Testimony of the Honorable Bill McCollum

On Behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform

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Introduction

Chairman Franks, Ranking Member Nadler and Members of the Subcommittee, on behalf of the United States Chamber of Commerce and the U.S. Chamber Institute for Legal Reform, thank you for allowing me the privilege to appear this afternoon to testify on what I believe are some very important issues facing our legal system. The views expressed in this testimony are my own.

The U.S. Chamber Institute for Legal Reform (ILR) is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's legal system simpler, fairer and faster for everyone. Founded by the Chamber in 1998 to address the country's litigation explosion, ILR is the only national legal reform advocate to approach reform comprehensively, by working to improve not only the law, but also the legal climate. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region.

In recent years several federal laws have given enforcement authority to state attorneys general. The most recent are enforcement provisions pertaining to the Consumer Financial Protection Bureau in the Dodd-Frank law. As a former Attorney General of Florida and a former member of Congress, I believe I have the experience and perspective to speak authoritatively on the subject of state attorneys general enforcing federal law and their use of contingency fee plaintiff counsel. I am concerned that the expansion of state authority to enforce federal law has the potential to create much greater and unnecessary burdens for businesses and the public. This is especially the case if state attorneys general contract with private attorneys on a contingency fee basis to bring enforcement actions under this authority.

I am also very concerned that, when state attorneys general elect to retain contingent fee plaintiff counsel to pursue litigation on behalf of the state, there is a substantial risk of, and opportunity for, "pay-to-play" schemes and other types of abuse in which political contributions from plaintiff firms are traded for contingent fee contracts. At the very least, use of such counsel without proper safeguards can give the appearance of impropriety and undermine public confidence in our legal system. State attorneys general should only enter into private attorney contingency fee contracts when their own office does not have the expertise or ability to handle a matter and the AG cannot locate an appropriate outside counsel to handle the matter on an hourly fee/non-contingency basis. Then only with complete transparency, a competitive bid process and caps on attorney fees, should contingency fee counsel be retained.

There are three very important issues that I believe the Subcommittee should consider: (1) how to create a balanced legal system – one that protects the public without creating incentives for unnecessary litigation that imposes enormous and unnecessary costs on businesses which must be, and are, passed on to consumers; (2) the risks and burdens for business and the public from the continuing expansion of the legislative authority for state attorneys general ("State AGs") to enforce federal laws concurrently with federal law enforcers; and (3) the need for increased transparency, fee caps, and other safeguards on those occasions where State AGs deem it necessary to utilize private sector contingent fee attorneys to pursue litigation on behalf of a state. Hopefully, such occasions will be rare.

In addition to their underlying state enforcement powers, State AGs are increasingly receiving the authority to enforce federal laws which can be duplicative and unnecessary. All of you understand the importance to business of being able to know the rules of the road, the standards under which businesses are required to operate. Unfortunately, a state attorney general, empowered by federal law, but who operates completely independent of any federal checks and balances, can add significant uncertainty and costs to a business community that needs predictability and reliability. This problem is exacerbated when an AG retains private plaintiff's counsel to enforce federal law on a contingency fee basis.

I wrote and promoted the Transparency in Private Attorney Contracts (TiPAC) legislation, which was enacted in Florida. I strongly support this law that requires Florida's Attorney General to conduct open bidding for contingency fee contracts and provides for caps on potential attorneys' fees. I believe that our nation would be well-served if such a standard was adopted nationally through the action of all state legislatures and through federal law requiring state attorneys general to follow TiPAC guidelines whenever they choose to use contingency fee outside counsel to enforce federal laws.

State AG Enforcement Authority

As the former Attorney General of Florida, I know firsthand the vital role that State AGs play as both the chief law enforcement officer and the chief lawyer for their respective states. I have tremendous respect for the work my former colleagues do to keep our communities safe and secure. The scope of the issues over which the State AGs have jurisdiction has increased substantially in recent years. In addition to the traditional areas of consumer protection and criminal law enforcement, attorneys general are now considering such subjects as reviewing corporate mergers for antitrust compliance, investigating healthcare companies for Medicaid fraud and delving into energy policy issues.

