The Modern Role of State Attorneys General: A Renewed Activism

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Introduction

This paper describes the traditional role of the state attorneys general and contrasts that traditional role with the increasingly active role of modern state attorneys general, who more and more frequently employ common-law and statutory powers, both state and federal, to achieve public policy ends they deem desirable. This paper asserts that the modern state attorneys general are more inclined to develop the means and mechanisms by which to use this legal and political power to change business practices, instigate reform and seek damages from private parties in the marketplace. These practices have sparked a separation of powers debate to the extent that the state attorneys general engage in "regulation by litigation;" assuming a legislative role in addition to their proper executive function. Insofar as some of the settlements that result from such litigation actually result in an ongoing oversight role for a state attorney general, they have been criticized for also taking on the function of the third branch of government. These practices raise additional federalism questions to the extent that they have extraterritorial effect. Finally, gaining popularity in the state attorney general community is the practice of retaining outside counsel, often on a contingency fee basis, which raises a host of additional points of debate discussed in this paper.

The Traditional Role

The first recorded establishment of a state attorney general dates back prior to the Declaration of Independence. In 1643, Richard Lee was appointed as Attorney

general in Virginia. While state attorneys general were typically appointed in the past, today forty-three states elect their attorney general.

Overall, there are fifty-six attorneys general in the fifty states and territories of the United States. The traditional duties of the state attorneys general include:

- representing the state and its agencies in trial and appellate litigation,
- investigating individual, corporate and government misconduct, and
- issuing advisory opinions on questions and issues of state law.

State attorneys general are the chief legal officers of their jurisdiction and are often referred to as defenders of their state constitution. However, the popular phrase "top cop" is often a misnomer as many attorneys generals actually have limited authority to initiate criminal prosecutions. Most state attorneys general are responsible for defending criminal convictions in appellate proceedings. Among the most high profile cases (in states with the death penalty) are appeals of convictions with a death sentence, and associated proceedings for writs of habeas corpus.

California's attorney general provides an excellent example for this analysis. The California Department of Justice website provides some historical perspective of the role of the attorney general in the Golden State. In California, the office of attorney general was established in 1850 to contend with what was considered at the time an unstructured, inadequate and inconsistent system of law enforcement.

Since its creation, the office of the attorney general has been changed by three distinct forces: (1) the California Constitution and state government codes, which specify the duties and responsibilities of the attorney general, (2) legislative decree altering the duties of the attorney general in response to specific state needs, and (3) the personalities and ambitions of those who have served as attorney general.

In all of state government in California, the office of the attorney general has probably changed the most dramatically in its more than 150-year-history. Its development essentially mirrors the history of California and the development of the state itself.

The office of attorney general in its present form is vastly different from the office created by California's founders. Gradually, through cases centered on the protection of state lands and resources, by monitoring corporate practices, through asserting the rights of the people against discrimination, and by assuming the role of the state's central law enforcement authority, the attorney general has grown to play an expansive and an enduring role in the life of Californians. It is the role of "monitoring corporate practices" in California and in other states which has created much controversy and caused the debate which led to this study of the role of state attorneys general.

The California Department of Justice website notes that it is the duty of the attorney general to see that the laws of the state are uniformly and adequately enforced in accordance with California Constitution, Article V, Section 13. The state attorney general carries out responsibilities of the office through the California Department of Justice.[1]

The California Attorney General represents the people of the state in civil and criminal matters before trial, appellate and supreme courts of California and the United States. The attorney general also serves as legal counsel to state officers and, in

[1] The California Attorney General's Mission Statement follows:

"It is our duty to serve our state and work honorably every day to fulfill California's promise. The Attorney General and our Department's employees provide leadership, information and education in partnership with state and local governments and the people of California to:

- Enforce and apply all our laws fairly and impartially.
- Ensure justice, safety, and liberty for everyone.
- Encourage economic prosperity, equal opportunity and tolerance.
- Safeguard California's human, natural, and financial resources for this and future generations."

most cases, to state agencies, boards and commissions. Exceptions to the centralized legal work done on behalf of the state are listed in Section 11041 of the California Government Code.

The California Attorney General also assists local law enforcement, district attorneys, and federal and international criminal justice agencies in the administration of justice. To support California's law enforcement community, the state attorney general coordinates statewide narcotics enforcement efforts, participates in criminal investigations and provides forensic science services, identification and information services and telecommunication support.

