

## Decisions Affecting the Powers and Duties of State Attorneys General



EMILY MYERS, ANTITRUST COUNSEL

This is another in our series reporting on recent decisions from across the country affecting the powers and duties of state Attorneys General.

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### **Connecticut—Limits on Campaign Contributions to Attorney General Candidates.** *Dean v. Blumenthal*, 577 F. 3d 60 (2d Cir. 2009)

This case involved enforcement of a contractual provision included in all contracts for legal services entered into by the state Attorney General. The provision prohibited contributions to candidates for Attorney General of Connecticut from private counsel who were under contract with the state for legal services. This provision was said to have been included “in order to avoid the appearance that the contracting law firm was being awarded a contract in exchange for future campaign contributions.” Plaintiff was a candidate for Attorney General who challenged the provision on the grounds that it deprived her of a First Amendment right to receive political contributions. Shortly after the suit was filed, Attorney General Blumenthal suspended enforcement of this contractual provision, and sent notice to all law firms under contract with the state notifying them of the suspension of the provision. The suit was unresolved through the following election, and Attorney General Blumenthal continued the suspension of the provision until the legislature superseded it with a more general statutory provision covering contributions by state contractors. The suit was dismissed by the District Court on the grounds that plaintiff lacked standing because there existed no constitutional right to receive campaign contributions.

The Second Circuit first determined that much of the case was moot, because the office policy that was originally challenged had been superseded by legislation. Although the plaintiff argued that the Attorney General could re-institute such a policy at any time, the court decided that the Attorney General’s assertion that he had no intention of re-instituting the policy, coupled with his voluntarily declining to enforce the policy for six years, was sufficient to render plaintiff’s claims for injunctive and declaratory relief moot. Turning to her claim for damages, the Court of Appeals applied a two-pronged test to determine if the Attorney General was entitled to qualified immunity<sup>1</sup>: 1) is there a clearly-established Constitutional right; 2) did the government actor’s conduct violate that right. The court concluded that there was no clearly established right to receive campaign contributions during the relevant period. Even if the Supreme Court’s decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), could be said

<sup>1</sup> Qualified immunity protects state officers “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009)

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## NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

The NAAGazette is published monthly and is posted at [www.naag.org](http://www.naag.org). To subscribe or for more information, contact Marjorie Tharp at 202-326-6047 or via email at [mtharp@naag.org](mailto:mtharp@naag.org).

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to recognize such a right, it was decided long after the Attorney General suspended enforcement of the contractual provision. The Attorney General was therefore entitled to qualified immunity, and the case was dismissed.

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**Idaho—Different Deputies Do Not Require Notice of Substitution of Counsel.** *Idaho State Tax Commission v. Beus*, 2009 Ida. App. Unpub. LEXIS 307 (Id. Ct. App. Sept. 10, 2009)

In the context of a tax case, the taxpayers challenged the default judgment against them on the grounds that a different deputy attorney general appeared at the hearing on the motion for default than had previously represented the state tax commission. The court held,

By statute, it is the attorney general who represents the Tax Commission in court, . . . and though the attorney general may assign deputy attorneys general and special deputy attorneys general to assist in such representation, . . . it is still the attorney general who technically serves as the Commission's representative. Here, though a different deputy was present on the Commission's behalf during one of the hearings than had previously been present, no change in representation had actually taken place since it was the attorney general who represented the Commission at all times. Because the attorney general is the one who represented the Commission at all times, albeit through different deputies, the rules do not require that a notice of change of counsel be filed.

.....  
**Michigan—Attorney General Not Disqualified.** *People v. Waterstone*, No. 09-015867-01-AR (Wayne Cty. 3rd Cir. Ct., Crim. Div., Sept. 29, 2009)

In the course of the drug trafficking trial of Alexander Aceval, the assistant prosecuting attorney (APA) allegedly suborned perjury in order to protect the identity of a confidential informant. Judge Waterstone became aware of this perjury and knowingly allowed it to occur. After Aceval was convicted, and the perjury was discovered, Aceval sued Waterstone and others, alleging civil rights violations. The general counsel of the Michigan Supreme Court requested that the Attorney General's office represent Waterstone, and an assistant attorney general (AAG) from the Public Employment, Elections and Tort Division did so, speaking with Waterstone three times. The case was dismissed.

