

# NAAG Gazette

A Newsletter of the National Association of Attorneys General

March 2009

## Federal Government Action & Spending Affects Attorneys General & State Programs



**BLAIR TINKLE**

BLAIR TINKLE, ASSOCIATION GENERAL COUNSEL AND CONGRESSIONAL LIAISON

The ailing economy and attempts at finding solutions to it have set in motion a flurry of federal government action and spending, some of which has affected state Attorneys General and state programs, including crime and drug enforcement and child support enforcement.

Since late 2007, America has faced a deteriorating stock market, higher than average unemployment, a lack of consumer confidence and an overall decline in American industry. This prolonged period of economic decline has led the United States into recession which began in large part with the subprime mortgage crisis. The federal government has responded in several ways to attempt to quell the effects. This has included a \$700 billion bank and auto industry bailout termed the “Emergency Economic Stabilization Act” (EESA) which created the Troubled Asset Relief Program (TARP), a \$789 billion economic stimulus package termed the “American Recovery and Reinvestment Act”, a potential \$75 billion mortgage foreclosure plan proposed by the Obama administration, and a \$200 billion supplement for Fannie Mae and Freddie Mac.

President Bush signed TARP into law on Oct. 3, 2008. TARP allows the Department of the Treasury to purchase or insure up to \$700 billion of assets deemed troubled. The Treasury can purchase non-liquid, difficult-to-value assets from financial institutions. TARP is intended to increase the liquidity of these assets by purchasing them using secondary market mechanisms, and allowing participating institutions to stabilize their balance sheets and avoid further losses. The first \$350 billion of the \$700 billion was released on Oct. 3, 2008, and Congress voted

to approve the release of the second \$350 billion on Jan. 15.

Another substantial congressional move was the \$789 billion economic stimulus package, signed into law on Feb. 17 by President Obama. The Act has been described as an attempt to create or save approximately 3.5 million jobs over the next two years in sectors ranging from the clean energy industry to health care. It is also intended to provide nearly \$230 billion in tax cuts for the middle class including a “Making Work Pay” tax credit, increased funding for renewable energy research and production as well as tax incentives for renewable energy investors. The Act also provides investments of \$17 billion into the public transportation system and high speed rail, \$25 billion in school construction bonds and \$7 billion in expanded broadband coverage in the United States. In addition, the bill provides \$85 billion in the form of a temporary increase in the Federal Medical Assistance Percentage.

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## **NATIONAL ASSOCIATION OF ATTORNEYS GENERAL**

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The stimulus package also contains provisions expanding state Attorneys General authority with respect to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (see accompanying article for details), creates funds for child support enforcement for states and gives a one-time boost of monies to the Edward Byrne Justice Assistance Grants (Byrne/JAG) program. Byrne/JAG is currently the only source of funding available for multi-jurisdictional drug enforcement.

The economic stimulus package restored some child support funding lost by the Deficit Reduction Act of 2005. It allows the federal government to restore, on a one-time basis, the matching state expenditures of federal child support incentive payments which in turn allows states and counties to draw down federal incentive matching funds for previous years.

Lastly, the stimulus package included a one-time \$2.2 billion boost for Byrne/JAG. The funding is broken down into \$2 billion for Byrne/JAG formula grants and \$225 million for Byrne competitive grants. Byrne funds were cut by nearly 67 percent in fiscal year 2008 for state and local law enforcement. The recently passed Act restored funding lost in FY 2008 as well as brought Byrne numbers close to their 2001 peak.

For information on the amounts of money states will receive in child support enforcement dollars and Byrne/JAG funds, please contact Bill Malloy, legislative project assistant, at [wmalloy@naag.org](mailto:wmalloy@naag.org) or 202-326-6045.

