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STATE ATTORNEYS GENERAL: THE PEOPLE'S CHAMPION

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"Fighting to protect the right to jury trial and an independent judiciary for all Americans."

PART I: INTRODUCTION

State Attorneys General are among our country's most important public advocates. Charged with enforcing state law, they act on behalf of citizens in many diverse areas, like consumer protection, antitrust and utility regulation and environmental protection. State AGs often initiate civil suits on behalf of the public to accomplish these goals, and for this reason they are known as the "People's Lawyer."[1] Such lawsuits target corrupt and harmful business practices and have greatly benefited state consumers.

Not surprisingly, attacks on these AG suits have become part of the so-called "tort reform" movement – attempts by the insurance, tobacco, pharmaceutical and other industries to limit their liability should their wrongdoing result in injuries or death.[2] Over the last decade, these business groups have launched unfair, misleading assaults against state Attorneys General, even to the point of manipulating state elections to defeat popular pro-consumer candidates for state Attorneys General.[3]

Corporate groups have recently focused equal if not more effort on trying to discredit and defund suits brought by Attorneys General. How? By latching onto one issue for criticism – states' sometimes use of outside counsel.

Private outside counsel are hired by state AGs on contingency at no cost to taxpayers. 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 receive no fee 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 for by the wrongdoer, not the taxpayer, and the money is used to cover the costs of the litigation as well as disbursed 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.'"[4]

Contingency fee arrangements make it possible for relatively underfunded, understaffed Attorneys General offices to bring important public interest lawsuits. According to Ohio Attorney General Marc Dann, the Chamber of Commerce and the American Tort Reform Association (ATRA) have launched an aggressive media attack against this practice, "[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.[5]

Just as important, without state AGs getting involved in these types of large consumer actions, there may be virtually no check on the behavior of some of our most powerful industries. As Cornell University Law School professor Theodore Eisenberg and former Louisiana Attorney General Richard Ieyoub have written, 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."[6]

It is precisely this check on industry that so angers corporate interests. When Attorneys General and private attorneys join together, the power of the state is made stronger by the additional resources, manpower and strategic advice provided by private counsel. It increases their access to documents so the state can investigate exactly what was happening behind corporate doors. Also, because the state is involved, it can provide more whistleblower protection to insiders willing to speak the truth about industry misconduct.

Given the critical role state Attorneys General play in safeguarding the public, it comes as no surprise that Congress is attempting to increase their ability to protect consumers. More specifically, both the House and Senate have passed a bill giving state AGs authority to seek federal injunctions against manufacturers, distributors and retailers who violate consumer product safety laws.[7] Under the proposed legislation, unless there is a pending civil or administrative action being pursued by the Consumer Product Safety Commission (CPSC),

> whenever the attorney general of a State has reason to believe that the interests of the residents of that State have been, or are being, threatened or adversely affected by a violation of any consumer product safety rule, regulation, standard, certification, or labeling requirement, or order prescribed under this [CPSC Reform] Act, or any other Act enforced by the Commission (including the sale of a voluntarily or mandatorily recalled product or of a banned hazardous substance or product), the State, as *parens patriae*, may bring a civil action on behalf of its residents in an appropriate district court of the United States to obtain injunctive relief….[8]

And if an injunction is granted, the bill would allow state Attorneys General to recover costs and attorneys fees from the manufacturer, distributor or retailer. Clearly, Congress recognizes that taxpayers benefit from the consumer protections realized when state Attorneys General take action.

The following examples show how state Attorneys General litigate in the public interest.

PART II: IMPORTANT CASES INVOLVING THE ASSISTANCE OF PRIVATE COUNSEL

TOBACCO

The state tobacco litigation was a watershed case for Attorneys General across the nation. In partnership with private attorneys, AGs were not only able to force the industry to reimburse state funds expended to deal with one of the biggest public health disasters in modern times, they were also able to expose the industry's corrupt practices, uncovering for the first time how it promoted addiction through manipulation of nicotine levels, engaged in a secret campaign to hook teens and even pre-teens and lied to government officials and the public. According to Connecticut Attorney General Richard Blumenthal, "Never before [this lawsuit] has any tobacco company or member of the industry acknowledged that cigarettes cause cancer, nicotine is addictive and the industry targets its marketing to children and suppresses its own knowledge about how harmful its products are."[9]

The state cases began with few believing they could be successful. After two waves of litigation against the tobacco industry, beginning in the 1950s, private plaintiffs had lost all cases. The defense was well-funded, while victims' attorneys tended to be small operations being buried by paperwork and delay tactics.[10] In a famous memo J. Michael Jordan, the R.J. Reynolds lawyer in charge of California cases, explained why a number of attorneys were dropping their cases against the tobacco giant: "[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."[11]

With the strategic advice and resources of private counsel, including South Carolina's Ron Motley and Joe Rice,[12] states began challenging the tobacco industry with a different strategy. Rather than representing individual smokers, they sought to recoup health care costs due to smoking-related illnesses. They argued that the tobacco industry had profited from knowingly fraudulent and dangerous marketing and sales activities.

Mississippi led with the first state-run litigation based on this theory.[13] Eventually, 46 states followed, culminating in a Master Settlement in 1998 whereby the tobacco industry paid more than $200 billion to end this line of lawsuits.[14] In addition to monetary compensation to the states, the settlement provided an historic boon to public health, from banning certain forms of tobacco advertising and marketing to children, to funding education and awareness campaigns about the dangers of smoking.[15] The Master Settlement also required the dismantling of certain industry groups that had been formed to mislead the public about tobacco's health effects.[16]

One of the most important suits was brought by Minnesota Attorney General Hubert H. ("Skip") Humphrey III and Blue Cross/Blue Shield of Minnesota, aided by the Minnesota law firm Robins, Kaplan, Miller & Ciresi and its counsel, Roberta B. Walburn. By the time Minnesota's four-month trial was ending, private counsel had spent over $10 million on the case, knowing full well they would not be paid if they lost.[17] The industry settled at the conclusion of trial but before the jury retired.