The Michigan Prosecuting Attorneys Coordinating Council asked the Attorney General to appoint a special prosecutor to investigate the alleged subornation of perjury. The Attorney General, apparently unaware that Waterstone had already been represented by an AAG in the civil rights case, assigned two attorneys from the office's Criminal Division. In March 2009, the Attorney General issued a multi-count felony indictment against Waterstone and others, alleging judicial misconduct with regard to allowing presentation of perjured testimony and ex parte communications with the prosecutor. Waterstone sought to disqualify the Attorney General's office, claiming that its representation of her in the civil rights case and the current investigation were an inherent conflict of interest. The court stated the question presented as "Should the AG be disqualified because one attorney in the Public Employment, Elections and Tort Division represented defendant in a civil matter which involved the same set of operative facts for which the defendant is currently being prosecuted by the Criminal Division?"

The court first looked at Michigan Rules of Professional Conduct. Rule 1.9(a) provides, "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially



Oleg Kobelev joined the NAAG team less than a month ago but he has already attuned to his role as a staff attorney on the Tobacco Project. Oleg is responsible for a number of duties

that primarily concern communication with states on issues regarding the Master Settlement Agreement (MSA). He routinely coordinates with states to address public health and payment issues under the MSA, to discuss federal and state legislation, and to ensure maintenance of the Wiki page that facilitates communication between states and the Tobacco Project.

His past government and litigation experience is sure to have eased his transition. Prior to joining NAAG, Oleg was a staff attorney in the legal division of the U.S. Court of Appeals for the D.C. Circuit. He also worked for Sidley Austin, LLP, a large multinational law firm in New York.

“I handled a broad spectrum of cases while working at the Court and at Sidley Austin,” he said. “Here I enjoy the opportunity to specialize in one particular area. It’s a nice change of pace.”

Oleg graduated with high honors from Guilford College in 2003, and went on to graduate with honors from UNC Chapel Hill School of Law in 2006. There he was editor-in-chief of the North Carolina Journal of Law & Technology.

Born in Kiev, Ukraine, Oleg moved to North Carolina in 1998. He now resides in Arlington, Va., and enjoys cycling, hiking, and traveling.

related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.” Rule 1.10 provides “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule . . . 1.9(a).” Reading the two sections together, the court determined that while the Rules of Professional Conduct apply to the Attorney General’s office, in this case, there was “no knowledge of the previous representation at the time of the criminal investigation of defendant.” When it became known, the criminal division immediately took steps to erect a conflict wall.

The court stated, “Furthermore, the attorneys in question were acting independently from one another and did not exercise authority over each other. They were in fact in different divisions, with different chains of command and located in geographically different offices.” The court was persuaded by the reasoning of a Hawaii decision that discussed the unique nature of the Attorney General’s office, and held “the AG may represent a state employee in civil matters while investigating and prosecuting him in criminal matters, so long as the staff of the AG can be assigned in such a manner as to afford independent legal counsel and representation in the civil matter and so long as such representation does not result in prejudice in the criminal matter to the person represented.”<sup>2</sup>

The court also noted that the Attorney General’s office, as soon as it became aware of the previous representation, had implemented a conflict screening policy to ensure that confidential communications protected by the attorney-client privilege did not inadvertently contaminate the rest of the AG’s office.

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### **Ohio–Attorney General Has Standing to Obtain Writ of Prohibition Against Judge. *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009 Ohio 4986; 915 N.E.2d 633; 2009 Ohio LEXIS 2690 (2009)**

