

Testimony of

Amy Widman

Assistant Professor of Law

Northern Illinois University College of Law

Before the United States House of Representatives

House Judiciary Committee

Subcommittee on the Constitution

“Contingent Fees and Conflicts of Interest in State Attorney

General Enforcement of Federal Law”

February 2, 2012

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

From our recent study on state enforcement of federal law:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

intervening after the AG has launched a contingency fee-funded litigation effort.”^{xxi}

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

Any abuses of the system can be dealt with by states

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

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

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

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

Conclusion

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

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

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

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

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

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

^{vi} For more on the legislative history on this issue, see Widman & Cox, *supra* n. 2, at 58-61.

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

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

^{ix} Widman & Cox, *supra* n. 2, at 64-65

^x *Id.* at 63

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

^{xii} See Emily Gottlieb & Amy Widman, “State Attorneys General: The People’s Champion,” Center for Justice & Democracy (2008).

^{xiii} See Stephanie Mencimer, “Corporate Enemy #1: State Attorneys General,” *Mother Jones*, December 6, 2007.

^{xiv} See generally *Santa Clara*, 74 Cal. Rptr. 3d at 842; *Kinder v. Nixon*, No. WD

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

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

^{xvi} Richard P. Ieyoub & Theodore Eisenberg, “State Attorney General Actions, the Tobacco Litigation, and the Doctrine of *Parens Patriae*,” 74 *Tul. L. Rev.* 1859 (2000).

^{xvii} Valerie Jablow, “Governments and tort ‘reformers’ clash over the hiring of private lawyers,” *TRIAL* (August 2007).

^{xviii} Robert J. Smith, “Top Firm Takes on Poultry Industry,” *Arkansas Democrat-Gazette*, February 5, 2006.

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

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

^{xxi} David A. Dana, “Public Interest and Private Lawyers: Toward a Normative Evaluation of *Parens Patriae* Litigation by Contingency Fee,” 51 *DePaul L Rev* 315, 321 (2001).

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

^{xxiii} See generally n. 13.