The success of AG Humphrey's case went far beyond recouping his state Medicare costs. Part of the settlement involved releasing 30 million pages of internal documents that showed an industry engaging in active fraud on the public and aggressively marketing a dangerous product to kids. The release of those documents created a seismic shift in opinion against Big Tobacco.

The difference between the early failures and later successes of litigation against the tobacco industry is entirely attributable to the power of the state Attorneys General working in conjunction with private attorneys. Where before the tobacco industry could crush the odd plaintiff lawsuit that came up, these firms had the resources to continue, making plaintiffs better able to fight the delay tactics that had been so successfully deployed before.

Many retainer agreements between AGs and private firms were made public, usually showing a standard contingency fee of around 15 percent, lower than typical 1/3 arrangements, despite the huge risks and the small likelihood of a plaintiff win.[18] Yet when the industry began to settle these cases, most private counsel gave up the contracted fee and amiably agreed, along with the tobacco industry, to arbitrated fee decisions. In announcing the first fee award to attorneys in Florida, Texas and Mississippi in December 1998, to be paid by the tobacco companies over a minimum of 10 years, labor mediator and panel Chairman John Calhoun Wells said, "[N]otwithstanding all the efforts by individuals who committed years of their lives to achieving progress on this issue, without these outside counsel, there would be no multibillion-dollar settlements for the states to reimburse tobacco-related health expenses and provide funds for educational efforts to reduce youth smoking.[19]

Tobacco litigation is not entirely over. Since the Master Settlement, AGs have successfully sued tobacco companies for violating the prohibition against youth-targeted advertising. Most recently, in December 2007, Connecticut AG Blumenthal, in conjunction with seven other state AGs, sued R.J. Reynolds for an advertisement in *Rolling Stone* magazine promoting cigarettes alongside indie music, cartoons and other teenage inducements. According to Blumenthal, "We seek to hold RJR in contempt of court because of its relentless disregard for court orders, legal standards and American public health. The courts must clearly corral this unconscionable marketing campaign pitching 'The Farm: Free Range Music' as a cover for luring young people into lifetimes of tobacco addiction and disease."[20]

LEAD PAINT

Though much was known about the dangers of lead in paint as early as the 1930s, the United States did not ban lead paint until 1978.[21] Manufacturers had spent millions lobbying Congress to keep lead paint in the marketplace, even as Europe was banning it.[22] More egregious, however, was the fact that paint manufacturers, knowing of the danger, marketed themselves as kid-friendly and safe in America, while providing Europe with lead-free paint and protecting farm animals from the effects of lead poisoning.[23]

The paint companies, fully aware of the health effects, profited immensely from their deadly paint. Moreover, most of these companies still exist in some form and continue to profit from their past misdeeds.[24] At the same time, many children live in pre-1978 housing and are therefore tragically at risk for lead poisoning. State and local governments have borne substantial costs enforcing safety measures that protect children from being poisoned.

Former Rhode Island Attorney General Sheldon Whitehouse and later his successor, Patrick Lynch, sought to hold the paint industry responsible for some of the overwhelming healthcare and housing costs associated with lead-poisoned children by taking them to court. They knew that, like with the tobacco cases, the state would be swamped with delay tactics if they attempted such large-scale litigation without help. Such tactics had already squashed smaller private plaintiff lawsuits regarding lead paint poisoning. So the AG's office hired outside counsel to aid them in the massive lawsuit, notably John J. McConnell Jr. from the Motley Rice firm's Rhode Island office.

As Rhode Island Assistant AG Neil Kelly explained, hiring outside lawyers helps "level the playing field" against corporate defendants with far more resources.[25] "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."[26]

With the assistance of private counsel, Lynch's office was handed a victory in February 2006 when a jury returned a multibillion-dollar verdict against three former lead paint manufacturers. The verdict mandated that the companies fund the removal of lead paint from more than 300,000 Rhode Island homes.[27]

In April 2007, Ohio AG Marc Dann filed a lawsuit similar to Rhode Island's.[28] The Ohio suit was effectively ended when the state legislature passed a bill banning such cases as part of a broader products liability bill. Although vetoed by the Governor, the Ohio Supreme Court found the veto to be invalid for procedural reasons.[29] In contrast, Vermont AG William Sorrell sued landlords for failing to maintain their properties with regard to lead paint. The case settled in October 2007.[30]

POULTRY FARMS

In June 2005, Oklahoma Attorney General W.A. Drew Edmondson filed suit against Arkansas poultry farmers, including industry giant Tyson Foods, Inc., for polluting the Illinois River with chicken waste and hazardous chemicals.[31] "We are asking the court to force these companies to stop polluting and repair the damage they have already done," Edmondson said when announcing the lawsuit.[32] "Clean water is our most important natural resource, not only for public water supply and recreation, but also for the future of agriculture, industry and tourism."[33]

As reported on March 3, 2008 by the *Associated Press*, "Oklahoma estimates more than 345,000 tons of poultry waste are produced annually in the river valley, with the bulk of that tonnage disposed of in the same area."[34] "They could burn it as energy, process it and pelletize it, they can even properly compost it, but until the pathogens are dead," Edmondson told the *AP*. "And they have chosen economically not to."[35]

