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BACKGROUNDER:

CORPORATIONS PURSUE LEGAL IMMUNITY BY ATTACKING STATE ATTORNEYS GENERAL

OVERVIEW

If one consistent theme emerges from the recent *The New York Times* series on state Attorneys General (AGs),[1] it is that their work as public advocates aggravates powerful industries. History is clear that state AG civil suits targeting corrupt and harmful business practices have prevented and mitigated substantial harm, recouped for taxpayers significant costs caused by corporate law-breaking, and filled large voids caused by ineffective or weak regulation.

Companies that violate the law have been increasingly up in arms over state AG activity, accusing state AGs of abusing their power. But as *The New York Times* reported, it is the behavior of corporate lawbreakers that may be most astonishing, using boundless resources to lobby state AGs to ignore violations of state law. At the same time, enormous corporate trade associations like the U.S. Chamber of Commerce and the American Legislative Exchange Counsel have directed substantial lobbying resources to push for state and federal legislation. These bills would, in various ways, prevent AGs from enforcing laws to protect their citizens, including bringing civil lawsuits or hiring outside counsel to assist them.

In 2012 and again in 2013, the U.S. House of Representatives Subcommittee on the Constitution and Civil Justice held hearings at which representatives from the U.S. Chamber called for "federal intervention" to prevent AGs from enforcing laws, including forbidding them from "retaining contingency-fee counsel."[2] Given the current political make-up in Congress, the Chamber's legislation may now be seriously considered, either as a broad bill or in statute-specific legislation. This memo explains the tremendous concerns that the consumer rights community has with these proposals.

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[1] See, e.g., http://www.nytimes.com/2014/12/27/us/bipartisan-effort-to-restrict-lobbyists-influence-of-attorneys-general.html; http://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html?_r=0; http://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html

[2] http://judiciary.house.gov/_files/hearings/113th/03132013/Beisner%2003132013.pdf; https://www.uschamber.com/sites/default/files/documents/files/120202BillMcCollumtestimony.pdf

BACKGROUND ON STATE ATTORNEY GENERAL ENFORCEMENT AND CONTINGENCY FEES

State AGs are charged with enforcing both state and federal law, and are regularly attacked by big corporations for doing their job.

- **State law:** AGs act on behalf of citizens in many diverse areas, including consumer protection, financial fraud, utility regulation and environmental protection.
    - State AGs often initiate civil suits on behalf of the public to accomplish these goals. The Center for Justice & Democracy's 2008 report[3] examined some representative cases in the areas of drug and medical devices, chemicals and environmental protection, bank and credit card abuses, antitrust violations, and predatory and payday lending.
    - Instances of widespread corporate law-breaking can often cost taxpayers millions of dollars; AG lawsuits not only cause lawbreakers to disgorge ill-gotten gains, but also allow states to recover substantial money.
    - Without state AG involvement in large consumer actions, an important check on the behavior of some of our most powerful industries would be severely weakened.
    - It is well-documented that the U.S. Chamber of Commerce, often through its "tort reform" branch, the Institute for Legal Reform, has financed vicious campaigns through local front groups to oust state AGs who have aggressively tried to protect state consumers.[4]

- **Federal law:** Twenty-two federal laws explicitly provide for concurrent federal and state public enforcement authority. Law professors Amy Widman at Northern Illinois University College of Law and Prentiss Cox at the University of Minnesota Law School did the first and only empirical analysis of state AG use of this concurrent authority,[5] and found that no problem exists for Congress to solve:
    - State AGs enforce federal consumer protection laws in a "sparing manner";
    - State cases appear to have generated almost no conflict with federal agency enforcement;
    - Federal agency involvement in state cases has been cooperative;
    - There have not been inconsistent interpretations of the statutes or conflicts with federal interpretation of the law, and;
    - The use of outside counsel in these cases appeared to be infrequent or even non-existent.

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[3] https://www.centerjd.org/content/center-justice-democracy-releases-state-attorneys-general-peoples-champion

[4] See, e.g., http://centerjd.org/content/secret-chamber-inner-workings-us-chamber-commerce-and-hijacking-election

[5] Amy Widman & Prentiss Cox, State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws, 33 CARDOZO L.REV. 53 (2011); http://judiciary.house.gov/_files/hearings/Hearings%202012/Widman%2002022012.pdf

State AG offices are underfunded and understaffed.

- Many state AG offices have seen their enforcement capacity decimated by depleted state treasuries and corporate-backed political agendas. As government austerity measures continue, state AGs find it difficult to shoulder the entire burden of consumer protection enforcement.
- Often, state AGs are facing cases that are highly complex, cross state and district lines, and take years to resolve.
- When tackling massive corporate wrongdoing, state AGs also face an inherent unleveled playing field. There is no limit to the resources corporations can use to evade the law and often state AGs staff are outnumbered and outspent.

