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Congress Extends Deadline for Negotiations as Discussions Continue on Consumer, Finance and Health Bills



BLAIR TINKLE

BLAIR TINKLE, LEGISLATIVE DIRECTOR

Lawmakers on Capitol Hill are facing hectic schedules as they address a variety of issues before going home for the holidays, not to return until 2008, the final year of the 110th Congress and a presidential election year. As is usually the case, the appropriations process is deadlocked, but Congress bought a new deadline

for negotiations by passing a Continuing Resolution until December 14, 2007. Congressional leaders have indicated that they intend to address a farm bill, an energy bill, an Alternative Minimum Tax, the Foreign Intelligence Surveillance Act and agreement on spending bills.

Even amidst an ambitious schedule, bills of interest to state Attorneys General are seeing action before year's end. Legislators are addressing the shaky home mortgage market with several housing measures, attempting to confront the issue of lead-tainted toys before Christmas and the children's health insurance package, funded by an increase in the federal cigarette tax.

On the foreclosure front, it is estimated that in the coming year, many homeowners will face mortgage resets that would increase monthly payments on their home loans, in some cases as much as a 50 percent jump. The FDIC estimates that as much as \$300 billion in such loans will reset in the calendar year 2008. In 2007, nearly \$150 billion in reset loans caused a crisis of foreclosures and the media attention and public awareness of continued market instability have clearly given congressional leaders the impetus to get something done.

Although it is not likely that Congress will be able to get a bill on the President's desk this year, especially given the current backlog in the Senate, the House did pass a bill, by a 291-127 vote. The bill places standards on brokers, lenders and Wall Street firms. The bill also gives federal regulators greater authority to oversee the financial services industry.

The measure became a bipartisan effort when the bill's manager, House Financial Services Committee Chairman Barney Frank (D-MA), reached agreement with House Financial Services Committee Ranking Member Spencer Bachus (R-AL). Among other concessions, the agreement included a preemption of state laws providing a limited liability for Wall Street firms that sell mortgage-backed securities.

An effort was made by a number of state Attorneys General to fend off greater preemption in the bill and attempts are still being made to narrow the current limited liability, or even have it removed from the bill altogether.

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

ACTING EXECUTIVE DIRECTOR

CHRISTOPHER TOTH

NAAGAZETTE

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EDITOR

ANGELITA PLEMMER

Communications Director

CONTRIBUTORS

STEVE CARTER

Indiana Attorney General

TOM CORBETT

Pennsylvania Attorney General

PAULA COTTER

Environment Project Director and Chief Counsel

JUDY MCKEE

End of Life Health Care Project Coordinator and Counsel

ELLEN RYAN

Consumer Protection Project Manager and Counsel

BLAIR TINKLE

Legislative Director

CREATIVE

LISA JETER

Web Programmer/Designer

PRODUCTION & CIRCULATION

LESLIE NELSON

Communications &

Special Projects Assistant

.....

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The bill now moves to the Senate where Senate Banking Committee Chairman Christopher Dodd (D-CT) is expected to introduce legislation soon.

On the issue of lead-tainted toys sold in the United States, it appears again that media attention and public awareness are creating an atmosphere of urgency in Congress. Committees in both the House and Senate have held hearings and passed bills recently.



Within the last year, millions of children's products, many of which were imports from China, have been recalled due to the presence of excessive amounts of toxic lead, hazardous magnets and other dangerous chemicals.

This has prompted lawmakers in both chambers of Congress to act, primarily to give the Consumer Product Safety Commission (CPSC) more authority to oversee goods. There are also provisions in both the House and Senate bills that propose a cap on lead in consumer products and language that would allow state Attorneys General to enforce consumer product safety laws. The bill however, could see changes, perhaps regarding state Attorney General enforcement rights, as negotiations continue in the Senate.

On November 15, 2007, the House Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Commerce and Energy reported legislation to the full committee addressing the issue. While expanding CPSC authority to regulate goods, particularly with an eye toward children's products, the initiative also permits state Attorneys General a right of action to enforce a consumer product safety rule or order and the ability to obtain appropriate injunctive relief. The House bill moves to the full committee and action is expected soon.