In addition, the attorney general establishes and operates projects and programs to protect Californians from fraudulent, unfair, and illegal activities that victimize consumers or threaten public safety, and enforces the laws designed to safeguard the environment and natural resources.

Under the California Constitution, the attorney general is elected to a four-year term in the same statewide election as the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer and Insurance Commissioner. In 1990, voters imposed a limit of two terms on these statewide offices.

The California Department of Justice carries out the responsibilities of the attorney general through ten main divisions. The Department operates statewide with offices in Sacramento, San Francisco, Oakland, Fresno and San Diego. The ten main divisions include:

- Division of Criminal Law This division carries out the constitutional and statutory mandate that the Attorney general represents the People of the State of California in criminal cases.

- Division of Civil Law This division both prosecutes and defends civil actions on behalf of Californians and hundreds of state officers, agencies, departments, boards, bureaus and commissions.
- Division of Public Rights This division also prosecutes and defends civil actions on behalf of the public, but focuses on where the Attorney general may be more proactive in prosecuting the rights of the public, including civil rights enforcement, environmental and natural resources protection, antitrust and consumer protection, among other issues.
- Division of Law Enforcement This division maintains several crime suppression programs and provides a wide range of support to other state and local law enforcement agencies through forensic sciences, narcotics investigation, intelligence and training.
- Division of Gambling Control This division regulates legal gambling activities in the state to ensure that gambling is conducted honestly, competitively and free from criminal and corruptive elements.
- California Justice Information Services Division This division facilitates the exchange of criminal justice intelligence among law enforcement agencies using technologies to help protect the public.
- Division of Legal Support and Technology This division delivers administrative technology and support services to client agencies.
- Division of Firearms This division regulates acquisition and possession of firearms and other dangerous weapons.
- Executive Division This division provides the support network for the Attorney general and includes functions not directly related to the office's litigation or law enforcement responsibilities. These activities include an Office of Victims' Services and Office of Native American Affairs.

- Administrative Service Division This division supports the day-to-day operations of the Department of Justice and its personnel.

As will be shown, it is in the area of consumer protection and antitrust that the attorney general has become most proactive in pursuing enforcement actions, damages actions, antitrust review, and in settlement of litigation. Although, in the context of the more traditional role and powers of an attorney general, the pursuit of consumer protection and antitrust actions is but a small part of the overall duties and responsibilities. However, it is here that the modern state attorney general often expends a disproportionate amount of energy and resources in this area. This area of litigation also generates the most comment and controversy.

While the role of the attorney general varies from state to state, California serves as a good example of the historic role and function of the chief legal officer of other jurisdictions. As will be shown, in California and elsewhere, the traditional role began to change in the 1990's and continues to evolve into what we will call the "modern role."

The Modern Role and Its Implications

In the mid-1990's, state attorneys general added to their traditional role a function that has been called "regulation through litigation," whereby state attorneys general bring state-sponsored litigation designed to achieve regulatory or policymaking objectives. The traditional role of the state attorneys general, as the state's chief law enforcement official, was uncontroversial. However, in the modern role, the state attorneys general do not limit themselves to traditional executive functions. They sometimes also engage in legislative and policy-making activities resembling those of the Legislature.

Critics of this new, expanded role invoke the separation of powers doctrine—fearing the accumulation or consolidation of power by one branch of government, and the resultant potential for tyranny, the Founders very deliberately separated the executive, legislative and judicial functions into three separate and distinct branches of government. In this view, critics maintain that in pursuing litigation which effectuates public policy the state attorneys general are improperly exercising a legislative function. They maintain further, as a practical matter, policy-making should be left to the representative branch of government, the Legislature, which has the mechanisms for holding dispassionate hearings, entertaining public comment and ascertaining public policy preferences, and setting government-wide policies.

