

NAAG Gazette

A Newsletter of the National Association of Attorneys General

April 2009

Attorneys General Train Mexican Prosecutors



Attendees and faculty at Mexican Prosecutor Training

The National Attorneys General Training & Research Institute (NAGTRI) trained 26 Mexican prosecutors in Austin, Texas the week of March 30 as Mexico's judicial system transitions from written proceedings to an oral adversarial system. Assistant Attorneys General from California, Florida, Idaho, Illinois, Nevada, New Mexico, Puerto Rico, Texas and Utah served as bilingual faculty members, teaching all sessions in Spanish.

This was the second training, with a goal of training up to 600 Mexican prosecutors over the next three years. The first training, with 13 Mexican prosecutors, occurred in February in Colorado.

"Ultimately, these efforts should help Mexico lock up more criminals, reduce systemic corruption and ease the pressures that are contributing to the shocking outbreak of violence," said Patrick Lynch, NAAG President and Rhode Island Attorney General.

Texas Attorney General Greg Abbott opened the Austin training with remarks regarding cooperative efforts between the United States and Mexico generally, and the Texas Attorney General Office and Mexican Attorney General Office more specifically. "As representatives of the

governments in our respective countries, justice is our end, our ultimate goal. With our collaborative work this week, we will all be better equipped to reach that goal," Abbott said.

IN THIS ISSUE

The Presumption Against Preemption Strikes Back	2
Employee Spotlight.....	3
Decisions Affecting the Powers and Duties of State Attorneys General.....	6
Federal Response to the Mortgage Foreclosure Crisis	8
Summer Meeting: Public Protection in Challenging Economic Times	10
NAAG Spring Supreme Court Fellows.....	10
NAAG Gets Support to Reduce Crime Through Early Education and Child Care.....	11
NAAG's Community Outreach.....	11
Year of the Child Presidential Summit	12

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

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Prosecutors traveled from the Mexican states of Chihuahua, Oaxaca and Baja to attend the week-long Austin training. A full agenda consisted of both lectures and practical exercises on topics such as opening and closing arguments, direct and cross examination, plea negotiations, rules of evidence and ethics.

The NAGTRI Mexican prosecutor training was created in conjunction with the Conference of Western Attorneys General (CWAG) and made possible with \$1.5 million in funding from the U.S. Agency for International Development.

“The training for Mexico’s prosecutors is an important element in the U.S. - Mexico State Alliance Partnership, which was initiated to improve cross border cooperation in law enforcement matters,” said Idaho Attorney General and former NAAG President and CWAG Chair Lawrence Wasden. “There are people in government in Mexico who are putting their lives on the line every day, in order to establish justice. In working with my colleagues in Mexico, it has become apparent that there is a strong desire for transparency and predictability through reforms to their legal system. I am hopeful that these reforms will result in increased stability and cooperation among us all.”

The changes in Mexico’s judicial system, which are occurring over seven years, are the result of a constitutional amendment approved last summer by all 31 states in Mexico and the federal district of Mexico City. Reforms include the presumption of innocence, confrontation of witnesses and speedy trial rights.

The Presumption Against Preemption Strikes Back: The Lessons of *Altria Group v. Good* and *Wyeth v. Levine*

DAN SCHWEITZER, SUPREME COURT COUNSEL



DAN SCHWEITZER

In the ongoing preemption wars, February 22, 2008, was the states’ darkest day. The Supreme Court handed down five decisions, three in preemption cases. And the Court found state law preempted in all three. One of those decisions, *Rowe v. New Hampshire Motor Transport Association*, broadly construed an express preemption provision to nullify a Maine statute that sought to prevent minors from obtaining cigarettes through Internet purchases – even though a state public health law of that sort was the furthest thing from Congress’ mind when it enacted the federal statute at issue. In another, *Riegel v. Medtronic, Inc.*, the Court drastically limited the ability of consumers injured by Food and Drug Administration (FDA)-approved medical devices to sue the manufacturers – again, even though no one seriously argued that Congress specifically intended to preempt state tort actions when it added the express preemption provision in 1976. In neither case did the Court so much as mention the presumption against preemption, which supposedly requires courts not to find state laws preempted “unless that

was the clear and manifest purpose of Congress.” At the time, commentators leaped over each other to declare the Roberts Court more pro-business than any Court in recent history.

