CONTINGENT FEES AND CONFLICTS OF INTEREST IN STATE AG ENFORCEMENT OF FEDERAL LAW

HEARING

BEFORE THE

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OF THE

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HOUSE OF REPRESENTATIVES

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CONTINGENT FEES AND CONFLICTS OF INTEREST IN STATE AG ENFORCEMENT OF FEDERAL LAW

THURSDAY, FEBRUARY 2, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:36 p.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Pence, Conyers, Scott, and Quigley.

Staff present: (Majority) Holt Lackey, Counsel; Sarah Vance, Clerk; (Minority) Heather Sawyer, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Well, good afternoon and welcome to this Constitution Subcommittee hearing on contingent fees and conflicts of interest in State attorney general enforcement of Federal law.

Without objection, the Chair is authorized to declare a recess of the Committee at any time.

Again, I just want to welcome you all here today and appreciate the Members at least on this side of the aisle for being here and hope you guys can carry the day when the time comes.

The rule of law is not just a matter of what the law is. Who enforces the law and how they enforce it are also critically important. The rule of law does not require only fair laws; it also requires that those laws are applied with integrity, consistency, and accountability.

Today's hearing is about who should enforce Federal law and how. Specifically, we ask whether Federal law should ever be enforced by trial lawyers seeking a contingent-fee payday.

Over the past 2 decades, there has been an increase in the phenomenon of State attorneys general outsourcing their law enforcement duties to contingency fee lawyers. These State AG's will hire a plaintiffs' lawyer to sue a business for an alleged wrong on behalf of all of the people of the State.

The contracts that these State AG's enter with plaintiffs' lawyers are often secretive, lucrative, and ethically dubious. Often there is no competitive bidding by various law firms to ensure that the taxpayers received the best value possible for their legal representation. As a result, the contracts sometimes dramatically overcom-

pensate the lawyers. Law firms representing the States have been awarded contingency fees that equal as much as $90,000 per hour of work performed on a case.

Many of these cases are not brought based on the independent judges or judgment by analysis of the State attorney general as a law enforcement official, but instead, outside trial lawyers generate the cases and then pitch them to the State AG. In this way, the lawyer's interest in profit supplants prosecutorial discretion in deciding when to enforce the law.

This trend is especially troubling because the plaintiffs' lawyers who bring these cases are often among the biggest donors to the State AG's election campaigns. State AG's should be focused on defending the public and enforcing the law, not on enriching their political benefactors in the trial bar. Giving unelected, unaccountable trial lawyers a profit interest in enforcing the law leads to inconsistent law enforcement and troubling conflicts of interest. Law enforcement should not be motivated by profit.

I will use an example, imagine if a city decided that instead of police officers, it would hire a private company to enforce its traffic and parking laws and give that company a percentage of every ticket that it wrote. Does anyone imagine that this would lead to more consistent or fair application of the law?

To protect taxpayers from paying unduly high legal fees, to prevent conflicts of interest and cronyism in law enforcement, and to protect prosecutorial independence, the executive branch of the Federal Government has banned Government agencies from hiring outside counsel on a contingent-fee basis.

Despite this ban on Federal agencies entering contingency fee contracts, certain statutes adopted by the late Democratic majority in Congress empower State AG's to enforce Federal laws by outsourcing the work to trial lawyers on a contingency fee basis. These provisions of law contradict the general Federal policy against contingency fees by giving State AG's power to enforce Federal laws without restricting them from outsourcing the work on a contingency basis.

I expect today's testimony will demonstrate contingency fee enforcement of State law by State attorneys general in the past has been bedeviled by conflicts of interest and, in at least one case, criminal convictions for corruption. Allowing State AG's to enforce Federal law on a contingency basis raises the specter of bringing this corruption and conflict of interest to Federal law enforcement.

And so I look forward to the witnesses' testimony on the propriety of allowing State attorneys general to enforce Federal law on a contingency basis and to any suggestions for how Congress can protect prosecutorial independence and neutrality.

And with that, again I thank you all for being here, and I would now yield to the Ranking Member of the Committee, in this case, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. I am happy to be with you again.

And I am particularly pleased to see our former colleague, Bill McCollum of Florida, who spent many years on the Committee himself. I welcome his presence today.

There are a number of ways we can approach this subject, and of course, each Member has his own interpretation of it. But just starting on my statement, which I probably will not get to page 7 of an 11-page statement in 5 minutes, I will point out that the Speaker of the House has authorized payment of up to $1.5 million to outside counsel, a very prominent, conservative lawyer, to defend the Defense of Marriage Act in court. And I am sure he will be interested in what all of us think and say in the course of this hearing.

Now, the most prominent case for hiring outside counsel, the most famous to me, is the tobacco cases where R.J. Reynolds made it clear about what they were trying to do, which was quite inappropriate, and we now went on through outside counsel and State attorneys general to force the tobacco industry to compensate for funds used to pay for the public health disaster caused by smoking, a landmark case.

They also uncovered the industry's corrupt practices, including promotion of addiction through manipulation of nicotine levels and efforts to recruit teenage smokers. 46 States eventually joined in the litigation, resulting in a $200 billion payment by the tobacco industry and also a requirement to dismantle many of the industry groups that spearheaded the deliberate misinformation.

I have a number of other cases, the most recent being the former Ohio Attorney General, Richard Cordray, who partnered with outside lawyers to reach a $475 million settlement on behalf of Ohio investors who were deliberately misled by Merrill Lynch. The attorney general Cordray also reached a $700 million agreement with AIG over investor losses, helping to recoup funds lost by the Ohio Public Employees Retirement System and the State Teachers Retirement System.

Then we have the Zyprexa case in South Carolina, a $45 million settlement.

And we had the Louisiana attorney general have outside counsel challenge the tobacco industry in his State.

In addition, I would like to include in my statement a memo from the Center for Justice and Democracy, which outlines probably more than a dozen other important cases brought by State attorneys general with outside counsel.

With that, Mr. Chairman, I will conclude my statement and thank you very much.

[The information referred to follows:]

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EXAMPLES OF IMPORTANT CASES BROUGHT BY STATE ATTORNEYS GENERAL

(January 30, 2012)

TOBACCO

In partnership with private attorneys, AGs in 46 states settled with the tobacco industry in 1998, whereby the tobacco industry paid more than $200 billion. The attorneys and AG's were not only able to force the tobacco industry to reimburse state funds expended to deal with one of the biggest public health disasters in modern times, they were also able to expose the industry's corrupt practices, uncovering for the first time how it promoted addiction through manipulation of nicotine levels, engaged in a secret campaign to hook teens and even pre-teens and lied to government officials and the public.

Had state AGs not joined forces with private counsel, cases against the tobacco industry would have never succeeded. In a famous memo, R.J. Reynolds lawyer J. Michael Jordan, explained: "[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his."[1]

Many retainer agreements between AGs and private firms were made public, usually showing a standard contingency fee of around 15 percent, lower than typical 1/3 arrangements, despite the huge risks and the small likelihood of a plaintiff win.[2] Yet when the industry began to settle these cases, most private counsel gave up the contracted fee and amiably agreed, along with the tobacco industry, to arbitrated fee decisions. In announcing the first fee award to attorneys in Florida, Texas and Mississippi in December 1998, to be paid by the tobacco companies over a minimum of 10 years, labor mediator and panel Chairman John Calhoun Wells said, "[N]otwithstanding all the efforts by individuals who committed years of their lives to achieving progress on this issue, without these outside counsel, there would be no multibillion-dollar settlements for the states to reimburse tobacco-related health expenses and provide funds for educational efforts to reduce youth smoking."[3]

POULTRY FARMS

In June 2005, then-Oklahoma Attorney General W.A. Drew Edmondson sued Arkansas poultry farmers, including industry giant Tyson Foods, Inc., for polluting the Illinois River with chicken waste and hazardous chemicals.[4] The suit was brought under the federal Superfund law and other state statutes.[5] Edmondson brought on a consortium of outside firms on a contingency fee basis because his office could not undertake the expense of handling such major litigation.[6] When the defendants' challenged this arrangement, the court dismissed the motion, allowing the suit to continue with the help of outside counsel.[7] The case is still pending.[8]

HYTRIN

In July 2005, 18 Attorneys General settled charges of antitrust and consumer protection law violations brought against Abbott Laboratories and Geneva Pharmaceuticals Inc. for $30.7 million.[9] Of that amount, $28.7 million went to consumers and third-party payers. The remaining $2 million reimbursed state agency claims and litigation costs incurred by Florida, Kansas and Colorado, states that led the investigation and initiated the AG suit.[10]

REMERON

In August 2005, a federal court approved a $36 million settlement between Attorneys General from 50 states, the District of Columbia and other U.S. territories and Organon USA Inc. and parent company, Akzo Nobel N.V., over the anti-depressant drug Remeron.[11] Of the $36 million, $8.6 million compensated consumers for amounts they overpaid for Remeron.[12]

PREDATORY LENDING

In January 2006, 49 states and the District of Columbia entered into a settlement agreement with Ameriquest Mortgage Company over alleged illegal lending practices.[13] Under the settlement, Ameriquest agreed to pay $295 million to consumers and $30 million to the Attorneys General to cover costs and fund consumer education and consumer protection enforcement programs.[14] The agreement also compelled Ameriquest to make sweeping reforms of its business practices.[15]

LEAD IN CHILDREN'S JEWELRY

In April 2006, then-California Attorney General Bill Lockyer announced a settlement with U.S. retailers and distributors over lead levels in costume jewelry.[16] Under the agreement, retailers and suppliers had to stop sales in California of any product not meeting the strict lead-content standards.[17] The retailers also pledged to pay a total of $1.9 million, with $325,000 earmarked for consumer education about the dangers of heavy metal exposure and $250,000 set aside for a jewelry-testing fund.

PAYDAY LENDERS

In November 2006, West Virginia Attorney General Darrell McGraw reached settlements with 18 Internet-based lenders who allegedly made "payday loans" to West Virginia consumers without being licensed to do business in the state.[18] Under the settlements, the companies agreed to quit doing business in West Virginia, pay refunds to consumers and cancel their debts.[19]

BILLING PRACTICES

In December 2006, 16 Attorneys General, led by then-California Attorney General Bill Lockyer, settled a lawsuit with JPMorgan's Chase Bank and Trilegiant Corp. over deceptive billing practices.[20] Under the $14.5 million settlement, Trilegiant and Chase agreed to clearly disclose all terms of any free trials and were barred from characterizing future advertising solicitations as "reward" or "rebate" offers.[21] Chase and Trilegiant also pledged to pay the settling states for attorneys' fees and investigation and litigation costs, and/or consumer protection enforcement funds, consumer education, litigation or local consumer aid and other uses permitted by state law, at the discretion of each state Attorney General.[22]

BAYCOL

In January 2007, 30 Attorneys General settled with Bayer Corporation over its marketing of Baycol, a dangerous "statin" drug.[23] An $8 million settlement was reached, with the monies used by the states for attorneys' fees and other costs of investigation and litigation, consumer protection enforcement funds, consumer education, litigation or local consumer aid funds or other purposes.[24]

ANNUITIES

In October 2007, Minnesota Attorney General Lori Swanson settled a lawsuit against Allianz Life Insurance Company for marketing and selling $259 million worth of unsuitable long-term annuities to seniors.[25] The settlement, among other things, established a restitution process to review sales to more than 7,000 Minnesota seniors.[26]

ZYPREXA

In October 2008, 33 State Attorneys General announced a $62 million settlement agreement with Eli Lilly over its marketing of the anti-psychotic drug Zyprexa,[27] with the monies to be used by the states for attorneys' fees and other costs of investigation and litigation, consumer protection enforcement funds, consumer education, litigation or local consumer aid funds or other purposes.[28] Under the settlement, Lilly was also required to spend six years implementing major changes in how it marketed Zyprexa.[29]

Rather than participate in the 2008 settlement, several State AGs achieved justice by pursing individual lawsuits against Lilly with the help of outside counsel. For example, in October 2009, South Carolina reached a $45 million settlement over the drugmaker's Zyprexa marketing practices, with Lilly paying over $37 million for Medicaid/State Health Plan reimbursement and consumer protection and pledging to institute significant changes in how it marketed Zyprexa.[30] As then-South Carolina Attorney General Henry McMaster explained when announcing the settlement, "The Eli Lilly case was handled on a contingent basis by special counsel appointed by the attorney general. Special counsel paid and incurred all up front costs associated with bringing the case, and their expertise in similar pharmaceutical litigation was instrumental in its successful resolution."[31]

Similarly, in April 2010, Louisiana Attorney General Buddy Caldwell announced a $20 million settlement over Lilly's Zyprexa, with nearly $17 million going to the state's general fund, $3 million reimbursing the state's Medicaid fund and the company pledging to significantly change the way it marketed Zyprexa.[32] Lilly also agreed to pay private counsel's fees in addition to the state's $20 million recovery.[33]

SECURITIES FRAUD

In August 2009, a federal court approved a $475 million securities class action settlement between then-Ohio Attorney General Richard Cordray and Merrill Lynch, which allegedly, among other things, "made materially false and misleading statements in its financial statements concerning its exposure to residential mortgage-related debt, including subprime and collateralized debt obligations."[34] Outside attorneys served as co-lead counsel in the litigation.[35]

Later that year, AG Cordray announced a $400 million securities class action settlement for investors harmed by Marsh & McLennan Companies, Inc., Marsh Inc. and former company executives Jeffrey Greenberg and Roger Egan (collectively "Marsh").[36] The agreement, negotiated by Cordray and New Jersey's Attorney General, held Marsh accountable for "failure to disclose a scheme that generated substantial earnings from illegal, anticompetitive arrangements with insurance carriers."[37] The settlement received final court approval in December 2009.[38]

In July 2010, Cordray announced a proposed settlement of $725 million with AIG over investor losses from the company's participation in an "illegal, industry-wide market division scheme involving the payment of improper 'steering' contingent commissions as well as bid-rigging and accounting fraud."[39] Private counsel represented the lead plaintiffs (the Ohio Public Employees Retirement System, the State Teachers Retirement System of Ohio and the Ohio Police and Fire Pension Fund), along with the Ohio AG, in the class action suit.[40] The court granted preliminary approval of the settlement in October 2011. As of January 2012, the agreement had not been finalized.[41]

TFT-LCD PANELS

In December 2011, a multi-state group of eight Attorneys General and private class action attorneys reached a $553 million settlement with seven major technology corporations, which allegedly conspired to fix prices of thin film transistor-liquid crystal display (TFT-LCD) screens used in televisions, computer monitors and laptops.[42] According to New York Attorney General Eric Schneiderman, "Up to $501 million will be available for partial refunds to compensate consumers residing in 24 states and the District of Columbia who purchased products containing TFT-LCD panels during the period beginning January 1, 1999 and continuing through December 31, 2006."[43]

RISPERDAL

In January 2012, Texas Attorney General Greg Abbott secured a $158 million settlement with Johnson & Johnson over its marketing of the anti-psychotic drug Risperdal.[44] "Today's agreement sends a strong message that the State will pursue those who defraud Texas taxpayers," Abbott said in a statement. "Johnson & Johnson's scheme to profit from the Medicaid program by overstating the safety and effectiveness of an expensive drug and improperly influencing officials ended up costing taxpayers millions of dollars."[45] The settlement will be allocated to the state, the federal government (since it provided Medicaid reimbursements), the whistleblower whose lawsuit served as the basis for the Texas case and his attorneys.[46]

NOTES

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[1] *See. e.g.*, Complaint, *Florido v. American Tobacco Co. et al.*, No. CL-1466A0 (Circuit Ct.,15th Circuit, Palm Beach. Fla., Apr. 18, 1995) (memorandum from J. Michael Jordan, legal counsel, RJR).

[2] Stephanie Mencimer, *Blocking the Courthouse Door*. New York: Free Press (2006), pp. 78-79.

[3] "Tobacco Fee Arbitration Panel Announces First Decisions," *PR Newswire*, December 11, 1998.

[4] Press release from the Office of Oklahoma Attorney General W.A. Drew Edmondson, "AG Sues Poultry Industry for Polluting Oklahoma Waters," June 13, 2005, found at http://www.oag.state.ok.us/oagweb.nsf/srch/7DB11B73010BFF99862572B4006F60FB?OpenDocument.

[5] Press release from the Office of Oklahoma Attorney General W.A. Drew Edmondson, "AG sues poultry industry for polluting Oklahoma's waters," June 13, 2005, and attached complaint, found at http://www.oag.state.ok.us/oagweb.nsf/srch/7DB11B73010BFF99862572B4006F60FB.

[6] The consortium includes Motley Rice; Riggs, Abney, Neal, Turpen, Orbison & Lewis of Oklahoma City; and Miller & Keffer of Tulsa. Tulsa attorney Louis Bullock also is working on the case. Robert J. Smith, "Top Firm Takes on Poultry Industry," *Arkansas Democrat-Gazette*, February 5, 2006.

[7] "Judge sides with Oklahoma on legal challenges to poultry suit," *Associated Press*, June 16, 2007, found at http://www2.arkansasonline.com/news/2007/jun/16/judge-sides-oklahoma-legal-challenges- poultry-suit/.

[8] U.S. District Court, Northern District of Oklahoma, "Court Filings for Oklahoma, State of v. Tyson Foods, Inc. et al (4:05-cv-00329-GKF -PJC)" (visited January 25, 2012), found at https://ecf.oknd.uscourts.gov/cgi-bin/5cv329.pl?full_report=1.

[9] "McGraw announces settlement, refund," *Associated Press*, July 6, 2005; Press release from the Office of West Virginia Attorney General Darrell McGraw, "McGraw Announces Settlement & Refunds in Hytrin Case," July 5, 2005, found at http://www.wvago.gov/press.cfm?ID=118&fx=more; "Consumers Eligible for Refunds in Hytrin Antitrust Settlement," *ConsumerAffairs.com*, June 20, 2005, found at http://www.consumeraffairs.com/news04/2005/hytrin.html; Press release from Florida Attorney General Charlie Crist, "Crist Announces Settlement, Consumer Refunds in Hytrin Antitrust Case," March 31, 2005, found at http://myfloridalegal.com/newsrel.nsf/newsreleases/E4208EAFF672805C85256FD50068E8C1; Press release from the Office of Colorado Attorney General John Suthers, "Geneva Pharmaceuticals and Abbott Laboratories to Pay $200,000 Civil Penalty," March 14, 2005, found at http://www.ago.state.co.us/press detail.cfm?pressID=13. *See also*, *In Re Terazosin Hydrochloride Antitrust Litigation*, Master File No. 99-MDL-1317, S.D. Fla. (summary notice of pending class action proposed settlement and fairness hearing)(March 7, 2005), found at http://completeclaimsolutions.com/hytrin.

[10] "Between 1999 and 2001, a number of consumers filed lawsuits against Abbott and Geneva. The cases were consolidated into a single lawsuit in federal court in the Southern District of Florida. After conducting their own investigations, the states of Florida, Kansas and Colorado filed their own lawsuit in the same court." Press release from the Office of Florida Attorney General Charlie Crist, "Crist Announces Settlement, Consumer Refunds in Hytrin Antitrust Case," March 31, 2005, found at

http://myfloridalegal.com/newsrel.nsf/newsreleases/E4208EAFF672805C85256FD50068E8C1. *See also*, "Consumers Eligible for Refunds in Hytrin Antitrust Settlement," *ConsumerAffairs.com*, June 20, 2005, found at http://www.consumeraffairs.com/news04/2005/hytrin.html; *In Re Terazosin Hydrochloride Antitrust Litigation*, Master File No. 99-MDL-1317, S.D. Fla. (summary notice of pending class action proposed settlement and fairness hearing)(March 7, 2005), found at http://completeclaimsolutions.com/hytrin.

[11] Press release from the Office of Illinois Attorney General Lisa Madigan, "Madigan Announces Distribution Of Antitrust Settlement Proceeds To Illinois Consumers," April 10, 2007, found at http://www.ag.state.il.us/pressroom/2007_04/20070410.html; John O'Brien, "Settlement produces $1 million in Fla. Rebates," *LegalNewsline.com*, March 28, 2007, found at http://legalnewsline.com/news/contentview.asp?c=192654; Press release from the Office of Attorney General Bill McCollum, "McCollum: Florida to Receive $1 Million in Rebates for Prescription Overpayment," March 28, 2007, found at http://myfloridalegal.com/newsrel.nsf/newsreleases/B742C900C0274146852572AC0068E474; "Remeron Refund Procedure Announced," *ConsumerAffairs.com*, March 18, 2005, found at http://www.consumeraffairs.com/news04/2005/remeron_settlement.html; William McCall, "States Propose $36M Organon Settlement," *Associated Press*, October 22, 2004, found at http://www.msnbc.msn.com/id/6309524; Press release from the Office of Oregon Attorney General Hardy Myers, "AG Announces $36 Million Proposed Settlement With Drug Maker Organon USA And Parent Company Akzo Nobel Concerning The Drug Remeron," October 21, 2004, found at http://www.doj.state.or.us/releases/2004/rel102904.shtml.

[12] Press release from the Office of Illinois Attorney General Lisa Madigan, "Madigan Announces Distribution Of Antitrust Settlement Proceeds To Illinois Consumers," April 10, 2007, found at http://www.ag.state.il.us/pressroom/2007_04/20070410.html.

[13] Carolyn Said, "Mortgage Meltdown," *San Francisco Chronicle*, February 3, 2008, found at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/03/BU9OUPJM8.DTL; Eileen Ambrose, "Lender, 49 states settle probe," *Baltimore Sun*, January 24, 2006; Press release from the Office of Arizona Attorney General Terry Goddard, "Terry Goddard Announces Settlement with Ameriquest Lender to Pay $325 Million and Reform its Lending Practices," January 23, 2006, found at www.azag.gov/press_releases/jan/2006/Ameriquest_release_arizona.pdf; Press release from the Office of Iowa Attorney General Tom Miller, "Miller: Ameriquest Will Pay $325 Million and Reform its Lending Practices," January 23, 2006, found at http://www.iowa.gov/government/ag/latest_news/releases/jan_2006/Ameriquest_Iowa.html; Press release from the Office of Texas Attorney General Greg Abbott, "Attorney General Abbott Announces Sweeping $325 Million Settlement With Ameriquest Mortgage," January 23, 2006, found at http://www.oag.state.tx.us/oagnews/release.php?id=1412; "Ameriquest Settles Multi-State Probe for $325 Million," *ConsumerAffairs.com*, January 23, 2006, found at http://www.consumeraffairs.com/news04/2006/01/ameriquest_settles.html.

[14] Press release from the Office of Arizona Attorney General Terry Goddard, "Terry Goddard Announces Settlement with Ameriquest Lender to Pay $325 Million and Reform its Lending Practices," January 23, 2006, found at www.azag.gov/press_releases/jan/2006/Ameriquest_release_arizona.pdf; Press release from the Office of Iowa Attorney General Tom Miller, "Miller: Ameriquest Will Pay $325 Million and Reform its Lending Practices," January 23, 2006, found at http://www.iowa.gov/government/ag/latest_news/releases/jan_2006/Ameriquest_Iowa.html; "Ameriquest Settles Multi-State Probe for $325 Million," *ConsumerAffairs.com*, January 23, 2006, found at http://www.consumeraffairs.com/news04/2006/01/ameriquest_settles.html.

[15] Press release from the Office of Arizona Attorney General Terry Goddard, "Terry Goddard Announces Settlement with Ameriquest Lender to Pay $325 Million and Reform its Lending Practices," January 23, 2006, found at www.azag.gov/press_releases/jan/2006/Ameriquest_release_arizona.pdf; Press release from the Office of Iowa Attorney General Tom Miller, "Miller: Ameriquest Will Pay $325 Million and Reform its Lending Practices," January 23, 2006, found at http://www.iowa.gov/government/ag/latest_news/releases/jan_2006/Ameriquest_Iowa.html; Press release from the Office of Kentucky Attorney General Greg Stumbo, "Attorney General Stumbo Announces that Ameriquest Will Pay $325 Million and Reform its Lending Practices to Resolve States' Investigations," January 23, 2006, found at http://ag.ky.gov/NR/rdonlyres/4DF07235-E3BE-49DC-9DE7-67FEAC9C0770/0/AttorneyGeneralStumboAnnouncesthatAmeriquestWillPay325Million.htm; "Ameriquest Settles Multi-State Probe for $325 Million," *ConsumerAffairs.com*, January 23, 2006, found at http://www.consumeraffairs.com/news04/2006/01/ameriquest_settles.html.

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Mr. FRANKS. And I thank the distinguished former Chairman, and without objection, other Members' opening statements will be made part of the record.

Let me also add my welcome to Mr. McCollum. He is someone that was never a colleague while I was here but certainly someone

I hold to be a friend, and he is, as the former Chairman said, no stranger to this Committee.

Bill McCollum, a partner at the law firm of SNR Denton, was a 20-year Congressman from Florida and a Member of the Judiciary Committee. From 2007 to 2011, Mr. McCollum served as Attorney General of the State of Florida where he spearheaded passage of the Transparency in Private Attorney Contracts legislation which requires Florida's attorney general to conduct open bidding for contingency fee contracts and provides for caps on potential attorney's fees.

Our second witness is Professor Amy Widman or Widman?

Ms. WIDMAN. Widman.

Mr. FRANKS. Widman. Forgive me. Professor Amy Widman of Northern Illinois University College of Law. Professor Widman teaches torts, administrative law, and legislation. Her academic interests include research and writings on State attorney general enforcemenr of Federal law. And we appreciate you being here, Professor.