The suit was brought under the federal Superfund law and other state statutes.[36] The case set off a political firestorm as certain members of Congress moved to shut down the suit by redefining what toxic substances would be covered by the Superfund law, with intensive lobbying from Tyson Foods.[37]

Edmondson brought on a consortium of outside firms because his office could not undertake the expense of handling such major litigation. According to the Oklahoma AG, several firms expressed interest in helping his office "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."[38] 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."[39]

The case is on its third year, but Oklahoma has won some victories. A 2006 ruling allowed plaintiffs to collect samples from the defendants' property for environmental analysis.[40] More recently, the court dismissed defendants' challenge over Edmondson's use of outside counsel on a contingency fee basis.[41]

PART III: ATTORNEYS GENERAL AND OTHER IMPORTANT WORK ON BEHALF OF CONSUMERS

A. DRUGS AND MEDICAL DEVICES

Baycol

In January 2007, 30 Attorneys General settled with Bayer Corporation over its marketing of Baycol, a "statin" drug used to lower cholesterol.[42] Five states led the investigation: Pennsylvania, Vermont, Oregon, Michigan and Connecticut.[43]

Though all statins carry known risks to the muscles, Baycol turned out to be significantly more dangerous, particularly at higher doses and when combined with genfibrozil, another cholesterol-lowering drug – facts Bayer allegedly knew from post-marketing surveillance of its product. According to the Attorneys General, Bayer alerted the FDA to the safety risks yet failed to adequately warn prescribers and consumers about them.[44]

An $8 million settlement was reached, with the monies used by the states for attorneys' fees and other costs of investigation and litigation, consumer protection enforcement funds, consumer education, litigation or local consumer aid funds or other purposes at the sole discretion of each Attorney General.[45] Florida, for example, chose to use its share of the settlement funds ($200,000) to reimburse taxpayers for the cost of the state's investigation.[46]

Also under the settlement, Bayer must register most of its clinical studies and post the results at the end of each study; comply with the law in future marketing, sale and promotion of its pharmaceutical and biological products; and refrain from making false and misleading claims relating to any such product sold in the United States.[47]

"This judgment provides critical public safeguards against an emerging threat," said Kentucky Attorney General Greg Stumbo.[48] "Knowledge is power, especially when public health is at stake. It is vital that consumers be given clear and complete information regarding the potential effects of drugs so that they may make informed decisions about their treatment options."

Defibrillators

In August 2007, 36 Attorneys General reached a $16.75 million settlement with Boston Scientific Corp. over sales of Prizm ICDs by the company's Guidant Corp. unit.[49] The Attorneys General sued after investigations pursuant to their respective state consumer protection laws.[50]

ICDs are implantable defibrillators designed to deliver life-saving shocks to malfunctioning hearts. The suit, led by Oregon AG Hardy Myers, alleged that in 2002 and 2003 Guidant knowingly sold Prizms with a wiring defect yet never informed doctors, patients or the public of the danger until 2005.[51] The state became involved "after two cardiologists disclosed the company's sale of unmodified Prizm ICDs following the company's discovery of the wiring problem."[52]

State taxpayers not only benefited from this case, but also, it cost them nothing. According to the settlement, "The entire $16.75 million sum compensates the states for attorneys' fees, consumer protection enforcement, consumer health education programs or other beneficial programs permissible under state laws."[53] Also as part of the settlement, Boston Scientific agreed to extend the timeline of its warranty program to: 1) provide consumers who wanted to replace their Prizms with a new device at no cost; and 2) reimburse consumers up to $2,500 for out-of-pocket expenses incurred with the replacement.[54] The manufacturer also pledged to institute safety programs and publicly report critical safety information about its defibrillators.[55]

As lead state in the case, Oregon was responsible for administering $1 million of the settlement to reimburse warranty program participants for expenses they incurred beyond $2,500.[56] Oregon placed its share of the settlement ($815,000) in the state's DOJ Consumer Protection and Education Fund.[57]

"More than the money, today's settlement sends a message: Corporations have a profound responsibility to disclose product problems to consumers – particularly when lives are on the line," said Connecticut Attorney General Richard Blumenthal.[58] "Consumers counted on life-saving measures from potentially defective devices – implantable heart defibrillators that could have short circuited and failed. Guidant's failure to fully disclose defects endangered the lives of countless citizens who could have taken more immediate corrective measures had they been promptly and properly informed."

Hytrin

In July 2005, 18 Attorneys General settled charges of antitrust and consumer protection law violations brought against Abbott Laboratories and Geneva Pharmaceuticals Inc. for $30.7 million.[59] Of that amount, $28.7 million went to consumers and third-party payers. The remaining $2 million reimbursed state agency claims and litigation costs incurred by Florida, Kansas and Colorado, states that led the investigation and initiated the AG suit.[60]

According to the AGs, Abbott and Geneva had conspired not to release a generic version of Hytrin, a drug used to treat high blood pressure and enlarged prostates. More specifically, Abbott, fearing that a lower-cost generic equivalent would eliminate millions in Hytrin sales, paid Geneva $4.5 million per month to withhold its generic version from consumers. "Not releasing the drug was expected to cost Geneva only $1 million to $1.5 million each month," according to the *Associated Press*.[61]

"When companies conspire to stifle competition, consumers lose," said then-Florida Attorney General Charlie Crist.[62] "The settlement in this case provides an opportunity for consumers who paid more than they should have to be reimbursed."