The United States Constitution also seeks to divide power between the federal and state governments, further preventing the possible consolidation of power by a single entity. The works of Dr. Michael Greve of the American Enterprise Institute are instructive on the principles that should determine when state activity should cede to federal authority.[2] Essentially, those state activities and enforcement actions that have extraterritorial effect run afoul of the Founder's vision of federalism because they necessarily empower one state (or even, as in the case of state attorneys general, a single state official) to set policy for a particular region or even the entire nation. Many state attorneys general cases, noted below, have been cited as arguably failing this test. For example, California Attorney General William Lockyer's lawsuit against a brokerage firm over mutual funds sales practices was dismissed in the spring of 2006, when the court ruled that California's case conflicted with a federal law that

[2] *See, e.g.*, "Why the Litigation Industry Will Beat All Others" by Michael S, Greve, June 18, 2002 which states, in part: "[T]he secret to the trial lawyers' and the AG's success is interstate exploitation or, legally speaking, the extraterritorial reach of state law. Mississippi AG Mike Moore got to apply his home state's law to out-of-state corporations and their consumers, and was off to the races. Eliot Sptizer can reach investment houses everywhere (so long as they have customers in New York). Nevada can sue—and hence home cook—foreign corporations under its own law, in its own courts."

gives United States regulators sole authority to set securities-industry disclosure rules.[3]

In pursuit of litigation in the modern role, state attorneys general sometimes hire private contingency-fee plaintiff law firms, often with no competitive bidding or legislative oversight. Criticisms of these relationships are numerous, and include: attacks on the substantial effective hourly rate the private attorneys earn, the total amount of attorneys fees that arguably would otherwise have inured to the benefit of the state,[4] the fact that contracts are ill-defined and sometimes awarded without competitive bidding or sufficient transparency,[5] the assertion that the selected law firms are "friends" of or campaign contributors to the state attorney general,[6] and the concern that the private firms' goals in the litigation might differ substantially from those of the client.[7]

There is also the separate, but thus far largely unexplored issue, of whether the amount of fees recovered by these private attorneys is "reasonable," under professional ethics standards, given the amount of time spent on the cases. The practice of hiring outside counsel on a contingency fee basis began with the tobacco litigation. After settlements in nationwide lawsuits against tobacco companies generated billions of dollars, resulting in enormous attorney fee payments to private law firms, partnership between the attorneys general and outside counsel has become increasingly popular in many states.

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[3] June 2, 2006, *Los Angeles Times*, Lexis-Nexis Academic.

[4] *See, e.g.,* "Auditor, attorney general feud over $14M fee to private attorneys," by Emily Wagster Pettus of The Associated Press, October 23, 2006 (Mississippi dispute arising out of collection of back taxes from a large telecommunications company) and "U.S. Chamber: Contingency Fee Bill Will Cost Louisiana Jobs; Intent Is to Line Lawyers' Pockets, Not Serve Citizens," U.S. Newswire, May 25, 2006.

[5] "Auditor, attorney general feud over $14M fee to private attorneys," *supra*; ,"Compacts and Collusion," Michael S. Greve, April 1, 2002.

[6] "Auditor, attorney general feud over 14M fee to private attorneys" *supra*; "Shining A Spotlight on Regulation Through Litigation," ; The American Tort Reform Association , October 2006.

[7] " Shining A Spotlight on Regulation Through Litigation," *supra*.

One concern that has been expressed is that, while the public interest might be served by the attorney general initiating a lawsuit against a business or industry, the sole remedy usually sought by contingency fee plaintiff lawyers is money damages. Other remedies, such as changing a business practice or ordering a recall of a product, are typically of no interest to outside counsel, who is rewarded only by payment of money damages. The greater the settlement, the larger the payment of contingent fees. Some argue that if it is unacceptable for police officers and prosecutors to be paid a bonus based on the size of a fine a person or company had to pay, then it is no different where the state attorney general delegates handling of a case to outside counsel who is compensated by receiving a percentage of a settlement or judgment. One critic of state attorney generals' contingent fee arrangements with private attorneys is former Alabama Attorney General William H. Pryor, who summarized his concerns as follows:

> The use of contingent fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to taxpayers….If you do not ban these arrangements, in the context of government suits, you should, at least, consider several legislative restrictions: caps on hourly rates or percentages; competitive bidding; detailed time and expense record keeping; review by legislative committee of contracts with attorneys; and limits on campaign contributions by attorneys to government officials. [8]

Wall Street Journal columnist John Fund has written an article on this problem called "Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiff's Bar." In this article, Mr. Fund writes:

> It is hard to exaggerate how much the role of state AGs has changed. "For 200 years they defended the state in cases brought by outside parties," Drew Ketterer, Maine's attorney general from 1995 to 2001, told *Corporate Legal Times* "That was basically the job. Nobody really knew who these people were." Today all that has changed. The

[8] "Curbing the Abuses of Government Lawsuits Against Industries," program of the American Legislative Exchange Council, Aug. 11, 1999.

