

**THE SALE OF THE RED SOX: A CASE STUDY OF THE STATE
ATTORNEY GENERAL AND CHARITABLE TRUSTS**

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Introduction

During the winter of 2001/2002, the Boston Red Sox were sold to a group led by John W. Henry, a Florida-based commodities investor, and Tom Werner, a television producer. The day after the Red Sox limited partners announced that the Henry/Werner group had submitted the winning bid, Massachusetts Attorney General Thomas Reilly announced that he would be reviewing the sale pursuant to his role as overseer of charities in the Commonwealth of Massachusetts. He stated that his reasons for reviewing the sale were that the Red Sox had been owned by a charitable trust called the Yawkey Foundation, proceeds of the sale would go to the Foundation to distribute to charities, and that Henry/Werner's bid was not the highest bid made.

Over the course of approximately one month, Reilly conducted a very public investigation of the sale, during which he made negative comments about the process, Major League Baseball's (hereinafter "MLB") involvement in the sale, and threatened to block the transaction. Eventually the Red Sox limited partners, the Henry/Werner group, and Reilly negotiated a settlement, in which Reilly agreed to allow the sale to proceed, the Henry/Werner group agreed to create their own charitable foundation, and the Red Sox limited partners agreed to give \$10 million more to the Yawkey Foundation. The Foundation also provided Reilly with a great deal of access to, and oversight of, its day-to-day activities.

This paper will examine the facts surrounding the sale of the Red Sox, Reilly's review of the sale process, the settlement that was reached, and Reilly's subsequent oversight of the Yawkey Foundation. It will analyze Reilly's actions and the statutory and common law authority given to the Commonwealth's Attorney General to determine if Reilly acted permissibly or if he took action that over-stepped the authority granted to the Attorney General.

Background

Tom Yawkey bought the Boston Red Sox in 1933 for \$1.2 million.¹ He owned and ran the team until his death in 1976.² At his death, Tom Yawkey placed the team in trust (the Yawkey Foundation³)

¹ See Derek Gentile, The Complete Boston Red Sox, Black Dog and Leventhal Publishers, Inc. New York, 2003, p. 22.

² See id. at 32.

and his wife Jean Yawkey ran the trust until her death in 1992.⁴ Before her death, Mrs. Yawkey named John Harrington as Trustee of the Yawkey Foundation and executor of her estate.⁵ Mrs. Yawkey gave Harrington and the other trustees of the Yawkey Foundation great discretion in how they ran the Foundation. In a trust document dated July 29, 1982 she wrote:

My trustees shall have full power...to retain any investments or cash, however the same may be acquired and for such period of time as they shall deem advisable, and invest and reinvest in any kind of real or personal property whatsoever.⁶

Reilly recognized the wide latitude the trustees had when he conducted a review of the trustees' actions in 1999, and found no wrongdoing.⁷ Upon concluding the review, Reilly acknowledged that Mrs. Yawkey purposely created the private trust to avoid public scrutiny and stated, "There is discretion given to the trustees."⁸

This was not the only time that Reilly acknowledged the private nature of the Yawkey Foundation and the substantial discretion Mrs. Yawkey gave to the trustees. On October 6, 2000, the day Harrington announced the Red Sox would be sold, Reilly stated, "As we have explained in the past, the trust set up by the Yawkeys to operate the ballclub and Fenway Park is private and its actions are not subject to our regulatory approval."⁹ Furthermore on December 18, 2001, when talking about the sale of the Red Sox, Reilly's comments went further when he stated, "The highest bidder is one factor. It is not the only factor. John Harrington will have a lot to say about who the next owner is because the Yawkeys wanted it that way."¹⁰ While Reilly would initially adhere to this position when the Red Sox sale was first announced, his actions and statements grew to eventually contradict these early statements as his review of the sale progressed.

³ The Yawkey Foundation is a trust created by Mr. and Mrs. Yawkey. In this paper, the actual name of the trust, "The Yawkey Foundation," will be used when discussing the trust. However, multiple quotes in this paper refer to the trust as "The Yawkey Trust." The reader should be aware that while "The Yawkey Foundation" is the actual name of the trust, for the purposes of this paper, "The Yawkey Trust" also refers to the "The Yawkey Foundation."

⁴ See id.

⁵ See Meg Vaillancourt, State Finds No Wrongdoing by Harrington, The Boston Globe, June 5, 1999 at F1.

⁶ See Jack Sullivan, Sox For Sale, The Boston Herald, October 7, 2000 at p.15.

⁷ See Jack Sullivan, Harrington Probe Finds No Wrongdoing; AG: Red Sox CEO Follows Rules, The Boston Herald, June 4, 1999 at p.5.