Defendant Rawlins shot and killed his wife’s lover, was convicted of murder and in 1997 received a sentence of 15 years in prison. He appealed his conviction on the grounds that the jury was not instructed on involuntary and voluntary manslaughter. The Ohio Court of Appeals and Ohio Supreme Court rejected his appeal. In 2003, Rawlins filed a motion with Judge William Marshall for relief from judgment of conviction and sentence, alleging the same grounds as his appeals. In March 2005, Judge Marshall, who had not presided over the original trial, held a hearing and granted Rawlins’ motion, based on Rawlins’ argument that the jury should have been instructed on the lesser charges. The prosecuting attorney, who had not been in office when the original trial took place, stated that the state had no objection. Judge Marshall accepted Rawlins’ plea of voluntary manslaughter, reduced his sentence to 10 years and released him from prison. In May 2005, the Attorney General sought from the county court of appeals a writ of prohibition to compel Judge Marshall to vacate his entries granting Rawlins’s motion for relief from judgment, convicting him of voluntary manslaughter instead of murder, and releasing him from prison. The court of appeals granted the writ, and Rawlins was returned to prison.

On appeal, Rawlins argued that the Attorney General had no standing to seek a writ of prohibition. Ohio’s Attorney General is a constitutional officer, and the Attorney General’s duties are specified by statute. Among other things,

<sup>2</sup> State v. Klattenhoff, 801 P.2d 548 (1990).

Ohio statutes provide: “When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested.” Rawlins argued that the Attorney General had no standing to seek the writ of prohibition because he had not been asked to do so by the governor or legislature.

The Ohio Supreme Court has held “when these constitutions were adopted (both state and federal), they were adopted with a recognition of established contemporaneous common-law principles; and...they did not repudiate, but cherished, the established common law.” *State v. Wing*, 66 Ohio St. 407, 420, 64 N.E. 514 (1902). In this case, nothing in the statute abrogates the Attorney General’s common law powers, which would allow him to bring this type of action. Nor did the fact that the local prosecutor did not object preclude the Attorney General from bringing this suit, separate from the prosecution, to prohibit a court from acting where it lacks jurisdiction. Citing the National Association of Attorneys General Powers & Responsibilities book, the court held, “The exercise of this authority under the unique, limited facts of this case is consistent with the common-law powers of the majority of state attorneys general.”

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**South Carolina–Contingency Fee Contracts Permissible.** *State v. Eli Lilly*, 2007-CP-42-1855 (S.C. Ct. Comm. Pleas 7<sup>th</sup> Jud. Dist. 2009)

The Attorney General of South Carolina retained private attorneys to pursue a claim against Eli Lilly in connection with its marketing of the drug Zyprexa. The attorneys were hired on a contingency fee basis, under which they would bear all risk of the lawsuit and would receive payment, if any, only if they were successful in the case. The Attorney General retained supervisory authority over the private attorneys. Eli Lilly challenged the state’s retention of counsel on a contingency fee basis on the grounds that it violated the separation of powers in the South Carolina constitution because the legislature did not appropriate funds to pay the private attorneys who were representing the state. Eli Lilly also challenged the arrangement on the grounds that it violated the due process clause of the U.S. and South Carolina constitutions because it gave the state’s counsel a personal financial interest in the outcome of the case.

The court first addressed the due process claim. It rejected the notion that attorneys representing the government must be neutral, “even in the context of litigation against an alleged wrongdoer.” The court cited *Marshall v. Jerrico*, 446 U.S. 238 (1980) for the proposition that “Prosecutors need not be entirely neutral and detached. In an adversary system, they are necessarily permitted to

be zealous in their enforcement of the law.” The court continued,

The lawyers representing the State of South Carolina in civil tort cases, whether in-house or outside counsel, have a duty to represent the State of South Carolina’s interests to the fullest, advocating the State of South Carolina’s position in the litigation brought to vindicate the State of South Carolina’s rights and recover the funds expended because of a private party’s alleged wrongdoing.

The court cited numerous decisions from other states rejecting the argument that government lawyers in a non-judicial role must be neutral, and cited many decisions approving contingency fee arrangements entered into by state governments. The court stated, “[I]f the practice of hiring private lawyers in special cases by States’ Attorneys General was actually unconstitutionally improper, one would have expected that some authoritative court would have definitively ruled that way by now.”

Turning to the separation of powers argument, the court noted that the South Carolina statute specifically authorizes payment of “the costs of litigation” out of litigation proceeds. The only case in which the separation of powers argument was successful was a Louisiana case in which the statute required that “all sums recovered” be paid to the state treasury. The court also determined that Lilly was arguing that the Attorney General might, if Lilly lost, act in a way that violates the separation of powers doctrine. The claim is not yet ripe, according to the court.