The contingency fee system helps level the playing field and is critical to consumer protection – while costing taxpayers nothing.

- Contingency fee arrangements make it possible for underfunded and understaffed AG offices to bring important public interest lawsuits that are too large, complex, and expensive for an AG's office to bring on its own.
- Allowing state AGs to hire private attorneys is demonstrably beneficial to taxpayers.
    - Private counsel working on contingency receive no fee up front. Attorneys who take cases on contingency take a risk- if the case is lost they are paid nothing.
    - **If successful, settlements and fees are paid for by the wrongdoers, not the taxpayer, shifting the costs back to the company that broke the law.** Unlike Congress, states may not deficit spend, and contingency fee contracts have allowed enforcement to continue while saving taxpayers' money.
- When AGs and private attorneys join together, the state benefits from additional resources, manpower and strategic advice provided by private counsel. Their access to documents is also increased so the state can investigate exactly what was happening behind corporate doors.

State That Hire Contingency Fee Firms Can Get Better Results for Their Taxpayers

- State settlements do not just happen. Expertise and time are always required even in the best of circumstances, and an attorney's reputation and ability can greatly influence the speed and amount of settlement. This has clear value to the state.
- **Zyprexa Case Study:** In 2006, the *New York Times* broke a major story based on documents uncovered in litigation and given exclusively to the *Times* about Eli Lilly's "off label" marketing (employing nefarious sales tactics) of the anti-psychotic drug Zyprexa.[6]
    - Over 30,000 people sued Eli Lilly and by January 2007, Eli Lilly had settled most of the individual cases for a total of $1.2 billion.
    - In October 2008, 33 State Attorneys General announced a $62 million settlement agreement with Lilly.
    - Rather than participate in the 2008 settlement, several state AGs pursed individual lawsuits against Lilly with the help of outside counsel. South Carolina AG Henry

[6] http://www.nytimes.com/2006/12/17/business/17drug.html?pagewanted=all

McMaster said, “The Eli Lilly case was handled on a contingent basis by special counsel appointed by the attorney general. Special counsel paid and incurred all up front costs associated with bringing the case, and their expertise in similar pharmaceutical litigation was instrumental in its successful resolution.”

- In October 2009, South Carolina reached a $45 million settlement, with Lilly paying over $37 million for Medicaid/State Health Plan reimbursement. This was 10 times the amount South Carolina likely would have recovered had it not filed its own contingency fee lawsuit.[7] “We would have been derelict in our duty if we had just signed onto that and not recovered as much of the taxpayer money as possible,” said the AG’s office.

The contingency fee system has tremendous public disclosure benefits.

- **Tobacco Case Study:** It is well-known that state AG lawsuits against Big Tobacco forced the industry to reimburse states for $200 billion in public health costs as part of the 1998 Tobacco Master Settlement agreement. However, the public disclosure results from this litigation may have more lasting benefit, and would not have been possible without skilled outside counsel.
    - Private outside counsel representing the Minnesota Attorney General Hubert H. (“Skip”) Humphrey III spent over $10 million in a four-month trial against Big Tobacco (knowing full well they would not be paid if they lost), after which the industry settled – a settlement that went far beyond recouping state public health expenditures.[8]
    - Part of the settlement involved releasing 30 million pages of internal documents providing evidence to researchers and the media of the tobacco industry’s active fraud on the public. The release of those documents, which were placed in an accessible public archive, created a seismic shift in opinion against Big Tobacco. Had it not been for the assistance of skilled outside counsel, this settlement would never have occurred.

Bottom Line: State AGs sometimes hire private outside counsel on contingency, at no cost to taxpayers, making it possible for relatively underfunded, understaffed AG offices to bring lawsuits to protect the interests of their state, sometimes to collect funds for state treasuries, and sometimes leading to the release of significant public documents. Limiting or prohibiting the use of outside counsel will result in state AGs being wholly unable to use private attorneys in the most important cases where litigation expenses and complexity make the assistance of private attorneys necessary.