Although the immediate future of the economy is uncertain, President Obama has announced the next phase in his economic recovery proposal. On Feb. 18, the president announced a \$75 billion program intended to help nine million homeowners avoid foreclosure. This \$75 billion would be supplemented by \$200 billion in additional funding for Fannie Mae and Freddie Mac to purchase and refinance mortgages. Obama's plan is funded mostly from the TARP Program. Termed the "Homeowner Affordability and Stability Plan," it proposes using cost sharing and other incentives to encourage lenders to reduce homeowners' monthly payments to 31 percent of their monthly income. A lender would be responsible for reducing monthly payments to no more than 38 percent of a borrower's income, with government sharing the cost to reduce the rate further to 31 percent. The plan also includes the possibility of a lending institution forgiving a portion of the balance of the borrower's mortgage. Companies that service these mortgages will get incentives to modify loans and to help the homeowner stay current on payments.

Time will tell whether this combination of federal policies will accomplish the goals envisioned by the administration and Congress. NAAG will continue to provide updates in the coming months.



# Amendments to Health Privacy Law Grant States Enforcement Powers



**PAULA COTTER**

PAULA COTTER, EHEALTH ISSUES COUNSEL

The economic stimulus package, signed into law Feb. 17, grants state Attorneys General specific new enforcement authority in protecting patient privacy. Officially known as the “American Recovery and Reinvestment Act of 2009” (P.L. 111-5), the law will affect Attorneys General work directly and indirectly in several ways. The health privacy provisions are a good example. In addition to expanded enforcement authority in protecting patient privacy, the requirements that Attorneys General may now enforce changed. The law also encourages more and more use

of electronic storage and transfer of health information—which means more and more instances that could give rise to violations of state and federal privacy laws.

The Health Insurance Portability and Accountability Act (HIPAA)<sup>1</sup> is the federal law that requires certain individuals and organizations in the health care system to hold patients’ health information confidential. The statutory provisions and administrative rules implementing HIPAA are complex and technical, but the stimulus package tightens up and extends the prohibitions against disclosure, although not as comprehensively as some privacy groups had hoped. Three major changes stand out in the new provisions.

- One major change is that “covered entities” (health care providers, health care clearinghouses and health care plans) are now required to notify patients about breaches to their unsecured private health information.
- New provisions extend some of HIPAA’s privacy protection requirements to “business associates” of covered entities. This means that “business associates,” such as outside billers and health care consultants are directly subject to HIPAA—not simply vulnerable to contract disputes or cancellation of contracts.
- HIPAA now provides that “covered entities” and “business associates” are prohibited from selling protected health information.

For Attorneys General, Section 13421 of the stimulus bill<sup>2</sup> is the provision with the most obvious impact. It authorizes state Attorneys General to take enforcement action against HIPAA violators. The new law provides:

- The Attorneys General are authorized to bring civil suit in federal district court as *parens patriae* (on behalf of state residents) if they believe their residents are threatened or adversely affected by HIPAA violations.
- The Attorneys General can sue for injunctive relief, and/or for damages.
- Damages are limited to \$25,000 in a calendar year, at up to \$100 per violation.
- States must notify the Secretary of Health and Human Services before bringing such a suit; a pending federal suit bars any such state action.



**ALBERT CAHN**

Albert Cahn lends his technological expertise and passion for law to NAAG’s Tobacco Project in his role as a paralegal. After graduating from college, this New York City native moved to Washington, D.C. to be in the midst

of the political action.

“There is something I find compelling about being here in the seat of government and seeing firsthand how it operates,” Albert said.

His position combines a myriad of technological and legal duties which include managing the server that hosts the new Tobacco Project Wiki, doing legal research, organizing meetings and completing other tasks that vary daily.

“I really enjoy that my position has given me a vehicle to study the areas of law and computer science more intensely,” said Albert.

Albert, a self-proclaimed politics and news junkie, developed an interest in tobacco issues before joining NAAG in August 2007. “I have been interested in the operation of the Master Settlement Agreement since before I came to NAAG. As someone who enjoys studying the law, I find this groundbreaking agreement fascinating. Although, I feel like I’ll never fully understand it because its always full of new surprises,” Albert said.