⁸ See id.

⁹ See Sullivan, October 7, 2000, at p.15.

¹⁰ See Joan Vennoch, Landing Ramirez, The Boston Globe, December 19, 2000, at A23.

The Sale of the Red Sox and Reilly's Review

On December 20, 2001 John Harrington and the Red Sox limited partners announced that they had accepted the Henry/Werner group's bid of \$700 million for the Red Sox, \$410 million of which would go to the Yawkey Foundation to benefit charities.¹¹ The very next day, Reilly, noting his position as watchdog for the charities of the Commonwealth, announced that he would review the sale process.¹² Reilly was moved to review the process because the Henry/Werner group's bid was accepted even though it was matched by cable mogul Charles Dolan's bid and exceeded by New York corporate lawyer Miles Prentice's \$790 million bid, \$490 of which would have gone to the charities of the Yawkey Foundation.¹³

Until being sold to the Henry/Werner group, the Red Sox were owned by the Yawkey Trust as the general partner (46.5%) and by a group of limited partners that included the Yawkey Foundation (6.99%), Harrington (2.33%), the Aramark Corporation, which provided concessions at Fenway Park (17.47%) and Dr. Arthur Pappas, team doctor and personal friend of John Harrington (4.66%).¹⁴ Will McDonough of the Boston Globe reported that during the meeting to select the winning bid, Harrington strongly urged the limited partners to accept the Henry/Werner bid.¹⁵ McDonough reported that Harrington was able to secure some of the twelve needed votes to approve the Henry/Werner bid by casting his own vote and the three votes of the Yawkey Foundation, which he controlled, for the Henry/Werner group, and by persuading Dr. Pappas, to do the same with his two votes.¹⁶ The remaining six votes needed for approval were cast by the Aramark Corporation, which provided concessions at Fenway Park.¹⁷ The morning that Aramark cast its vote, Harrington, as acting CEO of the Red Sox, extended Aramark's concessions contract at Fenway Park for an additional eight years.¹⁸ In addition to helping persuade Aramark to vote for his and

¹¹ See Scott Van Voorhis, Foul Ball?: AG Questions Low-Bid Sox Deal, The Boston Herald, December 22, 2001 at p.1.

¹² See *id.*

¹³ See Van Voorhis December 22, 2001 at p.1.

¹⁴ See Sullivan, October 7, 2000, at p.15.

¹⁵ See Will McDonough, More Wait Wouldn't Have Burdened Sox, The Boston Globe, January 6, 2002 at D2.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

MLB's preferred Henry/Werner group,¹⁹ extending Aramark's contract enabled Harrington to eliminate local businessmen Joe O'Donnell and Steve Karp from the bidding process, as they dropped out after learning of the new contract.²⁰ O'Donnell owns a concession business and wanted to buy the team and provide concessions at Fenway Park.

On December 23, 2001 Reilly continued his review, but still acknowledged that he had limited authority to dictate the Yawkey Foundation's actions. He maintained his earlier position and stated that "the Trust set up by the Yawkeys...is private and its actions are not subject to our regulatory approval."²¹ However, he also stated that he was going to "determine whether the Yawkey Trust has appropriately discharged its fiduciary responsibility to the charities that stand to benefit from the sale of the team."²²

Reilly continued to temper his statements until December 27, 2001 when he stated that he was "troubled" by the sale because charities would have received \$50 million more if Prentice's bid had been accepted.²³ While he continued to acknowledge that he had no precedent to allow him to block the Red Sox sale and was unable to point to any authority empowering him to do so, his statements grew more aggressive as he said, "This is not about authority, it's about responsibility."²⁴ On January 2, 2002 Reilly abandoned any pretenses suggesting that he believed that the sale was not conducted fairly, calling the sale "lousy" and stating that he would use his review to "shine a spotlight" on the process.²⁵

¹⁹ The reader should recognize MLB's interest in having the Henry/Werner purchase the Boston Red Sox. At the time of the sale, there was division amongst MLB owners over the concept of revenue sharing, which calls for large market teams (teams with lucrative cable television contracts, favorable stadium leases, and high attendance) to share some of their revenue (through cash payments) with the budget-conscious smaller market teams. When bidding on the Red Sox, Henry was the owner of the Florida Marlins and a proponent of revenue sharing. Commissioner Bud Selig was also a proponent of revenue sharing and wanted to have a similar-minded owner controlling the large market Red Sox. Furthermore, Selig and MLB wanted the sale of the Red Sox to create a chain reaction (which occurred) in which Henry sold the Marlins to Montreal Expos owner Jeffrey Loria, who in turn sold the Expos to MLB. Currently, MLB is owns and runs the Montreal Expos and hopes to dissolve the franchise in the future, raising the value of other franchises and limiting the number of players in MLB.

