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

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*The views expressed here are the author's alone and do not necessarily reflect the views of the
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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 highlight 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.bcnys.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.

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&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).

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

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 donors²⁴—including plaintiffs’ lawyers who might enter into such contracts—to fund their campaigns.

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:

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, *Doroshov's Huffington Puffery*, POINTOFLAW.COM, Feb. 24, 2010, <http://www.pointoflaw.com/archives/2010/02/doroshows-huffi.php>; *My TownHall.com Response to Doroshov*, 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 1994³⁶ 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

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 officials⁴⁷ 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.

INTRODUCTION: TOBACCO**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 stern and stern 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 McMaster; 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.

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]

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]

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]

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]

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.

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]

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.

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]

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]

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.

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]

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.

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.

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]

“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]

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 aggressively 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.

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.

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. Scuggs 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 Scuggs, 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.bcny.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/04cnd-drug.html?hp&ex=1167973200&en=32c3e3c2d5309a8b&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/#.ToJIReyxV98>.
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\[\]=&filter\[\]=02/17/2006#sortable](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[]=&filter[]=02/17/2006#sortable) (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\[\]=&filter\[\]=04/26/2007#sortable](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[]=&filter[]=04/26/2007#sortable)
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/prepareflood.htm> (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*, LEGALNEWSLINE.COM (Mar. 19, 2007, 3:16 PM), <http://www.legalnewsline.com/news/192155-scruggs-contempt-hearing-set-fo>.
121. See Walter Olson, *The Other Scruggs Katrina Scandal*, POINTOFLAW.COM (Dec. 19, 2007 9:55AM), available at <http://www.pointoflaw.com/archives/2007/12/the-other-scrug.php>.
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.insurancecoverageblog.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=scholar.
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.