Ovcon

In June 2007, in a lawsuit initiated by Colorado,[63] 35 Attorneys General settled antitrust violation charges brought against Warner Chilcott, manufacturer of the oral contraceptive Ovcon.[64] According to the lawsuit, Warner Chilcott and one of its competitors, Barr Pharmaceuticals, had conspired to prevent generic versions of Ovcon from being available to consumers. More specifically, Warner Chilcott – the exclusive U.S. distributor of Ovcon since early 2000 –allegedly paid Barr $20 million to keep Barr's generic version of Ovcon off the market.

Warner Chilcott settled its portion of the suit for $5.5 million, also pledging not enter into any agreement that would limit the research, development, manufacture or sale of a generic alternative to one of its drugs; to provide the states notice of agreements it enters into with generic manufacturers; and to continue to make its records available to the states for inspection to determine whether the company is complying with the terms of the agreement.[65]

"Warner Chilcott and Barr Pharmaceuticals allegedly conspired to keep generic alternatives to Ovcon off the market, to keep the price of Ovcon as high as possible, and to share in the allegedly illegal profits," said Massachusetts Attorney General Martha Coakley.[66] "This lawsuit and settlement holds Warner Chilcott accountable for its actions, and helps ensure more choice and lower drug prices for consumers."

In February 2008, Barr reached a related settlement for $5.9 million to be used by the states for antitrust and consumer protection efforts.[67] And like Warner Chilcott, the company also agreed to change its business practices.[68]

Oxycotin

In May 2007, 27 Attorneys General reached a settlement with Purdue Pharma that stopped the drug company's unlawful marketing of the prescription painkiller, OxyContin.[69] The case was brought under the theory that "Purdue engaged in extensive off-label marketing of OxyContin and failed to adequately disclose abuse and diversion risks associated with the drug in violation of state civil consumer protection laws."[70] According to the lawsuit, Purdue aggressively marketed Oxycontin to doctors while intentionally downplaying the known addiction risks, resulting in more Oxycontin prescriptions, more abuse by legitimate users and more schemes to divert the drug to illicit users for a profit. An executive committee of seven Attorneys General led the investigation: the District of Columbia, Massachusetts, Nebraska, Ohio, Oregon, Vermont and Virginia.[71]

"OxyContin abuse has ravaged the lives of thousands of Mainers, including entire families and communities. It has also contributed to increased crime rates and emergency medical treatment," said Maine Attorney General Steven Rowe.[72] "Had Purdue Pharma limited its marketing to the drug's approved uses and disclosed the drug's abuse and diversion risks up front, it is likely that much of the devastation could have been prevented. This is a clear example of a pharmaceutical company putting corporate profits above the health and welfare of people."

"We are concerned about the abuse of prescription drugs and this case raised very serious allegations, along with concerns that young people are particularly frequently abusing this drug," Illinois Attorney General Lisa Madigan said.[73] "With this settlement, we have focused on requiring Purdue to take all measures necessary to protect people from abusing OxyContin, especially young people. We are pleased with the efforts that Purdue has committed to undertake to track and stop this abuse."[74]

Remeron

In August 2005, a federal court approved a $36 million settlement between Attorneys General from 50 states, the District of Columbia and other U.S. territories and Organon USA Inc. and parent company, Akzo Nobel N.V., over the anti-depressant drug

Remeron.[75] The settlement also resolved a private class action lawsuit brought on behalf of end-payors.[76]

Organon and Akzo Nobel allegedly violated antitrust laws by delaying a less expensive generic form of Remeron from coming on the market, forcing consumers and public entities to pay a higher price for Remeron than they would have paid for a generic substitute. The 10-month antitrust investigation was led by Attorneys General from Florida, Oregon and Texas.[77]

Of the $36 million, $8.6 million compensated consumers for amounts they overpaid for Remeron.[78] State governmental entities (such as Medicaid) and third-party payors (such as health insurance plans) also shared in the aggregate settlement.[79]

"The defendants in this case abused the regulatory scheme to stifle competition and prevent consumers from having access to low-cost, generic equivalents of this drug," said Oregon Attorney General Hardy Myers, one of the leaders of the antitrust investigation.[80] "This lawsuit represented a way for us to help lower prescription drug costs for consumers."

B. CHEMICALS AND THE ENVIRONMENT

State Attorneys General continue to pursue consumer actions involving chemicals and the environment. Recent cases include California AG Edmund ("Jerry") Brown's lawsuit against toymakers and national retailers who allegedly exposed children to dangerous amounts of lead in violation of state law[81]; and a joint federal lawsuit by twelve AGs to overturn new environmental regulations that would exempt thousands of companies from reporting toxic releases, denying the public access to information about hazardous chemicals in their communities.[82] Some previous AG-led consumer victories, many of them landmark cases, as well as groundbreaking new suits, include:

Global Warming

The first civil lawsuit to address global warming was filed in federal court in 2004 by several state Attorneys General, among them California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin.[83] The suit charged that American Electric Power Company, the Southern Company, Tennessee Valley Authority, Xcel Energy Inc. and Cinergy Corporation were a public nuisance. More specifically, the utility companies – who together owned and operated 174 fossil fuel burning power plants in twenty states – were emitting 650 million tons of carbon dioxide each year, ranking them among the nation's worst polluters. The AGs' action called on the companies to reduce their emissions to abate the nuisance.

"In filing this lawsuit, we take necessary steps to stem the rising tide of pollutants causing immeasurable harm to our environment and to maximize our ability to ensure that ensuing generations inherit a sustainable earth," said Rhode Island AG Patrick Lynch.[84] "It's imperative that we confront those responsible for unleashing an invader with the power to wreak unspeakable havoc on our climate and to damage, and destroy, our ecosystems."