Finally, the court addressed Lilly’s allegations that the state’s private counsel should be disqualified because they have violated S.C. Code §08-13-1342, which provides, “No person who has been awarded a contract with the State, a county, a municipality, or a political subdivision thereof, . . . may make a contribution after the awarding of the contract . . .” The court held that because the Supreme Court, rather than the legislature, has authority over attorney ethical rules, the only constitutional way to construe the statute is to conclude that the legislature did not intend it to cover lawyer-client relationships. As a further example of the problem with Lilly’s claim, the court noted that local counsel for Lilly had also made contributions to the Attorney General’s campaign. “A statute which prohibits a government official’s litigation allies from contributing to him, but permits his litigation adversaries to do so, is inordinately unfair.” Finally, the court noted the Attorney General’s broad constitutional and common law powers to retain attorneys to represent the state, and stated, “There are numerous huge differences between retainer agreements between Special Counsel and the Attorney General and commercial contracts between a municipality and its vendors. Supreme Court



rules thoroughly regulate the former relationship not the latter.”

**Ohio–Attorney General Power to Represent State.**  
*State ex rel. Merrill v. State Department of Natural Resources*, Case No. 2008-L-007, Ohio Ct. App., 11th App. Dist., 2009

Landowners on the south shore of Lake Erie sued the state, the Ohio Department of Natural Resources (ODNR) and its director, disputing the rights asserted by ODNR to land up to the high-water mark. The Attorney General’s office, representing the state, decided to litigate the case separately from ODNR, and the Attorney General retained outside counsel for ODNR. Before the lower court’s ruling on motions for summary judgment, ODNR filed a response stating that it would “adopt or enforce administrative rules and regulatory policies with the assumption that the lakefront owners’ deeds are presumptively valid.” The court of common pleas ruled that the limit of the territory regulated by ODNR was the water’s edge, wherever that boundary may be at any given time on any given property. The Attorney General appealed that ruling, ODNR did not.

The court of appeals first addressed the standing of the state to participate in the case. The court held that the Attorney General (representing the state) no longer had standing to participate in the case:

The Ohio Attorney General may only act at the behest of the governor, or the General Assembly. R.C. 109.02. In this case, the attorney general represented the state due to the activities of the ODNR, which department is under the authority of the governor, in whom the constitution vests the “supreme executive power.” Section 5, Article III, Ohio Constitution. The governor has ordered ODNR to cease those activities that made it a party to the action. We find no authority for the attorney general to prosecute this matter on his own behalf. We conclude that the state of Ohio no longer has standing in this matter, and order its assignments of error and briefs stricken.

Calling the court of appeals ruling “mistaken and harmful,” the Attorney General has appealed the decision to the Ohio Supreme Court, including the issue of the Attorney General’s standing to continue the suit. Among other issues, the Attorney General noted that the state was a defendant, rather than a plaintiff, in this case, and the court of appeals ruling thus limits the state’s ability to defend itself from suit. The Attorney General also argued that the state’s interests in this case “go far beyond the narrow question of how ODNR should administer its various duties.”

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## Attorneys General Offer Comments on Federal Tobacco Law



WILLIAM LIEBLICH, TOBACCO DEPUTY CHIEF COUNSEL

Attorneys General Jon Bruning of Nebraska and Martha Coakley of Massachusetts, co-chairs of the NAAG Tobacco Committee, sent a Dec. 9 letter to the U.S. Food and Drug Administration (FDA) in response to the FDA’s request for

“comments that will inform strategies to protect the public health” as the FDA implements the authority provided to it in the “Family Smoking Prevention and Tobacco Control Act” (the Act, P.L. #111-31).

The Act, which President Obama signed into law on June 22, granted the FDA comprehensive authority to regulate tobacco products, including their manufacture, ingredients, and marketing. On July 1, the FDA published a notice in the *Federal Register*, announcing that it was providing “an opportunity for all interested parties to provide information and share views on the implementation of the new law,” and stating that it was “particularly interested in comments on the approaches and actions the agency should consider initially to increase the likelihood of reducing the incidence and prevalence of tobacco product use and protecting the public health.”