Our final witness is Mr. Jim Copland, Director of the Center for Legal Policy at the Manhattan Institute for Policy Research. Mr. Copland has researched and written on the problems associated with State attorneys general outsourcing law enforcement work on a contingency fee basis.

Each of the witnesses' written statements will be entered into the record in its entirety. And I would ask that each witness summarize his or her testimony in 5 minutes or less, and to help you stay within that timeframe, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of this Subcommittee that they be sworn. So if you would please stand.

[Witnesses sworn.]

Mr. FRANKS. Thank you and be seated.

Now, I would recognize our first witness, Mr. McCollum, for 5 minutes.

TESTIMONY OF THE HONORABLE WILLIAM McCOLLUM, JR., FORMER FLORIDA ATTORNEY GENERAL, PARTNER, SNR DENTON

Mr. MCCOLLUM. I had a great pleasure of being on this Committee, as you noted, for a number of years. While you and I didn't serve, I have a great respect for you. Former Chairman Conyers, I guess Ranking Member, you were my very first Chairman, Subcommittee Chairman. You may remember, 1981-1982. And I have a lot of fond memories of those days. Congressman Scott and I did a lot of business together. It may sound strange. Democrats and Republicans actually worked together. At least when I was here on this Committee, we did. I hope you still do.

I am here today, Mr. Chairman, to represent the U.S. Chamber of Commerce and the U.S. Chamber of Commerce's Institute for Legal Reform in discussing the issue you have asked us to talk about, and that is the role of the State attorneys general in Federal

law enforcement today and the contingency fee contracting issue that goes with that.

I have had, as you might imagine, quite an experience with that, as recently as these 4 years you described. I was Florida's Attorney General, and I think I have a pretty good perspective on it.

And what I am concerned about and what concerns me the most is that over the last few years, there has been a considerable expansion of Federal law that provides State attorneys general with new powers, some of it unexercised, maybe not very publicly viewable or visible because of that. But the burdens potentially for business and the public with this duplication of Federal and State enforcement can be significant, and the potential for abuse is also significant, especially if there are contingency fee contracts with private plaintiff's attorneys associated with it.

I worry about pay for play—the possibility of it. The appearance of it is even worse. And that is what I have seen in activities of some of my former colleagues as State attorneys general. The concern that the public perception, when you make these deals out of the public scrutiny, that something hanky-panky is going on is really great.

And so I have had to attempt to address that. In a couple minutes, I am going to come back to the specifics of what I did in Florida and what I am promoting as a model program for contingency fee contracts, which you might wish to examine.

But first, I want to comment broadly on the fact that there are three things that I think the Subcommittee particularly should look at in examining this question. I think you should consider how to create a balanced legal system, one that protects the public without creating incentives for unnecessary litigation that impose enormous burdens on private businesses and consumers, the risk and burdens for business and the public of the continuing expansion of legislative authority, and the need for transparency, fee caps, and other safeguards on the occasions when contingency fee contracts are used.

Let me say at the outset that there are several new laws, the Consumer Product Safety Improvement Act of 2008, a provision that expanded the opportunity for State AG's in HIPPA, truth in lending, and most recently the Dodd-Frank bill, which disturbs most people—the potential of that—the most.

And just briefly on Dodd-Frank for a moment, it expands, as you know, the law in the area they call the Consumer Financial Protection Bureau. Mr. Cordray is now in charge of that, a former colleague of mine, attorney general. And the powers given to the States to enforce are explicit, and they are expected to be utilized. And there are questions about the definition of what is in fact a consumer violation under that law. It could be deceptive. It could be unfair, which are two terms that we have a lot of use in all of the State laws. But there is a new term called "abusive." An abusive act is not defined. I am sure that the bureau will eventually promulgate a regulation or rule trying to define it.

I worry—and you should too, I think—that there could be a proliferation of interpretations even of that rule in the State attorney general's efforts to gain traction in enforcing this.

But in the limited time I have, let me summarize what I think. I think that this Subcommittee should consider whether or not this continued expansion is a good idea of giving more power to State attorneys general in other areas of law, whether or not the Federal rule, which is an executive order that exists today that prohibits Federal agencies from contracting on a contingency fee basis should be the rule, maybe implemented as a contingent rule with all of the powers that are given to the State attorneys general so they don't have the power to go out and hire plaintiff's attorneys just as the Federal agencies cannot.

Or if you consider the way we are doing business now, I would suggest that the model Transparency in Private Attorney Contracting Act, which is modeled after a law that I wrote first as a regulation in my office and then got passed in 2010 in the State of Florida—that particular law is one which provides for some limits. It provides, first of all, that the State attorney general has to find that they don't have the ability, they don't have the resources, they don't have the capability in-house of doing the litigation.

Secondly, they have to do competitive bidding under their own rules.

Third, there has to be a determination that is posted that people can see when they do this competitive bidding.

Third—fourth, I guess it is. We have caps in any contract with a private attorney of fees, a total cap of $50 million per matter, but underneath that, it is a scale of 25 percent of the first $10 million, and then for each $5 million, it scales down 20 percent, 15 percent, down to 5 percent of the balance. We figured that on $1 billion recovery, which is very large for a State attorney general to have, you would wind up with the potential of having attorney fees of $50 million. Roughly that is what it equates to, $1 billion recovery.

Now, I got involved and interested in this in Florida because of the tobacco case that Mr. Conyers pointed out. Back in 1994, Florida was one of the early States to bring tobacco. It did use plaintiff's attorneys. It used 11 different law firms. It settled earlier than anyone else. And in the settlement process, the attorneys got $3.4 billion.

And what is it that is wrong about that?

Well, the taxpayers didn't get their—you know, they should have gotten a bigger take of that. We shouldn't be paying $3.4 billion in a settlement like that. That is way too much in attorney's fees.

And secondly, it had a terribly bad appearance. The public distaste for that was extreme. Former Governor, Lawton Chiles, a Democrat, was outraged when he realized what had happened. But in reality, that is what happened.

And so I promulgated this idea and the model has been expanded a bit. And today I would like to suggest that those caps and that provision, along with some control provisions, are in this model. And I don't believe it is in the record. I am not sure that it came up with my testimony. I would like to submit a copy of the model act for the record, if I could, Mr. Chairman.

Mr. FRANKS. Thank you, Mr. McCollum. Without objection, it will be entered into the record.

[The information referred to follows:]

MODEL TRANSPARENCY IN PRIVATE ATTORNEY CONTRACTS ACT

Section 1. Title

This Act may be known as the Transparency in Private Attorney Contracts (TIPAC) Act.

Section 2. Definitions

As used in this section, the term:

A. "Government attorney" means an attorney employed by the State as a staff attorney in the Attorney General's Office.

B. "Private attorney" means any private attorney or law firm.

C. "State" means the State of [insert name of state], including state officers, departments, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of state government, and any of its agents.

Section 3. Procurement

A. The Attorney General may not enter into a contingency fee contract with a private attorney unless the Attorney General makes a written determination prior to entering into such a contract that contingency fee representation is both cost-effective and in the public interest. Any written determination shall include specific findings for each of the following factors:

(i) Whether there exist sufficient and appropriate legal and financial resources within the Attorney General's office to handle the matter.

(ii) The time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.

(iii) The geographic area where the attorney services are to be provided.

(iv) The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.

B. If the Attorney General makes the determination described in subsection (A.), the Attorney General shall request proposals from private attorneys to represent the State on a contingency fee basis and draft a written request for proposal from private attorneys and post this request for proposal prominently on the Attorney General's website, unless the Attorney General determines that requesting proposals is not feasible under the circumstances and sets forth the basis for this determination in writing.

Section 4. Contingent Fees

A. The Attorney General may not enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee, exclusive of reasonable costs and expense, in excess of:

(i) Twenty-five percent of any recovery of up to $10 million; plus

(ii) Twenty percent of any portion of such recovery between $10 million and $15 million; plus

(iii) Fifteen percent of any portion of such recovery between $15 million and $20 million; plus

(iv) Ten percent of any portion of such recovery between $20 million and $25 million; plus

(v) Five percent of any portion of such recovery exceeding $25 million.

In no event shall the aggregate contingency fee exceed $50 million, exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery.

Section 5. Control

A. The Attorney General shall not enter into a contract for contingency fee attorney services unless the following requirements are met throughout the contract period and any extensions thereof:

(i) The government attorneys shall retain complete control over the course and conduct of the case.

(ii) A government attorney with supervisory authority shall be personally involved in overseeing the litigation.

(iii) The government attorneys shall retain the authority to reject any decisions made by outside counsel.

(iv) Any defendant that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with contingency fee counsel.

(v) A government attorney with supervisory authority for the case shall attend all settlement conferences.

(vi) Decisions regarding settlement of the case shall be reserved exclusively to the discretion of the government attorneys and the State.

B. The Attorney General shall develop a standard addendum to every contract for contingent fee attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the State, including, without limitation, the requirements listed in (A)(i)-(vi), inclusive.

Section 6. Oversight

A. Copies of any executed contingency fee contract and the Attorney General's written determination to enter into a contingency fee contract with the private attorney shall be posted on the Attorney General's website for public inspection within 5 business days after the date the contract is executed and shall remain posted on the website for the duration of the contingency fee contract, including any extensions or amendments thereto. Any payment of contingency fees shall be posted on the Attorney General's website within 15 days after the payment of such contingency fees to the private attorney and shall remain posted on the website for at least 365 days thereafter.

B. Any private attorney under contract to provide services to the State on a contingency fee basis shall, from the inception of the contract until at least 4 years after the contract expires or is terminated, maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of such attorney services. The private attorney shall make all such records available to the

Attorney General, where they will be available for inspection and copying upon request in accordance with [insert relevant sections of state Open Records statute]. The Attorney General may take reasonable steps to protect the evidentiary privileges of the State when producing these records under [relevant state Open Records statute]. In addition, the private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the matter in increments of no greater than 1/10 of an hour and shall promptly provide these records to the Attorney General, upon request.

C. By February 1 of each year, the Attorney General shall submit a report to the President of the Senate and the Speaker of the House of Representatives describing the use of contingency fee contracts with private attorneys in the preceding calendar year. The Attorney General may take reasonable steps to protect the evidentiary privileges of the State when producing this report. At a minimum, the report shall:

(i) Identify all new contingency fee contracts entered into during the year and all previously executed contingency fee contracts that remain current during any part of the year, and for each contract describe:

(a) The name of the private attorney with whom the department has contracted, including the name of the attorney's law firm;

(b) The nature and status of the legal matter;

(c) The name of the parties to the legal matter;

(d) The amount of any recovery; and

(e) The amount of any contingency fee paid.

(ii) Include copies of any written determinations made under subsections (3)(A) and (3)(B) during the year.

Section 7. No Expansion of Authority

Nothing in this Act shall be construed to expand the authority of any state agency or state agent to enter into contracts where no such authority previously existed.

Section 8. Effective Date

Mr. McCollum. Thank you.
[The prepared statement of Mr. McCollum follows:]

Testimony of the Honorable Bill McCollum

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

Before the Subcommittee on the Constitution of the Committee on the Judiciary

United States House of Representatives

February 2, 2012

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.

Mr. FRANKS. Thank you for your testimony.
Professor Widman, you are recognized for 5 minutes. Thank you.

TESTIMONY OF AMY WIDMAN, ASSISTANT PROFESSOR OF LAW, NORTHERN ILLINOIS UNIVERSITY COLLEGE OF LAW

Ms. WIDMAN. Mr. Chairman and Members of the Subcommittee, thank you for inviting me to speak today on enforcement of Federal law by State AG's. I am honored to be here today to share findings of my research in this area. My background, as you said, is Assistant Professor of Law at Northern Illinois University.

The role of State AG's in the context of their enforcement of State laws is hardly a Federal matter. As such, I would like to focus my testimony on Congress' role in State enforcement of Federal law.

I, along with Professor Cox at the University of Minnesota Law School, recently published the first study examining in detail the use by State attorneys general of concurrent enforcement authority in Federal consumer protection laws. Our research, which is published in the Cardozo Law Review, confirms that State AG's use their power to enforce the Federal law responsibly, Federal agencies work cooperatively with the States in this role, States have not contracted with private lawyers to enforce any Federal laws throughout the decades of such enforcement, and the presence of enforcement authority is a benefit to both citizens and the Federal agencies.

I would like to highlight for the Committee our findings which I think are important points on which to begin today's discussion.

At the outset, these enforcement grants are not new. Such enforcement grants began decades ago, have been passed by both Republican- and Democrat-controlled Congresses, and signed into law by every Administration since the mid-1970's.

We focused our research on the 16 consumer protection laws granting State AG's concurrent enforcement. Of those 16 laws we studied, three of them have now been incorporated into Dodd-Frank. So even though our study was conducted as Dodd-Frank was being signed into law, the results do directly speak to how State AG's have in the past and might continue to respond to at least part of the authority granted under Dodd-Frank.

Our findings were surprising in that they did not correlate with the statements put forth by critics of Federal grants of concurrent enforcement power.

First, such enforcement grants are used sparingly. In other words, fears of over-enforcement have not, in fact, played out during the decades of such concurrent enforcement.

Also, despite alleged predictions to the contrary, the number of claims has not risen in recent years, nor was there any indication of any trend toward more aggressive use.

More important for today's hearing, the court documents show that not one of these cases appeared to be brought in conjunction with private counsel.

We also found that Congress consistently inserted some limits to this authority. Dodd-Frank has similar limits, notably a notice provision allowing a Federal agency to intervene in any case filed by a State AG, remove such case to Federal court, and appeal any outcome. These types of restrictions, coupled with our data showing cooperation between State and Federal regulators, effectively preclude any risk that a State AG will enforce a law contrary to the

Federal agency interpretation. In fact, in passing Dodd-Frank, Congress had considered and rejected proposals to restrict such arrangements with outside counsel.

Another somewhat surprising finding from our study was that Federal agencies were actively and cooperatively involved in cases brought by State AG's. Our data showed clear communication and cooperation between the Federal and State enforcers, and the information and documents gathered as to cooperation tended to show no Federal-State conflict in interpretation of the laws.

Congressional grants of concurrent State enforcement powers have proven to be a benefit to both citizens and Federal agencies. It appears from the data that States approach their enforcement role as primarily a means to supplement and support Federal enforcement. It is also clear that Congress chose to grant State AG's these enforcement powers under these particular laws in order to increase enforcement. If Congress were to grant authority with one hand and limit it with the other through regulation of contingency fee agreements, which in turn could hypothetically mean that a State AG could not bring a viable enforcement action due to lack of resources, it would amount to an enforcement authority on paper but without any practical significance.

Given the clear benefits that such concurrent enforcement can provide for Congress, Federal agencies, and ultimately citizens, coupled with the lack of any instance of abuse, there is no reason for Congress to address such grants of enforcement authority now any differently than they have in the past.

I would like to point out here actually that from 1990 to 1999, 11 such statutes were passed with these Federal grants of authority to States to bring enforcement action, and from 2000 until the present, there have only been seven. So, in fact, the use of these grants has not increased in recent years.

Whether and how particular States respond to critics of contingency fee arrangements between State AG's and private counsel is a subject best handled within the realm of State governments.

Thank you for your time this afternoon, and I would be happy to answer any of your questions.

[The prepared statement of Ms. Widman follows:]

Testimony of

Amy Widman

Assistant Professor of Law

Northern Illinois University College of Law

Before the United States House of Representatives

House Judiciary Committee

Subcommittee on the Constitution

"Contingent Fees and Conflicts of Interest in State Attorney General Enforcement of Federal Law"

February 2, 2012

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to speak today on enforcement of federal law by state attorneys general. I am honored to be here today to share findings from my research and written work in this area. My background is Assistant Professor of Law at Northern Illinois University College of Law, where I teach torts, administrative law, and legislation.

I have written on the unique value of enforcement of federal law by state attorneys general and particularly the important gap that such enforcement can fill when federal agencies under-enforce federal law.[i]

Today's hearing examines Congress' role in the enforcement practices of state attorneys general, and I want to be clear that the circumstances as well as the history of state attorneys general working with private counsel differ whether the case at issue is based in state law or federal law.

But I believe we can start with the first principle that state attorney general enforcement is a necessary component to state law and, in instances where Congress has chosen to delegate that authority to enforce, federal law as well. Representing the citizens of their state against large-scale consumer abuses—whether consumer protection, environmental protection, curbing financial fraud, or other types of systemic injuries—is both expensive and requires a large staff, resources that many state AG offices are lacking. State attorneys general must be able to rely sometimes on outside counsel in order to marshal the manpower needed to rectify these types of abuses.

However, the role of state attorneys general in the context of their enforcement of state laws generally is hardly a federal matter. And, since there is no legislative proposal

currently before the House, I would like to focus my testimony first on Congress' role in state enforcement of federal law.

I, along with Professor Prentiss Cox at the University of Minnesota Law School, recently published the first study examining in detail the use by state attorneys general of concurrent enforcement authority in federal consumer protection laws. Our research, which is published in the Cardozo Law Review, confirms that state attorneys general use their power to enforce federal law responsibly, federal agencies often work cooperatively with the states in this role, states have not contracted with private lawyers to enforce federal laws throughout the three decades of such concurrent enforcement, and these grants of enforcement authority are a benefit to both citizens and the federal agencies. As we noted in the study:

> "How enforcement is ultimately authorized is both a practical and political issue. Especially in the area of consumer protection, where federal agencies oversee the federal laws and are subject to bureaucratic, budgetary, and ideological constraints, concurrent enforcement offers an expanded arsenal for public enforcement of these laws. Due to the power that inherently comes with enforcement authority, interested parties lobby for or against such legislative grants routinely. Yet legislators and scholars have no formal data or even a clear understanding of how and when such enforcement powers are used by states, either alone or in combination with other states. Nor is there reliable information on cooperation or disagreement between states and federal agencies with the concurrent enforcement power. The data we present are designed to add real-

world context to a debate that is often couched in rhetoric without grounding in the actual use of this authority."[ii]

It was directly in response to the recent increase in debates surrounding such grants of enforcement authority that we undertook to study exactly how and when such grants are used. I would like to highlight for the Committee our findings, which I think are important points at which to begin today's discussion of Congress' role in the federal enforcement practices of state attorneys general.[iii]

At the outset, these enforcement grants are not new. Twenty-four federal laws explicitly provide for concurrent federal and state public enforcement authority. Such enforcement grants began as early as 1976, have been passed by both Republican- and Democrat-controlled Congresses, and signed into law by every Administration since the mid-1970s.[iv]

We focused our research on the sixteen consumer protection laws granting state attorneys general concurrent enforcement.[v] We first identified all instances where a state attorney general acted under Congress' grant of authority and gathered all of the relevant litigation documents. We then organized the data according to the parties, the date filed, and the statute under which the claim was brought. Our goal was to investigate whether the claims made in legislative debates around the Consumer Protection and Safety Improvement Act of 2008 ("CPSIA") and the Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") of the potential for "over-enforcement" or "inconsistent interpretations of federal law" were in fact supported by the actual litigation data.[vi]

The data do not support the criticisms of state enforcement of federal law in the consumer protection arena

Our findings were surprising in that they did not correlate with the statements put forth by critics of federal grants of concurrent enforcement power:

1. First, such enforcement grants are used sparingly. In other words, critics' fears of over-enforcement have not in fact played out during the decades of such concurrent enforcement schemes. We identified 104 cases asserting 120 claims of violations of the sixteen consumer protection statutes with concurrent enforcement grants. Also, despite alleged predictions to the contrary, the number of claims has not risen in recent years, nor was there any indication of any trend toward more aggressive use.
2. More important for today's hearing, the court documents show that not one of these cases appeared to be brought in conjunction with private counsel.
3. We also found that Congress consistently inserted some limits to this authority. Such limits ranged from requiring notice to the federal agency before bringing suit to designating under which jurisdiction such suits could be filed to specifying the types of relief available to the states under the granted enforcement. In prescribing types of awards and limitations on state attorneys general, Congress had ample opportunity to debate whether states should be awarded legal fees when bringing such enforcement actions as well as whether there should be restrictions on arrangements with outside counsel. In fact, Congress directly debated both the role for attorneys general in enforcement as well as the possibility of regulating any relationship between private counsel and state attorneys general when passing both CPSIA and Dodd-Frank. In both instances, Congress chose not to restrict the use of contingency fees.

4. Contrary to assertions by critics of these grants that state attorneys general might over-enforce the particular federal laws of CPSIA and Dodd-Frank, there have been no state attorney actions yet at all under either statute.
5. Another somewhat surprising finding from our study was that federal agencies were actively and cooperatively involved in cases brought by state attorneys general. A federal agency participated in 20 out of the 104 cases brought under such enforcement grants. Federal participation was higher in multi-state suits than in actions by individual states (7 of the 12 multi-state cases also had federal participation). Our data showed a clear communication and cooperation between the federal and state enforcers and, although we did not evaluate the merits of the claims, the information and documents gathered as to cooperation tended to show no federal/state conflict in interpretation of the laws.

Congressional grants of concurrent state enforcement powers have proven to be a benefit to both citizens and federal agencies. It appears from the data that states approach their enforcement role as primarily a means to supplement and support federal enforcement.[vii] It is also clear that Congress chose to grant state attorneys general enforcement powers under these particular laws in order to increase enforcement. If Congress were to grant the authority with one hand and limit it with the other through regulation of contingency fee arrangements, which in turn would sometimes mean that state attorneys general could not bring a viable enforcement action due to lack of resources, it would amount to an enforcement authority on paper but without any practical significance.

There is another, often over-looked yet critical, role these grants play. There were a few instances in the data that suggest an underlying competition between the state and the federal agency at issue. A benefit of such competition, or even the possibility of such competition, is its ability to force accountability. Accountability for enforcement, especially in areas where Congress' action is understood to be a response to a pattern of under-enforcement, is crucial and is another point I believe should guide today's hearing.

The accountability-forcing role of state enforcement power may also explain the increase in debate surrounding CPSIA and Dodd-Frank. In other words, I suggest that rather than a concern that contingency fees generally might be the wrong choice of fee structure as a policy matter (an area where state governments are surely free to decide for themselves in the context of state enforcement), what might be underlying criticism of the contingency fee structure could in fact be a desire to limit accountability to the laws and regulations Congress has already prescribed and delegated.

When we talk about the role for state enforcement of federal law and, further, the ability of state attorneys general to contract with outside counsel under contingency fee arrangements, what we are really discussing is the ability of citizens to have laws enforced even against powerful industries. These industries may be capable of influencing enforcement decisions at the legislative or agency-level. But if Congress decides that a particular legislative aim is worthwhile, it does not make sense to frustrate the ability of the enforcement arms to fully realize those legislative directives. Any political opposition toward those directives should, as a normative matter, be directed at the law itself, and through a proper legislative process, rather than lobbying to hamstring its eventual enforcement.

Congress, as the branch of government charged with making legislative decisions, has various concerns when delegating administration to agencies. One such policy concern might rightfully be the importance of specifying multiple channels of enforcement so as to ensure the ultimate Congressional goals in creating the independent agency are carried out. As I wrote in the Yale Law & Policy Review:

> "Agency inaction, an understudied problem, is mostly immune to judicial review. Through inaction, an agency can neglect its [Congressional] public-interest mandate. The doctrine of nonreviewability governs which claims a court may hear, while the doctrine of standing governs which parties may bring suit. Both doctrines are used to bar judicial review of agency inaction. Where a state is given authority to bring an enforcement action under federal law, however, the issue of judicial review of agency inaction does not arise. Instead, the relevant policy concerns relate to federalism: Specifically, does harnessing the power of the states to aid, but also check, federal agencies result in more equitable enforcement and advance the agencies' [Congressional] public-interest mandate?"[viii]

Congress may make a choice that this check is one that it supports—indeed, one that it finds absolutely necessary as a condition of its delegation to an independent agency. Such possible benefits to the use of states in administrative law implementation is currently gathering support among scholars of administrative law and federalism. From our recent study on state enforcement of federal law:

> "Gillian Metzger [Columbia University School of Law] has tracked the rise of federalism in administrative law generally, most recently looking in detail at the states' role in reforming agency failures. While primarily focused on a judicially-

created special state role, Professor Metzger acknowledges the congressional delegations of state enforcement power and the ability of such enforcement powers to reform certain agency failures. Professor Metzger points to several justifications for a special state role in reforming agency failure, including 'the belief that states are likely to be particularly effective monitors of agencies and instigators of administrative change.' Echoing similar concerns of agency failure, Rachel Barkow [New York University School of Law] recently examined the history and design of the Consumer Product Safety Commission (CPSC) and the CFPB to determine new institutional design features that could buffer such independent consumer protection agencies against industry capture. Professor Barkow points to the benefits of state enforcement of federal law especially to address agency under-enforcement, which is a distinct element of industry capture. Catherine Sharkey [New York University School of Law] further acknowledges the unique role of the states in federal agency design, recommending in her recent draft guidance to the Administrative Conference of the United States that states be inserted into agency policy in meaningful ways, such as consultation and notification of both agency policy and enforcement decisions."[ix]

Because of the importance to Congress that its delegation be upheld in the spirit with which it was given, granting state AGs the power to enforce federal laws can offer another assurance to Congress that its legislative mandate will be fulfilled. As Representative John Dingell (D-MI) remarked during debate on an amendment to the CAN-SPAM Act that prohibited states from recovering litigation costs in enforcement

actions, "If we are serious about putting an end to spam, as I hope we are, then we should not be creating a disincentive to enforcing the law against it."[x]

State AG offices are often underfunded and understaffed. As a result, state AGs can and sometimes do work with outside counsel. Often these arrangements are based on the contingency fee model.

