

THE PLAINTIFFS' BAR'S COVERT EFFORT TO EXPAND STATE ATTORNEY GENERAL FEDERAL ENFORCEMENT POWER

by

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What do the Consumer Product Safety Improvement Act,¹ climate change legislation,² the Data Accountability and Trust Act,³ the Federal Trade Commission Reauthorization Act,⁴ and the economic stimulus package⁵ have in common? If you find yourself struggling for a satisfactory response, you are likely not alone. The common thread is quietly buried in legislation with a far broader agenda in mind. But embedded in each of these bills, and dozens of others, is a specific enforcement provision that allows a federal lawsuit to be initiated by a state's attorney general.

On the surface, this expansion of a state executive branch's enforcement authority may appear inconsequential, a mere technical fix to ensure proper enforcement. The reality underlying such provisions, however, is not so immaterial, and the provision's appearance in federal legislation not quite so random. Rather, the insertion of state attorney general enforcement provisions in select federal legislation is part of a coordinated effort by the organized plaintiffs' bar to expand the power of these state law enforcement officers. The American Association for Justice (AAJ) (formerly the Association of Trial Lawyers of America) and other groups that follow their lead have spent millions of dollars lobbying to modify federal legislation, including those provisions relating to state attorney general enforcement.

The payoff from the perspective of the AAJ and other groups is, like the answer to the initial question posed in this LEGAL BACKGROUNDER, not immediately apparent. After all, it would seem that the state attorney general's office is unrelated to the practices and influences of personal injury trial lawyers. In fact, the ties run so deep that it has become a viable profit-seeking activity for the AAJ and others to work *directly* to improve the power and autonomy of the state attorney general so that their members may join in expansive state-sponsored litigation.

Public Use of Private Contingency Fee Attorneys. The primary payoff of the plaintiffs' bar's legislative empowerment efforts emerges when state attorneys general hire outside counsel to pursue

¹See H.R. 4040, 110th Cong. (2008) (Pub. L. No. 110-314) (codified at 15 U.S.C. §§ 2051-2084).

²See S. 357, 110th Cong. (2007).

³See H.R. 2221, 111th Cong. (2009).

⁴See S. 2831, 110th Cong. (2008).

⁵See H.R. 1, 111th Cong. (2009); H.R. 598, 111th Cong. (2009) (healthcare portion of recovery package).

litigation on a contingent fee basis. Often such an arrangement is made without an open and competitive bidding process, a routine safeguard meant to assure that the state receives the best value. Even when state attorneys general issue a request for proposals, the selection standards can be quite lax. As a result, potentially lucrative government contracts have routinely been awarded to friends and traced to political supporters of the state attorney general.

Examples of this “pay to play” litigation system are prevalent and date back to what was the first major coordinated effort by state attorneys general and private contingency fee attorneys in multi-state tobacco litigation. In 1996, then-Texas Attorney General Dan Morales hired contingency fee lawyers to file his state’s tobacco litigation; four of the five hired firms had together contributed nearly \$150,000 in campaign contributions to Morales from 1990 to 1995. See Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, LEGAL TIMES, Feb. 1, 1999, at 27. After hiring the firms, Morales reportedly asked them to make an additional political contribution of \$250,000. See Miriam Rozen & Brenda Sapino Jeffreys, *Why Did Dan Morales Exchange Good Judgment for the Good Life?*, TEX. LAW., Oct. 27, 2003, at 1.

Similarly, the five firms selected by former Missouri Attorney General Jay Nixon (now Governor) to handle the state’s participation in the tobacco litigation had contributed over \$500,000 during the preceding eight years to Nixon and his political party. See Editorial, *All Aboard the Gravy Train*, ST. LOUIS POST-DISPATCH, Sept. 17, 2000, at B2. Those firms eventually received \$111 million in fees, an amount decried as “out of proportion to the work performed and the risk involved,” given that Missouri was the 27th state to join the litigation, coming in only after the hard work had been done by other states and settlement was inevitable. *Id.*

These are but a few examples. In fact, by 1999, attorneys general in thirty-six states had entered contingency fee arrangements with eighty-nine firms for up to a third of any judgment or settlement reached. See Attorney’s Fees & The Tobacco Settlement: Hearing on H.R. 2740 Before the House Comm. on the Judiciary, 105th Cong. 36 (1999) (statement of Lester Brickman, Cardozo School of Law). While the tobacco litigation has provided some of the most blatant examples of cronyism, contingency fee contracts between states and private lawyers continue to raise controversy and concern in numerous other areas today. See, e.g., Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. TIMES, July 9, 2007, at A10 (discussing Oklahoma Attorney General Drew Edmondson’s hiring of three plaintiffs’ firms to sue poultry companies for water pollution in an agreement entitling them to receive up to half of the recovery).

