and invalidity the exception. *Kleinwort*, 181 Ill.2d at 225, 692 N.E.2d at 274 (assignments of causes of action); *see also Burger*, 198 Ill.2d at 32, 759 N.E.2d at 540 (statutes presumed to be constitutional).

At worst, the opposing briefs present the Court with a doctrine that would upset settled relationships between the State and its citizens that have always allowed individuals to vindicate State rights, so long as they, also, have a personal stake in the matter. Indeed, appellees' argument is akin to that of the defendant in *Warrington*, 92 Ill. 157, 1879 WL 8493 at *1-3. There the defendant claimed that the plaintiff had no right to recover the double damages imposed by statute, because the penalty portion did not compensate the individual for any injury he sustained. This Court acknowledged that the source of the penalty was the State's police power (and not any inherent standing of the plaintiff), but held that the individual could enforce it to his benefit, because the legislature could dispose of the claim for penalties as it saw fit. The support for this view was the ubiquity and unquestioned validity of *qui tam* statutes.

As *Warrington* shows, *qui tam* "informer" statutes are not a mere historical oddity, but are, as AARP/TAF *Amici* have demonstrated, inherent in the legislature's and the State's ability to assign to, acquire from, and share claims with individuals that is part and parcel of our jurisprudence and various statutory schemes. Now we come full circle, and defendants are again claiming that individual litigants cannot litigate on behalf of the State where they have a personal stake in the litigation. However, now the ubiquity and unquestioned validity of assigned and shared claims that the reasoning underlying *qui tam* statutes first upheld in this State via *Warrington*, supports the validity of the *qui tam* provisions of the IWA.

This Court should continue its own precedent of *Warrington* and join the U.S. Supreme Court in evaluating these *qui tam* provisions under the long-established precepts of the laws of property that are clearly applicable to the specific provisions of the Act. It need not ignore the purpose and intent of the legislature and the unique interest earned by and conferred on the relator just to answer the broader and, under this statute, essentially hypothetical question of first impression as to whether the control and supervision afforded the Attorney General by the Act's provisions are sufficient to validate "citizen" or "taxpayer" standing under a generic statute establishing a right to sue on behalf of the State.

II. THE PARTIAL ASSIGNMENT OF THE STATE'S CAUSE OF ACTION DOES NOT IMPERMISSIBLY INTERFERE WITH THE ATTORNEY GENERAL'S COMMON LAW POWERS AND DUTIES

Since the partial assignment establishes the relator's standing and negates the suggestion that there has been a delegation of the Attorney General's powers, the only remaining question raised by appellees is the more general separation of powers issue as to whether the assignment impermissibly interferes with the Attorney General's common law powers to enforce the *remaining* portion of the cause of action still owned by the State.

In these circumstances, the distinction that appellees make between the general federal "Take Care" clause and the specific establishment of the Attorney General as the sole "legal officer" of the State cuts the other way. (*See Morgan Stanley Brief*, p. 18). There is no traditional common law power that allows the Attorney General to represent State interests *after* they have been alienated. Therefore the only possible intrusion on the Attorney General's traditional powers goes to the enforcement of the remaining portion of the action.

As a threshold matter, it might be noted that private suits in many areas of the law may "interfere" with the Attorney General's prosecution of a claim. The private enforcement of the

antitrust laws, consumer laws, securities laws, employment laws and even common law fraud all have the potential to interfere with the timing, investigation and handling of a prosecution by the Attorney General. And, if the legislature allowed these laws to be enforced by public volunteers, as opposed to persons with a stake in the action (including valid assignees), there would clearly be a delegation of the powers and duties of the Attorney General. Yet, the Attorney General has nothing resembling the plenary control of these private actions that is provided by the IWA.

Perhaps it might argued (though appellees do not), that a *partial* assignment of Illinois' cause of action creates complexities that are not present elsewhere. Yet, generally, a partial assignee may bring and maintain suit in the absence of the assignor where there is no danger of multiple actions against the defendant. *Ebaloy, Inc. v. Square Deal Plumbing & Heating Supply House, Inc.*, 27 Ill.App.2d 36, 48, 169 N.E.2d 527, 533 (1st Dist. 1960). As pointed out in AARP/TAF *Amici's* opening brief, the IWA does not permit multiple actions against the defendant. Furthermore, the statutory procedures do not create a danger that the suit will proceed without the knowledge of or opportunity to be heard, by the State.

Appellees make much of the fact that the relator may initiate and remain as a participant in the suit, before, after or without intervention of the State, yet these rights are the rights of any litigant with a legitimately acquired property interest. Indeed, the existence of these rights merely confirms the legislative purpose of assigning property as opposed to making any kind of delegation.

However, the IWA goes well beyond maintaining the minimum rights available to the normal partial assignor. As more fully explained in AARP/TAF *Amici's* opening brief (pp. 21-26) and again standing in stark contrast to Article XX, the Attorney General retains the absolute discretionary right to do anything with respect to the *entire* cause of action — litigate, settle,

forgive, treat as an administrative matter, delay action pending investigation — with the singular exception that she may not unconstitutionally deprive the relator of the property conferred without due process of law. Even so, the relator is prohibited from dismissing or settling the case without the consent of the Attorney General.

Ultimately, the Attorney General's complete control of the State's portion of the cause of action, combined with her right to likewise control the relator's portion, leaves no doubt as to the constitutionality of this Act. *Fair Employment Practices Comm. v. Rush-Presbyterian-St. Luke's Med. Center*, 41 Ill.App.3d 712, 715, 354 N.E.2d 596, 599 (1st Dist. 1976) (where the Attorney General can step in and direct the course of litigation, there is no unconstitutional usurpation of her powers).

Lastly, it is telling that the appellees implicitly take the ironic position that in order to preserve the prosecutorial discretion of the Attorney General over fraud cases brought to light by relators, it is necessary to eliminate the reason the cases were brought to light in the first place. This position is reminiscent of statements such as “we had to destroy the village to save it” or “the operation was a success, but the patient died.” Like these statements, it exhibits a failure to appreciate the fundamental purpose involved. Here the legislative purpose is to uncover fraud so that the Attorney General may exercise discretion that she otherwise would not have. She would not be aware of these many frauds uncovered by private parties, much less be able to decide whether, when and how to take them to task. In return, all the State need do is allow the relator to vindicate the property right promised and conferred by the legislature, subject to the Attorney General's ultimate authority. That is what the legislature has done, and it is respectfully submitted that the Court should not undo it.

CONCLUSION

For all of the reasons stated above, *amici curiae* respectfully request the Court reverse the trial court and uphold the constitutionality of the Illinois Whistleblower Reward and Protection Act.

Respectfully submitted,

AARP AND TAXPAYERS AGAINST FRAUD

Dated: August 30, 2004

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