> most aggressive state attorneys generals such as New York's Eliot Spitzer "have become nationally prominent as a result of their enforcement activism." Recently, Spitzer and seven of his fellow state AGs sued the nation's five largest public utilities, even though none of the utilities are located in their states. The lawsuit sought a three percent annual reduction in carbon dioxide emissions over the next decade. "Never mind that the AGs have neither the authority nor the responsibility to act in the broader national interest," writes Cato Institute Senior Fellow Robert Levy. Indeed, the state AGs are increasingly performing the function that Congress and federal regulatory agencies are supposed to carry out as well as saddling the general public with tax and regulatory burdens that were never voted on by elected representatives.
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> Former Clinton-era Labor Secretary Robert Reich is explicit in stating that we have entered a new era. "Regulation is out, litigation is in," he wrote in *USA Today*. "The era of big government may be over, but the era of regulation through litigation has just begun."

Indiana Attorney General Steve Carter contends, "The trend is accelerating, not slowing."[9]

The landmark tobacco settlements in the late 1990's, with the resultant windfalls to state treasuries and plaintiff lawyers, encouraged and allowed state attorneys general to take on a number of other industries, including: the airline industry, automakers, fast food companies, gun manufacturers, insurers, lead paint manufacturers and oil and gas companies. The coordinated activity of the state attorneys general has been called "the greatest legal threat against business today."[10]

A quick look at recent news sources includes the following stories of state attorneys general filing lawsuits against a myriad of businesses and industries:

- "California sued six of the world's largest automakers over global warming . . . charging that greenhouse gases from their vehicles have caused billions of dollars in damages. The lawsuit is the first of its kind to seek to hold manufacturers liable for the damages caused by their vehicles' emissions, State Attorney General Bill Lockyer said."[11]

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[9] "The Role of the State General: Differing Perspectives" program of the U.S. Chamber of Commerce, May 26, 2005.

[10] "State AGs Police Corporate America" by Phil Carlton with Jocelyn Y. Dyer.

[11] "California sues carmakers over global warming" REUTERS (http://today.reuters.com), September 20, 2006.

- "California Attorney General Bill Lockyer has filed a $10 million-plus lawsuit. . . contending that [a] firm unlawfully obtained and sold wireless customers' confidential monthly call records."[12]

- "New York Attorney General Elliot Spitzer has sued one of the most elusive Internet spyware companies, alleging that the firm surreptitiously installed millions of pop-up ad programs on consumers' computers."[13]

- "Ohio Attorney General Jim Petro. . . sued a Columbus check processor for helping telemarketers in Canada siphon money out of Ohio consumers' bank accounts in violation of state's consumer protection laws."[14]

The tobacco litigation in particular has been the subject of criticism. Some commentators have argued that the tobacco settlement agreement, ultimately paid for by defendant tobacco companies increasing the nationwide retail prices of tobacco products, acts as a de facto tax on the entire industry and its customers.[15] Again, considering separation of powers and federalism concerns, the question becomes whether a legislative function (establishing a tax) has been exercised and, if so, whether it should be exercised by an executive officer, a state attorney general. If a tax, the argument continues, it is certainly not transparent in its adoption or its operation.

But these cases, again in particular the tobacco litigation settlement, have come under attack for reasons in addition to violation of the principles of separation of powers, federalism, and the underlying contingency fee arrangement concerns. Justification for the tobacco suit was largely premised on the notion that the plaintiff

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[12] "California Sues. . . for $10 Million" *News* (www.consumeraffairs.com), March 14, 2006.

[13] "New York Sues Major Spyware Distributor" *News* (www.consumeraffairs.com), April 4, 2006.

[14] "Ohio Sues Firm for Helping Telemarketing Fraud", *News* (www.consumeraffairs.com), April 7, 2006.

[15] In a June 27, 2006, newswire announcing that The American Tort Reform Association launched a website to monitor the litigation agendas of state attorneys general (www.agwatch.org), ATRA President Sherman Joyce states ". . .with the rising annual cost of America's tort system of $260 billion, every man, woman and child already pays a tort tax of $886. The regulation-through-litigation agenda of many state AGs will raise that tax even higher."

states were due payment for expenses states had incurred in providing medical care and benefits to injured smokers.[16] Public pledges were made to ensure that settlement funds would be used for that purpose, and for education and smoking cessation programs.[17] Plaintiff states, it has been asserted, have broken these implicit and sometimes explicit promises and used settlement funds to enrich their general treasury.