²⁰ See id.

²¹ See Meg Vaillancourt, Red Sox Say Bids From Henry, Dolan Were of Equal Value; Prentice Offer's Details Rejected as Nonbinding, The Boston Globe, December 24, 2001 at B3.

²² See id.

²³ See Meg Vaillancourt, Reilly Vows a Hard Look at Sox Deal, Wants to Ensure Sale Fair to Charities, The Boston Globe, December 28, 2001 at A1.

²⁴ See id.

²⁵ See Meg Vaillancourt, Reilly Says Baseball Chiefs Tilted Sox Deal, The Boston Globe, January 3, 2002 at A1.

In addition, on January 2, 2002, Reilly began what would become very pointed criticism of MLB. He claimed that during the sale “MLB was calling the shots and that an assistant to MLB Commissioner Bud Selig was “involved in the final negotiations and decision making that took place in the latter days.”²⁶ In addition, he referred to MLB as a “club” and referenced his belief that MLB had preselected the Henry Werner group by saying, “It was very clear that certain people would not be accepted and one would.”²⁷ Finally, referencing his role as protector of the charitable interests in the sale, Reilly stated, “Little kids, schools, and hospitals were not first and foremost in the minds of the commissioner’s office or the representatives of MLB.”²⁸

At this point, Reilly had been conducting a very public review of the sale and had made negative statements about the sale process and the involvement of the Red Sox limited partners and MLB. However, there had been little if any response from either the Red Sox or MLB. That changed on January 3, 2002, as Samuel A. Tamposi, a New Hampshire businessman and limited partner of the Red Sox, wrote a letter to Reilly attempting to explain why the Red Sox accepted Henry/Werner’s bid while rejecting the bids of Prentice and Dolan.²⁹ Tamposi acknowledged that Prentice’s bid was \$90 million more than Henry/Werner’s, but claimed that Henry/Werner’s bid called for a disproportionate amount of money to be given to charity, while Prentice’s bid had unreliable financial backing, causing the limited partners to demand as much money as possible from the bid, leaving the Yawkey Foundation with less money than it would have received from the Henry/Werner bid.³⁰ He also stated that the limited partners were concerned that both Prentice and Dolan would not receive quick approval from MLB, despite the fact that MLB had already vetted all bidders.³¹ Finally, Tamposi suggested that Harrington should be commended for pushing for the Henry/Werner bid because he maximized the amount of money charities would receive while sacrificing the financial windfall he could have enjoyed as a limited partner.³² However, as trustee of the Yawkey Foundation, Harrington is paid a yearly salary based on a percentage of the total assets of

²⁶ See id.

²⁷ See id.

²⁸ See id.

²⁹ See Meg Vaillancourt, Sox Partner Says Deal Boosts Charities, The Boston Globe, January 4, 2002 at A1.

³⁰ See id.

³¹ See id.

the Foundation. Thus, even though he may have limited his take from the sale, he would recoup the money in his yearly salary from the Foundation. Reilly was unmoved by the letter, claiming that it supported his notion that MLB controlled the sale.³³

While Reilly was conducting a very public review and was adamant that the sale process was flawed, he still did not have any facts from which he could reasonably attempt to block the sale. Although he believed that there were improprieties by the Red Sox limited partners and MLB, Reilly continued to acknowledge that his jurisdiction was limited and seemed content to use the spotlight of his review to highlight those improprieties. However, Reilly obtained firm ground from which to launch an attempt to block the sale on January 10, 2002 when Dolan increased his offer by \$40 million to \$740 million.³⁴

Despite increasing his bid, Dolan called for a run-off auction between him and the Henry/Werner group because the Red Sox selected the Henry/Werner group's bid even though their initial bid and Dolan's initial bid were identical.³⁵ Responding to Dolan's request, Harrington claimed that the Henry/Werner bid was selected at 8 P.M. the day the bids were submitted while Dolan's bid expired that day at 5 P.M.³⁶ Reacting to Harrington's ridiculous claim, Reilly stated, "There were no rules. They changed from day to day, hour to hour, bidder to bidder."³⁷ However, despite the outrage he showed in public by making strong, negative statements about the Red Sox and MLB, on January 11, 2002, Reilly entered secret negotiations with the Red Sox and the Henry/Werner group to settle the dispute.³⁸

On January 13, 2002 the Red Sox limited partners voted unanimously to reject Dolan's increased offer, calling it "untimely."³⁹ They also cited concerns over Dolan's ownership of the New York Rangers hockey team, the New York Knicks basketball team, various media outlets including Cablevision, and his brother's ownership of the Cleveland Indians.⁴⁰ Like all potential bidders, Dolan had been previously

³² See id.