“The nation’s Attorneys General are prepared to share the lessons we have learned during the last 11 years of enforcing the settlement agreement we entered into with the tobacco companies in 1998,” the NAAG comments state.

Attorneys General Bruning and Coakley focused on three areas in the letter: first, areas of overlap between the Act and the Master Settlement Agreement (MSA);

second, areas where federal regulatory action is of critical necessity; and third, areas appropriate for cooperative federalism.

With respect to overlap between the Act and the MSA, the Attorneys General noted that the tobacco industry's marketing methods have evolved since the 1990s, in part in response to the MSA's restrictions and in part as a result of new technologies, such as the Internet. They offered to share the fruits of the states' experience in enforcing the MSA as the FDA moves forward in fashioning and enforcing marketing restrictions. They also mentioned tracking and tracing of tobacco products as an area where the states' experience could be helpful to the FDA.

On the subject of federal regulatory action, Attorneys General Bruning and Coakley singled out Internet and tribal sales of tobacco products as subjects that are of particular concern to the states on which the FDA may be able to take constructive action. The great majority of such sales violate state laws concerning verification of purchasers' age and the collection of state excise and sales taxes. They are, therefore, (1) a major source of sales of tobacco products to minors, and (2) a significant means of tax evasion, which results in lower prices and thus higher demand for such products. For both reasons, these sales endanger the public health and would benefit from FDA action.

Finally, Attorneys General Bruning and Coakley described examples where the states and the FDA could work cooperatively on matters over which both exercised authority. The first relates to retail sales to minors, in which states have active enforcement efforts; the second concerns dissolvable tobacco products, on which the FDA is required to conduct a study and whose implications regarding tobacco use by youth is a matter of concern to the states.



As Attorneys General Bruning and Coakley informed the FDA, the state Attorneys General "welcome and look forward to a long and productive collaborative relationship with the FDA, as together we address the public health challenges posed by tobacco use in the United States."

The NAAG comment letter is posted on the NAAG Web site, <http://www.naag.org/tobacco.php>

## U.S. House Passes Financial Reform Legislation



DENNIS CUEVAS, CONSUMER PROTECTION COUNSEL

By a vote of 223 to 202, the House of Representatives passed "The Wall Street Reform and Consumer Protection Act" (H.R. 4173) on Dec. 11, a bill that provides for some of the most sweeping financial reforms since the 1930s. It includes

language enabling state Attorneys General to enforce new federal financial regulations.

The bill marks an initial victory for President Obama to address the abuses that contributed to the current economic crisis and to prevent a recurrence. The legislation is broad and will affect how many conduct business, including financial institutions, both banks and nonbanks; homeowners; borrowers and credit card holders; insurance companies; hedge funds; traders in complex derivatives; and securities rating companies.

The cornerstone of the legislation is the modification of the current federal regulatory and enforcement structure and the creation of a Consumer Financial Protection Agency (CFPA). The CFPA will have jurisdiction over most lenders. Banks and credit unions with assets under \$10 billion are exempt from exam and primary enforcement. Also exempt from CFPA oversight are real estate brokers, auto dealers, lawyers, accountants, retailers, and pawnbrokers. Unlike the current structure where lending is regulated by several agencies, the CFPA will be the primary agency to oversee most aspects of consumer lending – mortgages, credit cards, payday loans, and the terms on savings accounts. The independent agency will have rule-making, enforcement, and examination authority and will be able to prohibit or restrict dangerous financial products and product features. The new agency will also address deceptive marketing practices and have authority to restrict forced arbitration.

In addition to creating a CFPA, the bill creates a Financial Services Oversight Council to look more closely at systemic risk. The Council, comprised of the Treasury secretary, the Federal Reserve chair, and heads of the regulatory agencies, will be charged with closely observing the markets for potential threats to the financial system. It can identify firms that should have more money in their reserves. The government may dismantle financial firms if they are considered a grave risk to the economy, and large firms and hedge funds will pay into a resolution fund to cover the costs of dismantling.