As State AG jurisdiction is expanding on the state level, Congress is increasingly deputizing State AGs to enforce federal law. For example, the Consumer Product Safety Improvement Act of 2008, the American Recovery and Reinvestment Act of 2009 (HIPPA enforcement), the Omnibus Appropriations Act of 2009 (Truth in Lending Act enforcement), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 all contain language that provides State AGs with enforcement authority. These are but a few examples of the myriad federal laws that allow State AG enforcement. This trend is certainly continuing in the current Congress.[1]

Dodd-Frank

Earlier this month, President Obama took the unusual and controversial step of making what the White House asserts is a "recess" appointment of Richard Cordray to be the Director of the Consumer Financial Protection Bureau ("CFPB"). The issue of whether the appointment itself is constitutionally valid is a matter that I will leave for debate by other parties. What can not be disputed is that, with a new Director in place, the CFPB is now exercising its powers over nonbank financial institutions under the Dodd-Frank Act to the full extent of the law. In addition to creating a new federal consumer regulator with extremely expansive regulatory and

[1] For example, each of the following bills introduced in the 112th Congress would grant State AGs the authority to enforce additional portions of federal law: the Commercial Privacy Bill of Rights Act of 2011, S. 799, § 403; the Consumer Rental-Purchase Agreement Act of 2011, S. 881, § 1016(b); the e-KNOW Act, S. 1029, § 215(i); the Personal Data Privacy and Security Act of 2011, S. 1151, § 203(c) (related bills – S. 1408, Data Breach Notification Act, S. 1535, Personal Data Protection and Breach Accountability Act); the Location Privacy Protection Act of 2011, S. 1223, § 3; the Children's Sports Athletic Equipment Safety Act, H.R. 1127, § 5(c) (related bill S. 601); the Motor Vehicle Owners Right to Repair Act of 2011, H.R. 1449, § 5; the Consumer Rental Purchase Agreement Act, H.R. 1588, § 3 (amending Section 1016 of the Consumer Credit Protection Act); and the SAFE Data Act, H.R. 2577, § 4(c) (related bills – H.R. 1707, H.R. 1841, S. 1207).

enforcement powers, the Dodd-Frank Act conferred broad authority on state attorneys general to enforce the new federal standards imposed by the Act. For example, a State AG may bring a lawsuit to enforce the Dodd-Frank Act's consumer protection provisions, as well as to enforce any regulations issued by this new federal regulator pursuant to the Dodd-Frank Act (enforcement actions also may be brought by other State regulators against companies doing business in the state).

A broad range of remedies are available in these lawsuits, including damages, rescission or reformation of contracts, injunctive relief limiting the company's activities or functions, civil penalties, restitution, disgorgement of unjust enrichment, refunds or return of property, and requiring public notification of the violation. The State AG must consult with the federal regulator before bringing an enforcement action (unless there is an "emergency," in which case consultation is not required).[2] Furthermore, it is important to note that this is only a consultation requirement and that the CFPB does not have an explicit ability to stop a State AG's enforcement activity under the CFPB's regulations.

The power conferred on State AGs is extremely broad, especially with regard to businesses other than federally-chartered financial institutions. That is because the statute generally prohibits any business subject to the Act from engaging in "any unfair, deceptive, or abusive act or practice" and prohibits "any person" from "recklessly providing substantial assistance" to the violation of the Act by a business subject to the Act's requirements. Because the statutory terms are very broad, they give State AGs a large amount of discretion in labeling something a "violation of the Act." Similarly, while a body of FTC and state consumer protection case law has developed as to what constitutes an "unfair" or "deceptive" practice,

[2] With respect to federally-chartered banks and savings associations, State AGs' authority is limited to enforcing regulations issued by the federal consumer regulator; the AGs cannot enforce provisions of the statute itself.

there is no federal precedent upon which to draw as to what constitutes an “abusive” practice. The lack of a standard for what constitutes an “abusive” practice allows for tremendous subjectivity and creates great opportunities for mischief. No doubt it will generate much litigation and appellate review.

In addition, the coverage of the final Dodd-Frank consumer provisions is extremely broad, reaching far beyond financial services businesses to numerous “Main Street” companies that engage in an activity falling within the statute’s broad definitions because it is ancillary to their principal business. For example, coverage – based on the key statutory terms “covered person” and “service provider” – is triggered by “extending credit,” providing financial advisory services, issuing stored value cards, and providing data processing services to financial institutions, among other things.

As Attorney General of Florida while the Dodd -Frank legislation was pending, I joined many of my fellow State Attorneys General in urging Congress to provide states with concurrent authority to enforce federal law and leave existing state consumer powers alone. My concern was to avoid inappropriate federal limitations on legitimate state enforcement powers. But I was – and continue to be – concerned that giving broad generalized authority to the state AGs (like that contained in the final version of Dodd-Frank) creates risks of both uncertainty and abuse. While regulations adopted by the CFPB could offer definitions of “abusive” and “violation of the Act,” State AGs could still adopt differing interpretations from each other and from the CFPB itself, as to what constitutes an “abusive” practice or a “violation of the Act” leaving businesses uncertain about the legal standards with which they are required to comply and burdened with the cost of litigation that is bound to proliferate until courts settle definitional issues.