"Our lawsuit is a huge, historic first step toward holding companies accountable for these pernicious pollutants that threaten our health, economy, environment and quality of life now and increasingly in the future," echoed Connecticut AG Richard Blumenthal.[85] "The eventual effects of C02 pollution will be severe and significant – increasing asthma and heat-related illnesses, eroding shorelines, floods, and other natural disasters, loss of forests and other precious resources. We must act, wisely and quickly, to stem global warming – and safeguard both our environment and economy. Time is not on our side."

The lower court dismissed the case on the grounds that it raised a "political question" (*i.e.*, an issue best resolved through the political process); however the court did not address the merits of the nuisance claim. Plaintiffs' appeal is now pending before the Second Circuit Court of Appeals.[86]

In September 2006, previous California AG Bill Lockyer filed a similar case against the auto industry, claiming that the world's six largest automakers created a public nuisance by manufacturing vehicles that emit massive amounts of carbon dioxide.[87] According to Lockyer, Chrysler, General Motors, Ford, Toyota, Honda and Nissan "emit a combined 289 million metric tons of carbon dioxide in the United States each year. Those emissions, the complaint alleges, currently account for nearly 20 percent of the carbon dioxide emissions in the United States and more than 30 percent in California."[88] The lawsuit seeks money damages for "past, current and future contributions to air pollution, beach erosion and reduced water supplies."[89]

"Vehicle emissions are the single most rapidly growing source of the carbon emissions contributing to global warming, yet the federal government and automakers have refused to act," Lockyer explained when announcing the lawsuit.[90] "It is time to hold these companies responsible for their contribution to this crisis."

The lower court dismissed the suit in 2007, however an appeal has been filed.[91]

Lead in Children's Jewelry

In 2007, then-California Attorney General Bill Lockyer reached a settlement with U.S. retailers and distributors over lead levels in costume jewelry.[92] Children and teenagers can suffer brain damage, kidney damage, hearing loss and impaired growth if they are exposed to lead. The lawsuit alleged that over 70 companies, including KMart, Sears, Target, Toys-R-Us and Wal-Mart, had violated state law by failing to warn consumers about the health risks from exposure to lead in jewelry.

Under the agreement, retailers and suppliers were required to meet new standards for lead-free and low-lead jewelry as quickly as possible but no later than March 2008.[93] After that date, they had to stop sales in California of any product not meeting the stricter lead-content standards. The retailers also pledged to pay a total of $1.9 million, with

$325,000 earmarked for consumer education about the dangers of heavy metal exposure and $250,000 set aside for a jewelry-testing fund.

"This case is a success story showing how Proposition 65, California's premier right-to-know law, protects our families and communities from the health risks resulting from exposure to toxic chemicals in our environment,"[94] said then-Attorney General Lockyer. "The power of the law has given the costume jewelry industry incentive to reduce and eliminate lead from their products in order to avoid having to warn consumers about the health risks."

Mercury Content Warnings

In February 2005, then-California Attorney General Bill Lockyer settled a lawsuit against hundreds of chain restaurants for failing to warn customers about the mercury content of fish.[95] According to Lockyer, Red Lobster, Outback Steakhouse, Cheesecake Factory and other chain restaurants had violated state law by not posting "clear and reasonable" consumer warnings about exposure to mercury – a substance known by the state to cause cancer or reproductive harm – in shark, swordfish and tuna.

Under the settlement, the restaurants agreed to post warnings for consumers about the mercury content of fish, as well as fund education programs and finance monitoring of restaurants to ensure compliance.[96] Part of the agreement also stipulated that the Attorney General's Office be reimbursed for the costs of investigating, bringing the action and negotiating a settlement.[97]

"We're not trying to discourage people from eating fish, which is an important source of protein and an important part of a balanced, healthy diet," said then-Attorney General Lockyer.[98] "But people have a right to know when they are being exposed to substances that can cause cancer, birth defects or reproductive harm, and businesses have a legal duty to provide that notice. This settlement achieves these significant public health objectives."

C. OTHER CONSUMER ISSUES

Annuities

In October 2007, Minnesota Attorney General Lori Swanson settled a lawsuit against Allianz Life Insurance Company for marketing and selling $259 million worth of unsuitable long-term annuities to seniors.[99] Swanson alleged Allianz had violated consumer fraud and insurance laws by not fully informing seniors that: 1) their limited savings could be tied up for as long as 15 years; 2) they could not cash in their annuities early without paying hefty surrender penalties; and 3) payments advertised as "immediate" bonuses were not payable for up to 15 years.

"These financial instruments are incredibly complicated," said Swanson.[100] "We have lawyers in the office who struggled to understand them…. They're written in small print.

They're extraordinarily complex. I believe they're intentionally designed to be complex. And that can lead to abuse, as well."

The settlement, among other things, established a restitution process to review sales to more than 7,000 Minnesota seniors that may have been unsuitable or the result of misrepresentations.[101] Minnesota consumers age 65 or older who purchased Allianz deferred annuities from January 1, 2001 on would have the opportunity to get a full refund without penalties. Moreover, any senior whose annuity purchase was deemed unsuitable or based on misrepresentations would be offered a refund with interest. Allianz also paid the state $500,000 to reimburse the costs, investigative expenses and attorney fees incurred by the AG's office in connection with the lawsuit, as well as the projected fees and costs associated with implementing the settlement.[102]

"This settlement provides Minnesota seniors who have had their funds locked up in long-term annuities the opportunity to ask for their money back," said Swanson.[103]

Billing Practices

In December 2006, 16 Attorneys General, led by then-California Attorney General Bill Lockyer, settled a lawsuit with JPMorgan's Chase Bank and Trilegiant Corp. over deceptive billing practices.[104] According to the complaint, Trilegiant used data from JPMorgan credit cards and mortgages to market "free" trial memberships to prospective customers. Those consumers typically received a check for $2 to $10, along with notice they'd received a "free" Trilegiant trial membership that provided discounts on car repair, home maintenance, shopping, travel and other goods and services.