The bill also beefs up investor protection by strengthening the Securities and Exchange Commission's powers so that it can better regulate the nation's securities markets. The bill improves disclosures provided to investors about investment products and services. Other provisions restrict mandatory arbitration clauses in brokerage contracts, increase resources for regulatory oversight, and require brokers who give investment advice to act in the best interest of their customers.

With respect to the issue of executive compensation, the bill allows company shareholders to get a nonbinding vote on executive pay, and enables federal regulators to ban risky or inappropriate compensation practices.

Lastly, the bill regulates the over-the-counter derivatives marketplace. All standardized swap transactions between dealers and "major swap participants" must be cleared and traded on an exchange or electronic platform. The bill defines a major swap participant as anyone who maintains a substantial net position in swaps, exclusive of hedging for commercial risk, or whose positions create such significant exposure to others that it requires monitoring.<sup>3</sup>

### *State Role and Preemption*

State Attorneys General have long identified the predatory and deceptive mortgage practices that led to the economic meltdown. State Attorneys General have brought enforcement actions against mortgage companies, forcing them to reform their sales practices and obtaining billions in consumer restitution.

For years, state Attorneys General have advocated that the federal government not preempt state laws aimed at protecting consumers from frauds and abuses, particularly in the enforcement of state banking and mortgage foreclosure laws.

In November, NAAG submitted a letter to Congress urging members to uphold the role of the states in enforcing consumer protection laws should Congress create a CFPA. "Rather than limiting the states' role in consumer

financial protection, as some have advocated," the letter stated, "we believe Congress should encourage an active and effective partnership between the states and federal financial regulatory agencies to the ultimate benefit of all consumers."

Under H.R. 4173, state Attorneys General can enforce the CFPA rules. However, an amendment to the bill rolled back the preemption restrictions contained in the original version of the CFPA. The bill now allows for federal preemption of state consumer laws if the Office of the Comptroller of the Currency deems that a state law "prevents, significantly interferes with, or materially impairs a national bank's ability to do business."

### *Senate Action*

The Senate Banking Committee recently began to consider its own financial reform legislation introduced by its chair Sen. Christopher J. Dodd (D-Conn.). Action is expected early next year.

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## **Federal-State Cooperation Pays Bonuses In Environmental Bankruptcy Cases**



KAREN CORDRY, BANKRUPTCY COUNSEL

What's the recipe for obtaining full payment—with interest—for close to \$2 billion in environmental remediation costs from a bankrupt debtor? Start with dedicated staff from numerous states with affected sites working closely with the U.S. Department of Justice and

Environmental Protection Agency, mix in a lot of hard work preparing cases and negotiating settlements, add a healthy dollop of better management and labor relations by the debtor, season with higher prices for the copper the debtor produces—and, oh yes, garnish with a \$6 billion fraudulent transfer judgment against a solvent defendant. The result is the confirmed plan in the case of Asarco, LLC and its various affiliates.

Asarco was a major operator of mining facilities throughout the United States, which, while now mostly shut down, had contaminated their surroundings and created hundreds of millions of dollars of remediation li-

<sup>3</sup> "House Approves Historic New Rules to Govern America's Financial System," House Financial Services Press Release, December 11, 2009.



abilities. When it filed bankruptcy in 2005, Asarco was a victim of falling commodity prices and mismanagement by its parent that left its labor relations in a shambles and caused a crippling strike. Those problems were compounded by the removal of assets by the parent that left Asarco in a severe liquidity crisis at the same time it faced those staggering environmental costs. Commentaries at the time suggested the bankruptcy case would make Asarco a poster child for the notion that polluters could enter bankruptcy and shed their liabilities without regard for the impact on the surrounding communities. The final result was 180 degrees from that initial assessment and succeeded the wildest expectations of environmental agencies going into the case.

Far from simply eliminating those liabilities without payment, Asarco confirmed a plan that resulted in payment, on Dec. 9, 2009, of almost \$1.8 billion, including \$775 million to the United States, \$697 million placed into custodial trusts to cover ongoing clean up costs in 14 States (Alabama, Arizona, Arkansas, Colorado, Idaho, Illinois, Indiana, Montana, New Mexico, Ohio, Oklahoma, Texas, Utah and Washington) and an additional \$322 million paid directly to those and other states (California, Kansas, Missouri, Nebraska, and New Jersey) for other claims.