Switching focus now to the practice by state attorneys general of sometimes partnering with outside counsel in order to bring lawsuits under state law, this practice is also not particularly new or as widespread as some claim.[xi] Such practice has also been upheld by state legislatures and state courts, and can make good financial sense to state coffers. Private outside counsel are hired by state AGs on contingency at no cost to taxpayers.[xii] Contingency fee arrangements entered between state AGs and private counsel serve the same functions as lawyers' fee contracts used by injured victims. Private counsel working on contingency are not paid up front. In return, counsel is entitled to a percentage of the money collected if the case is successful. Attorneys who take cases on contingency take a risk—if the case is lost they are paid nothing. If successful, however, settlements and fees are paid by the wrongdoer, not the taxpayer, and any money awarded to the state is used to reimburse its citizens or the state, and sometimes put into public programs related to the lawsuit or funneled back into the attorney general's office.

Moreover, contingency fee arrangements do not mean that state AGs are allowing private lawyers to take control of state functions. As West Virginia's Chief Deputy Attorney General Fran Hughes put it, with contingency arrangements, "the attorney

general retains control of the case, all the documents are available under the state Freedom of Information Act, and taxpayers end up better off because the legal fees 'are paid by the companies that break the law."[xiii] It is precisely because the state AG retains ultimate control over the litigation that such arrangements have overwhelmingly been upheld by state courts.[xiv]

Contingency fee arrangements are vital to the ability of the state to bring certain types of large-scale lawsuits against systemic abuses perpetrated by well-funded industries. Tort reform groups have launched an aggressive attack against this practice precisely "[b]ecause they know that public officials don't have the resources to finance complicated law suits that often take years to work their way through the courts…If these groups get their way, Attorneys General around the country will be disarmed."[xv]

Without the ability of state AGs to prosecute these types of large consumer actions, there may be virtually no check on the behavior of some of our most powerful industries. Cornell University Law School professor Theodore Eisenberg and former Louisiana Attorney General Richard Ieyoub explained that these cases are critical because, as with the tobacco industry, "which resisted federal and state regulation through massive lobbying as well as lack of candor about the health risks of smoking…the modern consumer state, like the industrial state, includes groups seemingly beyond the reach of traditional state regulation…and too powerful to be subject to federal regulation."[xvi]

What is often ignored in discussions of state attorneys general working with private counsel is the ultimate goal of accountability such arrangements make possible. The additional resources provided by private counsel increase the state's ability to access documents and other critical information through the litigation discovery process.

Perhaps even more important, given that such arrangements are still not the majority of work performed by state AGs, the possibility that a state AG *could* enlist the resource support of outside counsel might be enough to function as a vital accountability-forcing mechanism.

According to Rhode Island Assistant AG Neil Kelly, contracting with private counsel allows a state attorney general to "level the playing field" against industry defendants with immensely greater resources. "At one point [in the state's lead paint litigation], there were somewhere on the order of 120 lawyers who made appearances on behalf of the defendants. In our office, we have 13 people in our government litigation unit, and 3 were assigned to this case," he said. "Really, it's about access to justice and about being able to pursue it in the end."[xvii]

Because of the very nature of the particular type of state litigation that lends itself toward these arrangements, the contingency fee, as opposed to an hourly rate, is the optimum choice. Contingency fees are used in situations where the risk is high and the costs are both unknown and possibly unavailable. When a state decides to take on a well-funded industry, with a well-funded defense team, there is a risk. Importantly, risk does not mean the case is weak, nor that the legal theories are particularly novel. The risk inheres in the imbalance of power between the two parties, which is not something that our civil justice system should use to decide cases.

Oklahoma Attorney General Edmondson, who contracted with outside counsel on a contingency fee basis in order to sue Tyson, a poultry production company, explains that many firms were initially interested in working with the state "but the number 'dwindled' when the firms learned they would pay their own expenses…The private law firms

already have spent $2 million preparing for a federal trial." Moreover, "It's a big risk [for the private law firms]," Edmondson added. "They knew it was going to be expensive, and we ended up with a consortium of lawyers who got together. In the end, they were the only ones who wanted the work."[xviii]

Critics of contingency fees have lobbied for state legislation that would, among other things, limit the amount of fee that might be awarded. Setting caps on contingent fees is problematic for the same reasons that the disparity in resources between the state and the corporate defendants is problematic in these cases. If the contingency fee is capped, yet the defense counsel is not capped, a similar strategy of out-funding the plaintiff side might take place. In situations such as those, enforcement again is merely an idea, rather than a realistic course of action.

One of the lawyers representing tobacco companies in the California cases clearly explains this strategy in a now-famous memo: "[t]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his."[xix]

Besides merely continuing the resource imbalance which led to the need for outside counsel in the first place, capping contingency fees in this context has the same result as it does in all other tort reform legislation: it chills access to private counsel, which in turn shuts down a valuable mechanism for the state attorneys general to represent the interests of their constituents against well-funded industries.[xx]

Finally, while contingency fee arrangements in some cases allow the state AG to

realize its goals of curbing abuses against state citizens and recouping state money—these are not the only important justifications for their use in enforcing state (or, hypothetically, federal) law. By divorcing fee agreements from direct legislative budgetary control, the merits of the suit are placed front and center for the ultimate political check, the state voters. As explained by Professor David Dana:

> "[I]t is not true that the AGs' use of contingency fees overrules or renders powerless the will of state legislators. Rather, the use of contingency fees simply changes the nature of the action that legislators must take to block parens patriae litigation. Where contingency fees are not an option, the legislature's refusal to move ahead or consider a litigation funding request by the AG's office might be sufficient to block the litigation. For legislators inclined to support the industry in question but worried about that industry's unpopularity, the failure to fund is an attractive option. The failure to fund generally would not require a vote, so it allows for ducking accountability, and it can always be justified on grounds of fiscal conservatism and frugality as opposed to obeisance to the industry's power as a campaign contributor. At the same time, the decision would please the cash-rich industry seeking to block the litigation. Where an AG can finance litigation through contingency fees, the legislators opposed to the litigation can still stop the litigation, but doing so may require very public, accountable action, such as passage of a bill, and there would be no cover justification of fiscal conservatism. Thus, the relevant question, in terms of "democracy," is whether it is more "democratic" to allow the legislature to de facto block the AGs' litigation efforts before they are really underway or, alternatively, to limit the legislature to

intervening after the AG has launched a contingency fee-funded litigation effort."[xxi]

The same political dynamics are present in the federal system as well. In this way, the ability of contingency fees to allow enforcement actions to go forward without use of taxpayer money also allows citizens to hold their legislators responsible for decisions on the ultimate issue at hand, whether or not enforcement is necessary, rather than burying that issue in terms of budget decisions. This seems especially relevant to situations where both citizens and federal legislators have granted enforcement powers to the state due to a policy decision that more enforcement is needed on a national scale.

Any abuses of the system can be dealt with by states

To the extent that there may be isolated instances of state AG and private counsel enforcement of state law which may appear at all improper to state legislatures or state citizens, the state government itself, and not Congress, is the body best equipped to deal with a particular situation. In fact, state attorneys general, responding to criticisms in the media and from their constituents, have themselves often been the agents of reform in their states when it comes to specifying how such contracts are chosen.[xxii]

Some state legislatures have passed laws governing such arrangements and other state legislatures have introduced laws that have failed to garner majority support. The range of state legislative choices in addressing this issue is obviously vast and dependent on the particulars of a given state's constitutional structure and court precedent, but for the purposes of today's hearing, fairly moot.

Ultimately, any particular contingency fee agreement entered into under state law that is alleged as being unfair can also be addressed in the state courts. And the

overwhelming majority of state courts that have addressed such agreements have upheld them.[xxiii] Although purely hypothetical at this point, any future contingency fee arrangement used in furtherance of federal law would in turn be subject to federal court review.

Conclusion

Contingency fee arrangements have not been used in the relatively rare instances when a state attorney general has exercised a grant of enforcement authority delegated to it by Congress. Given the clear benefits that such concurrent enforcement can provide for Congress, federal agencies, and ultimately, citizens, and given the growing support for a state role in restoring accountability to administrative law generally, there is no reason for Congress to address such concurrent grants of authority now any differently than they have in the past. Whether and how particular states respond to the critics of contingency fee arrangements between state attorneys general and private counsel is a subject best handled within the realm of state governments. Thank you for your time this afternoon, and I would be happy to answer any of your questions.

[i] Much of the substance of this testimony is based on my previous writings in this area. For those interested in reading more, these articles are: Amy Widman & Prentiss Cox, "State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws," 33 Cardozo L Rev. 53, 54 (2011); Amy Widman, "Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008," 29 Yale L & Poly Rev 165, 167 (2010); and Emily Gottlieb & Amy Widman, "State Attorneys General: The People's Champion," Center for Justice & Democracy (2008).

[ii] Amy Widman & Prentiss Cox, "State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws," 33 Cardozo L Rev. 53, 54 (2011).

[iii] All of the following summaries of the data are readily supported within Widman & Cox, supra n. 2. Readers interested in the hard numbers and visual representations of the data should refer to the article in its entirety.

[iv] Our study did not include the Clayton Act provision, as it covered antitrust matters, an area with a long and unique history of state and federal cooperation in enforcement. Id. at 67 ("The original concurrent enforcement authority in federal law concerned antitrust enforcement. State attorneys general frequently use this federal enforcement power to bring actions that are filed jointly by numerous states in federal court. These cases are part of a well-organized group of antitrust enforcement officials in state attorneys general offices who have a fairly long history of cooperating to bring such joint actions in federal courts. In fact, state attorney general engagement in antitrust work, like in the environmental area, occurred through a federal initiative to increase state antitrust enforcement of federal law. Some data has been collected about the number and type of these actions and scholars have examined the use of concurrent enforcement authority under the Clayton Act. State attorneys general do not have such a well-developed multi-state system for enforcement of the federal consumer protection laws that form the subject of this study.").

[v] Our study also did not track the enforcement under two recent grants pointed to in reference to this hearing. However, it appears that these two grants of enforcement authority fit the overall pattern suggested by our data. As to the 2009 amendments to the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-5(d), only 2 state attorneys general have filed suits under this enforcement grant and neither state action involved outside counsel. As for the Truth-In-Lending Act provisions amended in the 2009 Omnibus Appropriations Act, Pub. L. No. 111-8, Title VI, § 626 (2009), those provisions were subsequently folded into the Dodd-Frank legislation. To date, I am not aware of a state filing a lawsuit under this particular enforcement authority.

[vi] For more on the legislative history on this issue, see Widman & Cox, supra n. 2, at 58-61.

[vii] The results of our study are echoed in the sentiment expressed by a coalition of state AGS in their August 17, 2009, letter to Congress in support of the legislative establishment of a Consumer Financial Protection Bureau ("The state Attorneys General are well suited to assist with the development and enforcement of the CFPA's rules. Like the existing federal regulators, the new agency will never have enough resources to comprehensively reform the financial marketplace across the entire nation. Allowing the states to participate in enforcement of the federal rules will maximize government resources, improve accountability, fill unexpected gaps, and encourage innovation in approaches to emerging fraudulent practices.")

[viii] Amy Widman, "Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008," 29 Yale L & Poly Rev 165, 167 (2010).

[ix] Widman & Cox, supra n. 2, at 64-65

[x] Id. at 63

[xi] Leah Godesky, "State Attorney General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?" 42 Columbia Journal of Law and Social Problems 587, 588 (2009)("most of the [state] attorneys general who use them [contingency fees] do so sparingly.").

[xii] See Emily Gottlieb & Amy Widman, "State Attorneys General: The People's Champion," Center for Justice & Democracy (2008).

[xiii] See Stephanie Mencimer, "Corporate Enemy #1: State Attorneys General," *Mother Jones*, December 6, 2007.

[xiv] See generally Santa Clara, 74 Cal. Rptr. 3d at 842; Kinder v. Nixon, No. WD

56802, 2000 WL 684860 (Mo. Ct. App. May 30, 2000); State v. Hagerty, 580 N.W.2d 139 (N.D. 1998); State v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2008)("Although we are keenly aware of the gravity of the issue and of the fact that thoughtful and potent policy-based arguments have been made on both sides of the issue, in the end we have concluded that, in principle, there is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters. Indeed, it is our view that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society-results which otherwise might not have been attainable. However, due to the special duty of attorneys general to "seek justice" and their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations. In short, it is our view that the Attorney General is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil litigation, so long as the Office of Attorney General retains absolute and total control over all critical decision-making in any case in which such agreements have been entered into."); "Judge sides with Oklahoma on legal challenges to poultry suit," Associated Press, June 16, 2007

[xv] See Speech given by Ohio Attorney General Marc Dann before the City Club of Cleveland, June 29, 2007, found at http://www.legalnewsline.com/content/img/f197459/dannspeech.pdf.

[xvi] Richard P. Ieyoub & Theodore Eisenberg, "State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae," 74 Tul. L. Rev. 1859 (2000).

[xvii] Valerie Jablow, "Governments and tort 'reformers' clash over the hiring of private lawyers," *TRIAL* (August 2007).

[xviii] Robert J. Smith, "Top Firm Takes on Poultry Industry," *Arkansas Democrat-Gazette*, February 5, 2006.

[xix] See. e.g., Complaint, *Florida v. American Tobacco Co. et al.*, No. CL-1466A0 (Circuit Ct.,15th Circuit, Palm Beach. Fla., Apr. 18, 1995) (memorandum from J. Michael Jordan, legal counsel, RJR).

[xx] See, e.g., Statement of Joanne Doroshow, Executive Director, Center for Justice & Democracy, before the House Judiciary Committee, Jan. 20, 2011, at 21("Insurance defense attorney Robert Baker, who defended malpractice suits for more than 20 years, told Congress several years ago, "As a result of the caps on damages, most of the exceedingly competent plaintiff's lawyers in California simply will not handle a malpractice case … There are entire categories of cases that have been eliminated since malpractice reform was implemented in California.").

[xxi] David A. Dana, "Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee," 51 Depaul L Rev 315, 321 (2001).

[xxii] Ohio AG Marc Dann overhauled the process by which private counsel is retained to work with the state of Ohio and made the selection process more transparent. Attorneys General in California and New Jersey are also leading the way to create more public selection processes for choosing an outside counsel. See Amanda Bronstad, "AGs Review Hiring of Outside Counsel," *National Law Journal*, May 15, 2007.

[xxiii] See generally n. 13.

Mr. FRANKS. Thank you, Professor.

And now, Mr. Copland, we will recognize you for 5 minutes, sir.

TESTIMONY OF JAMES R. COPLAND, DIRECTOR AND SENIOR FELLOW, CENTER FOR LEGAL POLICY, MANHATTAN INSTITUTE FOR POLICY RESEARCH

Mr. COPLAND. Thank you, Mr. Chairman, Representative Conyers, and other Members of the Subcommittee, for your invitation to testify today.

In my research, I have found that contingent-fee litigation entered into between States and private counsel can raise significant conflicts of interest and other ethical concerns. And I fear that the Federal delegation of enforcement authority to State attorneys general might magnify these concerns and expand their scope.

Whenever there is concurrent enforcement authority held by State attorneys general over Federal law, there is a risk of enforcement overreach. Even if the Federal authorities and 49 out of the 50 State attorneys general agree that conduct did not run afoul of a Federal law, a single State AG could, in effect, dictate national regulation for the rest of the country.

These risks are substantially heightened when States are permitted to contract out enforcement to private lawyers on a contingent-fee basis. As the Chairman stated at the outset, in practice, these State lawsuits are contracted out, often conceived by private lawyers themselves who approach the State attorneys general with ideas, rather than having ideas that are generated and originated out of the State attorneys general's offices.

Moreover, whereas State officials, acting in the public interest, would often prefer to balance a variety of concerns, private attorneys who operate on contingent-fee agreements have a financial incentive to maximize money recoveries, an incentive that would be congruent with a client's interests in private actions but is frequently in tension with a State's public interest role.

And indeed, when you look at the awards and settlements in State-sponsored contingent-fee lawsuits, they often total in the millions and sometimes billions of dollars, as Representative Conyers was alluding to in his opening remarks. Essentially this amounts to a huge diversion of funds from State governments to private counsel.

Moreover, because these sums often go to the current and future campaign donors of the State attorneys general—and 43 of the State attorneys general are elected officials—these arrangements can create at least the appearance of a "pay to play" arrangement, an appearance of impropriety. That a number of States have no formal process whatsoever for overseeing private attorney contracts—and many State attorneys general have doled out work on a no-bid basis—heightens these concerns.

I note in my written comments in more detail the recent history of States contracting out with private counsel on a contingent-fee basis and how it has been rife with abuse, including in the examples of tobacco litigation, the Zyprexa litigation that the Representative referred to, and other litigation including the former Attorney General Richard Cordray's securities class action litigation in Ohio.

I would also like to point out that under Executive Order 13433, Federal agencies are prohibited from entering into contingent-fee arrangements with outside counsel, and that is the case even though the potential for abuse is significantly greater for State than for Federal prosecutors, given that most State AGs are elected officials subject to fund-raising pressures.

Among recent Federal legislation that creates this concurrent State enforcement authority, Dodd-Frank, in my opinion, is particularly prone to potential abuse, both due to the statute's scope, which basically includes the entire U.S. financial industry, and to the relatively untrammeled lack of supervision existing for the new Consumer Financial Protection Bureau. And this bureau can promulgate regulations that State AGs might, in turn, enforce. It is rather uniquely insulated from congressional oversight.

Now, my fellow witness, Amy Widman, as she noted, along with Prentiss Cox, has done a survey of 16 Federal consumer protection statutes and concluded that, "neither over-enforcement nor inconsistency with Federal regulators is apparent." And she has extended that argument in her written comments and again in testimony today, going further than she did in her academic work, saying that this "effectively precludes any risk."

I simply disagree that the conclusions drawn by Widman and Cox follow from their data. Many of the most significant laws they examined are extremely new, including Dodd-Frank, which has just been passed and was just being passed when they wrote their paper.

Moreover, they exclude from their data set the potential large-scale claims invoking Federal law in the antitrust and environmental arena, not to mention State-led actions invoking Federal securities law where these abuses have been rife. The laws they study instead generally involve uncontroversial provisions applying to a narrow set of businesses, namely telemarketers, abortion clinics, boxing promoters, pornographers, sports agents, and moving companies. So I don't think it is a clear analogy with what we are talking about, with something with the breadth of Dodd-Frank.

In conclusion, I just want to say that I think Congress should consider what I would deem a modest step, and that is the step of codifying Executive Order 13433 and making that Federal rule apply equally to any State concurrent enforcement authority of Federal law.

I welcome any questions.

[The prepared statement of Mr. Copland follows:]

Statement Before the House Committee on the Judiciary
Subcommittee on the Constitution

Hearing on
Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law

Abuses in State AG Contingent-Fee Litigation and Dangers for Federal Delegation of Enforcement Authority

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February 2, 2012

The views expressed here are the author's alone and do not necessarily reflect the views of the Manhattan Institute for Policy Research.

Abuses in State AG Contingent-Fee Litigation and Dangers for Federal Delegation of Enforcement Authority

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Chairman Franks, Ranking Member Nadler, and members of the Subcommittee, I would like to thank you for the invitation to testify today on a topic that has constituted a significant focus in my recent research: how contingent-fee litigation entered into between states and private counsel can raise significant conflicts of interest and other ethical concerns; and how federal delegation of enforcement authority to state attorneys general might magnify these concerns and expand their scope. I conclude that recent legislation granting state attorneys general concurrent authority to enforce federal rules, without limiting the ability to contract out such authority to private counsel on a contingent-fee basis, potentially compromises the effectiveness and integrity of federal law enforcement, warranting Congressional action.

At the outset, I would like to emphasize that my comments today reflect my own views but do not necessarily reflect the views of my employer, the Manhattan Institute for Policy Research.

Many of the views expressed herein are drawn, in whole or in part, from my prior research on this topic, including a recent Manhattan Institute report, *Trial Lawyers, Inc.: Attorneys General—A Report on the Alliance Between State AGs and the Plaintiffs' Bar 2011*, the full text of which is attached as an appendix to this prepared testimony. In addition, the Subcommittee should be aware of the extensive academic work on this topic done by my colleague Lester Brickman, a Manhattan Institute Visiting Scholar and a Professor of Law at Cardozo Law School at Yeshiva University; Professor Brickman's work was recently summarized and expanded in *Lawyer Barons: What Their Contingency Fees Really Cost America*, published in 2011 by the Cambridge University Press.

Introduction

Part I of this testimony: (A) explains the theoretical problems with state-sponsored litigation delegated by state attorneys general to private counsel on a contingent-fee basis, (B) examines briefly some of the abuses that have historically arisen in such litigation, and (C) explores legislative remedies enacted by several states in response to such concerns. Part II (A) explains why state assignment of litigation on a contingent-fee basis raises special concerns in the context of delegated federal law-enforcement authority, (B) explores the variation between Executive Branch limits on privately delegated enforcement and concurrent state enforcement authority, and (C) explores recent federal legislation that gives rise to new concerns in this area. Part III concludes with a call for modest federal action designed to prevent abuse.

I. State Delegation of Litigation to Private Counsel on a Contingent-Fee Basis

A. Theoretical Problems

With necessarily limited staffs, many state attorneys general may prefer to contract with outside counsel for various enforcement activities, to acquire particularized legal expertise that does not reside in house. But entering into such contracts on a contingent-fee basis raises a host of ethical quandaries that do not apply in private litigation, for which such financing is standard American practice. The principal rationale for such arrangements in private litigation—that individuals tend to lack the up-front funds to pay lawyers by the hour and the sophistication to evaluate the merits of a potential claim and to monitor attorneys' conduct of their lawsuit—do not apply to states, which have financial resources unavailable to individual claimants and the legal sophistication both to determine whether a case under consideration has a chance of prevailing and to oversee attorneys' strategic choices and expenses.

In practice, state lawsuits contracted out on a contingent-fee basis are often conceived by private lawyers who approach state attorneys general with ideas, rather than originating with state attorneys general themselves.[1] Even apart from such practice, delegating state law-enforcement authority through contingent-fee financing creates potential conflicts between the state's

[1] *See. e.g.*, John Beisner, et al., *Bounty Hunters on The Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*, INSTITUTE FOR LEGAL REFORM (May 26, 2005), *available at* www.instituteforlegalreform.com/get_ilr_doc.php?id=939.

obligation to serve the general welfare and the hired private attorneys' interests. Whereas state officials acting in the public interest would often prefer to balance a variety of concerns, private attorneys operating on contingent-fee agreements have a financial incentive to maximize money recoveries—an incentive that is congruent with clients' interest in private actions but frequently in tension with the state's public-interest role when acting *parens patriae*. Such problems are complicated by the fact that state AGs, in many cases, essentially relinquish authority over the course of litigation to the private lawyers hired.

Moreover, because state *parens patriae* actions typically afford the opportunity for outsized awards or settlements totaling in the millions or billions of dollars—in effect serving as giant class action lawsuits without the numerosity, commonality, and typicality requirements that would apply to any class certification under Federal Rule of Civil Procedure 23—the fees collected in such litigation will often be disproportionate to the effort expended and will represent a huge diversion of funds from state governments to private counsel. Further, because these sums often go to AGs' past and future campaign donors, such arrangements can create at least the appearance of pernicious "pay to play" arrangements. That a number of states have no formal process for overseeing private attorney contracts—many state attorneys general have doled out work on a no-bid basis—heightens these concerns.

B. History

Ethical concerns about state-sponsored litigation contracted to private attorneys on a contingent-fee basis are not merely theoretical; arrangements that at least create an appearance of impropriety have been commonplace in practice.

1. Tobacco litigation

The large-scale contracting of state litigation to private counsel dates to 1994, when Mississippi asbestos lawyer Richard "Dickie" Scruggs approached his state's attorney general, Mike Moore, with a plan to sue tobacco companies for Medicaid expenses stemming from smoking-related injuries.[2] The multistate settlements resolving tobacco litigation conceived by Scruggs and Moore highligbt the potential windfalls available to private attorneys at the expense of state treasuries: several states' settlements reimbursed lawyers at an effective rate of over $10,000 per

[2] *See* WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW 33-39 (2003).

hour—up to $92,000 in Texas—with over $30 billion going to private attorneys overall, and a reported $1.4 billion flowing to Scruggs individually.[3]

Many of the state attorneys general involved in the tobacco lawsuits received political contributions from the attorneys they hired. Scruggs contributed more money to Moore's campaign than any other donor and flew the attorney general to campaign stops in his private jet. Carla Stovall, then the attorney general of Kansas, hired her former firm, Entz & Chanay, as local counsel in the settlement negotiations—and, later, received sizable campaign donations from her former colleagues at the firm. In at least one case, the arrangements went beyond the mere appearance of corruption: former Texas attorney general Dan Morales pled guilty to federal corruption charges that were premised in part on his role in attempting to offer a contract worth hundreds of millions of dollars in contingency fees to a plaintiffs' bar ally.[4]

2. Pharmaceutical litigation

Various state attorneys general have sued pharmaceutical manufacturers and other medical companies under a wide array of theories, including, as in the tobacco lawsuits, the claim that certain business practices illegitimately inflated state Medicaid expenses.