The lines are drawn fairly clear in the debate over the proper role of the state attorneys general. The United States Chamber of Commerce and its Institute for Legal Reform initiated a campaign against the consumer protection efforts of state attorneys general in 2006. Meanwhile, some consumer groups have come to the defense of state attorneys general in response to business groups' claims that states' chief law enforcement officers are a "serious threat." Consumers Union, Public Citizen, USPIRG and other consumer groups have called the accomplishments of state attorneys general "a critical bulwark of protection against fraud and unfair and deceptive practices." "State attorneys general perform a vital role in protecting consumers and businesses from the unfair business practices of those corporations that seek to make a profit and get ahead by breaking the law," the groups said in a statement. "Consumer protection and law enforcement by state attorney generals are essential to a vibrant and fair economy, to the preservation of federalism, to the supervision of entire sectors of the economy and to the safeguarding of one of consumers last avenues for redress."[18] But opponents of the modern role of the state attorneys general counter that while the enforcement role of the state attorneys general is both proper and desirable, to the extent state attorney general activities

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[16] "When States Screech, Don't Listen" NATIONAL REVIEW ONLINE by Michael S. Greve, January 23, 2004; "Government by Indictment—Attorneys General and Their False Federalism" by Michael S. Greve, American Enterprise Institute, May 24, 2005.

[17] "When States Screech, Don't Listen," *supra.*

[18] "Business Interests Target 'Activist' Attorney Generals," *News* (www.consumeraffairs.com) , May 27, 2005.

result in policy-making or have extraterritorial effect, they are on constitutionally infirm ground.

Several cases highlighted by the consumer groups in favor of action by state attorneys general are noted below. Others have argued that the cases are ill-advised because of their extra-territorial effect and the tendency to establish or modify policy positions, the focus of separation of powers critics.

Drug Pricing

In a series of cases, state attorneys general took coordinated enforcement action against multinational pharmaceutical companies, alleging they broke antitrust laws to prevent consumers' access to cheaper, generic drugs. The drug companies' conduct allegedly cost consumers and tax payers hundreds of millions of dollars, and it was claimed that the harm extended far beyond mere money. The drug companies were alleged to have rendered patients less able to combat heart disease, cancer, anxiety, and Alzheimer's disease. The state attorneys general produced settlements that provided restitution to consumers and taxpayers, and reformed the companies' business practices.

Predatory Lending

One finance company allegedly victimized consumers across the country with predatory lending practices that targeted the most vulnerable people. State attorneys general launched a multi-state enforcement action against this finance company. The result was a $474 million settlement that provided restitution to victims and changes to the company's lending practices.

Price-Gouging

Energy companies allegedly gouged California consumers and businesses to the tune of billions of dollars during the energy crisis of 2000 to 2001. The federal regulator that was supposed to protect rate payers (the Federal Energy Regulatory Commission or FERC) "slept through the crisis," according to consumer groups. The California Attorney General moved to fill the enforcement void by launching an investigation of the industry's market conduct. The State of California filed dozens of lawsuits against generators and marketers, and the Attorney general represented the state before FERC in California parties' quest for $9 billion in refunds. The California Attorney General's Energy Task Force negotiated $3.3 billion worth of settlements that have provided about $2.6 billion in benefits to ratepayers.

Investor Fraud

The New York Attorney General uncovered numerous fraudulent deeds and practices, including illegal market timing and excessive fees by mutual fund companies, and reached financial settlements; many of them in groundbreaking cases resulting in profit disgorgements, penalties, restitution and fee reductions that put money back in investors' pockets, according to consumer groups.

Pollution

Nine state attorneys general recently filed a lawsuit challenging the Environmental Protection Agency's new mercury pollution standards. The suit asserts that the new rule fails to protect the public and children from toxic emissions from coal-fired power plants, the single largest source of mercury pollution. When mercury enters the food chain and is consumed by young children and pregnant or nursing mothers, it can cause permanent brain and nervous system damage. Fish from some waters in forty-five states have been declared unsafe to eat because of the level of mercury they contain, according to consumer groups.