During his time at NAAG, he hopes to gain a more well-rounded understanding of the legal system in preparation to attend law school in the future.

In his spare time, Albert enjoys cooking, baking, sailing, and playing several musical instruments (guitar, recorder, gemshorn, and more). He is also in the process of launching a video blog and does a variety of computer-based projects.

Albert holds a bachelor’s degree in politics science and philosophy from Brandeis University in Waltham, Mass.

<sup>1</sup> 42 USC § 201 *et seq.*

<sup>2</sup> 42 U.S.C. § 1320d-5

- Attorney fees may be awarded the states.
- Nothing in the amended federal law may be construed to prevent a state Attorney General from exercising powers granted under state law.
- The statute of limitations applicable in the federal enforcement scheme is extended to actions brought by the Attorneys General.

The federal law preempts state law on the subject of individually identifiable health information to the extent that the state law is less stringent than the federal regime. The stimulus bill extends the preemption and its limitation to its new provisions of HIPAA. (Section 13421, applying 42 USC 1320d-7 to the new provisions). State Attorneys General will recognize that this provision follows the familiar formula characterizing the federal law as the “floor,” and state law as a higher standard. Existing HIPAA case law does not provide much guidance as to how state enforcement may develop, because almost all federal enforcement has been conducted in an administrative and collaborative setting, rather than as adversarial litigation. While it seems that HIPAA enforcement could reasonably be combined with supplemental jurisdiction state law privacy claims, it is unclear how frequently such claims will arise. It remains to be seen how state Attorneys General will make use of this new-found authority.

## Spring Meeting Focuses on State-Federal Relations

Forty-three Attorneys General convened in a snow-covered Washington, DC, March 2-4 to meet with federal officials and other stakeholders about stronger state-federal cooperation and to discuss pressing legal issues, including the credit card crisis among consumers and the



Former Mississippi Attorney General Mike Moore (left) greets U.S. Attorney General Eric Holder while NAAG Executive Director Jim McPherson (right) looks on.



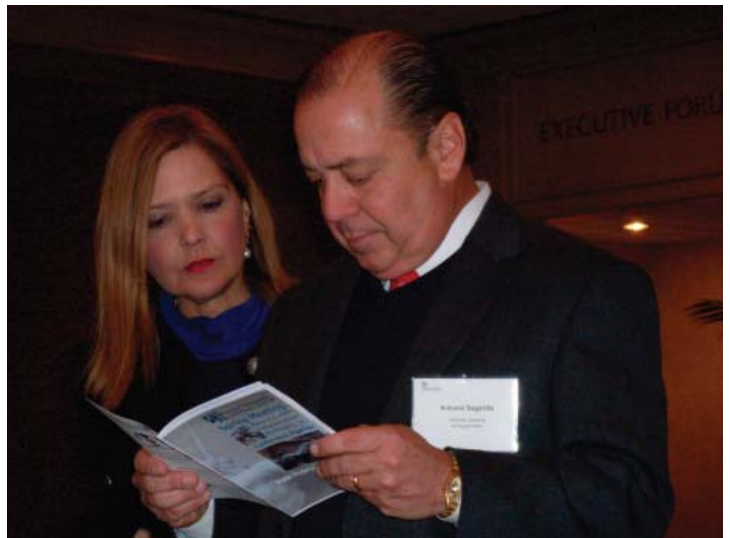
FDIC Chairman Sheila Bair with NAAG President and Rhode Island Attorney General Patrick Lynch.

safety of minors using social networking sites. It was all part of the annual NAAG Spring Meeting.

Federal Deposit Insurance Corporation Chairman Sheila Bair and the new U.S. Attorney General Eric Holder served as keynote speakers. Holder addressed such topics of concern to state Attorneys General as preemption, the Adam Walsh Act, and crime and drug enforcement funds in the economic stimulus package.