Yet by cashing the check, those consumers – many of whom were senior citizens or had limited English language skills – were unwittingly enrolled in and automatically billed for a regular membership after the trial period ended, in some cases to their Chase credit cards, without ever having provided account numbers or billing information.

"It's a rather familiar scam, as the company misleads consumers by providing unclear and inadequate information and then socks them with credit card charges the consumer never intended to agree to," said Missouri Attorney General Jay Nixon.[105] "We are pleased with this agreement, which should put a halt to such practices."

Under the $14.5 million settlement, Trilegiant and Chase agreed to clearly disclose all terms of any free trials and were barred from characterizing future advertising solicitations as "reward" or "rebate" offers.[106] Chase and Trilegiant also pledged to pay the settling states for attorneys' fees and investigation and litigation costs, and/or consumer protection enforcement funds, consumer education, litigation or local consumer aid and other uses permitted by state law, at the discretion of each state Attorney General.[107]

Cell Phones

In October 2007, California Attorney General Jerry Brown reached a settlement with AT&T Mobility ("AT&T") that stopped the company from charging customers for calls made after their cell phones were lost or stolen.[108] An investigation by Brown's office revealed that consumers were being billed thousands of dollars for calls made on stolen phones even when customers could fully document that the calls were unauthorized. In one case, according to the AG's probe, a customer who had never been to Mexico was charged for calls originating from Mexico.

Under the terms of the settlement, AT&T was required to: credit the disputed charges or immediately investigate customer reports of calls made after the phone was lost or stolen; reimburse customers who could show that their cell phones were used without permission since 2003; and inform customers of their legal rights regarding lost or stolen phones, including the right to have the case investigated within 30 days, the right to document that the calls were unauthorized, the right not to pay disputed charges during an investigation and the right to appeal the investigation's outcome to the California Public Utilities Commission.[109] AT&T also agreed to pay the Attorney General's Office $500,000 for the costs of the investigation and the Unfair Competition Law Fund, administered by the California District Attorneys Association.[110]

"This groundbreaking settlement makes AT&T the first cell phone company that has agreed to protect its customers from cell phone rip-offs and other unauthorized uses," said Attorney General Brown.[111] "It is now time for the rest of the cell phone industry to step forward and follow AT&T's example."

Credit Cards

In January 2008, West Virginia Attorney General Darrell McGraw settled a lawsuit against Visa and MasterCard for alleged antitrust and consumer protection violations.[112] According to McGraw, the companies forced merchants that accepted Visa and MasterCard's credit cards to also accept their debit cards and then charged the merchants the same fee for the credit and debit cards, despite the fact that there was far more risk and cost associated with the credit cards, costs that were passed on to consumers in the form of higher retail prices.

Under the preliminary settlement, Visa agreed to pay West Virginia $12.8 million, with $12.1 million of that amount earmarked to give state consumers relief from the 6 percent state sales tax. "I hope that the settlement clips the wings of anyone embarking on a course of illegal conduct in West Virginia," said AG McGraw.[113]

Memory Chips

In February 2007, 41 Attorneys General, led by New York, California and Illinois, settled allegations that Samsung Semiconductor and Samsung Electronics colluded to artificially raise the price of memory chips found in personal computers, network servers and many other electronic devices from 1998 until 2002.[114] Under the agreement, the manufacturers pledged to refrain from anti-competitive business practices, aid ongoing litigation against their alleged co-conspirators and pay $90 million. $80 million of that amount went to consumers, with the remaining $10 million being paid out to state and local governments.

"This settlement stops years of inflated prices for computers and other products containing DRAM, it also helps recoup some of the losses to consumers and government agencies across the country, and it sends the message that we won't let the industry get away with this type of behavior," said Mississippi Attorney General Jim Hood.[115]

Price-fixing lawsuits against at least seven more companies are still pending.[116]

Microsoft

In 1998, AGs from 20 states and the District of Columbia, led by Iowa Attorney General Tom Miller, filed an antitrust suit against Microsoft, alleging that the computer giant stifled competition to its Windows operating system.[117] In 2002, "the federal court of appeals in Washington D.C. found Microsoft had maintained an unlawful monopoly. After that ruling, requirements were imposed on Microsoft designed to reduce the firm's monopoly power by increasing competition."[118] The requirements were set to expire in 2007 but were extended at least though November 2009.[119] Key provisions require Microsoft to:

1) "develop and license 'communication protocols' to allow competing servers to function effectively with the Windows desktop;"[120]

2) "give all licensees using the current communications protocols a credit for any royalties owed, while the protocols are rewritten;"[121] and

3) "provide licensees more technical support, and contribute $1.6 million to help fund compliance enforcement."[122]

"Th[ese] provision [are] forward-looking and [some] of the most important remedies in the judgments," then-California AG Bill Lockyer said of the extensions.[123] "By fostering competition and innovation, it will benefit consumers by making their computers more versatile and efficient. Unfortunately, Microsoft's efforts to comply with the requirement have fallen short. To its credit, the company has acknowledged that failure, agreed to go back to the drawing board and accepted this extension. This is a significant agreement that will help ensure the settlement achieves its important objectives of marketplace and consumer protection."