Second, small business owners frequently rely upon consumer credit products – credit cards, mortgages on personal property, auto loans, etc. – to provide the capital that their businesses need. Interpretations of the Dodd-Frank Act or regulations issued thereunder that restrict the availability of these products therefore could have the effect of eliminating, or making impractical, the very credit products on which small businesses rely and thereby deprive small businesses of the credit that is essential for their survival and expansion.

Contingency Fee Plaintiff's Counsel

In light of the vast powers now possessed by State AGs and the trend toward increasing those powers even more, I feel compelled to warn Congress regarding the serious potential conflict-of-interest and ethical issues raised by the AGs' use of contingency-fee based plaintiff's counsel to litigate cases. I have been a vocal advocate before state legislatures of the need for reforms to address these issues and my message is the same for Congress. As State AGs become more engaged in enforcing the federal laws, more outside attorneys will be hired on a contingency fee basis to pursue litigation on behalf of the various State AGs. As payment, these attorneys receive a significant percentage of whatever awards or settlements the State may recover on behalf of the taxpayer.

In the past, some private law firms received extremely large fees in state contingency fee cases. This is not in the best interest of public policy. Federal and state laws should be designed to direct any recoveries to taxpayers, rather than contingency fee attorneys. Congress would do well to appropriately circumscribe the ability of State AGs to enforce federal statutes or at the very least, prohibit or limit their ability to use outside contingency fee counsel when enforcing federal law.

Related to this point, it is also worth noting that on May 16, 2007, President Bush issued Executive Order 13433, which prohibits agency heads from engaging legal or expert witness services under a contract in which "the amount or the payment of the fee for the services is contingent in whole or in part on the outcome of the matter for which the services were obtained. This Executive Order remains in effect.[3] It is a curious dichotomy that, as things currently stand, federal agencies (which by definition enforce federal law) are largely prohibited from using outside contingency fee counsel but State AGs deputized to enforce the very same statutes are under no such similar prohibition.

If, however, Congress chooses the route of putting limits on the ability of State AGs to use outside contingency fee counsel under these circumstances, instead of an absolute prohibition, I suggest enactment of the principles contained in the model Transparency in Private Attorney Contracting (TiPAC) law, based in large measure on the legislation that I drafted that was enacted in Florida in 2010.

Under TiPAC, as adopted in Florida, the Florida attorney general, when deciding to engage outside counsel on a contingency fee basis, must make a written finding that the office does not have the resources to handle the matter in-house, and then must seek competitive bids from outside firms wishing to do the work. Detailed time records must be kept by firms awarded such contracts. Contingency fees are subject to tiered limits and an aggregate cap of $50 million, exclusive of reasonable costs and expenses. All contingency-fee contracts must be posted on the

[3] That Executive Order states: "To help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States, it is the policy of the United States that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law." This Executive Order remains in effect and still prevents federal officials from entering into contingency contracts for legal or expert witness services. Executive Order 13433, "Protecting American Taxpayers from Payment of Contingency Fees," Federal Register Vol. 72, No. 96 (May 18, 2007).

website of the attorney general in a timely manner, and all fee payments must be posted within five days and remain posted for the duration of the contract. The model TiPAC legislation favored by ILR also adds provisions regarding the issue of control of the State AGs over the activity of the contingency fee counsel.

Anytime an office hires private counsel on behalf of the state, attorneys general owe it to the taxpayers to be transparent and accountable in how and why they do so. They should be able to articulate and demonstrate the value that outside counsel is providing to our states and to the taxpayers. Making sure that these outside counsel relationships receive the full sunlight of public scrutiny should be on the top of the agenda for every supporter of good government. Already, a number of state legislatures are considering TiPAC or related bills this year, and I urge Congress to follow their lead.

Conclusion

As attorneys general continue to play an increasing role in protecting the public interest, they must maintain the public's confidence. I believe that minimizing the use of private plaintiff contingent fee engagements is critical to achieving this objective. At the very least, if a State AG elects to retain a private firm on a contingent fee basis, he or she should do so in a manner meets the highest standards of transparency and accountability. The principles I have described in my testimony this afternoon would help ensure that any contingent fee contracts awarded by State AGs to private plaintiff law firms to pursue litigation enforcing federal law are being used in a manner consistent with Congressional intent, and would assist Congress in providing meaningful oversight over the State AGs' exercise of such federal law enforcement authority.

Thank you again for inviting me to testify. I look forward to your questions.