“You have my personal commitment to building a genuine and open partnership with my colleagues in the states,” Holder said.

Bair described the current economic crisis, including the mortgage meltdown, and ways the Attorneys General could work with the federal government.



Puerto Rico Attorney General Antonio Sagardia reviews the Spring Meeting agenda with his wife.

“...There’s a lot of anxiety and uncertainty out there, and some down-right fear. And people are looking to their government – regulators and law enforcement – for help and protection,” Bair said. “As a bank regulator, I see each and every state Attorneys General as an essential partner in answering the call.”

Bair continued, “These days, consumer protection is on everybody’s mind. A failure to promulgate and enforce stronger consumer protection rules applying to all mortgage lenders contributed significantly to this crisis. And unfortunately, in policing mortgage lending practices, instead of working together, federal and state officials were too often at odds. We must work together now.”



Tennessee Attorney General Robert Cooper, Jr. and Massachusetts Attorney General Martha Coakley converse with Supreme Court Justice Ruth Bader Ginsburg.

Other guest speakers discussed credit card debt in light of the economic downturn and offered policy considerations for the marketing and servicing of credit cards. Another panel delved into the use of social networking sites by children and the latest age/identity verification technology to improve safety.



NAAG members and guests mingle during the Supreme Court Reception.

Meeting attendees also received an update on recent Supreme Court cases and the Attorneys General met with U.S. Supreme Court Chief Justice John G. Roberts, Jr.

The 2010 NAAG Spring Meeting is scheduled for March 1-3 in Washington, DC.

## Philadelphia in May: Year of the Child Presidential Summit



HEDDA LITWIN, CYBERSPACE LAW  
COUNSEL

Attorneys General have continued to focus their collective efforts on children and technology under the leadership of current NAAG President and Rhode Island Attorney General Patrick Lynch’s year-long Presidential Initiative, The Year of the Child. While the Internet has provided our children with a greater knowledge of the world in which they live, it has also exposed them to danger from individuals who would hurt them. The goal continues to be to better educate, engage and empower our children and their parents in the safe use of online technology.

Attorney General Lynch’s initiative will culminate in his policy summit, “The Year of the Child: Protecting and Empowering the Next Generation.” The Summit will be held on May 12-13 at the Ritz Carlton Hotel in downtown Philadelphia. It will provide an opportunity for Attorneys General and other stakeholders to address the issues of safety and empowerment facing our children in today’s technology age.

Many of the most respected experts on these issues will be joining the Attorneys General at the Summit, including David Finklehor, director of the Crimes Against Children Center at the University of New Hampshire; Hemanshu Nigam, chief security officer for MySpace Fox Interactive; Ernie Allen, president and CEO of the National Center for Missing and Exploited Children; and Amanda Lenhart, senior research specialist at the Pew Internet and American Life Project, to name just a few. Some of the many issues on the Summit agenda include current trends in online safety technology; partnerships to stop the proliferation of online child pornography; the latest research and initiatives to combat cyberbullying; legislative responses to the Lori Drew/MySpace case; and keeping kids safe offline.

Attorney General Lynch invites you to join him in Philadelphia for what promises to be an historic meeting. Special registration fees and hotel rates are available for Attorney General staff. For additional information, contact Hedda Litwin, NAAG’s Cyberspace Law counsel, at 202-326-6022 or [hlitwin@naag.org](mailto:hlitwin@naag.org).

# National Crime Victims' Rights Week

April 26 marks the beginning of National Crime Victims' Rights Week (April 26 – May 2). Since 1981, National Crime Victims' Rights Week (NCVRW) has been an opportunity for communities, victims and their loved ones, and victim-serving professionals to join together and reflect on the hard-won progress achieved in victims' rights and services and the challenges many crime victims still face.