Among these lawsuits are those alleging that pharmaceutical companies were "gouging" the state by recommending "average wholesale prices" (AWP) to pharmacists, which, according to the lawsuits, inflated the states' Medicaid bills. In one such case, former Alabama attorney general Troy King, a Republican, hired the Beasley Allen law firm to help lead a suit against 73 pharmaceutical companies. Some of these companies decided to settle in 2008 and 2009, with total settlement values reaching $124 million, and private attorneys being paid fees and expenses over $20 million.[5] Based on an examination of the political-donation money trail, the American Tort Reform Association (ATRA) determined that Beasley Allen and its lawyers donated over

[3] *See* Editorial, *$30,000 an Hour*, WALL ST. J., July 5, 2000, at A22; Symposium, *Excessive Legal Fees: Protecting Unsophisticated Consumers, Class Action Members, and Taxpayers*, No. 3 MANHATTAN INST. CONF. SERIES 65 (Manhattan Inst. Center for Legal Pol'y), *available at* http://www.manhattan-institute.org/html/mics3a.htm; Miriam Rozen & Brenda Jeffers, *Why Did Morales Exchange Good Judgment for the Good Life?*, TEXLAW, Oct. 27, 2003; *And the Winners Are...*, N.Y. LAW., Dec. 2, 2002, *available at* http://www.nylawyer.com/news/02/12/120202j.html.

[4] *See* Olson, *supra* note 2, at 30, 40-44; Pete Slover, *Morales' Plea May Help Friend's Fraud Case, Attorney Says*, DALLAS MORNING NEWS, July 19, 2003, *available at* http://www.dallasnews.com/sharedcontent/dallas/tsw/stories/071903dntexmorales.55d96.html.

[5] *See* ATRA, BEYOND REPROACH? FOSTERING INTEGRITY AND PUBLIC TRUST IN THE OFFICES OF STATE ATTORNEYS GENERALS 6 (2010), *available at* http://www.benys.org/inside/legalreform/2010/ATRA-Report-Beyond-Reproach.pdf.

$760,000 to eight separate political action committees from 2006 through 2010, and that these PACs in turn spent $240,000 to support King's campaign.[6]

Other state-sponsored pharmaceutical lawsuits contracted out on a contingent-fee basis alleged that companies improperly promoted off-label drug prescriptions, and thereby inflated state Medicaid costs. Among the more lucrative of such lawsuits were those targeting certain antipsychotic drugs, such as Eli Lilly's Zyprexa, a standard treatment for schizophrenia and bipolar disorder that is also commonly prescribed off-label to treat dementia in elderly patients.[7] The attorneys general of twelve states decided not to join a 2008 $62-million multistate settlement resolving Zyprexa claims, preferring instead to pursue litigation individually with private firms hired on contingent-fee contracts.[8]

The Texas firm Bailey Perrin Bailey handled the Zyprexa litigation for several states, including Mississippi and Arkansas. In the settlement resolving the Mississippi and Arkansas litigation, respectively, private lawyers including the Bailey Perrin firm received $3.7 million and $2.78 million. The firm and its lawyers also donated $75,000 to Mississippi attorney general Jim Hood's reelection campaign and $70,000 to the Arkansas Democratic Party.[9] In parallel litigation, $5.4 million from New Mexico's settlement of Zyprexa claims went to private lawyers hired on a contingent-fee basis, including Heard Robins Cloud & Lubel, which had contributed $55,000 to the election campaign of New Mexico attorney general Gary King.[10]

Some state AGs have themselves allocated the proceeds of privately contracted litigation, rather than returning such monies to state treasuries. For example, in resolving a 2001 suit alleging that Oxycontin manufacturer Purdue Pharma had engaged in "aggressive marketing" tactics, West Virginia attorney general Darrell McGraw disbursed the settlement proceeds to various charitable causes of his choosing, including $500,000 to the University of Charleston's pharmacy school, rather than directing the money to the state's general fund.[11] In response, the U.S.

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[6] *See id.* at 7.

[7] *See* Associated Press, *Eli Lilly Settles Zyprexa Lawsuit for $1.42 Billion,* MSNBC.COM (Jan. 15, 2009, 6:45 PM), http://www.msnbc.msn.com/id/28677805/#.ToJIReyxV98.

[8] Chris Rizzo, *Lilly Settles with 32 States Over Its Zyprexa Marketing,* LEGAL NEWSLINE.COM (Oct. 7, 2008, 10:51 AM), http://www.legalnewsline.com/news/216400-lilly-settles-with-32-states-over-its-zyprexa-marketing; John O'Brien, *Louisiana Settles with Eli Lilly, $4M for Private Attorneys,* LEGAL NEWSLINE.COM (Apr. 8, 2010, 4:52 PM), http://www.legalnewsline.com/news/226556-louisiana-settles-with-eli-lilly-4m-for-private-attorneys.

[9] *See* John O'Brien, *Lilly Settles Ark. Suit Brought by Bailey Firm,* LEGAL NEWSLINE.COM (Feb. 18, 2010, 12:34 PM), http://www.legalnewsline.com/news/225611-lilly-settles-ark.-suit-brought-by-bailey-firm.

[10] *See* ATRA, *supra* note 5, at 12.

[11] *See* Staff Reports, *Oxycontin Case Divides McGraw's Fans, Foes,* THE WEST VIRGINIA RECORD (Aug. 8, 2008, 8:30 AM), http://wvrecord.com/news/contentview.asp?c=214129; John O'Brien, *Louisiana Settles with Eli Lilly, $4M for private attorneys,* LEGAL NEWSLINE.COM (Apr. 8, 2010, 4:52 PM), http://www.legalnewsline.com/news/226556-louisiana-settles-with-eli-lilly-4m-for-private-attorneys.

Department of Health and Human Services withheld $2,732,968 that it claimed it was owed as its share of the proceeds by West Virginia's Department of Health and Human Resources—meaning that McGraw's lawsuit, in effect, led to a hole in his state's budget.[12] (Another $3 million of $10 million in settlement proceeds, under the terms of contingent-fee contracts, went to law firms that McGraw had hired to handle the case; four of these firms had given $47,500 to McGraw's campaigns.[13])

3. Securities litigation

As a result of the Private Securities Litigation Reform Act (PSLRA),[14] which substantially enables large investors to control federal securities lawsuits, public-employee pension funds have acquired significant authority over such litigation. Because some states vest state attorneys general with authority to file suit on behalf of such funds, and to contract with private law firms to manage such litigation, securities class action lawsuits have become another avenue for state-sponsored contingent-fee litigation that can create an appearance of impropriety.

For example, in 2007 and 2008, out-of-state plaintiffs' law firms donated $830,000 to the Ohio Democratic Party, led by the New York firms Kaplan Fox & Kilsheimer and Bernstein Litowitz Berger & Grossmann—both shareholder-class-action specialists—which contributed $270,000 and $175,000, respectively.[15] After assuming office in 2009, former Ohio attorney general Richard Cordray contracted with private law firms to bring at least six securities class action lawsuits on behalf of state pension funds.[16]

Between February 14 and February 17, 2006, Douglas McKeige and four other Bernstein Litowitz partners gave a combined $25,000 to Mississippi attorney general Jim Hood's reelection campaign.[17] In short order—between February 21 and March 14—Hood entered into

[12] *See* ATRA, *supra* note 5, at 16.

[13] *See* Staff Reports, *supra* note 11.

[14] Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995).

[15] *See* FollowTheMoney, *Kaplan, Fox & Kilsheimer*, http://www.followthemoney.org/database/topcontributor.phtml?u=10353&y=0&ines=0&ince=1&incf=0&incy=0 (last visited Sept. 29, 2011); FollowTheMoney, *Bernstein, Litowitz, Berger & Grossmann*, http://www.followthemoney.org/database/topcontributor.phtml?u=10353&y=0&ines=0&ince=1&incf=0&incy=0 (last visited Sept. 29, 2011).

[16] *See* Mark Maremont et al., *Trial Lawyers Contribute, Shareholder Suits Follow*, WALL ST. J., Feb 3, 2010, http://online.wsj.com/article/SB10001424052748703837004575013633550087098.html.

[17] FollowTheMoney, *Mississippi Attorney General Jim Hood*, http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?&c=94660&i=98&s=MS&y=2007

signed contracts hiring Bernstein Litowitz on a contingency-fee basis to lead securities-fraud lawsuits on behalf of Mississippi, against Converium Holding AG, the Delphi Corporation, and the Mills Corporation, with McKeige appointed as Mississippi's special assistant attorney general for the cases.[18]

C. State Reforms

Various state legislatures have reacted to perceived abuses in contingent-fee contracting between private lawyers and state attorneys general, or to the potential for abuses, by enacting legislation to limit such contracting authority. To this end, ten states have adopted versions of the Private Attorney Retention Sunshine Act, model legislation developed by the American Legislative Exchange Council (ALEC), an organization that advances conservative and free-market reforms to state legislators around the nation.[19] Such "attorney sunshine" bills have variously required forms of public disclosure of contracts entered into between the state attorney general and private attorneys; competitive bidding and legislative oversight, at least for contracts with expected fees or values above a certain threshold; and limitations on the fees that may be contracted for with private counsel, either on an aggregate or an effective hourly basis.

Apart from legislative action, some state attorneys general have unilaterally adopted practices designed to prevent abuse and the appearance of impropriety. For example, Maryland attorney general Doug Gansler deposits any litigation proceeds into the state's general fund unless otherwise directed by court order, and Washington state attorney general Rob McKenna regularly gives his legislature detailed reports on contingency-fee contracts.

II. The Risk of Abuse in State AG Enforcement of Federal Law

A. Theoretical Problems

&summary=0&so=a&filter[]=&filter[]=&filter[]=&filter[]=&filter[]=02/17/2006#sorttable (last visited Sept. 29, 2011), and similar sorted search results for February 14 and 16, 2006.

[18] The contract to sue Converium is available at http://www.yallpolitics.com/images/Bernstein-Converium.pdf; the contract to sue Delphi is available at http://www.yallpolitics.com/images/Bernstein-Delphi.pdf; and the contract to sue Mills is available at http://www.yallpolitics.com/images/Bernstein-Mills.pdf (last visited Sept. 29, 2011).

[19] *See* ALEC, *State Contracts with Private Attorneys A Call for Sunshine*, http://www.alec.org/AM/Template.cfm?Section=PARSA&Template=/CM/HTMLDisplay.cfm&ContentID=15289 (last visited October 4, 2011).

In addition to the issues that can arise from state-sponsored contingent-fee litigation more generally, significant problems could arise were such arrangements used to enforce federal law.

Certain problems arise whenever there is concurrent enforcement authority held by state attorneys general for federal laws that involve substantial interstate commerce, at least to the extent that federal authorities lack the authority to preempt or forestall state-led actions. Even if federal authorities and 49 of the 50 state attorneys general agree that private conduct with a substantial interstate-commerce nexus did not run afoul of a federal law, a single state AG could in effect dictate national regulation for the rest of the country. Moreover, different state AGs could invoke differing interpretations of the same federal law, in effect requiring national and international businesses subject to such laws to comply with a variety of legal regimes, potentially in conflict with one another.

In considering whether to delegate enforcement authority to state attorneys general, Congress needs to weigh and measure these potential pitfalls against the need for robust enforcement authority that may be beyond federal-agency capabilities. Granting state attorneys general concurrent enforcement authority for federal laws is supported by at least some academic commentary,[20] generally written by scholars who support more government regulation and who worry about agency capture by industry.[21]

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[20] *See, e.g.*, Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53 (2011); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of Enforcement Powers: A Case Study of the Consumer Product Safety Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165 (2010). *But see* Victor E. Schwartz & Christopher E. Appel, *The Plaintiffs' Bar's Covert Effort to Expand State Attorney General Federal Enforcement Power*, Wash. Legal Found. (July 10, 2009), http://www.wlf.org/Upload/legalstudies/legalbackgrounder/071009Schwartz_LB.pdf.

[21] Although much academic commentary assumes that federal regulations underdeter misconduct, such analyses typically give short shrift to the possibility that even though many regulatory schemes fail to capture all the bad behavior they are intended to prevent, total regulatory costs nevertheless exceed total regulatory benefits. In many instances, however, even if there are sizable Type I regulatory errors (*i.e.*, errors of underdeterrence), there are even larger Type II errors (*i.e.*, errors of overdeterrence).

In the context of pharmaceutical regulation by the Food and Drug Administration, my colleague Paul Howard and I survey the evidence and reach the conclusion that the cost of Type II errors exceeds that of Type I errors, and that state tort litigation in this area exacerbates this regulatory bias to act largely as a tax on the research, development, and production of pharmaceutical products, without corresponding social benefit. *See* James R. Copland & Paul Howard, *In the Wake of Wyeth v. Levine: Making the Case for FDA Preemption and Administrative Compensation*, MANHATTAN INST. FOR POL'Y RES, PROJECT FDA REP. NO. 1 11 (Mar. 2009), *available at* http://www.manhattan-institute.org/html/fda_01.htm.; *see also* James R. Copland, *Administrative Compensation for Pharmaceutical and Vaccine-Related Injuries*, 8 IND. HEALTH L. REV. 275, 279-81 (2011) ("In short, there is every reason to suspect that the FDA, both in theory and based on the empirical data, is more likely to commit Type II than Type I error. Thus, any additional regulatory regime that is likely to discourage the introduction of new drugs is also likely to have costs outweighing its benefits, given the Type-II-loaded FDA regulatory backdrop.").

Such commentary typically fails to consider adequately, if at all, the substantial potential for abuse in cases in which state AGs might contract out their enforcement authority to private counsel on a contingent-fee basis. That state enforcement actions might be so contracted out creates a profoundly more pronounced risk of enforcement overreach, particularly given the diversity of state-level rules governing such arrangements: while ten states have enacted legislative reforms to limit the potential for abuse, other states have a history of abuse, including ten— Georgia, Idaho, Iowa, Michigan, Mississippi, Nebraska, Rhode Island, Tennessee, Vermont, and West Virginia—which sufficiently lack transparency that they have received failing grades in their handling of outside-counsel contracts from the American Tort Reform Association.[22]

B. Variation Between Federal and State Practice

In addition to generating possible variance among the states in interpreting federal law, that state enforcement of federal law might be contracted out to private attorneys on a contingent-fee basis creates a clear gap between potential state practice and federal-enforcement norms. Executive Order 13433, issued by President Bush on May 16, 2007, and still in effect, prohibits federal agencies from contracting for legal services when "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."[23] Thus, state attorneys general that choose to enforce federal law under their concurrent jurisdiction by contracting with outside counsel on a contingent-fee basis would be entering into agreements that would be prohibited were the federal enforcement authorities to pursue the same perceived violation.

Apart from the fact that allowing states to contract with private outside counsel on a contingent-fee basis creates a disjunction between state and federal norms for enforcing federal regulations and laws, it is worth noting that contingent-fee arrangements with private counsel are arguably *more* troubling at the state than at the federal level. Unlike Justice Department staff, who are unelected professionals—and at the highest levels, subject to Senate confirmation—state attorneys general are mostly elected and dependent on campaign donors[24]—including plaintiffs' lawyers who might enter into such contracts—to fund their campaigns.

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[22] *See* ATRA, SETTING THE COURSE: ESTABLISHING BEST PRACTICES FOR ATTORNEY GENERAL USE OF OUTSIDE COUNSEL 6 (2010), http://www.agwatch.org/settingthecourse.pdf.

[23] Executive Order 13433, "Protecting American Taxpayers from Payment of Contingency Fees," Federal Register Vol. 72, No. 96 (May 18, 2007).

[24] In all, forty-three of the fifty state attorneys general are elected. Five states—Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming—have attorneys general appointed by the governor. The state legislature elects the attorney general in Maine, and the Supreme Court selects the attorney general in Tennessee.

C. Recent Federal Legislation with the Potential for Abuse

According to a 2011 law review article by Amy Widman and Prentiss Cox,[25] written in conjunction with the pro-plaintiffs'-lawyer Center for Justice and Democracy,[26] at least twenty-four federal laws contain specific grants of enforcement authority to states, including sixteen involving consumer protection.[27] Five of these have been enacted since 2008:

1. The Consumer Product Safety Improvement Act of 2008 (the "CPSIA"), Section 218;[28]
2. The American Recovery and Reinvestment Act of 2009 (the "stimulus bill"), Section 13410;[29]
3. The Omnibus Appropriations Act of 2009, Section 626(b); [30]
4. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Section 1042;[31] and
5. The Restore Online Shoppers' Confidence Act of 2010.[32]

None of these new statutes has contained language precluding state attorneys general from contracting out their enforcement authority to private counsel on a contingent-fee basis.

As the federal delegation of enforcement authority to state attorneys general has become more commonplace, criticism of such practice has also escalated.[33] Reacting to the inclusion of such a provision in the CPSIA, Senator Coburn remarked:

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[25] *See* Widman & Cox, *supra* note 20.

[26] For some of my prior exchanges with the Center for Justice and Democracy, see, *e.g.*, James Copland, *Lawyers' Lies and the Lying Lawyers Who Tell Them*, TOWNHALL.COM, Feb. 23, 2010, http://townhall.com/columnists/jamescopland/2010/02/23/lawyers_lies_and_the_lying_lawyers_who_tell_them; James R. Copland, *Doroshow's Huffington Puffery*, POINTOFLAW.COM, Feb. 24, 2010, http://www.pointoflaw.com/archives/2010/02/doroshows-huffi.php; *My TownHall.com Response to Doroshow*, POINTOFLAW.COM, Feb. 23, 2010, http://www.pointoflaw.com/archives/2010/02/my-townhallcom.php.

[27] *See* Widman & Cox, *supra* note 20, *at* 53-56.

[28] Pub. L. 110-314, Aug. 14, 2008, 122 Stat. 3060-62.

[29] H.R. 1 of the 111th Congress (giving the power to seek statutory damages and attorney fees for alleged violations of the 1996 Health Insurance Portability and Accountability Act (HIPAA) to state attorneys general).

[30] Pub. L. No. 111-8, Title VI, § 626 (2009) (authorizing state enforcement of FTC mortgage-related rules).

[31] Dodd-Frank Act, Pub. L. No. 111-203, § 1042, 124 Stat. 1376, 2012-14 (2010) (empowering state attorneys general to enforce any provision of the title and to enforce any regulation promulgated by the newly created Consumer Financial Protection Board).

[32] Pub. L. No. 111-345 (2010).

[33] *See, e.g.*, *Creating A Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation*: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 111th Cong. 76 (2009) (statement

> Overzealous state attorneys general will now have the authority and discretion to interpret safety regulations and could unilaterally on a whim rule a business is noncompliant and could then hand over expensive lawsuits to their trial lawyer's cronies who are notoriously close with state law enforcement officials. State attorneys, then, would be hard-pressed to deny politically active state trial lawyers to sue companies when the litigation will not cost the State a dime and could, in many cases, bring the attorney general positive publicity.[34]

There is a dearth of good empirical evidence that might shed light on whether such concerns have borne out in practice. In their survey of state enforcement actions to date of sixteen federal consumer-protection statutes—specifically excluding antitrust and environmental laws—Widman and Cox count 120 claims across 104 cases, 92 of which were brought by a single attorney general.[35] Nine of sixteen federal statutes studied were invoked in such claims, though over three-fourths of the total involved just two telemarketing statutes, the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994[36] and the Telephone Consumer Protection Act of 1991.[37]

Admitting that their "very small sample size makes it difficult to make many detailed conclusions from the data," Widman and Cox nevertheless conclude that "neither overenforcement nor inconsistency with federal regulators is apparent."[38] Moreover, while Widman and Cox "did not collect data on the use of outside counsel in our study," they claim that "it appeared to be infrequent or even non-existent on the face of the pleadings in the state enforcement cases."[39]

The conclusions drawn by Widman and Cox, however, do not follow from their data, given the limitations of their dataset, its exclusions, and the relative novelty of provisions authorizing concurrent enforcement authority that concern a substantial segment of the American economy, most notably Dodd-Frank.

Even assuming for the sake of argument that the 120 claims that Widman and Cox identify is a small number, many of the statutes they studied are extremely recent in origin and the remainder

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of Edward Yingling, President and CEO, Am. Bankers Ass'n) ("[T]he safety and soundness regulator will not be able to do its job if it has no authority over consumer laws, much less if that authority is held by not only the Federal consumer regulator, but every State regulator, legislature and attorney general as well."); Schwartz & Appel, *supra* note 20.

[34] 154 Cong. Rec. S7872 (Statement of Sen. Coburn).

[35] *See* Widman & Cox, *supra* note 20, *at* 72-73.

[36] 15 U.S.C. § 6103 (2006).

[37] 47 U.S.C. § 227(f) (2006).

[38] *See* Widman & Cox, *supra* note 20, *at* 81-82.

[39] *Id.* at 82.

generally involve uncontroversial provisions applying to a narrow set of less-than-deep-pocketed businesses that have a rather insubstantial presence in interstate commerce, namely telemarketers, abortion clinics,[40] boxing promoters,[41] pornographers,[42] sports agents,[43] and moving companies.[44] By excluding potential large-scale claims invoking federal law in the antitrust and environmental arena—not to mention state-led actions invoking federal securities law—the authors generated a dataset almost sure to limit the number of state claims and the potential for such claims to be outsourced to plaintiffs' law firms seeking large contingent-fee payouts. Concluding that there is little potential for abuse by referring to an absence of abuses under the statutes Widman and Cox study is little more than begging the question.

Furthermore, even for the statutes studied by Widman and Cox, the composition of state-level enforcement actions is concerning: in the Widman-Cox dataset, the attorney general of Illinois was involved in 34 individual cases and 41 cases including multistate actions, more than triple the number of any other state and over one-third of all total actions.[45] That the attorney general of a single state would be a principal enforcer of federal law for the other 49 states is at least *prima facie* troubling. Widman and Cox suggest that the record indicates a higher-than-usual degree of cooperation between the Illinois attorney general's office and federal officials,[46] but even if true for the narrow statutes studied, such a record is of little comfort when contemplating the scope of potential enforcement under more recent legislation, particularly Dodd-Frank. That Illinois in recent years has been rather well-known for hosting an aggressive plaintiffs' bar allied with elected state officials[47] reinforces such concerns.

Among the most recent federal legislation creating concurrent state enforcement authority, Dodd-Frank is unquestionably the most prone to potential abuse. To begin with, the statute's scope—comprising in essence the whole of the U.S. financial industry—is far broader than consumer-protection statutes with concurrent enforcement authority to date.

In addition, the federal regulations for which state attorneys general have concurrent enforcement authority under Dodd-Frank include those to be promulgated by the new Consumer

[40] Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248(c)(3) (2006).

[41] Professional Boxing Safety Act of 1996, 15 U.S.C. § 6309(c) (2006).

[42] Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. § 7706(f) (2006).

[43] The Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7804 (2006).

[44] Household Goods Mover Oversight Enforcement and Reform Act of 2005, 49 U.S.C. §§ 14710–14711 (2006).

[45] *See* Widman & Cox, *supra* note 20, *at* 74.

[46] *See id.* at 86.

[47] *See generally* CENTER FOR LEGAL POL'Y, MANHATTAN INST., TRIAL LAWYERS, INC.: ILLINOIS—A REPORT ON THE LAWSUIT INDUSTRY IN ILLINOIS, 2006, *available at* http://www.triallawyersinc.com/IL/il01.html.

Financial Protection Bureau ("CFPB"),[48] which is rather uniquely insulated from federal oversight: the agency's budget is funded through the Federal Reserve's *seignorage* outside of the congressional appropriations process and the agency is headed by a single director, serving five-year terms, who is not subject to removal by the President except for cause. Section 1031 of Dodd-Frank confers upon the CFPB authority to regulate acts and practices that are "abusive"—an expansion beyond traditional "unfair and deceptive"—which leaves open the possibility of broad regulations subject to multiple interpretations by state AGs. Complicating this concern, Dodd-Frank limits the ability of the CFPB to stop any state attorney enforcing a federal rule, regardless of whether the CFPB director disagrees with the state AG: under the statute, states' obligations to the CFPB are limited to notice, and the agency's legal authority is limited to the ability to remove litigation to federal court, be heard, and appeal.[49] Of additional concern is the fact that Richard Cordray, President Obama's current choice to head the agency through an asserted recess appointment, made extensive use of outside-counsel contingent-fee contracting during his recent service as Ohio's attorney general, as discussed *supra*.

In short, the significant assignment to state attorneys general of concurrent enforcement authority over several sweeping new federal laws, without an express prohibition on contracting with private counsel on a contingent-fee basis in such enforcement, is deeply troubling.

III. A Modest Proposal for Reform

The significant expansion of state attorneys' general's concurrent enforcement authority under new federal laws—including those with to-date-unknown regulations, such as Dodd-Frank—is of considerable concern, based on both the theoretical potential for abuse in contingent-fee contracts entered into between states and private counsel and the actual past practices of some state AGs in similar state-law litigation.

That state AGs might choose to enforce federal law by contracting out claims to private counsel on a contingent-fee basis creates the potential for the appearance of impropriety; exacerbates concerns about enforcement overreach, state-to-state variance in enforcement, and the inverted federalism through which a single state or a minority of states may impose regulatory rules nationwide; and generates a significant disconnect between federal and state enforcement norms, given the federal prohibition on outside contingent-fee counsel.

The concerns underlying Executive Order 13433—namely, "to ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States"—apply with no less force when enforcement authority is delegated to the states. Indeed,

[48] *See* Dodd-Frank Act, § 1042(a)(1), 1042(a)(2)(B).