³³ See id.

³⁴ See Brian McGrory, AG Calls it Error, The Boston Globe, January 11, 2002 at B1.

³⁵ See Meg Vaillancourt and Kevin Cullen, Sox Limited Partners Discuss New Dolan Bid, The Boston Globe, January 12, 2002 at A1.

³⁶ See id.

³⁷ See id.

³⁸ See id.

³⁹ See Meg Vaillancourt Sox Partners Vote to Stay with Henry, The Boston Globe, January 14, 2002 at A1.

⁴⁰ See id.

approved by MLB. However, MLB told Reilly that a bidder was not approved to buy the Red Sox merely because he had been vetted to bid on the team.⁴¹ The next day, on January 14, 2002, the media reported information about Reilly's negotiations with the Red Sox and the Henry/Werner group. Responding to these reports, Dolan increased his offer to \$790 million and Prentice increased his offer to \$795 million while the Henry/Werner group reallocated money from their bid so a higher percentage would be given to charity.⁴²

The Settlement

The Red Sox limited partners would never examine the increased offers because on January 16, 2002 Reilly reached an agreement with the Red Sox, the Henry/Werner group, and the Yawkey Foundation.⁴³ Reilly agreed to end his review of the process and not block the sale in exchange for the following:⁴⁴

-The Red Sox limited partners agreed to give \$10 million more to the Yawkey Foundation from their share of the proceeds, raising the total amount for the Foundation to \$420 million

-The Henry/Werner group agreed to create their own charitable foundation and fund it with \$20 million over the next 10 years⁴⁵

-Reilly obtained extensive oversight of the Yawkey Foundation through a governance agreement:

-The Board of Trustees must expand from four to nine members within six months

-Reilly will determine if new trustees are qualified, but has no veto power

-New criteria were implemented for selecting trustees

-The Board of Trustees must elect a chairperson to serve for a one-year term and the trustees must rotate who serves as chairperson

-The Board of Trustees must draft conflict of interest policies for Reilly's review

Commenting on the settlement, Reilly stated, "We looked at several years of litigation. That was not an appealing option, but if we had to do it, we would have done it."⁴⁶ Noting his new role in regards to the

⁴¹ See Interview with Dean Richlin, April 15, 2004.

⁴² See Meg Vaillancourt, Bidders, AG, Sox in 9th Inning Drama, Two New Offers, The Boston Globe, January 15, 2002 at A1.

⁴³ See Meg Vaillancourt and Gordon Edes, Baseball OK's Red Sox Sale, Henry Gets Team After Charities' Funding Boosted, The Boston Globe, January 17, 2002 at A1.

⁴⁴ See *id.*

⁴⁵ On November 15, 2002, The Boston Globe reported that the Henry/Werner group had already raised \$14 million of the \$20 million commitment it made as part of the agreement with Reilly.

Yawkey Foundation, Reilly characterized his oversight powers as “extraordinary” and called the Foundation a “closed little club” that needed to be “more professionally managed.”⁴⁷ However, these comments are contrary to Reilly’s finding no wrongdoing after conducting a review of the Yawkey Foundation in June 1999.⁴⁸

Reilly’s Post-Sale Overview of the Yawkey Foundation

When the Henry/Werner group was finally allowed to buy the Red Sox after the settlement with Reilly, Dolan and Prentice threatened to file lawsuits to block the sale, but neither ever filed such a suit. The Yawkey Foundation was thus able to focus on its substantial new assets and begin to bequest money. However, the contentious relationship between Reilly and the Yawkey Foundation would continue even after the sale of the Red Sox. On April 8, 2002 Reilly demanded that the Foundation provide him with names of prospective candidates for the new trustee positions.⁴⁹ Dan Goldberg, the Foundation’s attorney, called Reilly’s request “inconsistent” with the governance agreement and embarrassing for candidates who are not selected.⁵⁰

On May 6, 2002 the Yawkey Foundation announced a gift of \$25 million to Massachusetts General Hospital.⁵¹ When making the bequest, the Foundation had yet to increase the number of trustees, as the governance agreement called for.⁵² Jamie Katz, chief of Reilly’s public charities division stated, “It’s a little bit hard to fathom the timing of it, before the new board is in place. It strikes us as not consistent with some of the discussions we’ve had with them.”⁵³ On May 8, 2002 Reilly offered stronger criticism of the Foundation’s gift stating:

It was handled in a secretive, clandestine manner, not in the way a foundation of this sort should be handling things. It is undisciplined. They are spending money like drunken sailors. It is unworthy of a foundation to act this way. It is an absolute violation of the spirit (of the governance agreement).⁵⁴

⁴⁶ See Vaillancourt and Edes, January 17, 2002 at A1.