Such results are certainly not the norm in bankruptcy—and, in this case, major factors included a rebound in copper prices during the case, changes in management that restored good employee working relationships and the aforementioned \$6 billion judgment against the parent for the removal of those assets. As a result, the parent and another company engaged in a bidding war that resulted in the “full payment with interest” plan. But, before that point was reached, much hard work was required

by the states and the federal government to ensure that their claims would get the best possible treatment whether those other favorable factors had occurred or not.

After their filing, the debtors sought to put their claims on a fast track for “estimation”, a process used in bankruptcy to reach a “quick and dirty” resolution of claims amounts so that they can be worked into the calculations for plan confirmation. While useful to a debtor, that process can be highly problematic for environmental claims where the extent of contamination is often not fully known, much less the nature and costs of the remediation efforts, or whether the debtor can be held legally responsible. As a result, the governmental entities were forced to approach these claims on something of an emergency basis to be able to investigate, quantify them, and be prepared to defend them on a highly expedited schedule. The work of doing so was greatly assisted by the unstinting work of all of the governmental entities and the strong cooperation between those entities.

Because the United States had the largest claims and had a national presence, it took the lead in coordinating the efforts and worked exceedingly well with all of the states. NAAG staff, Bankruptcy Counsel Karen Cordry and Environmental Counsel Paula Cotter, assisted throughout with the process of bringing the states and federal agencies together to foster this cooperative effort. As a result, the governments were able to collectively enforce demands for a reasonable timetable and structure for the preparations for the estimation process and, in the end, satisfactorily resolve all of their claims. While it was not initially clear those amounts could be paid in full, the efforts ensured that environmental claims would be treated fairly despite the complex problems in presenting them. And, when the proverbial pot of gold at the end of the bankruptcy rainbow did appear, that work resulted in full payment of the amounts currently incurred and ample funds being set aside for future costs.

While Asarco was the first example of this recent federal-state cooperation, it is by no means the last. The recent economic downturn has resulted in several other cases where environmental concerns have been major factors. Those cases include the Chemtura Corporation, the Lyondell Chemical Company, Tronox Incorporated B and General Motors Corporation. In the first three cases, the states and the federal government have followed the model from Asarco – the United States has taken the lead, but worked closely with the states. In many cases, the parties have filed joint briefs and other pleadings in order to coordinate their positions. Again, NAAG staff has worked with the states throughout to assist in coordination, to provide input on bankruptcy issues, and to assist in drafting and editing documents. In Lyondell and Chem-

tura, the governments are opposing efforts by the companies to obtain an early (and, the governments believe, premature) decision on whether their environmental claims may be discharged. In Tronox, the parties are working towards a consensual plan.

## *General Motors*

As to General Motors, while it certainly did not file because of environmental obligations, any manufacturing entity of its size and age will inevitably have cleanup obligations at its plants. The relationship between the states and the United States is somewhat different in this case, in that the United States was deeply involved with General Motors in filing its case and structuring the sale of its assets. The states filed a number of objections to the original sales documents, including several with respect to the treatment of environmental claims. The objections went primarily to the need for greater clarity and the states were able in the end to resolve them with new General Motors and the United States.

In addition to the assumption of liability by new General Motors for the plants that it bought, the sale terms also included a provision for an infusion from the U.S. Treasury of more than \$1 billion of cash into old General Motors (the liquidating entity) to pay for its wind down costs. Hundreds of thousands of dollars of that amount was set aside to deal with remediation expenses. Since the sale was consummated, the states and the United States have again been working together to determine the liabilities at those sites and the funding necessary to complete the cleanup. The dual role of the United States in the case does infuse added complexities, but the states continue to work with the United States to the greatest extent possible.

One interesting issue that the states have been working on is ensuring that old and new General Motors remain active in a nationwide program that provides incentives for recyclers to remove switches containing mercury from cars that are on the way to being melted down. With pressure from a number of state agencies, old General Motors has voluntarily resumed participation in that program for now. Because the program is slated to continue until 2017, though, it is likely that new General Motors will have to be brought into the picture as well—an effort that may again require discussion and cooperation between the states, the United States, and the new company.