[49] *See id.* at § 1042(b).

given the multiplicity of state-level enforcers and the fact that most state attorneys general are elected officials who raise money for their campaigns, the possibility that state attorneys general might contract with private counsel on a contingent-fee basis to enforce federal law generates *substantially magnified* risks of actions that are ineffective or lacking in integrity.

As such, Congress should consider the modest step of codifying Executive Order 13433 and extending its application to all state enforcement of federal law.

I welcome any questions.

APPENDIX

Trial Lawyers, Inc.: Attorneys General

A Report on the Alliance Between State AGs and the Plaintiffs' Bar 2011

A Message from the Director

Personal-injury lawyers, collectively, are among the biggest of big businesses, so much so that we at the Manhattan Institute have dubbed them "Trial Lawyers, Inc."[1] It's no secret that this group of attorneys is a powerful political force, exerting pressure on legislators and elected judges alike.[2] Few realize, however, just how in bed the litigation industry is with the very officials we entrust to enforce the law itself—the attorneys general of the various states. In fact, our state attorneys general have become not just allies of the trial bar but, in many cases, indispensable to developing Trial Lawyers, Inc.'s new lines of business. State AGs make possible the payment of windfall fees to their allies in the plaintiffs' bar, whose lawyers in turn gratefully fill the officials' campaign coffers with a share of their easily obtained cash. This report tells the story of the questionable bargain between the trial bar and the states' top law-enforcement officers.

In understanding just how and why state attorneys general work with the trial bar, it's important to realize that, unlike the U.S. attorney general, who is appointed by and accountable to the president, most state attorneys general are answerable to no higher official, having been chosen by the public at large.[3] The statewide campaigns they wage demand rich war chests. Moreover, winners often use these positions as stepping stones—as in the cases of Rhode Island senator Sheldon Whitehouse; New York's former governor, Eliot Spitzer; and Connecticut senator Richard Blumenthal[4] —requiring further financial support.

To subsidize their ambition, many state attorneys general have embraced the plaintiffs' bar over the past two decades in a symbiotic relationship that has enriched each at the expense of the general public and the rule of law. The large-scale trend dates back to 1994, when Mississippi trial lawyer Richard Scruggs reached out to his state's attorney general, Mike Moore, a fellow native of Scruggs's hometown of Pascagoula.[5] Scruggs's idea was to have Mississippi sue the

tobacco companies—and retain his own small firm to litigate the case. But that was not the nub of the problem, the dubious merits of the case aside. It lay in the fee arrangement: Scruggs and his firm would not get hourly fees, which would reflect the amount of work they performed—the normal arrangement between governments or companies and the private lawyers they retain. Instead, the Scruggs firm contracted for a share of the proceeds of the suit, through a contingency-fee arrangement roughly parallel to those regularly arranged between plaintiffs' lawyers and private individuals, who tend to lack the up-front funds to pay lawyers by the hour. States not only have such resources; they have the legal sophistication to determine whether a case under consideration has a chance of prevailing, unlike private citizens, who must turn to self-interested plaintiffs' lawyers to make that evaluation.

When the smoke cleared, all 50 state AGs signed on to some version of Scruggs's scheme.[6] The money involved was so great that even AGs from tobacco-growing states felt pressure to come on board, so as to ensure that their citizens got "their share" of the proceeds. And under the contingency-fee arrangement, a significant portion of each state's share went to the lawyers themselves. Scruggs himself took in over a billion dollars,[7] and though he is now serving time in federal prison for attempting to bribe a judge in an unrelated case,[8] the litigation business model that he developed lives on. Such arrangements undergird many of Trial Lawyers, Inc.'s most lucrative modern business lines, including litigation against pharmaceutical companies and shareholder lawsuits against companies for alleged securities fraud.

While the contracting out of the state's business to plaintiffs' lawyers for a share of the proceeds is the most obvious example of the unholy alliance between attorneys general and the trial bar, it is hardly the only way that lawyers benefit from friendly relations with states' top prosecutors. Even if not contracted out to private lawyers on a contingency basis, civil lawsuits and criminal investigations launched by state AGs can offer handsome rewards to lawyers involved in parallel litigation—as highlighted in the recent firestorm over the huge out-of-state campaign-donation inflow, from tort lawyers and others, received by the nation's longest-serving state attorney general, Tom Miller of Iowa, after he assumed control of multistate litigation over home foreclosures.[9] Even when state lawsuits ultimately lose, attorneys general can drive up settlement values for private lawsuits alleging wrongdoing by businesses by placing the state government's imprimatur on the legal theories floated. The ratchet effect that state AGs' investigations can bring to civil lawsuits was highlighted powerfully in the cooperation between Scruggs and current Mississippi attorney general Jim Hood, who, in the wake of Hurricane Katrina filed lawsuits attacking insurance companies for simply insisting on the terms of their policies.

Notwithstanding the unsavory alliance between trial lawyers and state AGs, the overall civil-litigation landscape in America continues to improve. In 2009, the most recent year for which data are available, tort costs—measured as the sum of all payments in tort litigation paid to individuals and attorneys, plus administrative costs—fell as a percentage of the economy for the sixth consecutive year.[10] In a series of major decisions, the U.S. Supreme Court recently enforced a federal law upholding mandatory arbitration clauses, found that another federal law preempted state litigation related to injuries attributed to childhood vaccines, found that a federal regulatory scheme preempted state-led "public-nuisance" lawsuits trying to force the adoption of policies intended to combat global warming, and made it more difficult to assert speculative employment-discrimination class actions.[11] In addition, many states have enacted varieties of tort reform that seem to be paying dividends.[12]

Unfortunately, the tort reform record as it relates to reining in abusive state attorneys general is rather limited. Only ten states have enacted reforms similar to the American Legislative Exchange Council's Private Attorney Retention Sunshine Act, which mandates public disclosure of contractual relationships between private lawyers and states.[13] The degree of transparency of such arrangements in ten other states—Georgia, Idaho, Iowa, Michigan, Mississippi, Nebraska, Rhode Island, Tennessee, Vermont, and West Virginia—received failing grades from the American Tort Reform Association.[14] Clearly, state attorneys general are the outliers in a broad landscape of reform. Here's hoping that this report can shed light on how state AGs work to further the trial bar's agenda and how thoughtful reforms might counteract such trends.

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JUSTICE FOR HIRE

The Origins of the Trial Bar's Cozy Relationship with State Attorneys General

By the 1990s, strong evidence had accumulated that smoking caused lung cancer, emphysema, and a host of other ailments.[15] A string of sterner and sterner warnings from the U.S surgeon general's office about cigarettes' potential health effects had by then rendered tobacco companies *personae non gratae*,[16] and the marketing efforts of cigarette manufacturers mostly generated public scorn, particularly those that seemed to target minors.

Because evidence had begun to emerge that the companies had known of smoking's dangers and addictiveness a good bit earlier than they'd let on,[17] tobacco companies began to look like easy targets for litigation. Yet winning verdicts proved elusive. Under general tort-law principles, individual tort claimants cannot seek compensation for injuries caused by inherently dangerous products[18] unless they were inadequately warned,[19] but federally mandated warning labels had existed on every pack of cigarettes since the 1960s.[20] Also, tobacco companies fiercely defended themselves against product liability actions, such that making individual smoking claims was an expensive and risky proposition. Furthermore, aggregating health-related tobacco claims into class actions was usually impossible, since every person's health profile and smoking history is so individual that those seeking to take legal action lack the "commonality" that members of class actions must have under Federal Rule of Civil Procedure 23.[21]

Scruggs Hatches a Plan

In the face of these constraints, in 1994 Mississippi asbestos lawyer Richard "Dickie" Scruggs approached his state's attorney general, Mike Moore, a fellow native of the small town of Pascagoula, with a scheme[22] that would transform the relationship between state AGs and the plaintiffs' bar. The legal theory concocted by Scruggs and Moore was ingenious: that tobacco companies were obliged to compensate the state for Medicaid expenses stemming from smoking-related injuries.[23] Their reasoning was dubious, given authoritative estimates that states' excise taxes on cigarettes exceeded the cost of treating smoking-related illnesses.[24] Like the legal theory that Moore and Scruggs advanced in the tobacco litigation, its fee arrangement was both novel and dubious. Rather than paying outside counsel an hourly rate, as state prosecutors' with insufficient internal manpower or expertise ordinarily do, Moore agreed to pay Scruggs and other retained private attorneys a *contingency fee*—allocating to the lawyers for hire a share of the

state's proceeds in any recovery. In the tobacco suits, several states' settlements reimbursed lawyers at an effective rate of over $10,000 per hour[25]—up to $92,000 in Texas[26] —with over $30 billion going to private attorneys overall, and a reported $1.4 billion flowing to Scruggs individually.[27] Such unprecedented sums represent simply the enormous size of the settlements, rather than the volume of work performed.

The opportunity to score political points by taking on a reviled industry and to fill strained state coffers made followers of top state prosecutors nationwide: eventually, all 50 states signed on to the litigation and entered into a settlement agreement with cigarette manufacturers.[28] (Some state attorneys general went so far as to lobby their legislators to change existing law so that they and their states could get in on the deal.)[29]

Some of the money that flowed to private lawyers found its way back into the campaign chests of the state AGs who had hired them. Scruggs made the arrangement worth Moore's while: he not only contributed more money to Moore's campaign than anyone else but flew the attorney general to campaign stops in his private jet.[30] Similar tales abounded in other states, which typically hired local counsel to join the Scruggs effort. The attorney general of Kansas at the time, Carla Stovall, hired her former firm, Entz & Chanay, as "local counsel" in the settlement negotiations—and, later, received sizable campaign donations from her local colleagues.[31] In one extreme case, former Texas attorney general Dan Morales pled guilty to federal corruption charges for his role in attempting to offer a contract worth hundreds of millions of dollars in contingency fees to a plaintiffs' bar ally and for converting campaign contributions to personal use.[32]

An Evolving Partnership

In the years since the tobacco litigation, contingency-fee arrangements of the sort concocted by Scruggs and Moore have come to define the relationship between state AGs and the trial bar. State attorneys general and their litigation-industry allies have continued to mine the Medicaid vein, outsourcing the people's work to the plaintiffs' bar in scores of health-care-related suits. The two financial collapses of the last decade or so have offered state AGs a host of opportunities to pursue related litigation and farm it out to Trial Lawyers, Inc., including shareholder lawsuits as well as others premised on various theories of consumer fraud. Though much of this litigation and enforcement has been at cross-purposes with federal schemes, some of it is actually being encouraged by federal lawmakers influenced by the trial bar to give state AGs the power to enforce new federal laws—in effect, creating a new revolving door of

litigation opportunity.

Moreover, state AGs have offered benefits to plaintiffs' attorneys beyond providing employment and the potential for huge fees. In moving against companies both civilly and criminally—as Eliot Spitzer did against the financial sector a decade ago, as Mississippi attorney general Jim Hood did against insurance companies in the wake of Hurricane Katrina, and as Iowa attorney general Tom Miller is doing against the mortgage industry today—AGs place the state's imprimatur on novel theories of corporate culpability and thus raise the value of legal claims.

The increasing value of state attorneys general to the private plaintiffs' bar is strikingly shown by the growth in Trial Lawyers, Inc.'s contributions to the Democratic Attorneys General Association (DAGA) over the last several electoral cycles. Some Republican AGs have also shown a willingness to farm out the state's work to private attorneys on a contingency-fee basis, among them former Alabama attorney general Troy King and former South Carolina attorney general Henry MeMaster; and present South Carolina attorney general Alan Wilson, Utah attorney general Mark Shurtleff, and Virginia attorney general Ken Cuccinelli. Trial Lawyers, Inc. plays no favorites beyond a devotion to its own bottom line.

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AN ETHICAL MORASS

The financing of private litigation by contingency fees—in which lawyers advance their legal services to plaintiffs in exchange for a share of any proceeds from a judgment or settlement—is standard American practice.[33] In the context of litigation on behalf of state governments, however, contracts paying private lawyers' contingency fees raise a host of ethical quandaries.

To begin with, in many instances the lawsuits do not originate with the state officials; rather, private attorneys approach state attorneys general with ideas.[34] Thus, private individuals with their own economic interests are influencing state law-enforcement priorities. Moreover, much of the litigation farmed out on a contingency-fee basis arises not from a violation of a clear legislative command but from some regulatory impulse culminating in a financial penalty more like a tax or a fine than a payment of damages to an injured party. In essence, policymaking is being usurped by state attorneys general at the behest of self-interested private parties.

Although they style themselves instruments of the state and its policy goals, firms that enter into contingency-fee arrangements actually create conflicts between their otherwise legitimate desire to maximize financial returns and the state's obligation to serve the general welfare, which often entails a balancing of interests and of short-term considerations against long-term ones. In many instances, state AGs essentially relinquish authority over the course of litigation to the private lawyers hired. The prospect of campaign contributions derived from the hard bargains that these private attorneys drive threatens to cloud at least some AGs' consciousness of the public interest.

Even when some portion of the proceeds is dedicated to programs serving the public welfare—such as the smoking-cessation campaigns funded by the tobacco settlements—it has often been state AGs, rather than the legislature, who have decided, sometimes in concert with their litigation-industry attorneys, how such monies are to be allocated. Too often, the "charities" funded through such settlements have tended to benefit state AGs' political careers—or the litigation interests of their outside counsel.[35]

Finally, the very size of the cases that AGs pursue with the help of plaintiffs' lawyers guarantees that the fees collected will be disproportionate to the effort expended and will represent a huge diversion of funds that belong with the government, if they belong anywhere. As it happens, these sums too often go to AGs' past and future campaign donors, creating at least the appearance of pernicious "pay to play" arrangements. Even so, a number of states have no formal process for overseeing private attorney contracts, and many state attorneys general have doled out work on a no-bid basis.[36]

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PHARMACEUTICALS
FEEDING FRENZY
State Attorney Generals Serve Up Lunch for the Mass-Tort Bar

The state AGs' strategy of enlisting contingency-fee lawyers to recoup states' Medicaid expenses was subsequently extended to suits against pharmaceutical makers, mainly alleging that the companies were looting Medicaid through "price gouging" or the "improper marketing" of drugs, including the promotion of "off-label" uses not formally approved by the U.S. Food and Drug Administration (see "What Are 'Off-Label' Drugs?" below).

McGraw Leads the Way

A pioneer in suing pharmaceutical companies, West Virginia attorney general Darrell McGraw and his allies in the litigation industry have taken full advantage of his state's lenient attitude toward no-bid contracting. First elected in 1992, McGraw has actively courted an army of "special assistant" attorneys general, arguably in defiance of a West Virginia court's holding that the state's AG is unauthorized by either statute or the state constitution to make such agreements and a similar rebuke by the state's auditor.[37]

McGraw's best known case of parceling out the state's business to Trial Lawyers, Inc., which spawned copycat cases nationwide, was filed in 2001 against Purdue Pharma, manufacturer of the painkiller Oxycontin, for allegedly "aggressive marketing" tactics that understated the drug's risks.[38] To handle the case, McGraw hired four private firms that had given $47,500 to his campaigns. These firms garnered $3 million in fees out of an ultimate $10 million settlement.[39] McGraw also took the extraordinary step of deciding on his own to disburse the remaining funds—to various charitable causes of his choosing, including $500,000 to the University of Charleston's pharmacy school[40]—rather than directing the money to the state's general fund. In response, the U.S. Department of Health and Human Services withheld $2,732,968 that it claimed it was owed as its share of the proceeds by West Virginia's Department of Health and Human Resources. McGraw's lawsuit, in short, led to a hole in his state's budget. [41]

Defying efforts to rein him in, McGraw has continued to farm out the state's mass-tort business against drug manufacturers to some of the very same law firms. One of them, Cook, Hall & Lampros, has led the state's suits against Merck-Medco and Bank of America.[42] The firm has given $20,000 to McGraw's campaigns since 2004 and is headed by the nephew by marriage of McGraw's brother.[43] Another firm, DiTrapano, Barrett & DiPiero, has handled suits against Abbott Laboratories, Geneva Pharmaceuticals, Warrick Pharmaceuticals, and Dey Pharma, among others.[44] The DiTrapano firm has given McGraw $37,800 since 2004, about 8 percent of the $500,000 raised by McGraw over that time span.[45]

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A JUDICIAL REBUKE

Although the Zyprexa lawsuit netted millions of dollars for aggressive state AGs and Trial Lawyers, Inc., it did not impress U.S. District Judge Jack Weinstein, of the Eastern District of New York, who oversaw much of the drug's mass-tort litigation. Weinstein is well known for crafting mass-tort settlements, dating back to his handling of the Agent Orange litigation in the 1980s.[46] When faced with Mississippi's Zyprexa suit, however, he not only tossed out all but one of Mississippi's claims; he also lambasted the attorneys for their legal theory:

> *If allowed to proceed in their entirety, the State's claims could result in serious harm or bankruptcy for this defendant and the pharmaceutical industry generally. For the legal system to be used for this slash-and-burn style of litigation would arguably constitute an abuse of the legal process. Constitutional, statutory and common law rights of those injured to seek relief from the courts must be recognized. But courts cannot be used as an engine of an industry's destruction.*[47]

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Antipsychotic Drug Prompts Crazy Litigation

Among the major pharmaceutical-industry targets of the state AGs—and Trial Lawyers, Inc.—is Eli Lilly, which markets the antipsychotic drug Zyprexa, a standard treatment for schizophrenia and bipolar disorder. A side effect of the drug can be weight gain and elevated blood sugar. In

private litigation alleging that Zyprexa caused individuals' diabetes and obesity, Lilly has already settled with more than 31,000 claimants—out of the 20 million people who had used the drug worldwide at the time of suit—for a minimum of $1.2 billion.[48]

State attorneys general went after Lilly using a different theory, namely, that in promoting Zyprexa as a treatment for dementia in elderly patients, an off-label use that had not been specifically approved by the FDA, Lilly was illegally inflating sales and thus state medical costs.[49]

In 2008, Lilly settled with 33 states, for $62 million, in litigation spearheaded by Illinois attorney general Lisa Madigan.[50] (Though Lilly admitted no wrongdoing, it did disclose the identity of individuals to whom it had paid consulting or promotional speaking fees.) But 12 states decided not to join the settlement and instead filed their own suits, which sought higher payments. These were often farmed out to Trial Lawyers, Inc. Among the states to have settled individual Zyprexa suits to date are:

- Utah, settling for $24 million, with $4 million to private attorneys hired by Attorney General Mark Shurtleff;
- West Virginia, settling for $22 million, with $6.75 million to private attorneys hired by Attorney General Darrell McGraw;
- Louisiana, settling for $20 million, with $4 million to private attorneys hired by then–attorney general Charles Foti;
- Mississippi, settling for $18.5 million, with $3.7 million to private attorneys hired by Attorney General Jim Hood;
- Arkansas, settling for $18.5 million, with $2.78 million to private attorneys hired by Attorney General Dustin McDaniel; and
- New Mexico, settling for $15.5 million, with $5.4 million to private attorneys hired by former attorney general Patricia Madrid.[51]

A leading law firm handling the Zyprexa litigation for several states, including Mississippi and Arkansas, was the Texas firm Bailey Perrin Bailey. The firm donated $75,000 to Mississippi attorney general Jim Hood's reelection campaign and $70,000 to the Arkansas Democratic Party.[54] Bailey Perrin was not involved in the Louisiana or New Mexico Zyprexa lawsuits. (The firms representing them did give generously to those states' attorneys general, however—including $55,000 given by Santa Fe law firm Heard Robins Cloud & Lubel to the election campaign of New Mexico attorney general Gary King.)[55] But Bailey Perrin did represent Louisiana and New Mexico in similar litigation involving Janssen Pharmaceuticals'

antipsychotic drug Risperdal, and the Louisiana lawsuit scored a $258 million verdict at trial.[56] (The firm donated $20,000 to a political action committee that supported Louisiana attorney general Buddy Caldwell's campaign, and $50,000 and $25,000 to current and former New Mexico attorneys general King and Madrid, respectively.[57] In addition, one of the firm's name lawyers, Kenneth Bailey, gave $85,000 to the Democratic Attorneys General Association, which spent hundreds of thousands backing both Caldwell's and King's candidacy.)[58]

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WHAT ARE "OFF-LABEL" DRUGS?

Off-label prescriptions of drugs are those written for the treatment of ailments or conditions beyond those for which the product was approved by the U.S. Food and Drug Administration. Only approved uses are listed on the label. However, drug companies may sell drugs for off-label uses, since all drugs approved for sale have undergone large-scale clinical trials that have established their safety.[52] (Possible side effects are also listed, but these can occur in patients who are taking the drugs for approved uses as well as in patients who are not.) Given the cost and time-consuming nature of the approval process, drug manufacturers typically do not submit new uses of already approved medications for full FDA review after the drug has been marketed and physicians have begun prescribing it for other ailments. But such uses are regularly studied in the medical literature, and such studies often reveal a broader spectrum of ailments against which the drug in question is effective than what the limited scope of clinical trials was able to reveal.[53] Off-label drug prescriptions constitute a large percentage of all pharmaceutical sales nationwide and likely contribute to public health.

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Alabama's Crimson Tide of Pharma Suits

Although Trial Lawyers, Inc.'s state attorney general allies are usually Democrats, litigation opportunity counts for more with the plaintiffs' bar than political affiliation does. Consider former Alabama attorney general Troy King, a Republican whose campaign profited handsomely from the political largesse of the influential law firm Beasley Allen—and hired the Montgomery firm to help lead a suit against 73 pharmaceutical companies over Medicaid reimbursements.[59]

The Alabama litigation, which is similar to that initiated by Kentucky attorney general Jack Conway and others, alleges that pharmaceutical companies have been "gouging" the state by recommending "average wholesale prices" (AWP) to pharmacists, which, the state argued, inflated its Medicaid bills. Like the Zyprexa lawsuits that actually went to trial, the Alabama AWP lawsuits that did so have not ultimately fared well. After juries awarded verdicts of $215 million, $33 million, and $80.9 million against AstraZeneca, Novartis, and GlaxoSmithKline, respectively, the companies pressed their cases on appeal, and the Alabama Supreme Court threw out these awards in their entirety.[60] According to the court, there was nothing preventing Alabama from negotiating its own pricing with the companies, and "[t]he State failed to produce substantial evidence that it reasonably relied on the misrepresentations and/or fraudulent suppression it alleged."[61]

Notwithstanding this rebuke, the private firms hired by Alabama stand to profit handsomely from the AWP litigation. Rather than risk trial, a number of the other companies that were sued decided to settle the case in 2008 for $35 million, with $8.7 million going to the law firms for fees and expenses; a subsequent settlement in 2009 with still more companies came to $89 million, with $12 million reserved for the private attorneys.[62]

The evidence seems to suggest that at least some of these attorneys were also generous donors on behalf of Troy King's political interests. Alabama's permissive campaign-finance disclosure rules allow donors to filter donations through political action committees, but the American Tort Reform Association (ATRA) examined the money trail in detail and concluded that Beasley Allen played a big role in bankrolling King: according to ATRA's report, Beasley Allen and its lawyers donated over $760,000 to eight separate PACs from 2006 through 2010, and these same PACs in turn gave $240,000 to support King's campaign.[63] (The Beasley Allen firm is led by longtime personal-injury kingpin Jere Beasley, who, before achieving national prominence as a plaintiffs' lawyer, served as the state's attorney general, under Governor George Wallace.)

SECURITIES AND FINANCE
CASHING IN
Securities Firms Pony Up Big Dollars to State Attorney General Allies

The bread and butter of Trial Lawyers, Inc.'s class-action line of business is lawsuits premised on "securities fraud," that is, suits alleging that a drop in a company's share price was caused by some fraud—usually, a failure to disclose material information to all shareholders—on the part of management. By stringing together thousands, or millions, of shareholders, lawyers are able to drive a hard bargain with companies, which pay hefty sums to make avaricious attorneys go away.

Unlike most tort litigation, shareholder suits originate under federal securities law. State-employee pension funds have emerged as the dominant force behind such suits, largely as an unintended consequence of a federal lawsuit reform passed in 1995, the Private Securities Litigation Reform Act (PSLRA) (see "Unintended Consequences Empower State Attorneys General" below). Because state attorneys general are, at least in some states, vested with authority to file suit on state-employee funds' behalf—and to select private attorneys to manage the cases—the PSLRA was, along with the tobacco litigation, a key driver of trial lawyer–attorney general collaboration at the beginning.

But even state AGs who do not or cannot instigate such suits on behalf of their state's pension funds can raise the value of private claims by taking aggressive actions purporting to enforce regulatory or criminal violations. Little wonder that securities-class-action plaintiffs' firms have become among the litigation industry's most enthusiastic sponsors of state attorney general campaigns.