This year's theme "25 Years of Rebuilding Lives: Celebrating the Victims of Crime Act" recognizes and celebrates the wide-reaching impact of the Victims of Crime Act (VOCA) on victims' rights and resources. For 25 years through the Crime Victims Fund, VOCA has supported thousands of agencies and millions of victims across the nation. The Fund provides critical financial assistance to victim compensation and victim service programs, such as domestic violence shelters and rape crisis centers, and it funds information and support for victims as their cases move through the courts.

The Office for Victims of Crime (OVC), a component of the Office of Justice Programs in the U.S. Department of Justice, has developed the 2009 NCVRW Resource Guide. The guide contains victimization statistics, special event ideas that can be adapted for communities, camera-ready art files, a 5-minute motivational DVD and customizable posters, including the NCVRW theme poster. A copy of the guide and theme poster may be ordered or accessed from OVC's Web site: <http://www.ojp.usdoj.gov/ovc/ncvrw>.



**In 2006, 25 million crimes were committed in the United States; of these, 6 million were violent and 19 million were property crimes. (Bureau of Justice)**

**In 2006, child protective services found approximately 905,000 children to be victims of child abuse or neglect. (U.S. DHHS)**

**Fake check scams were the number one type of Internet fraud in 2007, constituting 29 percent of complaints, with an average loss of \$3,311. (National Fraud Information Center).**

# Undertreatment of Pain Policy Brief Issued



**JUDY MCKEE**

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

Several articles in earlier issues of the NAAGazette have acquainted readers with NAAG's involvement in the Balanced Pain Policy Initiative (BPPI).<sup>3</sup> In early March, NAAG sent to each Attorney General a copy of the recently published policy brief, "Balance, Uniformity, and

Fairness: Effective Strategies for Law Enforcement for Investigating and Prosecuting the Diversion of Prescription Pain Medications While Protecting Appropriate Medical Practice." This document represents the culmination of the work done by the Law Enforcement Roundtable of the BPPI project to discern ways in which law enforcement personnel might address prescription drug diversion when it involves the investigation and prosecution of physicians while minimizing the chilling effect on the prescribing activities of legitimate physicians.

The Initiative's article in the September 2008 issue of *Pain Medicine* demonstrated that law enforcement has predominantly undertaken its prosecutorial duties with professionalism, responsibility, and care regarding physicians and prescription drug diversion. Nonetheless, even righteous prosecutions seem to have a deleterious effect on the prescribing practices of some doctors in regard to their chronic pain patients. By following the strategies outlined in the policy brief, law enforcement investigators and prosecutors will be able to fulfill their professional obligations while limiting the unintended harm to genuine chronic pain patients.

Strategy 1 is to distinguish criminal behavior from medical negligence. To assist in carrying out this task, a procedural template, originally developed by Oklahoma Attorney General Drew Edmondson, is included. Strategy 2 is the balancing of publicity regarding cases against physicians. Strategy 3 involves a particularly unique part of the policy brief. Leading pain societies have offered to devel-

<sup>3</sup> See "Finding the Proper Balance: Walking the Tightrope Between Treating Chronic Pain and Countering Prescription Drug Diversion," NAAGazette July-Aug. 2008; "Perception versus Reality: The Facts Regarding Prosecutions and Disciplining of Doctors for Abuses Involving Controlled Substances," NAAGazette Sept. 2008; "Balancing Law Enforcement and Pain Management: NAAG Holds Roundtable," NAAGazette Nov. 2008.

op a roster of national experts who would be “on call” to offer curbside consultations to law enforcement on case scenarios and hypotheticals. This would assist prosecutors in winnowing through various fact situations in trying to determine whether and when criminal behavior has occurred.

Strategy 4 involves use of the prescription monitoring programs that are now active in the majority of states. While the Roundtable participants largely supported the use of such a technological aid, it cautioned that the programs should be designed with appropriate privacy safeguards and be available to law enforcement only when there is already an on-going investigation. Interagency collaboration comprises strategy 5. This strategy advocates that, wherever possible and appropriate, local, state, and federal law enforcement, medical board personnel, pharmacy board personnel, and third-party payers communicate and work with one another regarding a suspect situation.