The Senate Commerce Committee recently passed a similar initiative regarding product safety, sponsored by former Arkansas Attorney General, now U.S. Senator Mark Pryor (D-AR). The Senate bill includes state Attorney General enforcement authority, is specifically not preemptive of state consumer laws, contains whistleblower protections and offers whistleblowers a portion of civil penalties collected as a result of information that they have provided.

Media attention and public awareness of several issues have Congress in action and state Attorneys General on call.

Some on Capitol Hill expect both the House and Senate bills to move before the end of this year, and although that is clearly possible, a backlog of schedules makes it somewhat unlikely. A NAAG working group on this issue has held regular calls and a letter may be forthcoming.

Congress is again addressing the reauthorization and expansion of the State Children's Health Insurance Program (SCHIP), created by the Balanced Budget Act of 1997 and scheduled to sunset this year. The SCHIP program was created to address the growing number of children in the United States without health insur-

ance, primarily because they live in families who earn too much money to qualify for Medicaid, yet cannot afford to buy private insurance.

Largely funded by an increase in the federal tobacco excise tax, from 39 cents to a dollar, the reauthorization and expansion of SCHIP has already been sent to the President this year. The President vetoed the bill and Congress could not override that veto. Currently surviving on a Continuing Resolution until December 14, 2007, the issue will again be negotiated by lawmakers this year as they seek to find approximately 12 more members to sustain a veto-proof majority in the House.

Although President Bush and Health and Human Services Secretary Michael Leavitt have stated opposition to raising the tobacco excise tax to fund the measure, lawmakers on both sides of the aisle continue to cite the tax as a revenue source to expand SCHIP. The issue will see action in December 2007, but similar to many other bills, it will likely move into the new year for resolution.

NAAG Assumes National Leadership of Executive Working Group on Prosecutorial Relations



STEVE CARTER



TOM CORBETT

INDIANA ATTORNEY GENERAL STEVE CARTER AND PENNSYLVANIA ATTORNEY GENERAL TOM CORBETT

Inaugural Meeting Highlights Immigration and Human Trafficking Challenges for Law Enforcement

We are honored to have been chosen by our colleagues within the Executive Working Group of Prosecutorial Relations (EWG) to serve as co-chairs for the next year. The EWG is comprised of principal representatives from NAAG, the National District Attorneys Association and the U.S. Department of Justice. The group was formed more than 30 years ago in an effort to increase cooperation among federal, state and local law enforcement and prosecutorial agencies. The overriding purpose is to provide a forum for federal, state and local law enforcement to engage in open and candid discussions regarding areas of mutual concern. The chair of the EWG rotates among the three member organizations and it is currently NAAG's turn to lead the group.

As co-chairs, we hope to lead the EWG in a positive direction, making the work of the group relevant and useful to all three member organizations that it serves. Part of our initial work will be to revisit the antiquated by-laws of the group in order to bring them up-to-date with the current activities and priorities of the group. In addition, we are in the process of institutionalizing a mechanism in which the EWG holds one of its three yearly meetings in conjunction with one of the national

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TRAYCE PAYNE WILSON

It has been nearly 15 years ago since Tracye Payne Wilson first started her career at NAAG as a secretary.

Her responsibilities included staffing the Supreme Court Project and the National Association of Medi-

caid Fraud Control

Units (NAMFCU), as well as pitching in wherever her administrative skills were needed. Back then, there were no more than 20 staffers at NAAG. She worked on a clunky DOS computer system and typewriter.

"We just had a receptionist who took handwritten messages," Tracye laughed. "And since there was no spellcheck on the computers, you had to eyeball everything. I can even remember getting training on how to use the computer mouse."

But today, NAAG is a different place. The staff size has more than doubled and pocket-sized Blackberries are the norm.

"The work of the Attorneys General has really changed," Tracye said. "With the evolution of the Internet, it has really created of all kinds of new issues and gray areas."

Tracye still works for NAMFCU, but as an Association Administrator, providing a full range of project management and administrative support. NAMFCU has grown to 50 member Medicaid Fraud Control Units (MFCUs) and approximately 1,900 employees.

A 1999 graduate of the University of the District of Columbia, Tracye spends her free time working as the outreach coordinator, group facilitator and newsletter editor at Our Place, DC, a drop-in center for formerly incarcerated D.C. women that helps women remain drug and alcohol free, obtain decent housing and jobs, gain access to education, secure resources for their children, and maintain physical and emotional health. Tracye has been involved with this program since its inception in 1999, was a member of the Advisory Board when the program was in the earliest stages of development and still serves in the capacity of program advisor.

meetings held by the member organizations, increasing the opportunities for further legal analysis and understanding of complex legal issues. It is our hope that the EWG will continue to be a vibrant forum for federal, state and local law enforcement officials to discuss critical issues of public safety and to promote a continued increase in cooperation among the various levels of government.

On October 30, the first meeting during our tenure as co-chairs, we focused on two issues of increasing concern for Attorneys General: immigration and human trafficking. The meeting featured robust discussion among the three groups, as well as an opportunity to engage in dialogue with senior level executives at the Department of Justice, including the Acting Attorney General.

The NAAG contingent presented information on the current hot-button issues within our jurisdictions related to immigration and human trafficking, including the use by state police agencies of powers under Section 287(g) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g), which provides state and local law enforcement with general powers involved in the routine enforcement of federal immigration laws. This broad enforcement authority can only be delegated to state and local law enforcement agencies through a formal Memorandum of Understanding (MOU), which effectively deputizes members of state or local law enforcement agencies to perform the "function[s] of an immigration officer." 8 U.S.C. § 1357(g).

The local perspective on these issues included discussions related to the potentially negative impact local law enforcement of federal immigration laws might have on cooperation with law enforcement in the immigrant community, as well as the increased victimization within those communities. One presentation of particular note examined how Maryland Attorney General Doug Gansler partnered with the Baltimore City State's Attorney and the U.S. Attorney to form a Human Trafficking Task Force.

Another unique cooperative approach by federal law enforcement included Operation Innocence Lost, a joint effort between the National Center for Missing and Exploited Children, the Federal Bureau of Investigation and the Child Exploitation and Obscenity Section of the Department of Justice. Started in the spring of 2003, this nationwide initiative seeks to establish partnerships among federal, state and local law enforcement to identify victims of human trafficking (particularly child victims of interstate sex trafficking in the United States) and provide services to these victims, as well as prosecute offenders. Research statistics indicate that the

Southwest border is a critical area of concern for federal immigration officials with 97 percent of illegal immigration migration coming through this area.

The next meeting will be hosted by EWG member and Colorado Attorney General John Suthers on January 18, 2008 in Denver, Colorado. The main focus of the discussion will be computer crime. Public corruption will lead items for discussion at the May meeting of the group, which will conclude NAAG's rotation as chair.

We look forward to our leadership role within the EWG in the coming months and the opportunity to work with federal and local law enforcement and prosecutorial agencies to make our communities safer.

NAAG Criminal Law Counsel Nick Alexander also contributed to this article.

FTC Pledges to Retain Numbers from the National Do-Not-Call Registry

ELLEN RYAN, PROJECT MANAGER AND COUNSEL, CONSUMER PROTECTION AND TELEMARKETING FRAUD



ELLEN RYAN

Telephone-number registration would be permanent under proposed legislation

Consumers who registered their telephone number with the National Do-Not-Call Registry may not have to worry about re-registering their phone number every five years under new legislation proposed in

Congress that makes one-time registration permanent.

The national Registry was established in 2003 as a means of blocking annoying phone calls from for-profit telemarketers. Under the current law, consumers must re-register their phone numbers every five years to ensure that the list is up to date. This requirement allows the Federal Trade Commission (FTC), which helps maintain the Registry, to periodically purge disconnected or reassigned numbers — ensuring the accuracy of the Registry, which now contains more than 145 million phone numbers.

However, the FTC announced in October that it is not dropping any telephone numbers from the Registry in spite of the

five-year requirement, pending final Congressional or agency action. Nearly 52 million numbers were scheduled to expire before September 30, 2008.

Legislation

There are currently two bills responding to the federal Registry's requirement for phone numbers to be re-registered. At separate House and Senate committee sessions on October 30, lawmakers approved legislation within the Committees that makes most of the phone numbers on the Registry permanent by eliminating the FTC's five-year expiration date.

In the House, HR 3541, the "Do-Not-Call Improvement Act of 2007," would also require purges of disconnected or re-assigned phone numbers by the FTC twice a month, as opposed to the once a month mechanism currently in place. The measure, sponsored by Rep. Mike Doyle (D-PA), cleared the House Committee on Energy and Commerce and is due to be sent to the full House for a vote. Doyle said his legislation would give millions of Americans "a little much-needed peace and quiet."

In the Senate, S.2096, the "Do-Not-Call Improvement Act of 2007," cleared the Senate Commerce, Science, and Transportation Committee. Sen. Byron Dorgan (D-ND), who sponsored the bill, said it would also establish a permanent registry extension and prevent consumers from having to re-register their phone numbers every five years. In addition, the legislation would remove the need for a costly education campaign reminding Americans to re-enroll their number on the Registry. The bill also heads to the full Senate for a vote.

History of Do-Not-Call

Since the late 1980s, several states began studying the problem of unwanted telemarketing calls and state legislatures responded to the increasing demand for privacy by enacting their own Do-Not-Call legislation. In 1991, Congress passed the Telephone Consumer Protection Act (TCPA), granting consumers certain rights to defend themselves against unwanted telemarketing calls through the company-specific no-call list. However, the company-specific list proved inadequate in protecting consumers because it left consumers entirely dependent on telemarketers to interpret the consumers' request that they not be called again, and to comply with that request. The creation of No-Call databases empowered consumers to choose, in advance, whether they wanted to receive these contacts in their homes. It also required telemarketers to access the list so those numbers could be blocked from their dial-out programs. Before the creation of

the national no-call registry, more than 20 states had a no-call registry.

On March 11, 2003, President Bush signed the Do-Not-Call



Implementation Act into law. The law was passed unanimously in the U.S. Senate and passed in the U.S. House of Representatives with a 418-7 vote. This law made it illegal for telemarketers to call consumers with whom they do not have a prior business relationship. It also limited times of day when telemarketers could call, the use of auto-dialing technology and the area codes accessible to telemarketers. In addition, it enforced severe fines for calling numbers on the national Registry, and it required telemarketers to keep their own Do-Not-Call lists up-to-date with the national Registry.

Pursuant to its authority under TCPA and to comply with the new law, the Federal Communications Commission (FCC), together with the FTC, established a national Do-Not-Call Registry in June of 2003. The FTC held numerous workshops, meetings and briefings to solicit feedback from interested parties and considered more than 64,000 public comments to determine the needs of the Registry. The Registry is nationwide in scope, applies to all telemarketers with the exception of certain non-profit organizations, and covers both interstate and intrastate telemarketing calls. It is managed and enforced by the FTC, the FCC and state law enforcement officials. Since 2003, about 30 states have merged their state Do-Not-Call information with the federal Registry.

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State Attorneys General Play Leading Role in Natural Resource Damage Cases



PAULA COTTER

PAULA COTTER, PROJECT DIRECTOR AND CHIEF COUNSEL, ENVIRONMENT

The federal government's Natural Resource Damage Assessment and Restoration Program (NRDAR) works to restore natural resources injured as a result of oil spills or hazardous substance releases into the environment.

Damage assessments provide the basis for determining the restoration needs that address the public's loss and use of these resources.

State Attorneys General often serve as counselors to state government agencies and legislatures and must act as representatives of the public interest. Restoration efforts can have an enormous impact on a state's environmental resources and affect the public's health and safety. As natural resource damage assessments and restoration play a growing role in the much larger scheme of environmental protection, Attorneys General are increasingly taking the lead in these types of cases.

Managed by the Department of the Interior (DOI), the Restoration Program assesses the damages and injuries to natural resources and negotiates legal settlements or takes other legal actions against the responsible parties for the spill or release. Funds from these settlements are then used to restore the injured resources at no expense to the taxpayer. Settlements often include the recovery of the costs incurred in assessing the damages. These funds are then used to fund further damage assessments.

Now, more recent trends indicate that many state Attorneys General have been actively involved in litigation and settlements of natural resource damage (NRD) cases and are progressively leading the way.

For instance, the state of Montana has recovered approximately \$200 million in settlement of its claims for mining-related NRDs in the Clark Fork River. The state of New Jersey is currently pursuing more than 100 claims for injury to its resources, primarily groundwater.

Virtually every state in the country has brought or settled claims, or is considering pursuing NRD, and an increasing number are actively building programs to handle such claims on a more routine basis. In almost every state, the Attorney General plays an important part in natural resource damage cases.

Natural resource damage suits emerge from a concept of public stewardship reflected in the common law. Today, however, natural resource damage actions are largely creatures of statute — most prominently the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund, as amended (42 U.S.C. §§ 9601, *et seq.*)) and the Oil Pollution Act (OPA, 33 U.S.C. §§ 2701, *et seq.*). The policy embodied in those statutes (and other less frequently used laws) is that governments are entrusted with protection and management of natural resources on behalf of the people. These federal laws allow state, federal and tribal trustees to recover damages for the injury, loss or destruction of natural resources due to releases of hazardous substances or oil.

All natural resource damage recoveries under the federal laws must be used to restore, replace or acquire resources equivalent to those lost. NRD claims differ from common environmental enforcement by states pursuant to authorized pollution programs in that they do not regulate on-going activities and are not considered punitive, unlike civil and criminal actions. Nor are natural resource damage claims intended to abate threats to humans and the environment, which is the purpose of the remedial provisions of CERCLA. Rather, the objective of NRDs is to replace or restore injured resources to conditions under which such resources can provide human and ecological services equivalent to those that would have been available had the release of hazardous substances or oil not occurred, and to compensate the public for the period of time between the release and the achievement of full restoration.



To give a simple example, a CERCLA suit for remediation might require a polluting company to dig up the chemicals that were leaking into the groundwater, which seeped out into a riverbank and into the water. The related natural resource damage suit might recover money to re-vegetate the riverbank and restore the fish population that was injured by the leaking chemicals either at the contaminated site, or at another location as trustees determine appropriate.

Under CERCLA and OPA, the state trustees are designated by the governors of the states. In some states, the governor has created a specific office to fulfill natural resource trustee duties. For instance, the Louisiana legislature created the Louisiana Oil Spill Coordinator's Office, which was made a part of the Governor's office and designated as the state trustee for all natural resource damage matters arising from oil spills. That office acts as a point of contact, pulling in the appropriate state agencies after a spill occurs. In Colorado, the Governor has designated three trustees for natural resource damage matters: the Attorney General; the executive director of the Colorado Department of Public Health and Environment; and the director of the Division of Reclamation, Mining and Safety in the Colorado Department of Natural Resources.

Federal trustees are identified in Executive Order 12580, as amended by Executive Order 12777, and include not only the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration, but also the Departments of Defense and Energy for their own federal facilities.

Often state, federal and tribal trustees work together at a site, because each has overlapping trusteeship over the resources at a site. For instance, at the Fox River site, the Oneida and Menominee tribes, Michigan and Wisconsin, the U. S. Fish & Wildlife Service and the National Oceanic and Atmospheric Administration combined to develop a restoration plan. Such co-trusteeship has also been present at the Tri-State site in Oklahoma, Kansas and Missouri, and in the Coeur d'Alene Basin in Idaho.

In 1994, DOI issued rules governing the assessment of NRDs under CERCLA. (43 CFR 11) Trustees are not required to comply with these regulations; however, they obtain a rebuttable presumption if they do. The 1994 rules have been widely criticized by trustees for a variety of reasons -- vagueness, impracticality, obsolescence and internal inconsistency are a few of the problems alleged by critics. DOI convened a Federal Advisory Committee in the hope of benefiting from a balanced and knowledgeable group of people who have experience with natural resource damages. Attorneys General were a logical choice to sit on the committee, because they represent legal interests distinct from those of the federal



trustee agencies that were already represented on the government's Federal Advisory Committee, especially those agencies that are liable for NRDs, such as the Department of Defense.

The committee met for two years to discuss and analyze a series of questions about probing different aspects of the existing rules. For purposes of providing expert advice, the advisory committee divided itself into four groups to consider four questions. Utah Attorney General Mark Shurtleff and Colorado Senior Assistant Attorney General Vicky Peters (acting as alternate), who were later honored for their efforts, participated on the subcommittee on the identification and selection of appropriate restoration alternatives. The four subcommittees then met as the full committee to consider the recommendations. DOI then designated representatives to draft an integrated report. A full discussion of the recommendations in the Report is beyond the scope of this article, but the list on the next page highlights some of the subjects considered and the strategies endorsed by the advisory committee. General information about the committee and its membership is available on DOI's, www.doi.gov. The text of the report is available online at http://restoration.doi.gov/pdf/facamtg5_finalreport.pdf.

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SUBCOMMITTEE QUESTIONS

Natural Resource Injury Determination and Quantification

What are the best available procedures for quantifying natural resource injury on a population, habitat or ecosystem level, as set forth in the DOI NRDAR regulations at 43 CFR 11.71(1)? What guidance is appropriate for the utilization of these procedures?

The committee could not reach consensus on this issue in the time available, and recommended that DOI sponsor a series of workshops and research papers to develop guidance about what level of biological scale is appropriate for quantifying injuries – i.e., whether the study be done at the level of individual organisms or, for instance, at a population level. The committee believes the guidance should not be excessively prescriptive, should be subject to peer review and should keep pace with the evolving field.

Restoration Action Selection

Should DOI's Natural Resource Damage Assessment and Restoration regulations provide additional guidance — beyond the current factors to consider found at 43 CFR 11.82 — for determining whether direct restoration, rehabilitation, replacement or acquisition of equivalent resources is the best strategy for addressing natural resource injury?

Choosing an appropriate restoration activity can be problematic. The regulated community, the public and the trustees have all wrestled with the task of identifying and choosing appropriate restoration projects. Communities long affected by contaminated sites often want to use NRD recoveries to generate funds or create recreational opportunities unrelated to restoration, such as ball-fields. Educational programs and signage related to contamination are other frequent suggestions. Others believe that the highest priority should be to directly restore the injured resource, no matter how expensive or infeasible, rather than finding replacements. As an example, direct restoration of the injured resource seems like an intuitively inviting approach — but direct restoration may not be possible or wise in a specific situation. If trustees look at a wider range of ideas, a whole variety of factors affect the connection between lost or injured resources and the chosen activity.

The committee recommended that the Department revise its regulations to clarify that *legality*, *reasonable likelihood of success* and a *demonstrable relationship between the injury and the restoration alternative* are threshold factors that must be present in order to justify a specific restoration alternative. The committee further recommended that revised rules require consideration of balancing factors such as the strength of the relationship between the injured resource and the restoration alternative, and the long-term, sustainable benefits to natural resources and services of each proposed project or group of projects.

Compensating for Public Losses Pending Restoration

Should DOI revise the Natural Resource Damage Assessment and Restoration Regulations to allow for compensating for interim losses with additional restoration projects in lieu of monetary damages for the economic value of the loss? If so, how should project-based interim loss claims be calculated?

CERCLA and the current regulations authorize natural resource trustees to recover compensatory damages for the interim loss of natural resource services that would have been available to the public if the hazardous substance release had not occurred. The current regulations have been interpreted by some to create a preference for calculating compensatory damages, meant based on the economic value of the lost resources and services based on the public's willingness to pay (43 CFR 11.83(c)). For instance, damages for interim losses at a contaminated lake could be calculated through travel cost models that would reveal how much money people were willing to spend to avail themselves of the services of the injured lake, or to be able to catch bigger or different types of fish that might no longer be present due to contamination. Some economists have conducted surveys to determine how much the public would be willing to pay merely to know that a valued resource exists or would provide services to future generations.

The perceived problems with the lost-economic-value approach are that a) economic valuation can be controversial, divisive and sometimes expensive; and b) it delays consideration of restoration alternatives that often inspire settlements. In contrast, the rules under the Oil Pollution Act authorize trustees to choose the restoration activities that would recompense the public for interim loss of resources, and the damages are set at the cost of performing the restoration activities.

The committee recommended that DOI undertake a narrow revision of the regulation to make clear that trustees may calculate compensation for interim public losses based on the cost of restoration. The committee went on to recommend that the department refrain from prescribing a particular methodology for calculating interim losses, but that it set general principles of reliability that will be applied to all methodologies. Most, if not all of the committee members supported restoration-based assessment of NRD and early consideration of appropriate restoration projects, rather than the current emphasis on economic valuation of interim losses.

Timely and Effective Restoration after Natural Resource Damage Assessment and Restoration Claims are Resolved

What measures should DOI consider to expedite restoration planning and ensure cost effective and efficient restoration after awards or settlements are secured?

To assist the DOI in its goal of actual restoration, the advisory committee made several recommendations, all of which were meant to achieve restoration in a more timely fashion. For instance, the committee recommended that DOI take steps to ensure that federal trustees perform NEPA review concurrently with natural resource restoration planning. Likewise, the committee recommended the department develop an inventory of restoration actions and categories of restoration actions, which trustees could use as a resource, and compile lists of potential partners that could facilitate restoration through funding or in-kind contributions.

To obtain a copy of the advisory committee's report, contact Paula Cotter at pcotter@naag.org, or 202-326-6250.

NAAG Addresses End-of-Life Health Care Issues



JUDY MCKEE

JUDY MCKEE, PROJECT COORDINATOR AND COUNSEL, END OF LIFE HEALTH CARE

In an effort to help the public sort through the increasingly complex legal and social questions surrounding end-of-life health care, the National Association of Attorneys General End-of-Life Health Care Project has tackled one of the most basic of consumer issues: How can states ensure that its citizens' desires concerning treatment at the end of their lives are honored? What changes in a state's laws or regulations are necessary in order to ensure that its citizens will be afforded adequate pain relief during their lives and in their waning days? What can Attorneys General offices do to educate constituents about advance medical directives and health care powers of attorney?



Launched in 2002 as a part of Oklahoma Attorney General Drew Edmondson's presidential initiative, the End-of-Life Project has encouraged Attorneys General across the country to take the lead in drafting legislative changes to make medical directives more consumer-friendly, to participate in citizen forums and educational efforts, to hold listening tours to understand the views of a multitude of stake-holders and to review their own jurisdiction's laws and regulations to ascertain where they may hinder the goals of ensuring that end-of-life wishes be carried out and that a balanced pain policy be pursued. The project published two reports — the first in 2003 titled, "Improving End-of-Life Care: The Role of Attorneys General," and the other similarly titled report in 2004, which outlined the challenges of pursuing the Project's goals and how Attorneys General might address the various issues

raised.¹ As a part of this effort, many Attorneys General offices placed sample forms of advance directives and educational material on their websites. The Terry Schiavo case in Florida sparked a national debate and served as an impetus for changes to be made in the laws of several states and tragically confirmed the importance of considering and expressing one's choices for treatment or non-treatment near the end of life.

In drafting legislation to address end-of-life care issues, states have had to wrestle with a plethora of issues, such as:

- ◆ Should there be a standardized form or should other forms be used and honored?
- ◆ If there is no health care directive, does that create a legal presumption as to the care one desires?
- ◆ Can a medical care directive be overridden if the patient is pregnant?
- ◆ How can an advance directive be revoked?
- ◆ If there are a number of advance directives, which one should be honored? (This can happen if a patient has filled out forms at different hospitals and other forms as part of an estate plan.)
- ◆ Who should make the decision regarding end-of-life care if no one has been appointed?
- ◆ Should medical judgment ever override a medical power of attorney or an advance directive?
- ◆ When a state agency has been appointed guardian, can a decision regarding withholding or withdrawing of life-sustaining treatment be made?
- ◆ How can legislation ensure that a patient's written instructions follow him from hospital to hospital, doctor to doctor, rehabilitation facility to nursing home?
- ◆ Should the state establish an on-line registry for advance medical directives?

The issue of the state's role in guardianship for incompetent individuals has been a particularly difficult one to tackle. Recent cases of severe child abuse in Massachusetts and New York, allegedly committed at the hand of natural guardians, have ended up with a judge being asked to decide whether treatment should be continued for the hospitalized children. May a state agree to the withdrawal of life-sustaining treatment that will lead to the death of a child? If

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¹ The 2003 report is available at http://www.naag.org/assets/files/pdf/report-end_of_life.pdf, and the 2004 report is available at <http://www.naag.org/assets/files/pdf/report-2004-end-of-life.pdf>.

COMMENTARY

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Holidays Offer Opportune Time to Discuss End of Life Health Care Options

JUDY MCKEE, END OF LIFE HEALTH CARE PROJECT COORDINATOR AND COUNSEL

End-of-life health care decisions are intricately interwoven with one's spiritual beliefs, cultural heritage, and intrinsic value system. We may think we know what our loved ones would wish, but, surprisingly, recent research has shown that even spouses fail to accurately predict each other's desires. When people fail to make their wishes known, do not fill out advance medical directives and never appoint a health care power of attorney, decisions will be made by grieving, and often disputing, family members or by strangers.

Many commentators and medical ethicists stress the importance of children with aging parents initiating a conversation regarding end-of-life issues. Thanksgiving and Christmas present an ideal opportunity for such a conversation. It is also important, however, to have this discussion with every family member — spouses, siblings, parents and their children, and even significant others. In other words, it is necessary to have that conversation with anyone whom you love and consider special in your life.

In my family, it was the impending deployment of my younger son to Iraq that precipitated the discussion. Some families take the opportunity when their teen-agers get their driver's license or are heading off to college to talk about these issues. One of my neighbors downloaded forms from the Internet after watching a memorable *Seinfeld* re-run where Kramer fills out an end-of-life directive.

At its most basic level, end-of-life issues are extremely personal and will affect each one of us at some point in our lives and, eventually, at the end of our lives.

so, can the state charge the perpetrator with voluntary manslaughter or murder? How soon may the state act to withdraw treatment?² Should quality of life be a consideration?

Another issue regarding end-of-life care in which states have recently been involved is the provision of hospice care for children. Once hospice care is chosen, government funds are normally no longer available for treatment care, but only for palliative care. California and several other states are piloting programs that afford children the opportunity to continue to receive treatment that might place a disease in remission while also receiving palliative care in a hospice setting.

The NAAG End-of-Life Project is assisted by the numerous Assistant Attorneys General and Deputy Attorneys General in the Attorneys General offices who are involved in these issues. The Project's advisors also include a distinguished and committed group of national experts, headed by Myra Christopher, president and chief executive officer of the Center for Practical Bioethics. The Project's counsel posts monthly "Updates" on NAAG's End-of-Life website³ that include information on activities by Attorneys General offices; legislative and judicial developments; news and articles on pain management, prescription pain diversion and medical advances; palliative care and hospice information; and other topics related to the project's mission. The website also contains links to the Attorneys General offices that have end-of-life information posted on their websites and to other Internet sources for advance medical directives, including those that are based on the beliefs of a number of different religions.

With one of the project's goals being the championing of a balanced pain policy by federal and state governments, the project counsel has worked with DEA and other stake-holders to discover ways in which vigorous enforcement of controlled substance laws will not interfere with patients' receiving needed and appropriate pain medication. As part of this impetus, NAAG partnered with the Center for Practical Bioethics and the Federation of State Medical Boards to undertake an extensive research project regarding the sanctioning of doctors, both criminally and administratively, for violations of controlled substance laws and regulations. The results of this research study are being prepared and will be the subject of a later article in the NAAGazette.



² While the court was debating the issue in Massachusetts, the child involved began to come out of the coma that medical experts had thought was irreversible.

³ Available at http://www.naag.org/end-of-life_healthcare.php.