The Class Action Cash Machine

When Marc Dann ran for attorney general of Ohio in 2006, his campaign promised plaintiffs' firms that he would bring new shareholder suits if elected.[64] Plaintiffs' firms responded enthusiastically, with out-of-state securities firms dropping almost $60,000 into his war chest.[65] Dann made good on his promise by contracting with some of the firms that contributed to his campaign. Those firms filed four securities lawsuits on behalf of Ohio's state pension funds.[66]

Dann resigned from office after only 18 months, having become embroiled in a sex scandal involving female staffers and campaign funds,[67] but his sue-happy policies intensified under his successor, Richard Cordray, who contracted with private law firms to bring at least six more securities class action lawsuits for state pension funds.[68] The Ohio legislature tried to block such behavior by passing a law forbidding any firm to enter into business dealings with the state if it had donated over $2,000 to the campaign of an official with oversight of the contract in question,[69] but the courts struck it down.[70] Even before that judicial action, however, Trial Lawyers, Inc. found a way around the law: plaintiffs' attorneys poured their money into the Ohio Democratic Party,[71] which, in turn, backed Cordray's candidacy. In 2007 and 2008, out-of-state plaintiffs' firms donated $830,000 to the Ohio Democratic Party, led by the New York firms Kaplan Fox & Kilsheimer and Bernstein Litowitz Berger & Grossmann—both shareholder-class-action specialists—which contributed $270,000 and $175,000, respectively.[72]

Far from limiting itself to Ohio, Bernstein Litowitz was also the biggest contributor to the DAGA from 2003 to 2010, giving $275,150 to bolster the cause of aspiring AGs (see graph). The firm also made direct contributions to state AG candidates, sometimes with eyebrow-raising timing. Between February 14 and February 17, 2006, Douglas McKeige and four other Bernstein Litowitz partners gave a combined $25,000 to Mississippi attorney general Jim Hood's reelection campaign.[77] In short order—between February 21 and March 14—Hood entered into signed contracts hiring Bernstein Litowitz on a contingency-fee basis to lead securities-fraud lawsuits on behalf of Mississippi, against Converium Holding AG, the Delphi Corporation, and the Mills Corporation, with McKeige appointed as Mississippi's special assistant attorney general for the cases.[78] On May 17 of the same year, Hood again contracted with Bernstein Litowitz on a contingency-fee basis to sue UnitedHealth Group for alleged securities fraud, this time deputizing firm partners Chad Johnson and Gerald Silk;[79] the following year, Johnson, Silk, and other Bernstein Litowitz partners donated thousands of dollars more to Hood's campaign.[80]

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UNINTENDED CONSEQUENCES EMPOWER STATE ATTORNEYS GENERAL

Scholars have long understood that the merits matter little in determining settlement values for securities-class-action lawsuits:[73] with sky-high discovery costs and potential damages in the

billions for large companies, securities claims almost always settle.[74] Moreover, in the 1980s and early 1990s, securities-law practice was known for its "race to the courthouse door": despite there being thousands upon thousands of shareholders in the companies being pursued, big securities plaintiffs' firms called upon the same stable of plaintiffs, with ready-made complaints, to try to file a case first and grab control of a lucrative business opportunity.[75] In 1995, Congress passed a law intended to clean up the securities-litigation business: the Private Securities Litigation Reform Act (PSLRA), which raised the threshold for pleading one's initial case and ended the race to the courthouse by ordering judges to determine the lead plaintiff not on the basis of who filed first but rather who was claiming to have lost the most.[76]

While the PSLRA did work to weed out the most abusive securities-class-action suits, it also created a new avenue for state AGs to work with their Trial Lawyers Inc. allies. By enabling the largest investors in the market to control litigation, the statute effectively gave states and their public-employee pension funds—the largest investors in the marketplace—the levers to control the litigation industry's lucrative securities-suit business line. And in states with cooperative rules, state AGs emerged as the real kingmakers.

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It's Not Only Fee-for-Hire

Even in states such as New York and California, in which it is officials other than the AG who decide whether to file suit on behalf of public-employee pension funds, securities law firms have an interest in supporting AGs who take an aggressive stance toward companies whose dealings might be the basis for a securities-fraud class-action suit. When former New York attorney general Eliot Spitzer launched an aggressive campaign against a virtual who's who of companies in the financial sector, he not only arrogated to himself broad national regulatory powers but also facilitated private securities-fraud class actions against the same firms that he was chasing under civil and criminal theories: merely by announcing an investigation with a fraud allegation, an attorney general like Spitzer drives down share prices—and generates a shareholder cause of action in the process.[84] (Spitzer's weapon of choice was New York's decades-old Martin Act, which predates the creation of the U.S. Securities and Exchange Commission and vests the attorney general with sweeping but, until Spitzer, unused authority over securities markets.)

The year 2010 offered up a case study in just this effect, when Iowa attorney general Tom Miller—the nation's longest-serving attorney general—launched an investigation of various

lenders and their housing foreclosure practices. On September 24, Miller announced an initial investigation of Ally Financial, an automobile mortgage lender affiliated with General Motors, followed within two weeks by expanded inquiries into Bank of America and JPMorgan Chase.85 Miller announced that he was coordinating his investigation with other state AGs, and on October 13, he formally assumed control of a 50-state AG action.[86] Between then and election day, the money poured in—with $338,223 in campaign contributions arriving in just three weeks.[87] From September 30 through the election, Miller received over $170,000 from out-of-state law firms—both plaintiffs' and defense firms[88]—more than twice his out-of-state lawyer support during the rest of the fund-raising cycle,[89] including donations from plaintiffs'-side securities law firms Kirby McInerney ($25,000), Kaplan Fox ($11,000), and Milberg LLP ($7,500), each of which is involved in its own private mortgage-related suit, although independently of the state AGs.[90]

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DELEGATES OF THE FEDS?

State attorney general actions, from securities suits to Eliot Spitzer's investigations to Tom Miller's multistate inquiry, have not only misallocated funds that are rightly either companies' or the public's; they have often seized effective regulatory control over a stream of national commerce. Invariably, the most aggressive attorneys general drive policy—and other AGs are impelled to sign up or face being excluded from negotiations, and thus a share of the settlement proceeds.

Unfortunately, such "reverse federalism" is now being pushed by the federal government itself, at least in the financial sector. In July 2011, the new Consumer Financial Protection Bureau (CFPB), created by the 2010 Dodd-Frank financial reform law, assumed control of national consumer financial regulations previously vested variously with the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Federal Trade Commission.[81] Dodd-Frank expressly gives state AGs power to enforce state laws against national banks, as well as to enforce federal laws against state and federally chartered banks alike.[82] State AGs will be, in essence, the new federal law's enforcement arm—a role sure to be strengthened under the leadership of President Obama's pick for CFPB director, Richard Cordray, who regularly contracted with private law firms to file securities-class-action suits when he was Ohio AG.[83]

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PUBLIC NUISANCE
MAKING A NUISANCE
State Attorneys General and Trial Lawyers, Inc. Twist an Ancient Doctrine into a New Profit Center

Not all the lawsuits launched by the Trial Lawyers, Inc.–state AG partnership allege fraud, as, for example, do those complaining of the padding of Medicaid bills or the failure of companies in which state pension funds have invested to disclose material information. Other classes of lawsuits allege instead a more direct tort—public nuisance—that, when they are successful, assign to state attorneys general and their allies in the plaintiffs' bar sweeping regulatory powers unbounded by statute.

The old tort of "public nuisance" is a relic of the criminal law dating from the era preceding the rise of the regulatory state (see below "An Ancient Writ Reborn"). A matter of strict liability—that is, not requiring a showing of fault—the public-nuisance tort was used in olden days to attack obstruction of public roads and waterways, limit noise and air pollution, and even go after public immorality. The scope of the tort is thus vast, applying in modern times to any "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience."[91]

The Emergence of Modern Public-Nuisance Litigation

Though the traditional public-nuisance tort was used injunctively—to halt a course of conduct, not to extract money damages—contemporary applications have sought to require private parties accused of creating a nuisance to pay for the public costs of "abating" the harm. An early example of such an application came in the 1980s, when a federal court allowed state and federal governments to bring a public-nuisance action against Hooker Chemical for the costs of abating toxic exposure in the "Love Canal" section of Niagara Falls, New York.[92] The large-scale Love Canal episode—which inspired federal Superfund legislation—would prove somewhat anomalous, however, since courts generally continued to reject public-nuisance claims that closely resembled product-liability actions initiated by parties other than the affected landowners.[93]

The public-nuisance doctrine resurfaced, however, during the Scruggs-Moore lawsuits against tobacco companies, which, in addition to seeking compensation for Medicaid costs, alleged that

tobacco companies had created a public nuisance. Since the suits settled, this contention has never been tested, except in one Texas case, where it failed.[94] Still, the financial and policy successes of the tobacco claims and the open-ended nature of public-nuisance law offered an avenue of opportunity to Trial Lawyers, Inc. and its political allies.

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AN ANCIENT WRIT REBORN

The long-standing "nuisance" tort, dating to 12th-century England,[95] originated as a criminal cause of action brought by the king of England to police infringements on his own lands or public roads or waterways.[96] In its earliest days, nuisance actions substituted for a general "police power" and came to include such disparate actions as public embezzlement, abetting a murderer, and selling impure foods.[97] For four centuries, nuisance remained a flexible doctrine—but enforceable only by the crown, making it nothing less than a crime.

In 1535, a nuisance tort enforceable by private parties was proposed in a judicial dissent,[98] and sometime later embraced by treatise makers. To bring a private right of action for damages, an individual had to suffer "special" or "particular" injuries different from those of the general public. Notably, nuisance law was linked to land and protected the rights of landowners against offensive odors, sounds, or emissions. Individual plaintiffs could recover only monetary damages, with the provision of injunctive relief left to government authorities, under the older public-nuisance doctrine.

As imported into early America, public-nuisance law was used by the state to protect public waterways and highways, but gradually came to be adopted as an early mechanism for policing establishments perceived as a threat to public morals—from taverns to gambling establishments to "houses of ill repute." With industrialization, public-nuisance law functioned as an early mechanism for controlling noise and air pollution.

The use of the nebulous and undefined public-nuisance tort waned with the rise of the regulatory state, as specific statutes targeted "public" offenses and supplanted ad hoc judicial remedies. By the time of the New Deal, public nuisance was such "a footnote"[99] in the law of tort that it was unmentioned in the 1939 version of the Restatement of Torts, published by the American Law

Institute (ALI), a widely heeded legal research and reform organization.[100]

Public nuisance was not, however, to be relegated to the dustbin of history. In the drafting of the Second Restatement of Torts of the 1960s, the particular scholars enlisted by the ALI didn't, in many instances, merely assess the current state of the law but looked into ways of expanding liability. In this atmosphere of receptivity, environmental activists—before the Environmental Protection Agency had been established—pressed the ALI's scholars to reinvigorate and expand public-nuisance law to encompass their concerns.[101]

Such activists were initially turned back by the principal drafter of the Restatement, William Prosser, who, despite being an advocate for expanded liability, thought that tort cases resting on a theory of public nuisance should be limited to circumstances giving rise to criminal charges.[102] But activists later persuaded the ALI's scholars to reconsider public-nuisance doctrine and eventually wound up with relatively broad and ambiguous language defining the tort as "an unreasonable interference with a right common to the general public" that "involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," regardless of whether such "public nuisance" was already prohibited by a regulation or statute.[103]

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The Broad Sweep of Modern Public Nuisance

After the tobacco litigation, the first major suits filed against product manufacturers under a public-nuisance theory were those against gun manufacturers. These cases were largely spearheaded by big-city mayors beyond the influence of the National Rifle Association, but they were also joined by attorneys general. The lawsuits claimed that gun manufacturers' sales practices abetted a black market in illegal guns that facilitated crime, but the theory was rejected by most, if not all, courts[104] before Congress nullified such claims with the Protection of Lawful Commerce in Arms Act of 2005.[105]

The next major wave of public-nuisance torts led by AGs involved "abatement costs" for removing paint containing lead. The first such suit was formulated by Motley Rice attorney Jack McConnell, a veteran of the tobacco litigation, in cooperation with the then–attorney general of

Rhode Island, Sheldon Whitehouse, and launched against private paint companies in 1999 (see below "Painting Influence"). Like similarly inspired cases, the claim was hollow: because lead can cause neurological damage in children, sale of lead-based paint was banned by federal law beginning in 1978; paint companies, of their own accord, had largely relegated its sale to specified outdoor use beginning in 1955. The Rhode Island Supreme Court ultimately threw out a $3 billion verdict against the paint companies, holding that public-nuisance theory was improperly applied, but similar lawsuits are still being litigated elsewhere; some state supreme courts—notably, Wisconsin's—have viewed lead-paint public-nuisance suits more favorably.

Public-nuisance suits have formed the basis of much of the states' modern environmental litigation[109]—not all involving contingency-fee contracts but all potentially benefiting Trial Lawyers, Inc. It remains to be seen just how indulgent courts will be toward environment-based public-nuisance theories. The U.S. Supreme Court struck a blow for common sense this summer when it unanimously threw out another multistate public-nuisance suit filed by state attorneys general against energy companies, which they sought to blame for global warming.[110] Nevertheless, the Court's rationale was rather narrow, holding merely that the federal Clean Air Act's designation of the Environmental Protection Agency as the body with the authority to regulate carbon emissions that may cause global warming displaced the federal common law of public nuisance. Whether courts will employ a similar logic to upset state common-law public-nuisance actions by finding that federal law preempts state actions in other areas of environmental concern awaits further litigation.

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PAINTING INFLUENCE

It is common practice for federal judges to be nominated to the bench based on political connections. But it is rare for such judges to be major donors and fund-raisers for political campaigns: since 1993, a total of 68 of President Obama's first 69 judicial nominees averaged $3,371 in total political contributions, based on Federal Election Commission records.[106] The 69th judicial nominee, Jack McConnell, is of a different mold. The former chairman of the Rhode Island Democratic Party, McConnell gave $253,660 to federal candidates directly (all but $2,000 to Democrats), and he and his family members gave over $550,000 to federal candidates and committees and a reported $700,000 to political campaigns overall.[107]

McConnell, you see, is a rich man, owing to his career as a plaintiffs' lawyer working hand in hand with state attorneys general. Over the next 15 years, McConnell stands to receive $2.5 million to $3.1 million annually from proceeds of the multistate tobacco settlement, in which he and his law partners in what is now the Motley Rice law firm teamed with Dickie Scruggs.[108] McConnell followed up his tobacco work with a similar, public-nuisance-based lawsuit on behalf of Rhode Island seeking to force paint companies, which had stopped producing paint containing lead in 1978, to pay for the costs of removing old paint from private homes around the state. The Rhode Island attorney general who hired McConnell to lead the lead-paint suit, Democrat Sheldon Whitehouse, was subsequently elected the state's U.S. senator. McConnell was confirmed to the federal bench in spring 2011.

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INSURANCE
CRIMINAL MISCHIEF
Trial Lawyers, Inc. Partners with State Attorneys General to Push Katrina Insurance Litigation

The litigation industry doesn't need contingency-fee arrangements to benefit from its closeness to legal officers. After 2005's Hurricane Katrina, the tobacco lawsuits' Dickie Scruggs teamed up with Mississippi's current attorney general, Jim Hood—whom we've already seen to be a big player in pharmaceutical and securities litigation—in what amounted to an attempt to strong-arm insurance companies handling residents' hurricane-injury claims. The litigation spurred by Katrina ultimately led to disbarment and federal prison for Scruggs and fellow Mississippi plaintiffs' lawyer Joey Langston, Hood's top two campaign contributors, who were caught up in a judicial bribery probe. Hood was not implicated in that scandal, but his partnership with Scruggs and other private counsels in the Katrina lawsuits nevertheless imperiled the rule of law itself.

Scruggs Fights to Rewrite Insurance Contracts

In the wake of Hurricane Katrina, many residents of the Gulf States faced a very difficult situation: their homes had been destroyed, but they lacked flood insurance to pay for the damage. Unlike claims stemming from death, car crashes, and medical injuries, which typically arise episodically, harms arising from floods and other large-scale natural catastrophes often arise simultaneously and in the hundreds or thousands, making insurance companies reluctant to write policies against them. Thus, standard homeowners' insurance contracts contain provisions excluding coverage for floods, which homeowners must acquire separately through a federally backed program.[111] Moreover, these standard contracts typically contain language specifying that damage caused by flooding and other natural events arising concurrently—such as wind—is excluded from coverage.[112]

Notwithstanding the "anti-concurrent" language, insurers were lenient in handling Katrina-related claims,[113] typically honoring claims in which the damage had more than one cause, even if one of those causes was flooding.[114] Insurers, however, were loath to honor policies with riders that explicitly excluded flood coverage in cases where flooding was the only cause of damage.[115] Soon enough, a coalition of lawyers dubbed the "Scruggs Katrina Group"[116] challenged the insurers' decisions not to pay homeowners with flood-damaged properties.

Scruggs Enlists Hood

As documents in subsequent and parallel litigation revealed (see below "'Whistleblower' Litigation Brings Mischief to Light"), there was a high degree of coordination between lawyers for the Scruggs Katrina Group and lawyers working for the Mississippi attorney general's office. According to deposition testimony by David Lee Harrell, Mississippi's deputy insurance commissioner, Scruggs met with officials in the state insurance department in December 2005 to discuss the Katrina litigation and told them that "he was going to work it the same way he and [former Mississippi attorney general] Mike Moore worked the tobacco case."[117] The insurance commissioner balked at cooperating with Scruggs, according to Harrell, but Scruggs found a more willing ally in Attorney General Hood. Incredibly, according to Harrell's deposition testimony, Hood had brought in former attorney general Moore to "assist" with the grand jury investigation, while Moore was simultaneously working with Scruggs on the civil litigation.[118] The AG's staff and Scruggs's attorneys well understood the intersection of Hood's criminal inquiries with the private litigation: according to a Scruggs Katrina Group engineer's notes of a conversation between Scruggs lawyers and Special Assistant Attorney General Courtney Schloemer, the parties "agreed that a criminal conviction could help civil cases.'"[121] Hood's office was so enmeshed with Scruggs's litigation team that U.S. District Judge William Acker derided Hood as "a so-called law enforcement official" and said that Mississippi's attorney general was such a "close confidant," "friend," and "associate" of Scruggs that Hood could be deemed a "co-conspirator" and "aider and abettor" in Scruggs's effort to avoid a judicial order to turn over documents.[122]

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"WHISTLEBLOWER" LITIGATION BRINGS MISCHIEF TO LIGHT

The evidence documenting the collaboration of Dickie Scruggs and Attorney General Jim Hood surfaced in litigation brought by E. A. Renfroe, an insurance adjuster hired by State Farm to evaluate Katrina claims. In June 2006, two sisters who worked for Renfroe, Kerri Rigsby and Cori Rigsby Moran, funneled documents to both Hood and the Scruggs Katrina Group, which launched a public-relations blitz hailing the sisters as "whistleblowers" and landing them in front of TV cameras, including those of the ABC news show 20/20. The sisters were subsequently hired by the Scruggs Katrina Group at annual salaries of $150,000 each.[119]

Nothing suggests that the Rigsby sisters' motives in coming forward were anything but pure, but when Renfroe sued its former workers for violating the terms of their employment contracts and

sought to obtain any documents that the sisters had turned over to Scruggs and Hood, the cooperation between Scruggs and Hood came to light. Scruggs actually drew a contempt citation from federal judge William Acker, who was overseeing the case, when he turned the documents over to Hood rather than Renfroe as Judge Acker had ordered; Hood was actively trying to block the release of all documents in question, by arguing that they were part of his criminal investigation.[120]

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A Semi-Happy Ending

At the end of the day, the Fifth Circuit U.S. Court of Appeals disagreed with Scruggs's theory and gave force to the insurance policies' exclusion of water damage.[123] But by that point, the damage was done: a multimillion-dollar public-relations barrage, early punitive damage awards (later reversed),[124] and, critically, the energetic assistance of the attorney general, having pressured insurers to settle with the Scruggs Katrina Group. Under pressure from both Scruggs and Hood, State Farm, the region's largest home insurer, initially offered to settle with both the private and government parties for $130 million.[125]

The fact that State Farm and other insurers were essentially vindicated in court and that homeowners with valid claims were overwhelmingly paid should not obscure the tens of millions of dollars in legal fees expended in litigation as well as the threat to contract law in Mississippi, even if it was eventually rebuffed. Dickie Scruggs was imprisoned and disbarred for his role in attempting to bribe a judge overseeing the dispute over contingency fees involved in the case. But Jim Hood remains the attorney general of Mississippi.

LEADERSHIP TEAM

Many of the "leaders" among the state attorneys general allied with Trial Lawyers, Inc. went on to higher office—among them California's Jerry Brown, New York's Eliot Spitzer, Rhode Island's Sheldon Whitehouse, and Connecticut's Richard Blumenthal. The following state AGs have shown themselves to be among the friendliest to the plaintiffs' bar's litigation agenda:

Buddy Caldwell

Louisiana

Although Louisiana technically prohibits the state from hiring outside counsel on a contingency-fee basis, Caldwell has continued the practice of his predecessor, Charles Foti, in seeking to work around (and persuade the legislature to reverse) the law; he parceled out the state's lawsuits over the Gulf oil spill to plaintiffs' firms that had collectively donated $145,000 to his campaign.[126]

Richard Cordray

Federal

Former Ohio AG Cordray, who aggressivley contracted out the state's securities-litigation business with law firms that had donated generously to his campaign, was recently nominated by President Obama to head the new Consumer Financial Protection Bureau. Under Dodd-Frank, Cordray will have substantial latitude to work with his former state AG cohorts and friends in the litigation industry.[127]

Jim Hood

Mississippi

Federal judge Jack Weinstein lambasted Hood for his "slash-and-burn style of litigation" against Eli Lilly. Hood also made news by hiring firms that had donated to his campaigns to file shareholder suits. And in the wake of Hurricane Katrina, he teamed with tobacco lawyer Richard Scruggs to challenge the enforceability of private contracts with insurers.[128]

Gary King

New Mexico

Continuing the path trod by his predecessor, Patricia Madrid, King retained the powerful Bailey Perrin firm of Texas on a no-bid, contingency-fee contract to sue Janssen Pharmaceuticals over the off-label marketing of its antipsychotic drug Risperdal—after receiving $50,000 from the firm for his election campaign.[129]

Darrell McGraw

West Virginia

Beginning with the multistate tobacco litigation brought by the states, McGraw has made a habit of offering no-bid contracts to plaintiffs' lawyers—in suits against pharmaceutical manufacturers, credit-card companies, and even, incredibly, his own state's Bureau of Employment Programs.[130]

Tom Miller

Iowa

America's longest-serving state attorney general, Miller has generally kept a fairly low profile—until recently, when he assumed control of the state lawsuits challenging mortgage foreclosures, after which fresh wads of out-of-state cash flowed into his campaign coffers.[131]

Mark Shurtleff

Utah

Utah's long-serving Republican attorney general has made it standard practice to hire plaintiffs' firms on a contingency-fee basis; the Steele & Biggs firm, which was awarded over $4 million in a settlement with Eli Lilly over its marketing of the drug Zyprexa, was hired by Shurtleff after donating $58,000 to his campaign—and hiring his daughter to work as a paralegal on Zyprexa cases.[132]

William Sorrell

Vermont

Shortly after he was appointed by then-governor Howard Dean in 1997, Sorrell pushed a bill through the legislature that retroactively changed Vermont law to allow the state to join suits against tobacco companies. Sorrell has subsequently signed his state on to misguided suits like the one targeting energy companies for global warming.[133]

CONCLUSION

A PATH FORWARD

Disclosure and Oversight a Key to Reforming Trial Lawyer–Attorney General Corruption

The giant windfall contingency fees given to lawyers in state-contracted mass-tort and class-action lawsuits have emerged as a major profit center for Trial Lawyers, Inc. Moreover, the fact that these windfall fees have often been subsequently diverted to the political campaigns of the state attorneys general who chose the lawyers and blessed the litigation creates at least an appearance of impropriety. To put a stop to such conflicts of interest and the appearance of self-dealing, states need to place restrictions on AGs' discretion in jobbing out state business, and they need to review laws that give AGs a putative basis for such overreaching. As the body with jurisdiction over interstate commerce, Congress also has a role to play in ensuring that state attorneys general are not perversely preempting federal regulatory schemes.

Reforming Contingency-Fee Contracts

In 2011, the legislatures of Arizona and Indiana curtailed the ability of their respective attorneys general to enter into contingency-fee arrangements with private attorneys, becoming the ninth and tenth states to adopt versions of the Private Attorney Retention Sunshine Act (see below "Sunshine Is the Best Disinfectant"), model legislation developed by the American Legislative Exchange Council (ALEC), an organization that advances conservative and free-market reforms to state legislators around the nation.[134] As the term "sunshine" would imply, Indiana's newly enacted law requires contingency-fee contracts to be posted on state websites within 15 days of execution and requires the AG to make a full formal report of such contracts to the legislature to facilitate lawmakers' oversight. ALEC's model bill also calls for competitive bidding. Other model laws, such as the Attorney General Transparency Code, developed by the American Tort Reform Association (ATRA),[135] and the State Attorney General Code of Conduct, developed by the U.S. Chamber of Commerce's Institute for Legal Reform (ILR),[136] join ALEC in calling for competitive bidding, full disclosure of contracts to the public at large, and legislative oversight. The ILR's Code of Conduct would limit contingency-fee arrangements to debt collection and other exercises of the state's proprietary, as distinct from police, power.

According to ATRA, which rates states that have enacted their own versions of the Sunshine Act as well as those that have not, none in the first group merited a grade lower than C.[137] Some

states without a Sunshine Act scored an A or a B (see chart), owing to general contracting rules or practices adopted by attorneys general without a legislative mandate. Maryland's attorney general, Doug Gansler, for instance, deposits any litigation proceeds in the state's general fund unless otherwise directed by court order—one reason his state earned a B without a Sunshine Act. ATRA gave Washington State a B as well, despite its lack of sunshine legislation, in part because of AG Rob McKenna's regular practice of giving the legislature detailed reports on contingency-fee contracts.