⁴⁷ See *id.*

⁴⁸ See Sullivan, June 4, 1999 at p.5.

⁴⁹ See Charity the Yawkey Way, Editorial, The Boston Globe, April 24, 2002 at A20.

⁵⁰ See *id.*

⁵¹ See Liz Kowalczyk, Yawkey Foundation Gives \$25 Million to MGH, The Boston Globe, May 7, 2002 at A1.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See Joan Vennoch, Reilly Cries Foul Over Yawkey Gifts, The Boston Globe, May 9, 2002 at A19.

Harrington responded to Reilly by telling him, through the media, “I trust you will never lose sight of the fact that the Yawkey Foundation is a private foundation. It has been funded entirely by Mrs. Yawkey’s money. It does not raise funds from the public.”⁵⁵

The Yawkey Foundation was allowed to proceed with its gift to MGH, and seemed to have turned a corner in its relationship with Reilly on May 31, 2002 when it appointed the new trustees to expand the Board. Speaking about the new trustees, Reilly said, “I am very pleased. This is what we are looking for.”⁵⁶ Reilly also stated that he expected scrutiny of the Foundation to abate with installation of the new trustees.⁵⁷ He said, “All is well that ends well,” and that he believed “his goals have been accomplished.”⁵⁸

However, the contentious relationship between the Yawkey Foundation and Reilly would resume in May of 2003 when the Foundation made a series of controversial gifts. First, the Foundation gave \$15 million to Boston College for the construction of a new athletic center.⁵⁹ While this gift may not have normally raised any questions, the conflict of interest surrounding the gift caused increased scrutiny. Harrington, who at the time was the executive director of the Foundation, was also a trustee at Boston College.⁶⁰ In addition, J. Donald Monan, a Yawkey Foundation board member, was the former President of Boston College, and Yawkey Foundation board member Charles Clough was also a trustee at Boston College.⁶¹ The second controversial gift made by the Yawkey Foundation in May 2003 was a bequest of \$1.2 million to the Ron Burton Training Village.⁶² Ron Burton is a Yawkey Foundation board member.⁶³

On September 5, 2003, Reilly concluded an investigation into the Yawkey Foundation’s above-mentioned gifts, and Reilly found “no substantive conflicts” in the way Harrington had run the

⁵⁵ See Peter J. Howe, Harrington Blasts AG’s Comments, Calls Criticism of Mass. General Gift an “Insult,” The Boston Globe, May 10, 2002 at D1.

⁵⁶ See Chris Reidy, Yawkey Foundation Expands Board, Selection of Six Trustees Follows Pact Between Harrington, Reilly, The Boston Globe, May 31, 2002 at C1.

⁵⁷ See Scott Van Voorhis, Yawkey Charity Has New Trustees, The Boston Herald, May 31, 2002 at p.29.

⁵⁸ See *id.*

⁵⁹ See Frank Phillips, 2nd Yawkey Beneficiary Tied to Board, The Boston Globe, May 9, 2003 at B1.

⁶⁰ See A Narrow Foundation, Editorial, The Boston Globe, May 9, 2003 at A26.

⁶¹ See *id.*

⁶² See Phillips, May 9, 2003 at B1.

⁶³ See *id.*

Foundation.⁶⁴ As no conflict was found, the Yawkey Foundation was permitted to proceed with its gifts to Boston College and the Ron Burton Training Village.⁶⁵ However, the Foundation also agreed to a stricter interpretation of its conflict-of-interest procedures, which now call for any conflicted Board members to recuse themselves from discussions and leave the room when a vote is taken.⁶⁶

The Law

The Office of the Attorney General in the Commonwealth of Massachusetts is provided for in Massachusetts General Laws, Chapter 12.⁶⁷ Section 8 of Chapter 12 provides in pertinent part: “The Attorney General shall enforce the due application of funds given or appropriated to public charities within the Commonwealth and prevent breaches of trust in the administration thereof.”⁶⁸ Furthermore, when the Attorney General believes that “breaches of trust have been or are being committed in the administration of a public charity,” he may “conduct an investigation upon application to and with approval of a judge of the trial court.”⁶⁹

In addition, many Attorneys General, including Massachusetts’, have common law *parens patriae* powers. By invoking *parens patriae*, the Attorney General can take action to protect the public interest by supervising charitable trusts, because the public is considered the ultimate beneficiary of all charities.⁷⁰ This power, which has its roots in the historical authority of the British monarchy, enables the Attorney General to act as a guardian over the public interest when a state’s proprietary, sovereign, or quasi-sovereign interests are at stake.⁷¹ A state’s sovereign interests include protecting the public, health, safety, and welfare, and a state’s proprietary interests are those that a state can assert, as if it were any other

⁶⁴ See Scott Van Voorhis, *State Finds No Fault With Harrington*, *The Boston Herald*, September 6, 2003, at p.21.