Finally, education is the key to a true balanced pain policy. Strategy 6 calls for education on all sides – law enforcement, medical personnel, and the general public. Law enforcement should learn the basics of good pain management; medical professionals must be trained in pain and addiction management and educate their pain patients in appropriate pain management; and the general public needs to be more aware of the dangers of prescription drug diversion and commit to keeping medications secure, both while in medicine cabinets at home and when disposing them.

Electronic copies of the policy brief are available on the NAAG Web site at <http://www.naag.org/1013>.



## NAGTRI Faculty of the Year



Andrew L. Rossner was the recipient of the 2008 National Attorneys General Training & Research Institute (NAGTRI) Faculty of the Year Award. Rossner is director of the New Jersey Attorney General’s Advocacy Institute. He is pictured with New Jersey Attorney General Anne Milgram.

Rossner previously served in the Division of Criminal Justice as deputy director and chief of the Financial Crimes & Antitrust Bureau. He has been involved in teaching trial advocacy for nearly 20 years.

NAGTRI’s mission is to provide high quality, responsive and innovative training to assistant attorneys general. Rossner helped to develop NAGTRI courses and has taught more than 20 of them. His knowledge, combined with dynamic lectures that resonated with course participants, led to his nomination and award. Thank you Andy and congratulations!

# States Participate in National Consumer Protection Week

State Attorneys General joined a group of federal, state, and local government agencies and national consumer advocacy organizations to launch the 11th annual National Consumer Protection Week (NCPW), March 2-8. This year's theme was "Nuts and Bolts: Tools for Today's Economy," which highlighted consumer education efforts to arm consumers in today's economic environment. Whether consumers are trying to improve their credit history, extend their paychecks or avoid a potential scam, information is a tool that can always help them get the most for their money. During the week, the state Attorneys General took the time to urge consumers to take advantage of information available on their state Web sites and the NCPW Web site, [www.consumer.gov/ncpw](http://www.consumer.gov/ncpw). These Web sites have the resources consumers need to make informed decisions on issues that include home foreclosures, investments, credit, and business opportunities.

In anticipation of NCPW, its Steering Committee hosted a Consumer Education Fair for congressional staffers on Feb. 19. Ellen Taverna, NAAG's Consumer Protection project manager and counsel, joined NCPW organizers at the Capitol Hill event to promote consumer education initiatives on behalf of the state Attorneys General. In addition to the National Association of Attorneys General, NCPW organizers include the Federal Trade Commission, AARP, Council of Better Business Bureaus, Consumer Federation of America, Federal Citizen Information Center, Federal Communications Commission, Federal Deposit Insurance Corporation, National Association of Consumer Agency Administrators, National Consumers League, Office of the Comptroller of the Currency, United States Postal Inspection Service, and the United States Postal Service.

## CALENDAR



### Internet Crimes Against Children

April 7-8, 2009  
Oxford, Mississippi  
Contact: Hedda Litwin  
[hlitwin@naag.org](mailto:hlitwin@naag.org)



### Advanced Management Training

April 27-28, 2009  
Burlington, Vermont  
Contact: Mary Winzenburg  
[mwinzenburg@naag.org](mailto:mwinzenburg@naag.org)



### Habeas Corpus: From File Review to Appeal

April 28-30, 2009  
Oklahoma City, Oklahoma  
Contact: Nick Alexander  
[nalexander@naag.org](mailto:nalexander@naag.org)

## SAVE THE DATE

### PRESIDENTIAL INITIATIVE



## YEAR OF THE CHILD

**"THE YEAR OF THE CHILD:  
PROTECTING AND EMPOWERING OUR NEXT GENERATION"**

**MAY 12-13, 2009  
PHILADELPHIA, PA**



### NAAG SUMMER MEETING

June 15-19, 2009  
Colorado Springs, Colorado  
Contact: Jeffrey Hunter  
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