A few state courts have constitutionally objected to the use of contingency fee attorneys in such instances. In 1985, the California Supreme Court held unconstitutional a contingency fee arrangement for enforcing public nuisance ordinances because it was “antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting” such a claim. *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985). The Court is currently reviewing a similar contingency fee arrangement in a suit against the former manufacturers of lead pigment and paint. See *County of Santa Clara v. Superior Court (Atlantic Richfield Co., et al.)*, No. S163681 (rev. granted July 23, 2008). Louisiana’s Supreme Court held that the attorney general’s use of contingency fee lawyers was an unconstitutional violation of separation of powers in that it expanded the attorney general’s office in ways which could not be accomplished through the legislature. See *Meredith v. Ieyoub*, 700 So. 2d 478, 481 (La. 1997). More recently, the Rhode Island Supreme Court held that if contingency fees were used, the Attorney General must retain “absolute and total control over all critical decision-making” in the matter. See *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 475 (R.I. 2008) (emphasis in original).

Nevertheless, in spite of these prohibitions and cautions by some state supreme courts, the campaign to expand state attorneys general’s power to enforce federal laws remains undeterred. Private contingency fee lawyers understand that federal legislative expansion represents the next step towards strengthening and legitimizing ties to state attorneys general and reaping potentially huge rewards in state-sponsored “federal” litigation. Even more than that, it provides an opportunity for these private attorneys to become the driving force behind initiating the litigation.

The Example of State Attorney General Enforcement in Federal Product Safety Law. The Consumer Product Safety Improvement Act of 2008 offers one of the most visible efforts to expand state attorney general enforcement authority. This reauthorizing legislation sought to revitalize an underfunded Consumer Product Safety Commission (CPSC) which, just prior to the law’s passage, struggled to address unsafe levels of lead in children’s toys imported from China. Sensing a prime business opportunity, trial lawyer groups invested significant financial and personnel resources into securing provisions in the law that would assure a steady flow of product liability litigation for their members. AAJ spent over \$5 million on federal lobbying in 2008 alone,⁶ with substantial funds directed towards modifying this legislation. Enacting state attorney general enforcement provisions was an important part of this effort.

The law as enacted explicitly authorizes state attorneys general to bring actions in federal court on behalf of residents of their states for injunctive relief to enforce certain CPSC rules and orders. *See* 15 U.S.C. § 2073(b).⁷ State attorneys general can file claims after providing the CPSC with thirty days notice, during which time the CPSC may intervene in the case. A state attorney general may also proceed with an injunctive action any time after the CPSC provides consent. Finally, the Act authorizes state attorneys general to merely “notify” the CPSC and seek an injunction whenever the attorney general deems a “substantial product hazard” exists. Pub. L. No. 110-314, § 218(b).

Although trial lawyer groups failed in this instance to push through an express enforcement provision permitting claims for monetary damages, they still achieved important gains with the legislation. First, because there was no constraint placed on combining additional claims, an attorney general can use this federal authority to bolster simultaneous or subsequent state claims which allow monetary damages, such as allegations under state consumer protection laws. Second, the law is ambiguous as to whether state attorneys general can contract with private attorneys to bring claims on a contingency fee basis. Thus, the end result is that this seemingly innocuous enforcement provision may permit expansive state litigation driven by private contingency fee attorneys.

The potential for expansive and independent state attorney general enforcement of federal law, well beyond that intended by Congress, is also evident in other enacted or proposed laws. For example, the section of the stimulus package that deals with health care information contains a specific state attorney general enforcement provision allowing for injunctive relief or damages. Provisions also specifically provide for the recovery of attorneys’ fees by the State. *See* Pub. L. No. 111-5, § 13410 (2009). Similarly, the reauthorizing legislation for the Federal Trade Commission includes language granting additional authority to state attorneys general to enforce federal consumer protection laws and receive fees for doing so. *See* S. 2831, 110th Cong. (2008). The legislation would also allow state attorneys general to use outside contingency fee counsel. Most recently, legislation that would establish a Consumer Financial Protection Agency with the authority to ban or impose conditions on certain financial products or activities expressly authorizes state attorneys general to bring a civil action for damages for any violation of the Act. *See* Consumer Financial Protection Agency Act of 2009; *see also* S. 566, 111th Cong. (2009). These acts may thus open the door to federal enforcement actions spearheaded by private attorneys, which are fundamentally inconsistent with congressional intent.