⁶⁵ See Frank Phillips, *Yawkey Trust Acknowledges Conflict After \$15 Million Donation to BC, Rules to Change*, *The Boston Globe*, September 6, 2003 at B1.

⁶⁶ See *id.*

⁶⁷ See M.G.L. Ch. 12.

⁶⁸ See M.G.L. Ch. 12 § 8.

⁶⁹ See M.G.L. Ch. 12 § 8H.

⁷⁰ See Ilana H. Eisenstein, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. Pa. L. Rev. 1747, 1765 (2003).

⁷¹ See *id.*

entity.⁷² However, what a state’s quasi-sovereign interests are is unclear, often being defined on a case by case basis and causing at least one legal scholar to claim, “No one has any idea what (quasi-sovereign interests) means.”⁷³

While an Attorney General’s *parens patriae* powers are broad, they are not limitless. First the Attorney General must articulate a state interest that is more than nominal; the state interest must be apart from any interest of particular private parties.⁷⁴ In addition, some states have codified the Attorney General’s *parens patriae* powers.⁷⁵ However, even this seemingly legal limitation may not act to curtail an Attorney General’s *parens patriae* powers as “*parens patriae* actions are not necessarily precluded by the existence of specific statutory remedies.”⁷⁶ In addition, the Attorney General is often constrained from using *parens patriae* by practical or prudential reasons.⁷⁷ But as the Supreme Court stated, “the vagueness of this concept can only be filled in by turning to individual cases.”⁷⁸ Thus, in Massachusetts, as in most states, the Attorney General’s duty is to oversee and enforce trusts.

Analysis of Reilly’s Review of the Red Sox Sale

Was Reilly within his authority when he conducted the review of the Red Sox sale, or did he overstep the authority given to him by M.G.L. Ch. 12 §§ 8 & 8H, and the common law *parens patriae* power? Furthermore, did he fail to fulfill his duty when he reached a settlement and allowed the sale to proceed?⁷⁹ When the above listed facts and law are examined, it becomes evident that while Reilly may have pushed the bounds of his office, he did so with good intentions, worked to correct a flawed sale process, and obtained a greater benefit for the charities of the Commonwealth of Massachusetts. Was he standing on firm legal ground? No. But, do the ends here justify the means? When all the factors that led to the final settlement are considered, the answer is yes.

⁷² See Richard P. Ieyoub & Theodore Eisenberg, *Class Actions in the Gulf South Symposium*, 74 Tul. L. Rev. 1859, 1864 (2000).

⁷³ Jim Tierney, class discussion, Boston College Law School, January 22, 2003.

⁷⁴ See Ieyoub and Eisenberg, 74 Tul. L. Rev. 1859 at 1867.

⁷⁵ See *id.* at 1876.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.* quoting (cite omitted).

⁷⁹ Analysis of Reilly’s involvement in the post-sale Yawkey Foundation through the governance agreement will be discussed below.

As stated earlier, Massachusetts has codified much of the Attorney General's duties in overseeing charitable interests in the Commonwealth. M.G.L. Ch. 12 § 8 clearly provides the Attorney General with the power to prevent "breaches of trust in the administration" of charitable money.⁸⁰ Thus, if anyone had the authority to examine the sale process, it was Reilly. However, M.G.L. Ch. 12 § 8H requires the Attorney General to obtain "approval of a judge of the trial court," before conducting an investigation.⁸¹

Reilly never obtained permission of a trial court judge during his review of the Red Sox sale, nor did he ever even petition the court for approval. Dean Richlin, Reilly's first assistant, adamantly contended that this was never an "investigation," and that the Attorney General's office always referred to their actions as "a review," and thus did not require judicial approval.⁸² He stated that if they so desired, he believes that the Attorney General's office had sufficient grounds to seek and obtain judicial approval for an investigation, which would have allowed them to take discovery and depositions under oath.⁸³ However, he indicated that a decision was made not to do so because of time and efficiency considerations.⁸⁴

Reilly's actions were not illegal; he never over-stepped the limits of his power, but he did use his authority, the media, and as he said, his review to "shine a spotlight" on the sale process.⁸⁵ This tactic of using the power of their office and the media to put pressure on various parties is not a new tactic by Attorneys General, and is perhaps best used by New York Attorney General Eliot Spitzer. Reilly should not be condemned for taking this tactic. Simply, MLB and the Red Sox limited partners did not conduct an honest and fair sale. The sale process was not transparent, the rules were repeatedly changed, and MLB had preordained the Henry/Werner group as the next owner of the Red Sox. Reilly quickly understood what was occurring, and used all the tools at his disposal to protect the charities of Massachusetts.