The modern role of the state attorneys general has led to a spirited debate as it pertains to these and other lawsuits, particularly when they are filed by private contingency fee law firms.

The Evolution from the Traditional to the Modern Role

Within the last decade, politicians, media commentators, the business community, conservatives, liberals, libertarians, federalists and consumer advocates have witnessed and remarked upon the expanding reach of state attorneys general in single-state and multi-state litigation and settlements designed to change the direction of many of the nation's business practices—continuing long after the nationwide tobacco settlement.

When sued by a state attorney general to reform its business practices, the targeted company or industry may express indignation that the litigation is sought to reform practices that normally would be subject to legislation or administrative action, where there is public input, comment and the opportunity for debate, and further that it creates discontinuity in the national market.[19] Yet such litigation is not the exclusive province of state attorneys general of one political party or another. Increasingly multi-state suits are brought by, or joined by, Democrat and Republican state attorneys general seeking to address perceived police misconduct or to address the perceived concerns of the consumers of their state. Clearly, the culture of each attorney general's office differs one state to the next, but the role that a state attorney general plays is unique and powerful among state officials. Attorneys general have the

[19] *See, Competitive Federalism: The Rise of the State attorney general,* by John C. Coffee, NEW YORK LAW JOURNAL, Sept. 18, 2003, at 5; *see also* Note, Greg Baker, Eliot Spitzer, the SEC, and Research Analyst Conflicts of Interest: Assessing the "Balkanization" Criticism of Eliot Spitzer's Analyst Conflict of Interest Case (http://www.law.columbia.edu/center_program/ag/Library/AG_Std_Papers).

duty to protect and they assume the duty with great seriousness. While serious corporate misconduct may come and go in cycles, checked by vigorous state and federal prosecution, this modern trend of state attorneys general, of all political stripes, to use their state powers to more broadly "police" the practices of businesses, both large and small, has outlasted any corporate misconduct cycle.

This paper contends that to the extent the state attorneys general bring legal actions (including for damages) in their quasi-sovereign, proprietary, and parens patriae capacities, and use long-standing state common law of fraud and nuisance, as well as various state consumer protection and fair dealing statutes, they are likely to continue to be vigorous in their pursuit of reform of businesses. To the extent that an underlying state law or the cause of action of the state attorney general may be expressly or impliedly preempted by federal law, the attorneys general are likely to be creative and find other legal theories and other means under state law to pursue their ends in court.

To the extent that preemptive federal laws may block certain state action or litigation, such preemption will in any case never be "complete," as Congress cannot possibly, or constitutionally, negate the entire body of state common law or associated remedies, [20] thus always affording the state attorneys general some opportunity to pursue a particular consumer interest or environmental protection. Further, to the extent certain federal laws do not expressly or impliedly preempt state law, and where state and federal cooperative prosecution is possible, the state attorneys general will continue to pursue joint federal-state actions on behalf of consumers and the environment.

Conclusion

[20] *See, e.g.,* "Free Eliot Spitzer!" by Michael S. Greve, AEI Online (www.aei.org) May 1, 2002.

Whether one approves or rejects the modern role of the state attorneys general, it is clear that regulation through litigation is here to stay. Because most states have elected officials to serve as attorneys general and, like California, New York and other jurisdictions, the state attorneys general are likely to run for re-election or other political offices, a case can be made to voters that regulation through litigation can be a beneficial means to an ends without the usual red tape of government.

Where federalism is concerned, it will be left to Congress and the federal courts to ensure that state attorneys general do not improperly exceed the boundaries of their authority or usurp power reserved to the federal government. As explained above, particular vigilance will be required in the area of federal preemption, which is likely to be circumvented by creative state attorneys general.

Finally, regarding the use of private firms to prosecute large-scale tort actions, there are likely to be greater calls for state monitoring of the practice. The hiring of outside counsel could be accompanied by mandatory competitive bidding and legislative oversight. Once counsel is retained, safeguards could be enacted to ensure that the private attorneys' fees are "reasonable." Moreover, states could pay careful attention to campaign contributions from law firms to elected state attorneys general to ensure that the hiring of outside counsel is not driven by improper motives. These and others proposals are at least worthy of debate.

Ultimately, it is clear the public needs to become more educated about the modern role of the state attorneys general before forming an opinion on whether to accept this rapidly emerging new form of "activity."