STATE EFFORTS TO UNDERMINE STATE AG’S ABILITY TO RETAIN OUTSIDE COUNSEL

The American Legislative Exchange Council (ALEC) has been promoting a model state bill called the “Private Attorney Retention Sunshine Act” (PARSA). Corporate groups like the

[7] http://www.postandcourier.com/article/20091024/PC05/310249942

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

American Tort Reform Association, the U.S. Chamber of Commerce[9] and New York State's Lawsuit Reform Alliance support a version of this legislation called the "Transparency in Private Attorney Contracting" (TIPAC). This bill has been deemed "more politically acceptable" to Republicans.[10]

While promoted as a "transparency" bill, the fact that these bills are backed by the same corporate interests that aggressively fight to limit AG consumer protection authority and oust pro-consumer AGs in election campaigns, compels a closer look. Indeed, both bills would assist corporate criminals and wrongdoers in several important ways:

- Under PARSA, if an AG wished to enter into a contract over $100,000, the AG must create an open and competitive bidding process for the contract. This will result in AGs contracting with the lowest bidder, not the most qualified attorney - even though costs to the taxpayer are the same either way, i.e. zero. This benefits the wrongdoer. As demonstrated above, without access to the most qualified attorney, a state's case can suffer both in terms of possible recovery for the state and the potential disclosure of wrongdoing to the public.
- If the contract is over $1,000,000, the contract must undergo a lengthy review process by the state legislature. First the AG must provide a copy of the contract to the state legislature to justify the existence of such a contract and detail any pre-existing relationship with the private attorney or firm. This places the AG at a significant disadvantage against the corporation by giving the corporate wrongdoer advance notice of the lawsuit and allowing the corporation time to hide or destroy documents.
- Some versions of this model legislation allow the legislature to issue recommendations and hold hearings on each individual contract. This delays the contracting process further and interferes unduly with the AG's ability to enforce state law. This also adds unnecessary politics and wastes taxpayers' dollars.
- Both PARSA and TIPAC require contingency fee attorneys to keep extensive time records and by extension, to create the overhead and expense that such record-keeping would entail. This requirement is not only a waste of time and money, it undermines one of the central advantages of the contingency fee system: making sure attorneys are outcome-focused, not time-focused. Their interest is to work hard and achieve the best possible results for their clients – in this case a state - in as timely and efficient a manner as possible instead of racking up billable hours, as defense attorneys do.
- In both bills, contingency fees (again, paid by the wrongdoer not the state) are capped, while corporate defendants are free to spend an unlimited amount of resources on their defense attorneys.
    - Contingency fee caps make it harder to find competent counsel and file legitimate lawsuits. This is particularly true for costly and complex cases, where caps prevent firms from justifying the expected time and expense associated with difficult litigation.
    - In multi-state litigation, state AGs typically insist that counsel not sign with other state AGs for a fee that is less than the initial contract. A state law capping fees

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[9] http://www.instituteforlegalreform.com/resource/us-chamber-applauds-signing-of-nations-strongest-outside-counsel-sunshine-law-in-wisconsin/

[10] http:// http://www.nylawsuitreform.org/wp-content/uploads/2011/06/TiPAC-ISSUE-BACKGROUNDER-3.pdfwww.nylawsuitreform.org/wp-content/uploads/2011/06/TiPAC-ISSUE-BACKGROUNDER-3.pdf

will prevent those states from even joining the multi-state litigation, to the detriment of state taxpayers.

- While research in the area of contingency fee caps involve non-state AG cases, the results are analogous:
  - In 2009, researchers from RAND's Institute for Civil Justice (ICJ) surveyed 965 plaintiffs' attorneys who were presented with "hypothetical meritorious cases" and asked if they would take the case given that either noneconomic damages caps or attorney fee limits were in effect. ICJ concluded that caps and attorney fee limits each "make it harder to retain counsel."[11]
  - Similarly, the ABA Tort Trial & Insurance Practice Section report on medical malpractice litigation found,
    - [I]mposing such limitations will likely preclude many medical malpractice actions from being filed because the prospective damages and resulting attorneys' fees will not justify the expected time and expense associated with the litigation.
    - [Limiting contingent fees] would have virtually the same effect as prohibiting them.
    - There would be no limit on the numbers of lawyers the defense could employ or the amount of fees those lawyers could charge. That creates a potential imbalance in favor of the defense.[12]

CONSUMER GROUP ACTION

Consumer groups sent a letter to Congress on January 31, 2012, expressing "concern about any attempts by Congress to interfere with the functions of state Attorneys General or their ability to continue their role as important public advocates." A copy of the letter is here: http://centerjd.org/system/files/CoalitionLtrStateAGsF.pdf

For more information about the important role of state AGs and a fact sheet about important cases brought by state Attorneys General, see the Center for Justice & Democracy's earlier study, *State Attorneys General: The People's Champion*, http://centerjd.org/content/white-paper-state-attorneys-general-peoples-champion and fact sheet http://centerjd.org/content/fact-sheet-examples-important-cases-brought-state-attorneys-general.

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[11] Steven Garber et al., "Do Noneconomic Damages Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?" 6 *J. Empirical Legal Stud.* 637 (December 2009).

[12] American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf.