

NAA Gazette

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IN THIS ISSUE

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State Cases Prominent on 2008 U.S. Supreme Court Docket

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The United States Supreme Court commenced its 2008 Term this month, and has already heard arguments by five Attorney General offices as well as arguments in a major preemption case.

The Court does not have any blockbuster cases on its docket, but it is hearing a steady stream of cases that could significantly affect the states' enforcement of their criminal and civil laws.

Starting with the big picture: The Court is hearing more cases than it has heard in a while. If it fills up its calendar with two cases for each of the remaining scheduled argument days, it will end up hearing 83 cases — the first time in years it has heard that many arguments. Of the 54 cases the Court has agreed to hear so far, 19 of them come from state Attorney General offices. This makes the Attorney General offices, collectively, the most frequent party in the Court.

As always, the Court's cases span an array of issues ranging from habeas corpus to civil rights to the construction of obscure federal statutes. This Term appears to stand apart for its heavy load of criminal law and environmental cases. Together they account for fully half of the docket (there being 22 criminal law cases and 5 environmental cases). Whereas last Term the Court decided only two cases involving Fourth, Fifth, and Sixth Amendment issues, this Term the Court is hearing 10 such cases (so far).

Let's now turn to some of the specific cases the Court will be hearing.

Preemption

Two of the most important cases on the docket address whether federal laws preempt state tort actions. At issue in *Altria Group, Inc. v. Good*, No. 07-562, is whether the Federal Cigarette Labeling and Advertising Act preempts state law deceptive practice claims in connection with the advertising of cigarettes as "light" or containing "lower tar and nicotine." The federal law has a provision that expressly preempts any state "requirement or prohibition based on smoking and health . . . with respect to . . . cigarettes." The principal issue in the case is whether a state tort action based on the general ban on deceptive commercial practices is an action "based on smoking and health."

At issue in *Wyeth v. Levine*, No. 06-1249, is whether the Food and Drug Administration's preapproval of a label for a drug impliedly preempts a state tort law failure-to-warn claim that is premised on the inadequacy of the drug label. The Vermont Supreme Court ruled that federal regulation of drug safety only provides a floor on labeling requirements, and leaves states free to impose more re-

ALSO IN THIS ISSUE

Employee Spotlight: Andrew Giessel	3
Bush & Obama: On the Same Page?	5
Congress' New Year's Resolution	6
Congress Passes Product Safety Legislation	9
Attorneys General and the State Alliance for eHealth	11
Balancing Law Enforcement and Pain Management:	
NAAG Holds Roundtable	14
NAAG Wins Legal Writing Institute's Golden Pen Award	15
NAAG Welcomes Two Fall Supreme Court Fellows	15
NAAG News	15

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strictive labeling under their own duty-to-warn tort laws. Wyeth argues that it is impossible for it to comply with the federal regulatory regime (which, it claims, mandates use of the approved label) and with the state tort regime (which, it claims, mandates use of a revised label). Wyeth further argues that allowing state juries to second guess the FDA's approval of a drug and its labels frustrates the objectives of the federal regulatory scheme. If the Court rules on the latter issue, it could have a major impact on the law of implied preemption.

First Amendment

Two of the four First Amendment cases on the Court's docket are especially interesting. *FCC v. Fox Television Stations*, No. 07-582, addresses the FCC's conclusion that two television networks violated the ban on indecent speech when performers (Bono and Nicole Richie) cursed during live award shows. The precise issue before the Court is whether the Second Circuit was correct in holding that the FCC failed to articulate a reasoned justification for changing its indecency policy with respect to fleeting and isolated expletives.

In *Pleasant Grove City v. Summum*, No. 97-665, the Court tackles a very different First Amendment issue: whether the Free Speech Clause requires that a city which displays numerous monuments in its park — including one that depicts the Ten Commandments — also display a monument donated by the Summum church containing its "Seven Aphorisms." The Tenth Circuit held that it does, concluding that the display of monuments constitutes private (not government) speech and that the park is a traditional public forum. The City argues that cities are entitled to decide what monuments to place on city property.

Environmental Law

As noted, the Court has agreed to hear five environmental cases, all involving complex statutory and jurisdictional issues. *Summers v. Earth Island Institute*, No. 07-463, addresses when environmental organizations may assert facial challenges to federal environmental regulations. *Entergy Corp. v. EPA*, 07-588, concerns the steps existing power plants must take under the Clean Water Act to limit the damage to fish caused by cooling intake structures (the power plants' structures that take water from rivers and circulate the water through their equipment to absorb heat). *Winter v. Natural Resources Defense Council*, No. 07-1239, asks whether a federal district court properly enjoined the Navy's use of sonar during training exercises based on the court's conclusion that the sonar harms whales and the Navy failed to comply with the National Environmental Policy Act.

At issue in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, No. 07-984, is whether discharges of dredged or fill material that are subject to the permitting authority of the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act are also subject to the permitting authority of the EPA under Section 402 of the Act. And in *Burlington Northern & Santa Fe R. Co. v. United States*, 07-1601, the Court will address two issues related to the reimbursement the government may obtain under CERCLA for the costs of remediating hazardous waste sites. Most notably, the Court will address the appropriate standard by which a district court should determine whether to impose joint and several liability on the defendants or to instead apportion responsibility among the many potentially responsible parties.

Other Civil Cases

Among the other civil cases of particular note to the states are *Bartlett v. Strickland*, No. 07-689, *Van de Kamp v. Goldstein*, 07-854, *Carcieri v. Kempthorne*, No. 07-526, and *Hawaii v. Office of Hawaiian Affairs*, 07-1372. *Bartlett v. Strickland* involves the showing a minority group must make to have a viable claim of vote dilution under Section 2 of the Voting Rights Act. Specifically, the question is whether a minority group that constitutes less than 50% of a proposed district's population can state such a claim. The *Van de Kamp* case involves a civil rights claim of an altogether different sort. At issue is whether, even though individual prosecutors are absolutely immune from §1983 liability based on their decisions to present false testimony or suppress evidence, an elected District Attorney and his chief deputy can nonetheless be subjected to liability based on their alleged failure to have proper policies and training on the subject.

Carcieri v. Kempthorne and *Hawaii v. Office of Hawaiian Affairs* both concern states' sovereign authority over land. At issue in *Carcieri* is whether the Secretary of Interior had the power to take land into trust in Rhode Island for the Narragansett Indian Tribe under the Indian Reorganization Act — even though that statute, enacted in 1934, only authorizes land to be taken into trust for “any recognized Indian tribe now under Federal jurisdiction,” and even though the Rhode Island Indian Land Claims Settlement Act expressly extinguished the Narragansett's aboriginal title throughout the state. *Office of Hawaiian Affairs* pertains to 1.2 million acres of land that, under its admission statute, the State of Hawaii holds in trust and may sell or dispose of for specified reasons. Under review is a Hawaii Supreme Court decision holding that a 1993 Joint Resolution of Congress that acknowledged and apologized for the 1893 overthrow of the Kingdom of Hawaii strips the state of its authority to sell or dispose of those lands unless and until it reaches a political settlement with native Hawaiians about the lands' status.

Criminal Law Cases

As noted earlier, the Court is hearing a plethora of criminal law cases this Term. The cases that will likely have the greatest impact on law enforcement are the criminal procedure cases. Here is a brief summary of them:

- ***Herring v. United States*, No. 07-513.** The question presented is “[w]hether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent.” Specifically, a clerk in a county sheriff's office mistakenly told another sheriff's office that there was an outstanding arrest warrant for petitioner. In *Arizona v. Evans*, 514 U.S. 1 (1995), the Court held that the exclusionary rule does not apply to evidence obtained incident to an arrest based on such a mistake when the negligent error was made a court clerk. This case will resolve whether *Evans* extends to negligent errors made by law enforcement personnel — and could result in the Court further chipping away at the exclusionary rule.
- ***Arizona v. Gant*, No. 07-542.** The question presented is whether “the Fourth Amendment require[s] law enforcement officers to demonstrate a



ANDREW GIESEL makes traveling and preparing for meetings look effortless. As NAAG's Consumer Protection project assistant, he juggles various tasks such as planning for Consumer Protection seminars

and National Association of State Charity Officials (NASCO) meetings, providing logistical support for NAGTRI trainings, handling CLE applications and contributing to the project's bi-weekly newsletter.

This Richmond, Virginia native joined NAAG in February 2008 after teaching English at La Universidad de Piura in Piura, Peru for six months. He quickly fell into the groove of assisting the chief counsel and manager in accomplishing the goals of the project, which include improving the enforcement of state and federal consumer protection laws by State Attorneys General, as well as supporting multistate consumer protection enforcement efforts.

Andrew's work in consumer protection issues has also influenced his habits and allowed him to be more knowledgeable as a consumer. “I exercise skepticism and caution. When compiling the Consumer Protection Report, I read press releases of people who are scammed because they didn't read the small print.” He hopes to continue to learn and cultivate these and other skills while at NAAG.

Andrew is a graduate of the University of Virginia, in Charlottesville, Virginia and holds a bachelor of arts in Spanish literature. When not cheering on the Virginia Cavaliers from his alma mater, this avid basketball fan especially enjoys rooting for his favorite professional basketball team, the San Antonio Spurs. He also attends wine tastings in his spare time and hopes to begin hosting his own tastings. In the future, Andrew would like to pursue volunteer work that would allow him to make use of his Spanish speaking skills.

threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?" Although the Court had previously held that no such demonstration is required, the Court had indicated in a prior case that it might revisit that holding. If the Court changes course on this issue, it would force law enforcement to change what has become standard police practice.

- **Oregon v. Ice, No. 07-791.** The question presented is "[w]hether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant."
- **Melendez-Diaz v. Massachusetts, No. 07-591.** At issue is "[w]hether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)." The Massachusetts Court of Appeals held it is not, and therefore held that the Confrontation Clause was not violated when the prosecution introduced laboratory reports declaring that packages seized in connection with Melendez-Diaz's arrest weighed over 14 grams and all contained cocaine, but did not call any state forensic examiners to the stand.
- **Pearson v. Callahan, No. 07-751.** Under the "consent once removed" doctrine recognized by most federal circuits, narcotics investigators may make a warrantless entry into a home after an undercover agent who entered the home at the express invitation of the homeowner observes narcotics there. The Fourth Amendment issue in the case is whether the doctrine applies when the undercover individual is a confidential informant, rather than a law enforcement officer. Because this case arises in the context of a §1983 action, it also presents important issues related to when officers are entitled to qualified immunity.
- **Arizona v. Johnson, No. 07-1122.** At issue is whether, after a car is stopped for a minor traffic infraction, an officer may "conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense."

- **Kansas v. Ventris, No. 07-1356.** The question presented is whether a criminal defendant's voluntary statement obtained in the absence of a knowing and voluntary waiver of his Sixth Amendment right to counsel is admissible for impeachment purposes. In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court held that a defendant's statement may be used for impeachment purposes when he has knowingly and voluntarily waived his right to counsel, but his waiver is deemed invalid because the police initiated interrogation in violation of *Michigan v. Jackson*, 475 U.S. 625 (1986). At issue here is whether the same result obtains when no waiver was given — for example, where the defendant made statements to a cellmate whom the state had recruited for that purpose.
- **Vermont v. Brillon, No. 08-88.** Under review is a Vermont Supreme Court decision vacating a conviction on the ground that the defendant's speedy trial rights were violated — even though the continuances and delays were caused by the indigent defendant's public defenders. The Vermont Supreme Court reasoned that the public defender's "office is part of the criminal justice system," and that, therefore, "a significant portion" of the delay "is attributable to the criminal justice system provided by the state."
- **Rivera v. Illinois, No. 07-9995.** Under review is an Illinois Supreme Court decision holding that the erroneous denial of a criminal defendant's preemptory challenge that resulted in the challenged juror being seated does not require automatic reversal of a conviction.



Bush & Obama: On the Same Page?



BLAIR TINKLE, GENERAL COUNSEL TO THE ASSOCIATION AND CONGRESSIONAL LIAISON

What might President George W. Bush and President-elect Barack Obama have in common? They could be the only two Presidents to use the Congressional Review Act (CRA), a little known federal statute put into law by former Chairman of House Ways and Means Committee Bill Archer (R-TX) and former

Speaker Newt Gingrich (R-GA) as part of the “Contract with America.” The CRA created a congressional review process for administrative rules, including the expected flurry of regulations that come at the end of a president’s term.

It is not unprecedented that an outgoing president would make a large series of administrative rules on the way out. President Clinton signed off on many administrative regulations toward the end of his term and it is widely reported that the current Bush administration is doing the same. Administrative rule-making in the last days of an administration has been coined “midnight rulemaking.”

Some of the “midnight rules” being considered at this time include new rules governing employees who take family-related or medical-related leaves, new standards for preventing or containing oil spills, a simplified process for settling real estate transactions and a rule that would effectively ban gambling on the Internet. It is rumored that as many as 90 of these regulations are being discussed and some believe that the Obama administration might seek to reverse some of these rules by beginning the oftentimes long and cumbersome process of opening up rules for comment. Or, they might look to the CRA.

Passed by Congress and signed into law in 1996, the CRA created a “fast track” procedure whereby Congress, in conjunction with a cooperative president willing to sign a joint resolution, can overturn or effectively veto administrative regulations. Under the CRA, the Office of Management and Budget provides notice to Congress of all regulations promulgated as “final rules.” Final rules cannot actually go into effect until Congress has sixty (60) days to review them. If Congress adjourns for a new, two-year

session within that 60 day window, as is the case with the current 110th Congress, then the commencement of the 60 day period is stayed until 15 days after the swearing in of the new Congress, in this case, starting in January when Obama will be sworn in as well.

In a situation where the Executive and Legislative branches of federal government are divided politically, the CRA cannot practically be used. For example, in the last several years Democrats in Congress could not really use the CRA as President Bush could have simply vetoed in support of his administration’s rules. However, with a larger Democrat majority in both chambers of Congress coming in ’09 and an incoming Democrat president, the atmosphere is ripe for use of the CRA.

Moreover, to move a joint resolution under the CRA, a simple majority suffices for passage in both houses. And, to the astonishment of beltway pundits, Senate debate is limited to 10 hours and there is no filibuster permitted under the CRA. President Bush and a Republican Congress used this process in 2001 to overturn the Clinton administration’s workplace ergonomics rule written near the end of Clinton’s second term. With the current political situation facing the 111th Congress, many are anticipating the possibility that the new Congress and new president might make ample use of the CRA.

Interestingly, if the Obama administration makes use of the CRA to overturn Bush administration regulations, it is notable that former Congressman Archer was the sponsor of the bill containing the CRA when it passed in 1996. Congressman Archer, after switching parties from Democrat to Republican in 1969, successfully served the citizens of Texas for 30 years, from 1971 to 2001, in the 7th District: the District vacated by Congressman George Herbert Walker Bush.



Congress' New Year's Resolution



KAREN CORDRY, BANKRUPTCY
PROJECT DIRECTOR

The New Congress and What's Coming Up with Bankruptcy

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Currently, it is considering further limited changes to the Bankruptcy Code to provide mortgage relief in response to the ongoing financial crisis. But, if it chooses to move forward with any of the pending bills in that, the States should hope that it takes the change to revisit the bankruptcy area more broadly. In doing so, it can reconsider some of the policy choices it made in enacting the BAPCPA. It can also correct the many drafting errors that were made in the BAPCPA in attempting to implement those policy choices and, equally importantly, it can address the many issues that existed before the bankruptcy review process began in 1994 and that still exist today. Not an inconsiderable set of tasks to be sure, but ones with many possible benefits. Congress could cut through the Gordian knot that has made delivering foreclosure relief to homeowners so difficult. It could reduce dramatically the work load on the courts and bankruptcy lawyers who are forced to try to construct a coherent reading of a statute that often reads exactly the opposite of what its drafters likely intended. And, finally, a new bill could look beyond the limited concerns of the creditor-oriented groups that were the impetus for the BAPCPA and resolve a number of problems that have faced government entities since the Bankruptcy Code was passed in 1978 (as well as settling other disputes that have plagued the system for decades).

The Bankruptcy Code was a complete overhaul of the Bankruptcy Act that had initially been enacted in 1898, and amended several times over the next eighty years. The Code was several years in the making, was thoroughly vetted and was, on the whole, a consistent and coherent approach to bankruptcy. Even so, it had its own drafting problems that had to be addressed with a technical corrections bill shortly thereafter. Moreover, from many

creditors' viewpoint, though, it was consistently too favorable to debtors. Accordingly, beginning in 1984, numerous substantive amendments were enacted, each of which largely served to make filing bankruptcy more difficult for debtors (consumer and business), and/or to provide benefits to special constituencies, all in the interest of discouraging unnecessary bankruptcy filings and better returns to creditors.¹

In 1992, a National Bankruptcy Review Commission ("NBRC") was proposed to carry out a global review of the Code with an eye towards restoring that original coherency, albeit with perhaps a less debtor-oriented slant. It took three tries, but, eventually, at the very end of the 1994 session, Congress passed a bill creating the NBRC. At the same time, against the advice of a number of bankruptcy professionals, it also answered a number of specific interpretation issues that had been plaguing courts at that time, rather than leaving those matters to the NBRC. Doing so turned out to be a wise choice, in that most of those issues just needed an answer and the system benefitted by not waiting 11 years to get it.

The NBRC was slowed initially by the untimely death of its original chair, former-Rep. Mike Synar (D-OK.) in early 1995, but eventually did proceed, from 1995 through 1997, with numerous hearings, committee discussions, proposed language drafts and re-drafts, and a final report in October 1997. Unfortunately, by then, the Commission was deeply split with a five-member majority producing a report that harkened back to the spirit of the 1978 Code, and a four-member minority taking a more creditor-oriented view, at least as to consumer bankruptcies and producing a lengthy dissent. Notwithstanding that split, the commission did examine many areas beside consumer filings and produced many useful recommendations in other areas of the Code, particularly with respect to business bankruptcies.

As is often the case with blue-ribbon commission reports, though, this one was DOA when it hit Capitol Hill (not least because of the inability of the NBRC to reach consensus positions on the controversial issue). Indeed, even before it was submitted, legislation had been introduced that took a profoundly different tack on those consumer issues from the NBRC majority and formed the core of what was eventually passed eight years later. The

¹ It might thus seem surprising that, ever since 1984, the growth in bankruptcy filings has accelerated substantially. Although there have been ticks upward during hard times, and downwards during particularly good economic times, the number of filings continued to march upwards inexorably, and, by 2005, had reached close to six times the number of filings in 1984. Researchers have concluded that one explanation is that, as filings are purportedly made more difficult, lenders become more confident and extend more credit than they would have otherwise, creating more filings when those marginal borrowers inevitably begin to default.

intent was to ensure that bankruptcy was “needs based,” i.e., that one did not receive more debt relief than necessary and to ensure that those who could pay some or all of their debts did so. That goal was implemented through various provisions, including requirements that consumers receive credit counseling before filing a case, the imposition of a “means test” to determine if a consumer should be denied the right to liquidate in Chapter 7 (so that they would be forced to file in Chapter 13 and make payments), and many provisions intended to protect secured creditors. It did very little, however, to address any of the matters that had been taken up by the NBRC outside the consumer areas or to include many matters of interest to governmental counsel.

The first bills were not voted on in 1997 but there were new versions, drafts, revisions, amendments, and added provisions over the next few years and the bills were voted on several time over the next few years, passing each time by veto-proof majorities. Finally, in 2000, the House voted on a final measure, but the Senate held back, trying to avoid a filibuster and talk the White House out of a veto threat. While it did eventually pass the bill overwhelmingly, that did not occur until the last day of its session in December 2000 so that it was too late to have an override vote when the bill was vetoed as promised by President Clinton. When Congress returned, abortion-related provision were added and gridlock ensured for four years until the additional Republicans elected in 2004 pushed the bill through in April 2005. Despite the extended time between 2000 and 2005, the bill changed very little. In particular, despite cogent analyses that pointed out glaring flaws in the drafting, the sponsors refused virtually all suggested changes, perhaps fearing they would undermine the bill. However, while many of those raising issues were no fans of the BAPCPA, that did not change the fact that they had raised valid issues. The drafters in-



formally reassured doubters that, while they did not want to disrupt a fragile coalition by changing the existing language, a “technical corrections” bill would then be used to fix all of those problems.

Not surprisingly, though, no corrections bill has emerged in the three and a half years since the BAPCPA passed. Instead, all of the problems identified by the critics and many more have come to light. Ironically, the poor drafting has often resulted in the BAPCPA not providing protections for creditors that they undoubtedly thought they were writing into the law. To be sure, courts could use the doctrine of “absurdity” to try to read the language in a way that was closer to what was likely intended, but when many of them were not happy with the bill to begin with, they often could not resist deferring to Congressional drafting and leaving it hoist on its own petard. Since, in many cases, Congress was warned of precisely the problems that were being seen – and chose not to change the problematic language – those courts insist that they are bound to find that Congress wanted that result, no matter how absurd or abusive.

The most obvious example can be see in the drafting of the “means test.” That test was intended to determine whether a Chapter 7 filing was abusive and, as a general principle, there is nothing wrong with having some form of uniform, objective test for that issue. Bankruptcy is constitutionally required to be uniform and it is not unreasonable to set some limits on judge’s discretion in this regard. Before the BAPCPA, there were as many “means tests” as there were judges to devise them, and their severity varied widely. Moreover, to the extent that an objective test is used as a “quick and dirty” screening method, and supplemented with a “smell test,” the combination serves the purpose of pushing abusive filed slackers out of Chapter 7 and into 13.

In drafting that test, Congress chose to use the standard expense allowances created by the IRS – but forgot to tell the courts to use the IRS interpretations as to how those allowances are to be applied. Thus, the IRS has a capped allowance for a car ownership allowance – but makes clear that it allows only the actual payment if it is less, than the cap. By definition, then, nothing is allowed if the taxpayer does not actually have a car payment. (There is a separate allowance for operating costs). By leaving out the notion that the allowance is a cap and not a guarantee, the courts are left with a test that, read literally, allows debtors to deduct a \$400 allowance where their payment is only \$200 – or even nothing at all if the car has been paid off. Indeed, many courts hold that the debtor may deduct an ownership payment even if he is surrendering the car to the secured creditor and will

no longer even own it after the petition date! Those results, while mind-numbingly odd, are not such a problem in Chapter 7 because the court can use the “smell test” to hold that a debtor who has \$400 in monthly income should be paying creditors.

The greater problem arises in that the same test is used in Chapter 13 for above-median income debtors. (Below-median income debtors are judged, as before, on their actual income and expenses, with the judge reviewing them for reasonableness.) Again, using a totally literal reading of the statute, about half the lower courts and at least one Court of Appeals find that above-median income debtors can – and must – be allowed to reduce their disposable income by wholly fictional expenses. As a result, they may show a calculated negative income, when, in reality, they have as much as \$1,000 or \$2,000 a month in actual disposable income. In turn, those courts may also find that, despite the new requirement that high-income debtors must have five year plans, these debtors have no obligation to pay anything to their creditors and no set time limit before they can receive the broader Chapter 13 discharge. And, finally, those courts find, since Congress decreed this system, it cannot be bad faith to take advantage of it. On the other hand, below-median income debtors are judged on their actual expenses and income and so may pay far more than their wealthier brethren.

This is the worst example, but others abound in the BAPCPA. At a minimum, Congress needs to thoroughly review the law to fix the many errors and ambiguities that have been found since its passage. When it does so, it can then decide whether the law’s single-minded focus on making bankruptcy filings more difficult, costly and time-consuming for consumers, while providing additional relief to creditors, is the best approach to the problems of overstretched consumers. For instance, the BAPCPA requires consumers to receive credit counseling before they can file a case and makes it virtually impossible to resolve the problem if they file without the counseling, even if they do so to avoid an imminent foreclosure. To be sure, consumers should know their options before filing and should try to resolve their problems before the sheriff is on the doorstep – but people in desperate financial straits don’t always do what they “should.” Nor is it at all clear that getting counseling can change the reality of the debtor’s finances. There are many other examples of new requirements, harsh timelines, and mandates that cases be dismissed for relatively minor or curable failings. And, after a case is dismissed, the BAPCPA penalizes debtors that seek to correct the problems and refile. Reviewing all of these changes with an eye to distinguishing between reasonable measures to limit abuse, and which are simply

bureaucratic overkill, and then correctly drafting language with regards to the measures that are retained would be a great first step in truly “reforming” bankruptcy law.

The current call for change, though, deals with a requirement that is not new – namely, the ban of modifying primary residence mortgages. This has been justified as a way to ensure that creditors feel safe in loaning such funds so that they will make the loans at lower rates. It is not clear that this really occurs and, even if it does, in these extraordinary times, many suggest this creditor protection can no longer be maintained. A major problem with resolving foreclosures is that often there are many parties involved and it may not be possible to obtain the consent of all to a modification. A bankruptcy court ruling could bind the parties and force the change on all of them. A second problem is that it is difficult to write a broad standard that can give relief to those who truly need help without going too far and relieving those who have only themselves to blame. Giving an independent party the discretion to examine the issues on a case-by-case basis (within established guidelines) could help steer between those two pitfalls.

It is not to say that such a change would be a panacea – bankruptcy is a drastic measure that imposes significant burdens and costs on debtors and creditors alike. To require a party to declare bankruptcy merely to modify a mortgage may be more change than is needed. Moreover, while the bankruptcy courts have handled as many as 1.5 million cases a year prior to BAPCPA, the number of defaulting mortgages may be far larger than that and could overwhelm bankruptcy courts if they became the primary focus for granting relief. All that said, it is clear that there is likely to be significant consideration of this issue when the new Congress convenes. The States’ primary interest should be in ensuring that consideration of bankruptcy does not begin and end with this provision – because they have had many other issues on their plate for many years.



environmental claims in bankruptcy. Despite the great importance of ensuring that other parties are not harmed by pollution coming from the debtor's facilities or its waste products, the Code provides no special treatment for such claims, whether by virtue of priority, or exception from discharge and the proper treatment of such claims remains distinctly unclear. Environmental claims are one example of a problem faced by government – namely, to what extent they can force debtors, whether reorganizing or liquidating, to comply with the law during the case with respect to pre-existing problems, and what is the status of any payments debtors must make to correct those problems. The lack of clarity in this area confounds debtors and the government and engenders unnecessary litigation.

There are numerous other areas to be considered. There is no clear provision for how workers' compensation payments are to be treated and governments, claimants, and coverage providers may all lose out under current law. Going out of business sales are occurring with great frequency and the same issues come up in case after case – yet the Code has no specific language dealing with those sales. As a result, there is no clear basis to decide the extent to which debtors are bound by – or can override – contractual and/or statutory provisions. The result is, again, unnecessary uncertainty, delay, and litigation that could be resolved once and for all with specific action. Another area that could be addressed are the terms for credit card debt. While not specifically a bankruptcy issue, high credit card debts are almost invariably a precipitating factor for a bankruptcy filing. In the past, the emphasis has tended to be on disclosure of terms – but disclosures are often not read or understood and, in any event, do not really solve the problem. Even if one understands that a credit card company intends to raise one's interest rate to 30% if there is a default on some other card, that mean the debtor can do anything to change that fact. And, it is a virtual certainty, that if one is having problems paying off credit cards at 15%, it will be impossible if the rates leap to 30%. Some issues can only be solved by setting substantive terms, not mere disclosure of their unfairness.

In short, there are a myriad of issues that are related to the current mortgage and credit crisis that are likely to be addressed in the upcoming session. The States have much interest and expertise that they can offer on many of the issues from the consumer protection side. In addition, they have many other government-related issues that need to be addressed (and that have been ignored during the 14 year period since the NBRC was first established). The BAPCPA did address some areas of concerns

for states – primarily taxes and collection of domestic support obligations. It should be a priority for them to address their remaining issues when (not if) the BAPCPA is reopened next year.

Congress Passes Product Safety Legislation



DENNIS CUEVAS, PROJECT DIRECTOR & CHIEF COUNSEL CONSUMER PROTECTION/TELEMARKETING FRAUD

The year 2007 could be dubbed as the “year of the recall” with a record-breaking 231 recalls of 45 millions toys and other children's products. In fact, well-known manufacturers were forced to recall millions of toys due to problems associated with lead paint. In the first half of 2008, 108 children's products were recalled, including 45 for lead contamination and 10 for hazardous magnets.

As a result of the increased reports of unsafe products, Congress, law enforcers, and the public sparked renewed interest in product safety and the Consumer Product Safety Commission (CPSC). Last year Congress acted relatively swiftly and introduced legislation to improve product safety and enforcement. Senator Mark Pryor (D-AR) and Senate Commerce, Science and Transportation Committee Chairman Daniel Inouye (D-HI) introduced S. 2045, while House Energy and Commerce Committee Chairman John Dingell (D-MI), Committee Ranking Member Joe Barton (R-TX) and Commerce, Trade and Consumer Protection Subcommittee Chairman Bobby Rush (D-IL) introduced H.R. 4040. Both bills significantly increased resources for the CPSC over the next seven years, required new standards for dangerous products, such as lead and phthalates and addressed important enforcement provisions.

As the bill continued to develop, a coalition of consumer advocacy groups, scientific organizations, law enforcement and industry worked to provide information to congressional staff by reviewing new sections and providing support for what some have deemed the

strongest consumer product safety legislation since the founding of the CPSC more than 30 years ago.

Throughout the legislative process, industry repeatedly attempted to limit states' authority to pass stronger laws and effectively enforce consumer protection laws. In May 2008, 50 State Attorneys General submitted a letter to the conference managers urging them to include a clause introduced by the Senate which clarifies that state attorneys general maintain the authority to pursue consumer protection investigations and enforcement actions under state law when dangerous products are offered for sale or use, affirming that federal legislation does not preempt non-conflicting state consumer protection laws. The letter also urged the inclusion of fee-shifting language which would prevent defendants from collecting court and expert fees from states attempting to enforce the Consumer Product Safety Act.

After months of discussion, a conference committee of House and Senate leaders approved a package on July 28, 2008, bringing negotiations on the Consumer Product Safety Improvement Act to a close. The final version of the bill passed the House two days later in a 424-1 vote. The next day, the bill passed the Senate in an 89-3 vote. In August, President Bush signed the Consumer Product Safety Improvement Act of 2008 (CPSIA).

CPSIA Product Safety Provisions

The CPSIA permanently bans any children's products containing more than point one percent of three specific types of phthalates (a plastic additive used to increase flexibility): di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalates (DBP), or benzyl butyl phthalate (BBP). Some advocates have said that a ban was imperative, while others have claimed that the science does not support a widespread restriction. In Europe, the European Union has banned phthalates in children's products, while the Centers for Disease Control and Prevention advocate for more research. Before the enactment of this legislation, phthalates were not regulated by CPSC. Under the new legislation, there is limited preemption of state laws regulating phthalates and phthalate alternatives.

The CPSIA also sets a general ban on lead in children's products by requiring the CPSC to set a standard of .01 percent within three years – mandating that lead content in children's products and toys be reduced to: no more than 600 parts per million by February 10, 2009; no more than 300 parts per million by August 14, 2009; and no more than 100 parts per million by August 14, 2011. The Act will also tighten the federal standard on lead paint to .009 percent.

The Act requires manufacturers "to the extent practicable" to place tracking labels on children's products in order to help consumers identify the source of a product in the event of a recall, and requires third party testing and certification for imported children's product for compliance with U.S. safety standards. The testing and certification provisions take effect 90 days after the CPSC has published its requirements for accreditation of third-party testing bodies. Previously, there were neither tracking label requirements nor certification of safety standards compliance.

Moreover, the new legislation creates new rules for durable infant and toddler products that will facilitate owner registration by requiring manufacturers to provide postpaid registration cards and to take steps that will enable more efficient distribution of recall and safety notices. It also expands warning requirements for choking hazards. Websites and printed catalogs that provide a direct means of purchasing must include warning statements by December 12, 2008 and February 10, 2009 respectively. Lastly, the Act requires the CPSC to adopt and enforce safety standards for four-wheel all-terrain vehicles.

CPSIA Enforcement Provisions

The Act provides state attorneys general the authorization to seek injunctive relief for certain violations of the CPSA. A state attorney general would be required to provide at least 30 days prior notice to the CPSC. If the CPSC files suit first, the state attorney general is precluded from filing suit with respect to certain violations. The Act includes a savings clause that protects the state attorney general's



right to pursue an action under state law and limits the use of privileged information by a private attorney hired to assist a state attorney general.

The Act infuses the CPSC with much-needed resources by increasing funding to \$136 million in fiscal year 2014 and increasing the commission's full-time staff by at least 500. For fiscal year 2008, CPSC received \$80 million. It restores the number of Commissioners to five, allows CPSC to operate with a two-member quorum for one year and allows CPSC to begin writing new regulations without publishing an Advanced Notice of Proposed Rulemaking.

Furthermore, the legislation decreases waiting periods for disclosure of consumer product information by the CPSC when disclosure would permit the public to ascertain readily the identity of the manufacturer or private labeler. It provides for expedited court actions to release information on products to the public and requires the CPSC to maintain on its website a publicly available, searchable database that includes any reports received by the CPSC of injuries, illness, death, or risk of such injury, illness, or death related to the use of consumer products other than information provided to the CPSC by manufacturers, private labelers, or retailers. The CPSIA eliminates the right of a party recalling a product to elect whether it will offer a refund, repair or replacement of recalled products and permits the CPSC to require a refund, repair and/or replacement.

The Act greatly increases civil penalties for violations of the CPSA to \$100,000 for each violation with a maximum of \$15 million for a related series of violations. It also increases criminal penalties by permitting larger fines, up to five years imprisonment, and forfeiture of assets associated with a violation. Previously, the civil penalty cap was \$8,000.

In sum, the CPSIA represents a dramatic change with respect to a regulatory and enforcement philosophy. It significantly enhances the role of the CPSC and State Attorneys General in regulating the manufacture and sale of consumer products.

Attorneys General and the State Alliance for eHealth



PAULA COTTER
DIRECTOR, ENERGY &
ENVIRONMENT PROJECT

Technological development has profoundly changed the health care community in the last 15 years. Computerized health information has become more common, and the Internet has made it more accessible. The systematic use of computer science and information science has

become known as health informatics. The term "eHealth" has also been used to describe "health services and information delivered or enhanced through the Internet and related technologies."² The term includes a wide variety of activities such as online billing, e-prescribing, and telemedicine, all of which involve use of information and health services. The overarching challenge in each area of eHealth is to promote the exchange of information (called interoperability) and protect the individuals whose information is being transferred, stored and protect their privacy.

In response to the changes in technology, the federal Department of Health and Human Services spearheaded an initiative, the Nationwide Health Information Network (NHIN)³. NHIN serves as a "network of networks," linking state and regional health information electronic health information exchanges. The long-term goal of the NHIN is to provide continuous real-time access to patient health care information as needed.

The State Alliance for eHealth⁴ was created to facilitate the NHIN by examining aspects of eHealth that are unique to states. The State Alliance was formed by the National Governors Association's Center for Best Practices, under a contract with the Department of Health and

² This definition is derived from an influential 2001 essay in the Journal of Medical Internet Research, see "What is e-health?" G. Eysenbach, <http://www.jmir.org/2001/2/e20/>

³ <http://www.hhs.gov/healthit/healthnetwork/background/>

⁴ <http://www.nga.org/portal/site/nga/menuitem.1f41d49be2d3d33eaccdb501010a0/?vgnnextoid=5066b5bd2b991110VgnVCM1000001a01010aRCRD>

Human Services. There are 19 members of the State Alliance for eHealth. Governors Phil Bredesen (Tennessee) and Jim Douglas (Vermont) are co-chairs of the Alliance; there are also three state legislators, two former governors, two insurance commissioners, and Attorneys General Steve Carter (Indiana) and Hardy Myers (Oregon), all voting members. The Alliance also includes a non-voting contingent of eight advisory members, who are from the private sector, academia, and state government health policy offices.

During the first phase of its existence, the State Alliance identified three primary goals, each associated with a Task Force that consists of stakeholders at the state level: the Health Information Protection Task Force, the Health Care Practice Task Force, and the Health Information Communication and Data Exchange Taskforce. The task forces develop reports examining the issues within their purview, and make recommendations to the Alliance as a whole. The reports⁵ may be found online as part of the website established to inform the public about the work and findings of the State Alliance. The State Alliance has also published *Accelerating Progress: Using Health Information Technology and Electronic Health Information Exchange to Improve Care*, summarizing the “testimony, deliberations, research and other activities” that the State Alliance for eHealth conducted or solicited during its first year.

Accelerating Progress includes six recommendations of two are perhaps most relevant to Attorneys General. First, the Alliance recommends that states address health information privacy and security. Existing state statutes and systems are quite variable in their approaches and their substantive requirements on privacy protection. For instance, some laws were clearly designed for a paper-based system, and are ill-adapted to electronic health information—it is difficult to say what an “original” document would be in the context of an electronic record. Within a state, an individual’s information may be treated differently. Moreover, the current state of technology allows information to move between states much more freely than it did in the past, which can lead to confusion about what is required at the level of hospital, lab, or doctor’s office.

The State Alliance developed two broad strategies as part of the recommendation to address health information privacy and security. First, the report suggests that states “[c]onsolidate and update relevant privacy and security laws to better respond to consumer protection needs in an electronic exchange environment.” The report identi-

fies several states’ efforts in this area. Some of them are mere codifications; but others represent an effort to address the electronic exchange of health information. For instance, Minnesota’s revised statutory structure is part of a broader health reform package enacted in spring of 2008. The new legislation will require e-prescribing by 2011, and will mandate interoperable health records by 2015. The State Alliance does not endorse any particular state’s approach, but does clearly recommend that states re-examine their privacy and security laws.

The second strategy recommended by the State Alliance is that states “[E]ducate leaders and support efforts to reduce variation of state privacy requirements while ensuring appropriate consumer protections.” While acknowledging the difficulties of real progress outside a federal review of privacy and security provisions, the Alliance recommends that each state foster education of the public and policy-makers about the specific challenges associated with their jurisdictions.

The other recommendation for state Attorneys General is for states to streamline the licensure process to facilitate cross-state eHealth. In sum, the problem is that current licensing for medical professionals was developed long before the advent of the internet, telemedicine, or even phone-based practice. Each state’s requirements and process are different, and many questions arise when someone licensed in one jurisdiction has a patient in another. The State Alliance looked closely at three medical professions, nurses, physicians and pharmacists, and developed a series of strategies to help states implement that recommendation. The eight strategies identified by the Alliance are:

To streamline the licensure application process...

- Direct each state health professional board to develop or adopt common core licensure applications.
- Direct each state health professional board to implement and promote the use of online licensure applications.

To streamline the licensure credentialing process...

- Direct each state health professional board to work with its counterparts in other states to develop a nationwide core set of credentialing parameters.
- Direct each health professional board to utilize a single, centrally coordinated credential verification organization (CVO) to conduct primary source verifications.

⁵ <http://www.nga.org/portal/site/nga/menuitem.1f41d49be2d3d33eacdcb501010a0/?vgnextoid=5066b5bd2b991110VgnVCM1000001a01010aRCRD>

- Direct each state health professional board to require state and federal criminal background checks from all applicants seeking an initial state license.

To streamline the licensure structure...

- Direct the state medical and pharmacy boards to individually participate in a collaborative effort with their respective state board counterparts to establish a process that ensures licensure recognition by other states.
- Direct the state nursing board to participate in the Nurse Licensure Compact
- States should pursue standardization of the regulatory framework for each field of advanced practice nursing.

The National Association of Attorneys General has undertaken to support aspects of the State Alliance for eHealth and its work. To this purpose, NAAG has presented a series of webinars covering basic points of three aspects of eHealth. On May 21, Professor Joy Pritts of Georgetown Law assisted in presenting an introduction to eHealth and electronic privacy issues. On June 10, a representative of Sure-Scripts/Rx-Hub, a health care infrastructure that facilitates electronic communications between pharmacists and physicians, spoke on the development and history of e-prescribing. The final webinar was scheduled for Wednesday, October 22; its subject was interstate issues, with a focus on licensure issues. The materials from all the webinars will be posted on the NAAG website.

Save the Date



NAAG President and Rhode Island Attorney General Patrick Lynch invites you to attend his Presidential Initiative: Year of the Child, May 12-13, 2009, Philadelphia, PA.

The purpose of the meeting is to provide information on a wide variety of topics in order to assist Attorneys General in fulfilling their multifaceted duties.

Calendar



Best Practices in E-Discovery

November 18-20, 2008
Oxford, MS
Contact: Hedda Litwin
hlitwin@naag.org



Supreme Court Seminar

December 2-4, 2008
Washington, DC
Contact: Andrea Hampton
ahampton@naag.org



NAAG Winter Meeting

December 2-5, 2008
Ft. Lauderdale, FL
Contact: Jeffrey Hunter
jhunter@naag.org



Evidentiary Issues

January 5-7, 2009
Orlando, FL
Contact: Dennis Cuevas
dcuevas@naag.org



Moving into Management Seminar

January 4-7, 2009
Orlando, FL
Contact: Mary Winzenburg
mwinzenburg@naag.org



Charities Fraud Investigations & Case Development

January 22-24, 2009
New York, NY
Contact: Mary Winzenburg
mwinzenburg@naag.org

NAGTRI Remote Trainings



Management Training

February 17-18, 2009
Utah
Contact: Mary Winzenburg
mwinzenburg@naag.org



Trial Advocacy

Week of March 23, 2009
Arizona
Contact: Mary Winzenburg
mwinzenburg@naag.org

Balancing Law Enforcement and Pain Management: NAAG Holds Roundtable



Oklahoma AG Drew Edmondson, Myra Christopher and Vermont AG Bill Sorrell discuss health policy and chronic pain.

JUDY MCKEE
END OF LIFE HEALTH CARE PROJECT COORDINATOR AND COUNSEL

On September 22, 2008, NAAG hosted the Balanced Pain Policy Initiative's second legal roundtable with the goal of establishing a set of suggested guidelines to assist law enforcement personnel in the investigation of physicians alleged to have mishandled or diverted controlled substances. Vermont Attorney General Bill Sorrell convened the meeting, attended by twenty-seven individuals representing prosecutors, investigators, medical boards, physicians, health insurers, ethicists, and others interested in health policy as it involves the undertreatment of chronic pain and the diversion of opioids and other controlled substances.

Discussion during the morning session centered around several case scenarios. The exchange of viewpoints from the varying professions represented was lively and educational. Former Nevada Attorney General Frankie Sue del Papa lent her considerable experience to the deliberation. While physicians informed the law enforcement community concerning standard treatment for various painful ailments, the prosecutors spoke about the ethical obligations prosecutors face, including the restrictions on commenting on cases and the concerns about parallel proceedings.

Oklahoma Attorney General Drew Edmondson presented a procedural template that his office has been following regarding investigations of physicians for controlled

substance violations in their prescribing practices. Attendees then considered the various aspects of what General Edmondson calls a "righteous prosecution" against prescribers. Numerous ideas were suggested as to how law enforcement can fulfill its obligation to enforce the various controlled substances laws while remaining cognizant of the effect the enforcement might have on the prescribing community. Bill Colby from the Center for Practical Bioethics, acting as convener, was kept busy recording the various perspectives offered by those gathered around the table. Consensus was reached on many of the practices suggested. These ideas will be memorialized in a written document that will be circulated among the BPPI partners and those who met in D.C. with the goal of publishing these ideas as suggested guidelines that prosecutors might wish to adopt in analyzing fact scenarios involving physicians with questionable prescribing habits.

The Attorneys General are committed to finding methods by which to achieve a balanced pain policy. It is hoped that the document that will evolve from the discussions held at NAAG in September will assist prosecutors at the local, state, and federal level to achieve this goal.

NAAG Wins Legal Writing Institute's Golden Pen Award

The Legal Writing Institute has voted to confer its 2009 Golden Pen Award on the National Association of Attorneys General. The Golden Pen Award recognizes those who make significant contributions to advance the cause of better legal writing. The Institute is conferring this year's award to NAAG based on our efforts to improve the states' appellate advocacy through such endeavors as the NAAG Best Briefs Awards. Prior recipients of the award include then-SEC Chairman Arthur Levitt, New York Times Supreme Court correspondent Linda Greenhouse, and several state and federal court judges.

The Legal Writing Institute is a non-profit organization dedicated to improving legal writing by providing a forum for discussion and scholarship about legal writing, analysis, and research. The Institute is the second largest organization of law professors in the United States, with more than 2100 members from thirty-eight countries.

NAAG Supreme Court Counsel Dan Schweitzer will accept the award at the next annual meeting of the Association of American Law Schools, which will take place in San Diego, California on January 9, 2009.

NAAG Welcomes Two Fall Supreme Court Fellows

The NAAG Supreme Court Fellowship program has begun its twenty-second year with the arrival of Colorado Assistant Attorney General John Seidel and New Mexico Assistant Attorney General Victoria Wilson. This program gives state lawyers an opportunity to obtain direct and intensive hands-on exposure to Supreme Court practice. Each of the six Fellows comes to D.C. for three- to four-month periods during the Court's argument session. They watch oral arguments, participate in our moot courts, prepare an amicus brief in a Supreme Court case, and draft the Report.

Victoria is from Albuquerque, New Mexico. She has been an Assistant Attorney General for twelve years in the Criminal Appeals Division of the New Mexico Attorney Gen-

eral's Office. In that capacity, she represents the state in criminal appeals in the state appellate courts. Victoria also represents the state, through the prison wardens, in federal habeas corpus proceedings in the federal district court and the U.S. Court of Appeals for the Tenth Circuit. She received a B.A. in Psychology from the University of New Mexico in 1983 and a J.D. from the University of New Mexico School of Law in 1987.

John is originally from Omaha, Nebraska. He graduated from Iowa State University in 1982 and Northwestern University School of Law in 1985. He was an in-house litigator for Texaco from 1985-88 (during which time Texaco went bankrupt fighting Pennzoil over the purchase of Getty Oil Co). He then moved to Colorado where he worked for KN Energy, a gas transmission company, from 1988-1990. John then became a part-time contract lawyer and full-time musician and composer for four years. In 1994, he began his career as an appellate lawyer in the Criminal Appeals section of the Colorado Attorney General's Office.

NAAG News

Isaiah Branton has joined the NAAG staff as a program assistant for NAGTRI. Isaiah is a graduate of Florida A&M University, where he majored in political science and minored in sociology. Isaiah has previously worked as a biological aide with the USDA in Gainesville, FL. He has also worked with the Congressional Youth Leadership Council as the operations team member. In his most recent position, he served as assistant director of enrollment services at Trinity University here in DC.

Valerie Gillis has joined NAAG's staff as an accounting clerk. Valerie studied accounting at Strayer University and has an extensive background in administration, finance and human resources. Her most recent position was with Birmingham Green where she served in the roles of payroll coordinator and resident fund coordinator.

Veronica Ricca is NAAG's new project assistant for the Antitrust and Supreme Court projects. Veronica is a graduate of Louisiana State University, where she majored in art history. Veronica has previously interned as the assistant for the Department of Cultural Programs with the Organization of American Affairs. Recently, she worked as a member services coordinator with the Corporate Executive Board.