Non-Contingency-Fee Issues

While contingency-fee arrangements can both reflect and promote collusion between state attorneys general and the plaintiffs' bar, AGs also have other methods at hand for doing so. As noted in the ILR's Code of Conduct, state AGs can severely prejudice defendants' cases with their public statements. Former New York attorney general Eliot Spitzer tended to try cases in the media—driving down share values of the companies he was targeting, for example, and building public pressure on companies to settle. In general, state AGs should refrain from potentially prejudicial public comment.

Also, the threat of criminal process can be used to drive up the value of civil actions, much as Mississippi AG Jim Hood's threatened criminal actions drove up the value of private attorney Dickie Scruggs's civil actions in post-Katrina litigation. Generally, when other types of attorneys make criminal threats to obtain leverage in a civil proceeding, it is an ethical violation, and it should be deemed one for attorneys general as well.

Finally, state legislatures should examine the ways in which existing laws enable attorneys general to abuse their power. State consumer-fraud statutes, or open-ended vehicles such as New York's Martin Act,[139] which do not demand a showing that someone relied on the fraud being alleged and was injured by it—an essential feature of common-law fraud cases—unleash aggressive AGs and victimize defendants.[140] Many modern criminal statutes, in fact, dispense altogether with the traditional demand for a showing of criminal intent, or mens rea.[141] And in many states, corporations can be held liable, criminally as well as civilly, for the actions of lower-level employees, even if those employees acted contrary to express corporate policy.[142] Such erosions of time-honored, common-law due process should be reversed.

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SUNSHINE IS THE BEST DISINFECTANT

The Private Attorney Retention Sunshine Act,[138] developed by the American Legislative Exchange Council, calls for the following reforms of states' attorney-contracting practices:

Competitive Bidding. The Sunshine Act requires competitive bidding for contingency-fee contracts. Competitive-bidding requirements are generally more effective than prohibitions on contracting with firms that have donated to an AG's political campaign, since contributors can easily evade such prohibitions by funneling their contributions through political action committees like the Democratic Attorneys General Association. Some states enacting this provision have insisted on competitive bidding only above a certain dollar threshold; Arizona, for instance, calls for an open, competitive bidding process whenever fees are expected to exceed $100,000.

Legislative Oversight. The Sunshine Act requires legislative oversight over all contingency-fee contracts in which the expected contract value exceeds $1 million. This provision is intended to ensure that the legislature retains control over its public-policy prerogatives.

Fee Standards. The Sunshine Act asks attorneys expecting contingency fees to document the hours they worked. The contingency fee they ultimately receive may not exceed the total number of hours they worked on the matter multiplied by $1,000, the maximum putative hourly rate they may charge. This provision is intended to reestablish the relationship between effort and reward and to place limits on the size of windfall fees, which are essentially diversions of money intended to compensate taxpayers and the government. Some states have adopted the alternative of placing a dollar limit on total fees paid; Indiana, for instance, caps fees at 5 percent of damages awarded that exceed $25 million, with a maximum possible award of $50 million.

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Federal Concerns

While the primary responsibility for reforming abuses committed by state attorneys general rests

with the states themselves, Congress certainly has an interest in protecting interstate commerce, as well as its own legislative prerogatives, from the interference of state AGs, who sometimes launch multistate actions in combination with their peers. In appropriate circumstances, Congress should explicitly preempt state laws that allow state AGs to venture where Congress has a constitutional obligation to hold sway.

Moreover, Congress should resist the temptation to "deputize" state AGs to enforce federal law—as the recent Dodd-Frank reforms have done, to some extent. Although such measures can leverage federal resources, they sacrifice a federal perspective on matters of national import, substituting the parochial perspective of the most aggressive state AG, who is then able to set the enforcement standard for his brethren by reshaping national practices, as Spitzer did with the financial and insurance industries.

Still, modest progress continues. Three states have implemented sunshine reforms in just the last two years; and last year, under the leadership of North Carolina attorney general Roy Cooper, the National Association of Attorneys General instituted an educational program for its members on the pitfalls of contingency-fee arrangements. Still, 40 of the 50 states have failed to take affirmative legislative steps to curb abuses, and 36 states have received a D or an F grade on the transparency of their contracting processes.[143] As happened after the implosion of the dot-com bubble, the recent financial crisis could spur today's AGs to initiate lawsuits and make their mark. Although tort reform has generally succeeded in scaling back the worst abuses of our overly litigious society, many state AGs still show a reflexive allegiance to the plaintiffs' bar. Let's hope that the makers of laws in the various states—the legislatures—take further steps to rein in those who are supposed to be no more than the law's enforcers.

APPENDIX NOTES:

1. *See* CENTER FOR LEGAL POL'Y, MANHATTAN INST., TRIAL LAWYERS, INC.: A REPORT ON THE LAWSUIT INDUSTRY IN AMERICA 2003, *available at* http://www.triallawyersinc.com/html/part01.html.

2. *See* CENTER FOR LEGAL POL'Y, MANHATTAN INST., TRIAL LAWYERS, INC.: K STREET, A REPORT ON THE LITIGATION LOBBY 2010, *available at* http://www.triallawyersinc.com/kstreet/kstr01.html.

3. In all, forty-three of the fifty state attorneys general are elected. Five states—Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming—have attorneys general appointed by the governor. The state legislature elects the attorney general in Maine, and the Supreme Court selects the attorney general in Tennessee.

4. Whitehouse served as Rhode Island's attorney general from 1999 through 2003 and was elected to the U.S. Senate in 2006. Spitzer served as New York's attorney general from 1996 through 2006, when he was elected governor. Serving as Connecticut's attorney general from 1991 through 2011, Blumenthal was elected to the U.S. Senate in 2010.

5. *See generally* JERE NASH, ANDY TAGGART & JOHN GRISHAM, MISSISSIPPI POLITICS: THE STRUGGLE FOR POWER, 1976-2008 (2d ed. 2010).

6. *See* U.S. Congressional Research Service, Attorneys' Fees in the State Tobacco Litigation Cases (97-883A, Sept. 23, 1997), by John Contrubis, *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/97-883_A.pdf (analyzing the fee agreements that the states have contracted with private counsel to pursue tobacco litigation); *see also* Barry Meier & Jill Abramson, *Tobacco War's New Front: Lawyers Fight for Big Fees,* N.Y. TIMES, June 9, 1998, http://www.nytimes.com/1998/06/09/us/tobacco-war-s-new-front-lawyers-fight-for-big-fees.html ("Nationwide, about 100 law firms were retained, although just a handful of lawyers dominated the cases. For example, the law firm headed by Mr. Scruggs represented Mississippi, the first state to sue, and was later hired by 29 other states.").

7. *See* Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 499 (2000) ("Plaintiffs' lawyer Richard Scruggs, who made a reported $1 billion for coordinating some of the government tobacco suits") (citing Eddie Curran, *A Class Action Prescription*, MOBILE REG., Dec. 30, 1999, at 10A).

8. *See* Abha Bhattarai, *Class-Action Lawyer Gets 5 Years in Bribery Case,* N.Y. TIMES, June 28, 2008, http://www.nytimes.com/2008/06/28/business/28tort.html.

9. *See* Kevin McNellis, *Iowa Attorney General Tom Miller Campaign Contributions Rise When Foreclosure Investigation Begins,* STOPFroclosureFraud.com (April 20, 2011), http://stopforeclosurefraud.com/2011/04/21/iowa-attorney-general-tom-miller-campaign-contributions-rise-when-foreclosure-investigation-begins/.

10. *See* TOWERS WATSON, 2010 UPDATE ON U.S. TORT COST TRENDS 3, http://www.towerswatson.com/assets/pdf/3424/Towers-Watson-Tort-Report-1.pdf.

11. *See* AT&T v. Concepcion, 131 S. Ct. 1740 (2011) (applying Federal Arbitration Act to consumer class actions); Bruesewitz v. Wyeth, 131 S. Ct. 1068 (2011) (holding state common law design-defect claims preempted by National Childhood Vaccine Injury Act); AEP v. Connecticut, 131 S. Ct. 2527 (2011) (holding federal common law of public nuisance as applied to carbon emissions displaced by Clean Air Act); Wal-Mart v. Dukes, 131 S. Ct. 254 (2011) (rejecting class certification of gender-discrimination lawsuit filed on behalf of over one million female Wal-Mart employees).

12. *See generally* ATRA, Tort Reform Record (June 30, 2011), *available at* http://www.atra.org/files.cgi/8608_record_7-1-11.pdf; LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX: 2008 REPORT (Pacific Research Inst. 2008), *available at* http://www.pacificresearch.org/publications/id.3709/pub_detail.asp.

13. The states adopting these reforms are Arizona, Colorado, Connecticut, Florida, Indiana, Kansas, Minnesota, North Dakota, Texas, and Virginia. *See* ALEC, State Contracts with Private Attorneys: A Call for Sunshine, http://www.alec.org/AM/Template.cfm?Section=PARSA&Template=/CM/HTMLDisplay.cfm&ContentID=15289 (last visited Sept. 29, 2011).

14. *See* ATRA, SETTING THE COURSE: ESTABLISHING BEST PRACTICES FOR ATTORNEY GENERAL USE OF OUTSIDE COUNSEL 6 (2010), http://www.agwatch.org/settingthecourse.pdf.

15. *See generally* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS (1996) (comprehensive history of the American tobacco industry).

16. *See id.*

17. *See id.*

18. *See* Restatement (Second) Of Torts § 402A cmt. k (1965) (discussing "unavoidably unsafe products" which are "quite incapable of being made safe for their intended and ordinary use" pointing out that "such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous").

19. *See id.*

20. *See* Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 4, 79 Stat. 282–83 (1965) (codified as amended 15 U.S.C. §§ 1331-1340 (2006)).

21. Fed. R. Civ. P. 23.

22. *See* WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW 33-39 (2003).

23. *See id.*

24. *See* U.S. Congressional Research Service, Cigarette Taxes to Fund Health Care Reform: An Economic Analysis i (94214 E, Mar. 8, 1994), by Jane G. Gravelle & Dennis Zimmerman, *available at* http://www.forces.org/evidence/files/crs-tax.htm ("Midrange estimates based upon likely assumptions suggest net external costs from smoking in the range of 33 cents per pack in 1995 prices, an amount that by itself is too small to justify either current cigarette taxes or the proposed tax increase.").

25. *See* Editorial, *$30,000 an Hour*, WALL ST. J., July 5, 2000, at A22; Symposium, *Excessive Legal Fees: Protecting Unsophisticated Consumers, Class Action Members, and Taxpayers*, No. 3 MANHATTAN INST. CONF. SERIES 65 (Manhattan Inst. Center for Legal Pol'y), *available at* http://www.manhattan-institute.org/html/mics3a.htm.

26. *See* Miriam Rozen & Brenda Jeffers, *Why Did Morales Exchange Good Judgment for the Good Life?*, TEXLAW, Oct. 27, 2003.

27. *See And the Winners Are...*, N.Y. LAW., Dec. 2, 2002, *available at* http://www.nylawyer.com/news/02/12/120202j.html.

28. Why would the companies agree to settle? For starters, the sheer dollar figures involved—stringing together the smoking-related injuries of millions nationwide—were so large as to make a possible final judgment financially crippling. By settling the cases, the companies were able to smooth damages out into predictable future cost streams, Sarah Frier & Martin Z. Braun, *Tobacco Bonds Gain Favor on Potential Steady Income: Muni Credit*, Bloomberg, June 23, 2011, http://www.bloomberg.com/news/2011-06-23/tobacco-bonds-gain-favor-on-potential-steady-income-muni-credit.html, as well as to erect what economists call "barriers to entry" to future competitors—i.e., by agreeing to restrict marketing and distribution, the companies made it harder for other player to enter the market and erode their market share, *see* Ian Ayres, *Using Tort Settlements To Cartelize*, 34 Val. U. L. Rev. 595, 595-596 (2000), http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1363&context=vulr.

29. *See* Hans Bader, Competitive Enter. Inst., *The Nation's Top Ten Worst State Attorneys General* (2007), *available at* http://cei.org/pdf/5719.pdf; *see also* H. 749 (Sorrell's bill), *codified as* Vt. Stat. Ann. tit. 33, §§ 1904, 1911 (1998).

30. *See* Olson, *supra* note 22, at 40-44.

31. *See id.* at 30.

32. *See* Pete Slover, *Morales' Plea May Help Friend's Fraud Case, Attorney Says*, DALLAS MORNING NEWS, July 19, 2003, *available at* http://www.dallasnews.com/sharedcontent/dallas/tsw/stories/071903dntexmorales.55d96.html.

33. For a thorough discussion of contingency fees, see generally LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA (2011).

34. *See, e.g.*, John Beisner, et al., *Bounty Hunters on The Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*, INSTITUTE FOR LEGAL REFORM (May 26, 2005), *available at* www.instituteforlegalreform.com/get_ilr_doc.php?id=939.

35. For an example involving West Virginia's Darrell McGraw, see John O'Brien, *More OxyContin Money Dished Out by AG McGraw*, LEGALNEWSLINE.COM, Aug. 6, 2007, *at* http://www.legalnewsline.com/news/198887-more-oxycontin-money-dished-out-by-ag-mcgraw. For a broad critique of such so-called *cy pres* awards more generally in the class action context, see Theodore H. Frank, Cy Pres *Settlements*, FED. SOC'Y CLASS ACTION WATCH (Mar. 8, 2008), *available at* http://www.fed-soc.org/publications/pubid.887/pub_detail.asp.

36. *See* Beisner, *supra* note 34.

37. *See* McGraw v. American Tobacco Co., No. 94-C-1707 (W. Va. Cir. Ct. Nov. 29, 1995) (holding that a contingency-fee arrangement is an unlawful appropriation of state funds and that the attorney general has neither statutory or constitutional authority to retain such counsel); Phil Kabler, *Legislative Audit Questions Attorney General's Authority*, CHARLESTON GAZETTE, January 8, 2002, at 5A (citing "constitutional requirement that the Legislature appropriate state funds").

38. *See* Staff Reports, *Oxycontin Case Divides McGraw's Fans, Foes*, THE WEST VIRGINIA RECORD (Aug. 8, 2008, 8:30 AM), http://wvrecord.com/news/contentview.asp?c=214129.

39. *Id.*

40. *See* John O'Brien, *Feds Probing McGraw's Handling of Purdue Pharma Settlement*, LEGAL NEWSLINE.COM (May 17, 2007, 11:00 AM), http://www.legalnewsline.com/news/195289-feds-probing-mcgraws-handling-of-purdue-pharma-settlement.

41. *See* ATRA, BEYOND REPROACH? FOSTERING INTEGRITY AND PUBLIC TRUST IN THE OFFICES OF STATE ATTORNEYS GENERALS 16 (2010), *available at* http://www.benys.org/inside/legalreform/2010/ATRA-Report-Beyond-Reproach.pdf.

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See* William Glaberson, *Agent Orange, the Next Generation*, N.Y. TIMES, Aug. 8, 2004, http://www.nytimes.com/2004/08/08/nyregion/08orange.html?pagewanted=all.

47. O'Brien, *infra* note 50.

48. *See* Alex Berenson, *Lilly to Pay Up to $500 Million to Settle Claims*, N.Y. TIMES, Jan. 4, 2007, http://www.nytimes.com/2007/01/04/business/04end-drug.html?hp&ex=1167973200&en=32e3e3c2d5309a8b&ei=5094&partner=homepage; Chris Rizzo, *Lilly Settles with 32 States Over Its Zyprexa Marketing*, LEGAL NEWSLINE.COM (Oct. 7, 2008, 10:51 AM), http://www.legalnewsline.com/news/216400-lilly-settles-with-32-states-over-its-zyprexa-marketing.

49. *See* Associated Press, *Eli Lilly Settles Zyprexa Lawsuit for $1.42 Billion*, MSNBC.COM (Jan. 15, 2009, 6:45 PM), http://www.msnbc.msn.com/id/28677805/#.ToJlReyxV98.

50. *See* Rizzo, *supra* note 48; John O'Brien, *Louisiana Settles with Eli Lilly, $4M for private attorneys*, LEGAL NEWSLINE.COM (Apr. 8, 2010, 4:52 PM), http://www.legalnewsline.com/news/226556-louisiana-settles-with-eli-lilly-4m-for-private-attorneys.

51. *See* John O'Brien, *Lilly Settles Ark. Suit Brought by Bailey Firm*, LEGAL NEWSLINE.COM (Feb. 18, 2010, 12:34 PM), http://www.legalnewsline.com/news/225611-lilly-settles-ark.-suit-brought-by-bailey-firm.

52. Note, however, that the FDA sharply limits companies' ability to market drugs for off-label use and typically limits communications with doctors to the dissemination of peer-reviewed journal articles and textbook excerpts, as well as answering doctors' questions posed directly about such off-label use. *See, e.g.*,

Gregory Conko & Henry I. Miller, *Off Target on Off-Label Drugs*, FORBES.COM (May 12, 2010), *at* http://www.fed-soc.org/publications/pubid.887/pub_detail.asp.

53. *See id.*

54. *See* O'Brien, *supra* note 51.

55. *See* ATRA, *supra* note 41 at 12.

56. *See* John O'Brien, *La. Jury Reaches $258M Verdict in Risperdal Case*, LEGAL NEWSLINE.COM (Oct. 19 2010, 2:22 PM), http://www.legalnewsline.com/news/229180-la.-jury-reaches-258m-verdict-in-risperdal-case.

57. *See* ATRA, *supra* note 41 at 9, 12.

58. *See id.*

59. *See id.* at 6-7.

60. *See* John O'Brien, *Ala. SC Consolidates Two of King's AWP Lawsuits*, LEGAL NEWSLINE.COM (Oct. 4 2010, 4:48 PM), http://www.legalnewsline.com/news/228973-ala.-sc-consolidates-two-of-kings-awp-lawsuits.

61. *See* ATRA, *supra* note 41 at 6.

62. *See id.*

63. *See id.* at 7.

64. *See* Mark Maremont et al., *Trial Lawyers Contribute, Shareholder Suits Follow*, WALL ST. J., Feb 3, 2010, http://online.wsj.com/article/SB10001424052748703837004575013633550087098.html.

65. *See id.*

66. *See id.*

67. *See Financial Relationships Uncovered between Dann's Friends*, 10TV.COM (May 27, 2008, 5:11 PM) *available at* http://10tv.com/live/content/teninvestigates/stories/2008/05/27/dann_money.html.

68. *See* Maremont, *supra* note 64.

69. *See* H.B. 694, 126th Gen. Assem., Reg. Sess. (Ohio 2006).

70. *See* United Auto Workers v. Brunner, 182 Ohio App. 3d 1 (10th Dist. Franklin County 2009).

71. *See* Maremont, *supra* note 64.

72. *See* FollowTheMoney, *Kaplan, Fox & Kilsheimer*, http://www.followthemoney.org/database/topcontributor.phtml?u=10353&y=0&incs=0&ince=1&incf=0&incy=0 (last visited Sept. 29, 2011); FollowTheMoney, *Bernstein, Litowitz, Berger & Grossmann*, http://www.followthemoney.org/database/topcontributor.phtml?u=10353&y=0&incs=0&ince=1&incf=0&incy=0 (last visited Sept. 29, 2011).

73. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements of Securities Class Actions*, 43 STAN. L. REV. 497-598 (1991) ("According to the general assumption that outcomes reflect the parties' estimates of the strength of the case, the results in these cases should vary, reflecting differences in the merits. Instead, the cases settled at an apparent 'going rate' of approximately one quarter of the potential damages.").

74. *See* Bernadette Tansey, *Rise in Biotech Lawsuits Industry Blames Law Firms Looking for New Targets*, S.F. CHRON., Jan. 26, 2004, at E1.

75. *See* Article, *New York Attorney Sentenced in Kickback Scheme*, N.Y. TIMES, Nov. 1, 2008, *available at* http://www.nytimes.com/2008/02/11/business/worldbusiness/11iht-kickbacks.5.9951917.html (last visited Sept. 29, 2011) ("Before the Private Securities Litigation Reform Act of 1995, shareholder lawyers seeking to lead class action lawsuits against companies whose stock dropped needed simply to be the first to file. Law firms had stables of clients who owned shares in huge companies considered susceptible to such litigation.").

76. *See* Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995).

77. *See* Y'all Politics, *Hopkins Accuses Hood of Pay for Play - And Provides His Evidence*, http://www.yallpolitics.com/index.php/yp/post/5075/ (last visited Sept. 29, 2011); *see also* FollowTheMoney, *Mississippi Attorney General Jim Hood*, http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?&c=94660&i=98&s=MS&y=2007&summary=0&so=a&filter[]=&filter[]=&filter[]=&filter[]=&filter[]=02/17/2006#sorttable (last visited Sept. 29, 2011), and similar sorted search results for February 14 and 16, 2006.

78. The contract to sue Converium is *available at* http://www.yallpolitics.com/images/Bernstein-Converium.pdf; the contract to sue Delphi is available at http://www.yallpolitics.com/images/Bernstein-Delphi.pdf; and the contract to sue Mills is *available at* http://www.yallpolitics.com/images/Bernstein-Mills.pdf (last visited Sept. 29, 2011).

79. The contract to sue UnitedHealth is available at http://www.yallpolitics.com/images/Bernstein-United.pdf (last visited Sept. 29, 2011).

80. *See* FollowTheMoney, *Mississippi Attorney General Jim Hood*, http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?&c=94660&i=98&s=MS&y=2007&summary=0&so=a&filter[]=&filter[]=&filter[]=&filter[]=&filter[]=04/26/2007#sorttable

81. *See* Consumer Federation of America, *The Dodd-Frank Act: How States and the Consumer Financial Protection Bureau Will Work Together to Protect Consumers* (Nov. 2010), http://www.consumerfed.org/pdfs/Fact%20Sheet%20CFPB%20and%20the%20States%20Nov%202010%20_3__.pdf.

82. *See* The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 2012-2015 (2010) [hereinafter Dodd-Frank Act].

83. *See* Maremont, *supra* note 64.

84. *See* James R. Copland, *What's Wrong-And Right- With New York Criminal Law*, *in* ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY 173 (Paul Rosenzweig & Brian W. Walsh eds., 2010).

85. *See* FollowTheMoney, *Iowa Attorney General Tom Miller*, http://www.followthemoney.org/press/ReportView.phtml?r=447 (last visited Sept. 29, 2011).

86. *See id.*

87. *See id.*

88. Defense-side as well as plaintiffs'-side firms regularly contribute to state attorney general campaigns. While plaintiffs' firms benefit most obviously through the awarding of contingency fee cases by the state AGs, defense firms as well as plaintiffs' firms benefit from more state-AG-sponsored lawsuits and other legal actions, since they obviously bill their clients to defend against any cases either initiated or facilitated by activists. *See id.*

89. *See id.*

90. *See id.*

91. Restatement (Second) Of Torts § 821B (1979).

92. *See* United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 963-70 (W.D.N.Y. 1989).

93. *See, e.g.*, City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986) (asbestos); City of Bloomington v. Westinghouse Electric Corporation, 891 F.2d 611, 614 (7th Cir. 1989) (PCBs); E.S. Robbins Corporation v. Eastman Chemical Company, 912 F. Supp. 1476, 1493-94 (N.D. Ala. 1995) (chemicals).

94. *See* Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997).

95. *See* C. H. S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 3-5 (1949).

96. *See id.*

97. *See* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359, 362 (1990).

98. Y.B. Mich. 27 Hen. 8, 10 (1535).

99. Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 90 (1998).

100. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 806 (2003).

101. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 839 (2001).

102. *Cf.* William L. Prosser *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966).

103. Restatement (Second) Of Torts § 821B (1979).

104. *See* NRA-ILA, *Reckless Lawsuits: Courts Reject Lawsuits against Gun Makers*, (Oct. 16, 2003, 12:00AM), http://www.nraila.org/Issues/FactSheets/Read.aspx?id=37&issue=022.

105. *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-7903 (2006); 18 U.S.C. §§ 922, 924 (2006)).

106. *See* Lisa Rickard, *McConnell Is Unqualified to Sit on the Federal Bench in Rhode Island*, PROVIDENCE J., May 26, 2010, *available at* http://www.projo.com/opinion/contributors/content/CT_rickard26_05-26-10_R2IK31U_v15.3d4077c.html.

107. *See id.*; *see also* OpenSecrets, Donor Lookup, open secrets (http://www.opensecrets.org/indivs/search.php?capcode=vxwq8&name=mcconnell&employ=&cand=&state=RI&zip=&all=n&old=Y&c2008=N&c2010=N&c2012=N&sort=A&page=6) (last visited Sept. 29, 2011).

108. *See* Rickard, *supra* note 106.

109. *See* CENTER FOR LEGAL POL'Y, MANHATTAN INST., TRIAL LAWYERS, INC.: ENVIRONMENT: UNNATURAL CLAIMS: LITIGATION INDUSTRY USURPS REGULATORS' ROLE; CREDIBLE CLAIMS SUFFER (2010) *available at* http://www.triallawyersinc.com/updates/tli_update_environment_0810.html.