In all of these cases, it is clear that having government agencies speak with one voice benefits them in their efforts to protect the public interest and obtain compensation for their environmental claims. It is also, though, a benefit to debtors seeking to resolve these issues consensually. Bankruptcy is a forum in which the

ability to make deals, quickly and economically, can be crucial in the debtor's effort to survive and emerge as a renewed and viable entity. Being able to deal with environmental issues on a collective basis and reach a global settlement may be crucial to putting a confirmable plan together. That was the case with the Circle K Corporation, as far back as 1992, where the states were able to work through NAAG bankruptcy staff to negotiate a settlement that provided for payment of \$30 million to 30 states for cleanup of leaking underground storage tanks. The same is true now.

In recognition of that fact, and the invaluable assistance of the United States in reaching those results, a plaque was presented to Alan Tenenbaum, national bankruptcy coordinator for the U.S. Department of Justice at the October bankruptcy conference in Nashville, noting that he was receiving it as a representative of all of the federal staff whose work with the states has been so crucial over the last several years. We look forward to continuing the relationship in the future, even if the pending cases may not provide results as spectacular as in Asarco.



# Registration Open for Presidential Initiative Summit



NAAG President and Nebraska Attorney General Jon Bruning invites you to attend the 2010 Presidential Initiative Summit to discuss how to protect children from sexual predators and to protect consumers and businesses from fraud. “Virtual

World – Real Crime” will provide a forum for Attorneys General and other stakeholders to address the issues facing children and citizens in today’s technology age. The Summit will be held Feb. 8-10 in Fort Lauderdale, Fla.

## *Discount for Two NAAG Meetings*

The NAAG Spring Meeting will be held just a few weeks later, March 1-3 in Washington, D.C. If you attend both the Summit and the Spring Meeting, you will receive a discount in registering for both meetings. Contact Dennis Cuevas, [dcuevas@naag.org](mailto:dcuevas@naag.org), to get the Summit registration fees and form, as well as hotel information. Lower early-bird registration fees are available until Jan. 15.

## NAAG Winter Meeting



Arizona Supreme Court with NAAG leaders

The NAAG Winter Meeting was held Dec. 1-3 at the Biltmore in Phoenix, Ariz. Participation was high with 29 Attorneys General attending and 11 designated representatives. This year’s program featured panel presentations on Southwest Border Violence, Mexico-U.S. Cooperation, Practicing Before the State Supreme Court, Issues Facing the U.S. Territories, and the Market Meltdown. Guest speakers included U.S. Deputy Attorney General David Ogden and Dr. Joseph Thompson, Arkansas surgeon gen-



Native American Session

eral. Particularly noteworthy, and unprecedented, was our afternoon and evening sessions addressing Native American issues.

The Annual Winter Meeting has traditionally been for Attorneys General and their staff only. This limited participation has been very beneficial in fostering more dynamic dialog among the NAAG members and providing the opportunity to address sensitive issues in a more private setting. This year, the NAAG Planning Committee, prompted by the recommendation of our host, Arizona Attorney General Terry Goddard, decided to include several sessions concerning Native American issues and invited tribal representatives from the tribes located in Arizona and New Mexico to attend and participate. Through the tremendous efforts of the staff of the Attorneys General offices in Arizona and New Mexico, we welcomed representatives from many tribes to our Wednesday afternoon sessions on State/Tribal Collaboration—moderated by Attorneys General Goddard and Gary King—and Combating Crime in Indian Country—moderated by South Dakota Attorney General Marty Jackley. In addition, Assistant Secretary for Indian Affairs, U.S. Department of the Interior, Larry Echo Hawk, was present for all the sessions and concluded the day at dinner that evening with very moving and inspiring remarks. Thanks to the hard work of many, it was a very successful program.



## NAAG 2010 Spring Meeting

March 1 - 3, 2010

Washington, DC

Contact: Jeffrey Hunter, [jhunter@naag.org](mailto:jhunter@naag.org)