Payday Lenders

In November 2006, West Virginia Attorney General Darrell McGraw reached settlements with 18 Internet-based lenders who allegedly made "payday loans" to West Virginia consumers without being licensed to do business in the state.[124] "Payday loans" are small, short-term loans or cash advances, usually on a two-week term, secured by a post-dated check or an agreement authorizing an electronic debit for the full loan amount plus interest from the consumer's account. Payday lenders often charge exorbitant rates, forcing consumers who are unable to pay off loans make a payment, pay a fee and renew the loan, propelling them further into debt.

Under the settlements, the companies agreed to quit doing business in West Virginia, pay refunds to consumers and cancel their debts. "Today, we have sent a message that loans made to West Virginia consumers over the Internet must comply with our laws," said Attorney General McGraw.[125] "We will take whatever legal action is necessary to protect our consumers from Internet predators."

Predatory Lending

In January 2006, 49 states and the District of Columbia entered into a settlement agreement with Ameriquest Mortgage Company over alleged illegal lending practices.[126] Those practices included: misleading consumers about interest rates, discount points, prepayment penalties and other loan terms; making unsolicited refinancing offers that did not adequately disclose prepayment penalties; improperly influencing and accepting inflated home appraisals; and encouraging borrowers to give inaccurate income or employment information to obtain loans.

Under the settlement, Ameriquest agreed to pay $295 million to consumers and $30 million to the Attorneys General to cover costs and fund consumer education and consumer protection enforcement programs.[127] The agreement also compelled Ameriquest to make sweeping reforms of its business practices.[128] More specifically, the company was required to:

- Provide the same interest rates and discount points for similarly-situated consumers;

- Not pay incentives to sales personnel to include prepayment penalties or any other fees or charges in the mortgages;

- Provide full disclosure regarding interest rates, discount points, prepayment penalties, and other loan or refinancing terms;

- Overhaul its appraisal practices by removing branch offices and sales personnel from the appraiser selection process, instituting an automated system to select appraisers from panels created in each state, limiting the company's ability to get second opinions on appraisals, and prohibiting Ameriquest employees from influencing appraisals;

- Not encourage prospective borrowers to misstate income sources or income levels;

- Provide accurate, good faith estimates;
- Limit prepayment penalty periods on variable rate mortgages;
- Not engage in refinancing solicitations during the first 24 months of a loan, unless the borrower is considering refinancing;
- Use independent loan closers; and
- Adopt policies to protect whistle-blowers and facilitate reporting of improper conduct.[129]

"We uncovered serious problems at Ameriquest that unfairly and substantially affected their borrowers," said Iowa Attorney General Tom Miller, who led the nationwide case against Ameriquest.[130] "However, now we have reached an agreement that will return hundreds of millions of dollars to consumers, and – even more important – it will reform the company's practices. Indeed, I believe this agreement will fundamentally change the company."

Rent-To-Own Programs

In November 2006, then-California Attorney General Bill Lockyer reached a settlement with Rent-A-Center (RAC), the nation's largest rent-to-own company, over deceptive business practices.[131] RAC rents and sells new and used household merchandise, including televisions, computers, furniture and appliances.

According to the lawsuit, RAC had allegedly violated state law by misleading California consumers about the true costs of its rent-to-own programs. The company also faced charges of deceptive advertising when marketing and selling its "Preferred Customer Club" membership. Among RAC's misrepresentations to consumers: false claims of providing extended warranties, insurance or service contracts for rental merchandise; and failure to fully disclose that customers would have to pay more than $100 in additional fees to receive $500 in grocery discounts.

Under the settlement, RAC had to pay more than $7 million to thousands of Californians who bought "Preferred Customer Club" memberships or who rented or purchased electronic merchandise, appliances or computer systems from RAC on or after November 1, 2004.[132] RAC also faced $750,000 in civil penalties.

And to safeguard future consumers, the agreement compelled RAC to deposit another $7 million into a special consumer protection fund and reform its business practices.[133] Specific reforms included: prohibiting RAC from charging prices that exceeded the maximum amount allowed by law; and requiring RAC to clearly disclose all terms of its Club membership, including any costs, benefits, services, features, discounts and cancellation rights.

"Our economic system is not driven solely by the profit motive," said Lockyer.[134] "To function properly, businesses must deal fairly and honestly with consumers. Rent-A-Center flouted this fundamental principle, violated state law and harmed consumers. This settlement not only will provide restitution to thousands of victims, but also ensure the company reforms its business practices to conform with the law."

PART IV: NOTES

1 National Association of Attorneys General, "What Does An Attorney General Do?" found at http://www.naag.org/what_does_an_attorney_general_do.php; National Association of Attorneys General, "About NAAG," found at http://www.naag.org/about_naag.php.

2 These include: AG Agenda Watch, a project of the American Tort Reform Association; the U.S. Chamber of Commerce Institute for Legal Reform; and the Competiveness Enterprise Institute, which recently characterized some of the country's most pro-consumer state AGs among "The Nation's Top Ten Worst Attorneys General." Even President George W. Bush has gotten into the act, recently signing an Executive Order forbidding federal agencies from contracting with private attorneys on a contingency fee basis. White House Executive Order, "Protecting American Taxpayers From Payment of Contingency Fees," May 16, 2007, found at http://www.whitehouse.gov/news/releases/2007/05/20070516.html.