110. AEP v. Connecticut, 131 S. Ct. 2527.

111. *See* Mark Jewell, *Hurricane-Related Flood Damage? Few Homes Covered,* ASSOCIATED PRESS, Aug. 29, 2011, http://www.mainstreet.com/print/23581 ("Nearly all flood coverage is purchased through the government's National Flood Insurance Program. Homeowners, renters and business owners in about 21,000 communities nationwide are eligible to purchase federally backed flood policies, typically through private insurers that market the coverage."); *see also* Homeowners Insurance Guide, *A Homeowner's Guide to Natural Disasters: Preparing for a Flood*, http://homeownersinsuranceguide.flash.org/preparefloodhtm (last visited Sept. 29, 2011).

112. *See* John Egan, *Anti-concurrent Causation Clause: A 'Trap Door' in your Home Insurance Policy,* INSURANCEQUOTES.COM, http://www.insurancequotes.com/anti-concurrent-causation-clause/ (last visited Sept. 29, 2011) ("anti-concurrent causation clause – legal jargon tucked into many home insurance policies – could prevent you from being paid for both the wind and flood damage").

113. David Rossmiller, *George Dale: Insurance Companies Paid Katrina Money They Did Not Owe,* INSURANCE COVERAGE LAW BLOG (Nov. 7, 2007), http://www.insurancecoverageblog.com/archives/industry-developments-george-dale-insurance-companies-paid-katrina-money-they-did-not-owe.html

114. *See id.*

115. *See id.*

116. Joseph B. Treaster, *A Lawyer Like a Hurricane,* N.Y. TIMES, Mar. 16, 2007, http://www.nytimes.com/2007/03/16/business/16scruggs.html?pagewanted=print.

117. McIntosh v. State Farm, et al., Harrell Dep. 332:1-334:25 (S.D. Miss. 2007), *available at* http://www.insurancecoverageblog.com/Exh%20B%20to%20SF%20Opp%20to%20Hood%20Mtn%20to%20Clarify%2011062007.pdf.

118. *Id.*

119. *See* McIntosh v. State Farm, No. 1:06CV1080, 2008 WL 941640, at *1 (S.D. Miss. Apr. 04, 2008); *see also* Press Release, State Farm, *State Farm Asks Court to Dismiss False Claims Act Suit and to Hold Rigsby Sisters and Their Lawyers Accountable for Conspiracy and Fraud* (Apr. 8, 2008) *available at* http://www.statefarm.com/about/media/media_releases/rigsby.asp.

120. *See* John O'Brien, *Scruggs' contempt hearing set for Wednesday*, LEGAL NEWSLINE.COM (Mar. 19, 2007, 3:16 PM), http://www.legalnewsline.com/news/192155-scruggs-contempt-hearing-set-fo.

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122. *See* E.A. Renfroe & Co. v. Rigsby, et al., Case 2:06-cv-01752-WMA (N.D. Ala. 2007) (memorandum decision), *available at* http://www.insuranceecoverageblog.com/Acker%20memo%20re%20civil%20contempt.pdf.

123. *See* Tuepker v. State Farm, 507 F.3d 346(5th Cir. 2007) (No. 06-61075), http://caselaw.findlaw.com/us-5th-circuit/1018441.html; *see also* Broussard v. State Farm, 523 F.3d 618, (5th Cir. 2008) (No. 07-60443), http://scholar.google.com/scholar_case?case=6178719537054621648&hl=en&as_sdt=2&as_vis=1&oi=scholarr.

124. *See* Broussard v. State, 523 F.3d 618.

125. *See* Editorial, *Mississippi Justice*, WALL ST. J., Mar. 15, 2007, http://online.wsj.com/article/SB117392424758037698.html.

126. *See* ATRA, *supra* note 41, *at* 8-9.

127. *See* Maremont, *supra* note 64.

128.*See*, e.g., O'Brien, *supra* note 51; Y'all Politics, *supra* note 77; Editorial, *supra* note 125.

129.*See* ATRA, *supra* note 41, *at* 12.

130. *See id. at* 16-17.

131. *See* Follow the Money, *supra* note 85.

132. *See* John O'Brien, *Pharma Suit Has Familiar Ring for Utah AG*, LEGALNEWSLINE.COM, May 14, 2010, *at* http://www.legalnewsline.com/printer/article.asp?c=227136.

133. *See* H. 749, *codified* as Vt. Stat. Ann. tit. 33, §§ 1904, 1911 (1998).

134. *See* ALEC, *State Contracts with Private Attorneys A Call for Sunshine*, http://www.alec.org/AM/Template.cfm?Section=PARSA&Template=/CM/HTMLDisplay.cfm&ContentID=15289 (last visited October 4, 2011).

135. *See* ATRA, *supra* note 14.

136. *See* ILR, Summary of the State Attorney General Code of Conduct, www.instituteforlegalreform.com/get_ilr_doc.php?id=1068 (last visited October 4, 2011).

137. *See* ATRA, *supra* note 14.

138. ALEC, *Private Attorney Retention Sunshine Act*, Jan. 1, 2009, *available at* http://heartland.org/sites/default/files/sites/all/modules/custom/heartland_migration/files/pdfs/7857.pdf (last visited October 4, 2011) (text of the model legislation as drafted and proposed by ALEC).

139. Martin Act, N.Y. Gen. Bus. Law art. 23-A (McKinney 1996).

140. *See* Copland, *supra* note 84.

141. *See* Marie Gryphon, *It's a Crime: Flaws in Federal Statutes That Punish Standard Business Practice*, *in* MANHATTAN INST. FOR POL'Y RES, CIV. JUST. REP. NO. 12 (Dec. 2009), *available at* http://www.manhattan-institute.org/html/cjr_12.htm.

142. *See* James R. Copland, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*, *in* MANHATTAN INST. FOR POL'Y RES, CIV. JUST. REP. NO. 13 (Dec. 2010), *available at* http://www.manhattan-institute.org/html/cjr_13.htm.

143.*See* ATRA, *supra* note 14.

Mr. FRANKS. Well, thank you all very much.

I am going to go ahead and begin the questioning time by recognizing myself for 5 minutes.

Mr. McCollum, when you were Attorney General in Florida, did members of the plaintiffs bar reach out to you to, as it were, pitch new lawsuits for you to file?

Mr. MCCOLLUM. Chairman Franks, they did, not frequently, but there were a half a dozen times, especially with regard to a rather unique problem with Florida and several other States dealing with sales tax issues and whether or not Expedia, Travelocity, those online travel agencies, were paying their appropriate share of the State sales tax laws. We ultimately decided that we weren't going to go that route. We decided to try to go through and get a determination by the court separately on our own.

But I will say to you that there are cases that are big enough, and there conceivably can be for State attorneys general where you do have to go outside, and there are conceivably cases where it is appropriate to use a plaintiff's contingency fee law firm. But if you do, I think they ought to have the restraints that I mentioned to you in this model, Transparency in Private Attorney Contracting. I am not so sure that is the same when you are giving this authority to the States, though, from a Federal law, which of course is a different horse.

Mr. FRANKS. Well, when you give model legislation and the guidelines that you have put in the record here, that is especially helpful because it is experienced and kind of tried by the fires of reality.

So I want to ask a question that would be to all of you. In your experience and your concern here, you understand that the primary concern that we have here is to try to reach justice ultimately and to prevent overcharging the taxpayer for certain legal services and to try to make sure that we maintain prosecutorial independence so that fairness and absence of corruption in general is obtained.

So I would start with you, Mr. McCollum. If you could put just one provision that you think would improve the existing legislation, where we are now, what is one thing that you would do. I suppose it would have to reflect one of your primary concerns with our present circumstance, and if you could point that out and say here is my main concern and here is how to fix it, what would be just one thing that you would say would be your——

Mr. MCCOLLUM. Well, the one thing I would do would be to adopt this model system, which, by the way, is being promoted in the States. 10 States, including yours, have adopted a version of this, and the Chamber of Commerce is promoting it now around the country with State AG's to have them sponsor it in their legislatures. I think if you could adopt that onto the Federal laws saying in every case where there is a Federal right being given to enforce a Federal law to a State attorney general, that they have to abide by this. Of course, they can do as they wish on State laws, but this is the Federal laws.

And I would add one other thing while you have given me the forum here. One of the great problems that State attorneys general have, especially in smaller States, is they don't have the resources to be able to go after the bad guys. Any number of these Federal

laws are not being used now primarily not because people are going out and looking for contingency fee attorneys, but because they don't have the capability of getting damages with them, they aren't able to recover costs. And the appropriations in the States often don't appropriate the monies, and the way that consumer protection works is that you have got to be able to recover costs of your lawyers and the time and all and the Federal laws that give these enforcement powers don't have those provisions.

Mr. FRANKS. Thank you.

I suppose if it is being adopted in Arizona, that should end the debate, but maybe it doesn't. [Laughter.]

Mr. MCCOLLUM. If Arizona and Florida agree to this, it ought to be done.

Mr. FRANKS. I don't know how you could do better than that.

But, Professor Widman, what would be your main concern with the present circumstance, and what would be your answer to respond?

Ms. WIDMAN. Yes. To the extent that this is entirely hypothetical, as we have never had a contingency arrangement under the State enforcement of Federal law, I think transparency is important. But I would define transparency as open bidding, and I would think that it would need to be applied to both contingency and hourly. If transparency is the goal, it makes no sense to focus purely on contingency fees. And so that would be my answer there.

I would also like to say there are damages and costs in the statutes that we studied. So I would just like to clarify that, that some of the State enforcement grants that exist on the books right now do allow for damages and costs.

Mr. FRANKS. Thank you.

Mr. Copland, main concern and best response.

Mr. COPLAND. Well, my main concern is the potential for over-enforcement and the appearance of impropriety, the quality of Federal justice. Your interest here is really the Federal law. I agree with Professor Widman that it is not appropriate for Congress to come in and try to dictate to States how to contract when you are enforcing State law, but when it comes to Federal law, we have an executive order, 13433, which says you can't use contingent-fee contracts with outside counsel to enforce Federal law. I think the same rule ought to apply to the States. And that is probably where I depart from General McCollum. Rather than trying to implement what I think is a very good reform at the State level, I would just extend that executive order, make it a Federal statute, and apply it equally for all enforcement of Federal law. Obviously, if State AGs want to bring enforcement actions under State law using contingent-fee agreements, that is a different matter.

Mr. MCCOLLUM. If I might, Mr. Chairman. The Chamber of Commerce would concur with Mr. Copland on that point. I simply suggested an alternative that I think is viable and I know a lot about it because I wrote it.

Mr. FRANKS. Yes, sir.

Well, thank you all very much. Very compelling.

I would now recognize Mr. Quigley for 5 minutes.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Mr. McCollum, I appreciate your candor in your testimony referring to the letter sent to Senators Dodd and Shelby, Frank and Bachus, November 4, 2009. But quite honestly, I think the letter is a little stronger than you sort of refer to now. It says, permitting States who enforce their own consumer protection laws while setting minimal Federal standards for all will encourage interested States to, quote, test drive innovative, new ideas and concepts, just as many State attorneys general did with the Bank of America in crafting the Countrywide settlement so as to focus on loan modifications and again a concern that State innovation may lead to a multitude of conflicting State requirements is misplaced. History has shown only a small number of States typically take advantage of the opportunity to move beyond Federal protections. Finally, if uniformity is to be achieved by sacrificing consumer protection, the very real cost to consumers must be weighed in the balance. Weakened consumer protections and limited enforcement authority already have damaged many consumers. It is a lot stronger than, I would suggest with respect, the reference you make here.

I mean, I understand that it is not a perfect comparison. This is a pretty good signal that the States are doing okay with this.

Mr. MCCOLLUM. Well, Mr. Quigley, if I might respond. I would say to you that the primary concern of my fellow attorneys general and I at the time that letter was written was that the Dodd-Frank law was going through. It was going to happen. And we always are very protective of our powers, our rights, and we didn't want to be preempted. We didn't want things to be taken away from us.

Mr. QUIGLEY. What was the first word? You didn't want to be what?

Mr. MCCOLLUM. And we preferred concurrence which would be giving us the equal power at least to share in this because we saw that with the new agency being created, there was going to be this huge Federal role. And we currently, at that time, were doing much of the same things that this new law is doing. It simply federalized it. So it was a better choice to not take those powers away.

Mr. QUIGLEY. Was it the problem of outsourcing at all? I mean, you have outsourced. You outsource services on a non-bid basis.

Mr. MCCOLLUM. Well, let me say to you that every State attorney general is different, and their rules are different. In Florida, we were a fairly large State, 400 lawyers. We did almost everything in-house. I think I only hired—and frankly, I only continued the contract of one outside counsel, and that was for a fee basis rather than the contingency fee. But there are smaller States that have to join other States. There are multi-State actions. There is a cooperative effort with the Justice Department. I wouldn't wish to segregate those out and tell you otherwise.

Mr. QUIGLEY. Well, but respectfully isn't that what you are asking us to do, sir? Isn't it asking us to sort of uniformly say to the States this is the way we are going—a one size fits all, given that their financial capabilities, their levels of expertise, their abilities frankly are quite disparate?

Mr. MCCOLLUM. Well, if I might say so, you certainly can argue that point with regard to whether or not you impose the Federal rule that Mr. Copland talked about, which does prohibit private attorney contracting for contingency fee. I am suggesting to you that

assuming you don't want to go that far and don't want to do that to the States—you have every right to do that because that is what the Federal rule is for Federal law with Federal agencies, and you are talking about enforcing Federal law here.

But if you don't want to go that route, then at the very least, the movement in the United States among the States—and there is becoming an increasing concurrence among AG's, Democrat and Republican—is that there needs to be a Transparency in Private Attorney Contracting, which includes some fee caps, includes putting stuff up on the Web, includes competitive bid, and includes a clear provision that some State supreme courts have ruled on that said the attorney general has an obligation to maintain control over litigation because he or she represents the State and the people. And those are things that are all written into this model that I propose to you that you might adopt in this case only—not to impose it on the States for State matters, but only for Federal law where the Federal Government is giving the enforcement powers to the States just for those. Then the States can decide on their own whether to adopt this for other matters.

Mr. QUIGLEY. Yes, but even there, you are limiting some of these States with a uniform provision. If what you say is true, then I would argue Congress doesn't have to do anything. But there is a difference between transparency and there is a difference between oversight and dictating one of the points that you made which is fee caps. All of a sudden, you are probably going to be limiting who is going to do this work for you. And these folks aren't competing against a very small entity. With Dodd-Frank, with the tobacco companies, they were competing against some extraordinarily influential, powerful people who had extraordinary resources too. I mean, isn't this a little bit about leveling the playing field?

Mr. MCCOLLUM. Let me respond by telling you this little story. This was a rule in the office before it was a statute. I asked it to be codified. I had lots of the most famous plaintiff's lawyers in the country come knock on my door perfectly willing to operate under these fee caps. And I proved my point. We marketed it out there calling up privately saying would you really do this. Now, the official story, of course, of the trial lawyers bar is we don't want any restraints at all. But the reality is this wasn't a big thing on their plate because the $50 million is a huge amount, and when you start seeing these even larger fees that are recovered, it is actually bad for the profession. It is certainly bad for the AG's. And I think the taxpayers are owed the obligation from the government, where you do have the opportunity to restrain it, to make sure that they get the benefit of these recoveries, that you are not paying out so much in attorney's fees, as long as you can get the attorneys to do the work. And this is not too low to do that.

Mr. QUIGLEY. But as a State official, did you want Congress telling you that, or did you want the ability—because you yourself began this conversation by saying there is such disparate differences between what a small State can dictate and what a larger State with greater resources and sophistication can. Don't you want to give them the opportunity to say, well, all right, we think fee caps make sense? And if that is what they want to do, that is their decision. It is a whole different story when we are dictating.

Mr. MCCOLLUM. I think you are not dictating it to them. You are just telling it to them with regard to their using Federal law in the cases where they are actually doing Federal work for you, for Congress. You have the right to do that. I would never want you to tell me as a State attorney general what to do with my State law, and that is why I wrote the letter, the one you were quoting.

Mr. QUIGLEY. And I will finish by saying this story as well. I just don't think there is as much difference between what you argued then and how—I would argue contradictory now. Abraham Lincoln argued before the Illinois Supreme Court in the morning, came back in the afternoon on a different case and argued the exact opposite. One of the justices noticed that and he said, well, I have had time to think about it since then. So I think we have a little bit of that in the consideration.

But I would seek, Mr. Chairman, if I could, without objection, a copy of the letter that I have referenced from the National Association of Attorneys General dated November 4, 2009, please.

Mr. FRANKS. Without objection.

[The information referred to follows:]

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Attorney General of Rhode Island

November 4, 2009

The Honorable Christopher Dodd
Chairman
Committee on Banking, Housing and Urban Affairs
United States Senate

The Honorable Richard Shelby
Ranking Member
Committee on Banking, Housing and Urban Affairs
United States Senate

The Honorable Barney Frank
Chairman
Committee on Financial Services
United States House of Representatives

The Honorable Spencer Bachus
Ranking Member
Committee on Financial Services
United States House of Representatives

Via Facsimile

Dear Senators Dodd and Shelby and Representatives Frank and Bachus:

Congress is now considering legislation that would substantially change the regulation of financial services in America and would create a Consumer Financial Protection Agency.

Though state attorneys general individually hold a wide variety of views on the optimal structure of regulatory reform, we all agree that the states contribute in important ways to the protection of American consumers from unfair and deceptive lending practices. Rather than limiting the states' role in consumer financial protection, as some have advocated, we believe Congress should encourage an active and effective partnership between the states and federal financial regulatory agencies to the ultimate benefit of all consumers.

Consumer protection is a traditional state police power. States have long been active in protecting their consumers from financial fraud. The landmark predatory lending settlements against Household International, Ameriquest, and Countrywide returned hundreds of millions of dollars to victimized borrowers while forcing changes to lending practices. This experience uniquely suits us to assist federal regulatory agencies with their enforcement burden. Allowing the states to enforce federal standards will maximize government resources, promote honest competition and deter potential violators.

Another traditional role for the states in our federal system is to help meet the changing needs of the marketplace by identifying emerging trends and developing solutions to ever evolving problems. Permitting states to enforce their own consumer protection laws, while setting minimum federal standards for all, will encourage interested states to "test drive" innovative new ideas and concepts, just as many State Attorneys General did with Bank of America in crafting the Countrywide settlement so as to focus on loan modifications for certain subprime borrowers. Concern that state innovation may lead to a multitude of conflicting state requirements is misplaced. History has shown that only a small number of states typically take advantage of the opportunity to move beyond federal protections.

Indeed, in our experience states more often seek to harmonize their own laws with related state and federal laws. For example, most state retail installment sales laws have their own disclosure mandates but also provide that disclosures made in compliance with the federal Truth in Lending law are deemed to be in compliance with state law. States routinely reconcile conflicting laws by passing uniform and model laws, and by working through multistate enforcement task forces. Most recently, these efforts have included substantial collaborative efforts among state attorneys general and state financial regulators. Finally, if uniformity is to be achieved by sacrificing consumer protection, the very real costs to consumers must be weighed in the balance. Weakened consumer protections and limited enforcement authority already have damaged many consumers and the economy in general.

Americans are better served when the states work as partners with the federal government and not as adversaries. The states respect the important role of the federal government in financial regulation. We seek not to challenge federal authority but to enhance it and make it more efficient and effective. States have a long history of working well with agencies such as the Federal Trade Commission. Presently, a number of states are actively engaged with federal agencies, including DOJ, Treasury, HUD, the FBI and others, in seeking opportunities for cooperation on issues like mortgage fraud enforcement.

The states have much to offer in a state-federal partnership. We have a nationwide network of experienced consumer protection enforcers ready to go to work immediately. Our close connection to our citizens often provides us with an early warning about what is happening "on the ground" in our communities. Early state action can prevent a local problem from becoming a national one.

States can also assist in educating consumers and improving consumer confidence in the marketplace. Many states have the infrastructure and expertise to respond to and resolve consumer complaints. A partnership built on mutual respect and shared interests is the best way for both the states and the federal government to serve our mutual constituents.

We urge members of Congress to provide states with concurrent authority to enforce federal law; and to allow states to enforce their own consumer protection laws and laws of general applicability without regard to the charter of the institution but subject to minimum federal standards.

Sincerely,

Tom Miller
Attorney General of Iowa

Rob McKenna
Attorney General of Washington

Daniel S. Sullivan
Attorney General of Alaska

Terry Goddard
Attorney General of Arizona

Edmund G. Brown, Jr.
Attorney General of California

Richard Blumenthal
Attorney General of Connecticut

Bill McCollum
Attorney General of Florida

Mark J. Bennett
Attorney General of Hawaii

Lisa Madigan
Attorney General of Illinois

Janet T. Mills
Attorney General of Maine

Fepulea'i A. "Afa" Ripley, Jr.
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Dustin McDaniel
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John W. Suthers
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Peter J. Nickles
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Darrell V. McGraw, Jr.
Attorney General of West Virginia

Bruce A. Salzburg
Attorney General of Wyoming

cc: The Honorable Nancy Pelosi, Speaker of the House
The Honorable Steny Hoyer, House Majority Leader
The Honorable John Boehner, House Minority Leader
House Financial Services Committee Members
Senate Banking, Housing and Urban Affairs Committee Members

Mr. QUIGLEY. Thank you.

Thank you, sir.

Mr. FRANKS. Thank you, Mr. Quigley.

And I now recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. McCollum, it is good to see you again.

Mr. MCCOLLUM. It is good to see you.

Mr. SCOTT. In your legislation or guidelines, you mentioned the requirement to find that you do not have the resources to fight the battle. How often does that happen?

Mr. MCCOLLUM. It happens. It depends on the size of the State again and the resources. Each State differs a lot, Congressman. In

Florida, we generally didn't have a problem with getting the job done. I had a great consumer protection division and did the unfair and deceptive trade practice, the little FTC laws, all the time, and we did great things. Like with the State of Illinois, we did Countrywide and got huge settlements. We did AT&T and Verizon and went up against the big boys. But in your smaller States and even medium-sized States, Kansas, Missouri—and I know that because I have worked with General Koster. By the way, he as a Democrat has accepted this model, and he feels it helps protect the image of the office and the feelings that might be there because he does do contingency fee contracting.

But I didn't have a problem in my office of needing to go outside. I can see where I would occasionally. It might happen. In securities litigation, you do have to. There is not that expertise in the office.

Mr. SCOTT. Your guidelines require a written representation, a competitive bid, detailed records, a cap, and posting on the website. Is that limited just to contingent-fee outsourcing?

Mr. MCCOLLUM. In our rule, it was because that was the area where the most apparent problem with appearances was. In other words, the worry that everybody has is that you are doing something on the side with somebody. We certainly were posting things, as far as our office was concerned, with regard to non-contingency cases too. Posting on the Web became the thing while I was attorney general.

By the way, Florida is a little different than some States. We have a sunshine law that we started down there. Everything is public. I can't sneeze without it being public.

Mr. SCOTT. As you indicated, the same problems would occur whether there is a contingent fee or an hourly rate or a flat fee.

Mr. MCCOLLUM. It could but frankly the fee arrangements are not nearly as explosive because the amount of money going to the attorneys is not as often huge quantities. You know, you take a percentage of a recovery in these big cases, securities cases or pharmaceutical cases or others. That is the issue. And there are going to be cases where that contingency fee is perfectly appropriate. I want to reiterate that with you.

Mr. SCOTT. When do you calculate the appropriateness of the fee? Waiting until the case has already been won seems like an inappropriate time to ascertain whether or not it is a reasonable fee. It is when the contract is made. It would be like waiting until someone has won a golf tournament and then ascertaining whether $1 million is a reasonable fee for 4 days' work. Well, you know, you should have said that before you won the tournament. When you write the contract, if it is reasonable then, it ought to be reasonable whatever the result is.

Mr. MCCOLLUM. Well, I agree with you on that, and that is why what this does—and I did not maybe go over it in great enough detail, but on the fee part, it says up front—so you know that from the very beginning—it is going to be 25 percent of the first $10 million that is recovered, 20 percent of the next 5, so on down the line, and you know what your limits are.

Mr. SCOTT. The reasonableness of that you ought to calculate at the beginning because that may be unreasonable. It may be a very easy case, which means those amounts may be unreasonable. It

may be very complex and very unlikely to recover anything at all, in which case those fees may be inadequate to attract reasonable——

Mr. MCCOLLUM. Remember, Congressman Scott, you are on the right end of it, the last statement you made. These are caps. The attorney general is perfectly in his bounds to have a more restrictive contact. It is still negotiable. But $50 million is a $1 billion recovery in our experiences for a single State. But if you have multiple States together, by the way, it would be $1 billion a State.

Mr. SCOTT. It also depends on how much work is done.

Professor Widman, can you describe why a contingent-fee arrangement may be a good thing?

Ms. WIDMAN. Well, contingency-fee arrangements allow—they are no-risk. So these sorts of cases are high-risk cases. So instead of using taxpayer money to fund what may be a very viable claim but risky precisely for the reasons that we have discussed, that a small State may be going up against a very well-funded defense team, therein lies the risk. The risk is not the novelty of the claim or anything like that, but it is the reality of the balance of power. And so contingency fees allow, at no risk to taxpayer money, the ability for a State to rectify those abuses.

Mr. FRANKS. Well, I thank all of you and I thank certainly the Members here. I come away more informed than I was, and I am, again, very grateful to all of you for your testimony.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward to the witnesses and ask them to respond as promptly as possible so that their answers may be made part of the record.

And without objection, all Members will have 5 legislative days with which to submit any additional materials for inclusion in the record.

And with that, again, I thank all of you and the Members and the observers.

And this hearing is adjourned.

[Whereupon, at 3:24 p.m., the Subcommittee was adjourned.]

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