Recent Divergence From Traditional State Attorney General Role. Over the past twenty years, the office of the state attorney general has seen a tremendous shift in activities, which is only in part due to express legislative grants of authority. Because state attorney general roles are often broadly defined, allowing them to “exercise all such authority as the public interest requires” with “wide discretion in making the determination as to the public interest,” *Florida ex rel Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 (5th Cir. 1976), and because they can have “a monopoly, or a near monopoly, on the state executive branch’s access to the courtroom,” Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CAL. L. REV. 885, 886 (2007), state attorneys general can unilaterally determine that a practice is

⁶AAJ spent \$5.38 million in 2008. *See* American Ass’n for Justice, Lobbying Report, filed Apr. 15, 2008 (First Quarter), filed July 8, 2008 (Second Quarter), filed Oct. 14, 2008 (Third Quarter), Jan. 14, 2009 (Fourth Quarter).

⁷Some observers of federal consumer protection law believe that the CPSC already had such authority under Section 24 of the Act, which authorizes “any interested person (including any individual or nonprofit, business, or other entity)” to bring an action for injunctive relief in federal court to enforce a consumer product safety rule or an order. 15 U.S.C. § 2073(a). To our knowledge, however, state attorneys general had not brought claims under this provision and, if they had clear authority to do so, it would be unnecessary to amend the Consumer Product Safety Act (CPSA).

contrary to the public interest, and initiate an action to curtail it.

Further, should a state attorney general overreach, there are few practical barriers. State attorneys general are most often popularly elected, and therefore have greater incentives to target unpopular businesses or industries rather than exercise restraint. *See* STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 15 (Lynne M. Ross ed., 1990) (stating that forty-three states popularly elect state attorneys general). Governors have little ability to impose sanctions or otherwise restrict their activities, and legislatures, which have the authority to pull back an overreaching state attorney general, are neither efficient nor effective in this regard, only rarely exercising such authority. *See e.g.*, Mo. Rev. Stat. § 537.595 (prohibiting lawsuits by attorney general against food producers based on obesity and weight gain). Thus, where the traditional role of the state attorney general is to enforce violations of law within its jurisdiction and provide counsel to its executive branch, the modern role of the state attorney general has been to affect greater influence over policy matters.

Federal legislative expansion of state attorney general enforcement authority is a means to legitimize these overreaching, and often purely policy-based, actions. Former Alabama Attorney General William Pryor, now a federal judge, has called such attorney general suits “the greatest threat to the rule of law today.” William H. Pryor, Jr., *Fulfilling the Reagan Revolution by Limiting Government Litigation*, Address at the Reagan Forum 2 (Nov. 14, 2000). The organized plaintiffs’ bar, by lobbying for express enforcement provisions, positions their members to play a key role in, and potentially lead, such lawsuits brought on the state’s behalf.

Expanding State Attorney General Enforcement Represents Unsound Policy. Granting state attorneys general even greater authority to enforce federal law presents serious public policy problems whose claimed benefits remain suspect. First, enforcement of federal law by fifty-one different attorneys general as opposed to the United States Attorney General inhibits uniform application of the law. This concern is amplified in the case of state attorneys general because they occupy such broad authority and have been willing to use it in ways to advance personal and politically expedient policy preferences. Most importantly, in cases where state attorneys general hire contingency fee lawyers to pursue public litigation, the private attorneys’ incentive to maximize the ultimate award may not align with, or may even be in direct conflict with, the public’s interest.

Even if one looks beyond these risks, this delegation of power does not appear to offer any offsetting benefits. One benefit might be addressing the need for more federal law enforcement personnel; however, there is no indication that the United States Department of Justice (DOJ) cannot enforce federal law effectively without the assistance of these state executive officers. DOJ consists of more than forty separate component organizations with offices around the country, and commands an annual budget of nearly \$30 billion. *See* Dept. of Justice: Office of the Attorney General, FY2008 Performance and Accountability Report, at <http://www.usdoj.gov/ag/annualreports.html>. Also, given that the core objective of plaintiff lawyer lobbying efforts is to take part in enforcement actions expected to return a higher dollar amount than they cost, it would seem that a lack of resources for effective enforcement would not be an issue.

Put simply, there is no sound justification for expanding state attorney general enforcement through federal legislation. Rather, there are compelling reasons not to increase the authority of these already extremely powerful state officers. Congress should take care when meting out federal law enforcement authority, and view with great skepticism the efforts of plaintiffs’ lawyer lobbying groups to buoy the office of the state attorney general for the advancement and profit of private attorneys.