3 *See*, *e.g.*, Laurie Beacham, "The Secret Chamber; The Inner Workings of the U.S. Chamber of Commerce and the Hijacking of an Election," Center for Justice & Democracy (July 2006). *See also*, Stephanie Mencimer, "Corporate Enemy #1: State Attorneys General," *Mother Jones*, December 6, 2007 ("For instance, in 2004, the Chamber went after Democrat Deborah Senn, the former Washington state insurance commissioner who was running for attorney general. Using a dormant nonprofit called the Voter Education Committee, the ILR secretly dumped several million dollars into issue advocacy ads in Washington bashing Senn, who was comfortably ahead in the polls. Oddly enough, the ads accused her of being in the pocket of some of the very insurance companies that were funding the ads; polling data suggested that this would turn voters against her. The characterization wasn't true: Senn was a Naderite with a strong history of consumer protection. Nonetheless, she lost the election. The state's Supreme Court later ruled that the Chamber's ads were illegal because they failed to disclose who paid for them. "They spent $4 million in a race that should have been $750,000, at most," says Senn. "It was a devastating loss.").

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

5 *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. Dann has recently 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.

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

7 "CPSC Reform Act" (S.2663 and H.R.4040), Section 26A(a), found at http://www.thomas.gov. *See also*, Patricia Callahan and Jim Tankersly, "Senate OKs sweeping product safety reform," *Chicago Tribune*, March 8, 2008, found at http://www.chicagotribune.com/news/nationworld/chi-billmar07,0,3286147.story.

8 "CPSC Reform Act" (S.2663 and H.R.4040), Section 26A(a), found at http://www.thomas.gov.

9 Press release from the Office of Connecticut Attorney General Richard Blumenthal, "Tobacco Company Turns State's Evidence; Admits That Industry Targeted Kids for Tobacco Sales," March 20, 1997, found at http://www.ct.gov/ag/cwp/view.asp?A=1772&Q=282504.

10 *See* Tobacco Fact Sheet, found at http://tobaccofreekids.org/campaign/global/docs/litigation.pdf.

11 *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).

12 These attorneys "developed the legal theory for suing the cigarette makers for reimbursement of Medicaid and other state health care expenses. They were trying to maneuver around Big Tobacco's highly successful defense strategies that had won every lawsuit filed by sick smokers for 40 years." Mark Curriden, "Up In Smoke," *ABA Journal*, March 2, 2007found at http://www.abanet.org/journal/ereport/m2fsmoke.html; http://www.motleyrice.com/default.asp.

13 Stephanie Mencimer, *Blocking the Courthouse Door*, Free Press (2006), pp. 33-35.

[14] Attorneys General of 46 states and 5 territories signed an agreement with tobacco companies to settle lawsuits. *See*, the Smokeless Tobacco Settlement Agreement (STMSA), found at http://ussmokelesstobacco.com/content.cfm?id=6. The Master Settlement and its amendments can be found at http://www.naag.org/issues/tobacco/index.php?sdpid=919. For more on the history of tobacco litigation, *see* "An Update on Tobacco Litigation," *Justice Talking*, November 13, 2006, found at http://www.justicetalking.org/transcripts/061113_tobacco_transcript.pdf

[15] Office of the California Attorney General, Tobacco Litigation and Enforcement home page, found at http://ag.ca.gov/tobacco/index.php.

[16] Office of the California Attorney General, Master Settlement Agreement, found at http://ag.ca.gov/tobacco/msa.php.

[17] David Phelps and Deborah Caulfield Rybak, "Prelude to War: Origins of the Minnesota Tobacco Trial," *Star Tribune*, November 21, 1998.

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

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[22] Gerald Markowitz and David Rosner, "Norton's Lobbying Shows Her Colors," *CommonDreams.org*, January 18, 2001. *See also*, Markowitz and Rosner, *Deceit and Denial*, Univ. of California Press (2002).

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[24] *See*, *e.g.*, Complaint, *State of Rhode Island, by and through Sheldon Whitehouse, Attorney General v. Lead Industries Association, Inc. et al*, found at http://www.riag.state.ri.us/documents/reports/lead/lead_complaint.pdf.

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[26] *Id*.

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[29] Peter B. Lord, "Lead paint battle spreads," *Providence Journal*, April 8, 2007.

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[55] More specifically, Boston Scientific agreed to: establish a patient safety advisory board consisting of independent experts to evaluate data concerning ICD performance; establish a patient safety officer position, staffed by a physician whose primary responsibility is to advance ICD patient safety; clearly disclose and disseminate to the public specific information on a quarterly basis, including worldwide failure data, survival probability estimates and current information in the event of an FDA recall of any ICD; post a notice on its website within 30 days of any modification to any of its ICDs to correct a failure pattern; solicit the return of out-of-service ICDs; and maintain a data system to track the serial numbers, implant and explant dates of all ICDs Guidant distributes in the U.S. Dean Olsen, "$605,000 is Illinois' part of settlement," *Journal-Register*, August 31, 2007, found at http://www.sj-r.com/news/statehouse/2007/08/31/_605_000_is_illinois_part_of_settlement_state_sued; "Boston Scientific to pay $17M to settle state probes," *bizjournals.com*, August 31, 2007, found at http://news.moneycentral.msn.com/provider/providerarticle.aspx?Feed=ACBJ&Date=20070831&ID=7404223; John O'Brien, "Defibrillator company settles with 36 Attorneys General," *LegalNewsline.com*, August 30, 2007, found at http://www.legalnewsline.com/news/contentview.asp?c=200188; Press release from the Office of Connecticut Attorney General Richard Blumenthal, "Attorney General Announces $16.75 Million

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