But should the Attorney General even have been involved in this transaction? Reilly himself, as stated above, made multiple comments about the autonomy of the Yawkey Foundation, the discretion given to John Harrington, and how the highest bidder would only be one factor in the choice of the next owner of

⁸⁰ See M.G.L. Ch. 12 § 8.

⁸¹ See M.G.L. Ch. 12 § 8H.

⁸² Interview with Dean Richlin, April 15, 2004.

⁸³ See id.

⁸⁴ See id.

the Red Sox. When those statements are combined with notions of independent donor intent and the ability of individuals to give money to whomever they please, one could make a strong argument that there was simply no place for government involvement in this case.

However, when one considers the actions of MLB, the Red Sox limited partners, and Harrington's conflict of interest, it is clear that the charities of Massachusetts were not going to receive their fair portion of money without Reilly's involvement. Reilly needed to step in. Richlin stated that the "rigged sale" process was not enough to warrant Reilly's involvement, but that the Harrington's conflict (as Red Sox limited partner, trustee of the Yawkey Foundation, and personal friend of Bud Selig) left the charities of Massachusetts without an advocate and needing protection.⁸⁶ Furthermore, the charities of Massachusetts did not have some general interest in the sale, but rather were going to be the direct beneficiaries of the sale, and one particular charity, the Yawkey Foundation, which was going to have the most direct impact, did not have anyone protecting its interests.

Finally did Reilly fail to fulfill his duty when he reached a settlement with the Red Sox limited partners, the Henry/Werner group, and the Yawkey Foundation? The highest bid made for the Red Sox was by Miles Prentice for \$795, \$495 million of which would have gone to the Yawkey Foundation.⁸⁷ The settlement Reilly agreed to provided \$440 million for charity (\$420 to the Yawkey Foundation and \$20 million through a new foundation created by the Henry/Werner group). Richlin explained the \$55 million difference between what Reilly agreed to and Prentice's bid by saying that one must also consider the price of certainty.⁸⁸ He stated that Reilly was concerned that holding up the sale could result in an eventual lower price for the Red Sox and thus less money for the Yawkey Foundation.⁸⁹ Richlin stated that there was fear that the price could decline depending on the economy and Reilly was concerned that since this was an issue of first impression, he could receive a negative ruling from the court.⁹⁰ Richlin admitted that when the Red Sox limited partners offered another \$10 million and the Henry/Werner group offered to create their own \$20 million charitable trust, that the gap between the Henry/Werner group's offer and

⁸⁵ See Vaillancourt, January 3, 2002 at A1.

⁸⁶ Interview with Dean Richlin, April 15, 2004.

⁸⁷ See Vaillancourt, January 15, 2002 at A1.

⁸⁸ Interview with Dean Richlin, April 15, 2004.

⁸⁹ Id.

Prentice's offer was closed enough to reach a settlement, when considering the uncertainty of moving forward.⁹¹

Reilly did the best that he could in this situation. He was able to expose the fraud that MLB and the Red Sox limited partners perpetrated. But, most importantly, he was able to use the power of his office and his statutory and *parens patriae* authority to obtain an extra \$30 million for the charities of Massachusetts when he was standing on tenuous legal ground. He did potentially leave money on the table, but there is no certainty that a protracted legal battle, which would have kept the charities from receiving any money until it concluded, would have ultimately resulted in a higher sale price. The settlement may have been affected by Reilly not wanting to be known as the man who kept Boston's beloved Red Sox in limbo for two years while pursuing the lawsuit, especially if he runs for governor as many expect he will, but nevertheless, in a short period of time, Reilly was able to expose the corrupt sale process and obtain an additional \$30 million for the charities of Massachusetts. He protected the public and did so by using the powers of his office effectively. He should be commended.

Analysis of Governance Agreement Between Reilly and the Yawkey Foundation

As part of the settlement that was reached, the Yawkey Foundation and Reilly entered into a governance agreement pertaining to how the Foundation would be run in the future. Reilly described the oversight powers he obtained from the governance agreement as "extraordinary."⁹² However, when one looks at how the agreement was structured, the nature of Reilly's authority to enter into such an agreement, and Reilly's past assessments of the Yawkey Foundation, it becomes evident that Reilly over-stepped the limits of his authority when entering into the governance agreement.

M.G.L. Ch. 12 § 8H allows the Attorney General to take action when "he believes...breaches of trust *have been or are being committed* in the administration of a public charity."⁹³ This statutory provision allows the attorney general to take action when he believes something untoward has already happened or is currently happening. It makes the Attorney General a reactive force; he is to correct wrongs

⁹⁰ Id.

⁹¹ Id.

⁹² See Vaillancourt and Edes, January 17, 2002 at A1.

as they occur or after they occur. In this situation, Reilly forced changes to the Yawkey Foundation before any wrongdoing had occurred, and even before the Foundation had received any money from the sale.

Richlin stated that Reilly was motivated to seek the governance agreement because “Harrington was wearing too many hats,” the Foundation’s Board of Trustees did not have enough experience to manage the substantial new assets, and that Reilly wanted an enforceable contract so as to be able to ensure the Foundation’s compliance.⁹⁴ Richlin characterized the governance agreement as an “activist use of the Attorney General’s authority” and attempted to claim that there was precedent for the governance agreement by citing Reilly’s interactions with the Care Group and Beth Israel Deaconess Hospital.⁹⁵

In August of 2001, Reilly met with the Board of Trustees of the hospital because he was concerned that they were wasting the hospital’s charitable assets. As a result of Reilly’s assertions of bad management, he and the Board of Trustees entered into a governance agreement similar to the one formed between Reilly and the Yawkey Foundation.⁹⁶ However, the two situations are not analogous, as Reilly believed that the hospital had been wasting money for some time. Here, there was simply no evidence that the Yawkey Foundation had committed any wrongdoing. In fact, as stated earlier, Reilly had reviewed the Foundation’s actions in 1999 and found no wrongdoing whatsoever.⁹⁷ When confronted with this contrast, Richlin stated that the “Harrington piece was a very important part of this,” and that when Reilly combined Harrington’s conflict with his concerns about the sale and the Foundation’s board’s lack of experience, he believed that the governance agreement was warranted.⁹⁸

The Foundation’s subsequent actions and questionable gifts that are discussed above validated Reilly’s concerns, but they did not validate Reilly going beyond the bounds of his office and creating a proactive governance agreement. Reilly himself stated before the sale occurred that Mrs. Yawkey wanted the trustees to have a great deal of discretion and continually acknowledged that he had no jurisdiction over the private Foundation. He then contradicted his own statements by dictating changes to the Foundation. He has not forced other well-endowed Foundations to make similar changes to their Board. For example,

⁹³ See M.G.L. Ch. 12 § 8H (emphasis added).

⁹⁴ Interview with Dean Richlin, April 15, 2004.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Sullivan, June 4, 1999 at p.5

the Barr Foundation has \$863 million in assets and just three trustees and the Amelia Peabody Charitable Fund Trust has \$221 million in assets and five trustees.⁹⁹ The Yawkey Foundation needed to change, and their conflicted post-governance agreement gifts substantiated Reilly's concern. But until the Foundation had breached the trust, Reilly was constrained by the statutory authority given to him and should not have entered into the governance agreement.

Conclusion

The sale of the Boston Red Sox was not conducted fairly. MLB had pre-determined who would take control of the Red Sox and with the help of Harrington and the Red Sox limited partners, installed the Henry/Werner group as owners. Realizing that the process was unjust and that charitable interests in Massachusetts were being deprived of their full monetary rights, Reilly fulfilled his duty as protector of charities, and used his statutory and *parens patriae* powers to negotiate a settlement that provided charities with more money. In doing so, Reilly used all the resources at his disposal, and considering the circumstances, obtained the most for the charities of Massachusetts that could have been expected.

However, while Reilly should be applauded for the monetary aspects of the settlement, he should be criticized for overstepping the limits of his power and entering into a governance agreement with the Yawkey Foundation. Even though the Foundation subsequently made questionable gifts which validated Reilly's concerns, he should not have imposed his will upon, or interfered with, the private trust until misconduct had occurred.

The sale of the Red Sox, Reilly's review, and the eventual settlement provide a good example of an Attorney General exercising his statutory and *parens patriae* authorities while deftly using the power of his office to right a wrong and effectuate great change. The governance agreement also provides a good example, but that example is of an Attorney General who over-stepped the limits of his authority.

⁹⁸ Interview with Dean Richlin April 15, 2004.

⁹⁹ See Beth Healy, Foundation Faces Greater Oversight, AG Sets Bar Higher for Yawkey Trust Than for Other Charities, *The Boston Globe*, January 18, 2002 at C1.