What a difference a year makes.

This Term, the Court has already issued two major opinions holding that state laws are *not* preempted by federal law. In *Altria Group, Inc. v. Good*, the Court held that the Federal Cigarette Labeling and Advertising Act does not preempt a state-law action alleging that Philip Morris deceptively advertised “light” cigarettes. More recently, in *Wyeth v. Levine*, the Court held that federal law does not preempt a state-law tort claim asserting that an FDA-approved label for a drug did not contain an adequate warning. Thorough summaries of those decisions appear in 16 *Supreme Court Report* 4 (NAAG 2008) and 16 *Supreme Court Report* 8 (NAAG 2009). Rather than repeating those discussions, what follows is a listing of some of the most important holdings in the two opinions. These holdings – which involve both express preemption (*i.e.*, where the federal statute includes a provision expressly preempting state law) and implied conflict preemption (*i.e.*, where federal law preempts state law because it is either impossible to comply with both the state and federal law or because the state law stands as an obstacle to the accomplishment of the federal law’s objectives) – should assist the states in litigating all manner of preemption cases in the lower courts.

The presumption against preemption applies with a vengeance in express preemption cases.

Over the dissent of four Justices, the Court in *Altria Group* reaffirmed that the presumption against preemption applies when a court is construing an express preemption provision. 129 S. Ct. at 543. Indeed, the Court set forth a *Chevron*-like rule that, if strictly applied, would dramatically cabin express preemption: “...when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption.” *Id.* (internal quotation marks omitted).

The presumption against preemption applies to fields that have long been subject to federal regulation.

In *United States v. Locke*, 529 U.S. 89, 108 (2000), the Court held that the presumption “is not triggered when the State regulates in an area where there has been a history of significant federal presence,” for example, maritime commerce. Since then, businesses have asserted that this limitation applies to virtually every field of activity. See, *e.g.*, Brief for Petitioner at 51 n.23, *Wyeth v. Levine* (arguing that the presumption does not apply because “[r]egulation of drug labeling has now been the domain of the federal government for more than a century”). The Court in *Wyeth* decisively rejected that argument, stating that “it misunderstands the principle: We rely on the presumption because respect for the states as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action. The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation.” Slip op. at 9 n.3 (internal quotation marks and citation omitted).



PATRICIA MOLTENI

Patricia Molteni is no stranger to the inner workings of the Attorney’s General office. Before coming to NAAG, she worked for 12 years in the Missouri Office of the Attorney General under former Attor-

ney General and current Missouri Governor Jeremiah “Jay” Nixon. Throughout her career, Patricia has worked primarily in commercial litigation specializing in bankruptcy and collection cases..

“I enjoy litigating over contracts and money,” Patricia said.

Two years ago, she brought those bankruptcy savvy skills to NAAG where she is a staff attorney with the Tobacco Project. She collaborates with Karen Cordry, NAAG bankruptcy counsel, to represent the Settling States in bankruptcy cases filed by tobacco companies. She also oversees a pilot program that coordinates a multi-state effort (about 15 states) to collect and enforce judgments against tobacco companies.

“I like working for state Attorneys General because I believe in their mission, and I think that their policies directly affect the every day lives of their constituents—that is certainly the case when states regulate tobacco companies through the MSA [Master Settlement Agreement],” said Patricia.

On the weekends, this Holly, Michigan native spends her time shuttling her two daughters to soccer games and other social activities. In her spare time, she also enjoys gardening and visiting the Smithsonian Natural History Museum and other area museums.

Patricia holds a bachelor’s degree in economics from Michigan State University in East Lansing, Michigan and a JD from Washington University in St. Louis, Missouri. She lives in Arlington, Virginia with her husband and two young daughters.



The presumption against preemption applies in conflict preemption cases.

In several recent amicus briefs, the Chamber of Commerce and the Product Liability Advisory Council argued that the presumption against preemption does not apply in conflict preemption cases. This is so, they argued, because the Supremacy Clause dictates that any state law that actually conflicts with federal law is preempted; and determining whether state law actually conflicts with federal law requires interpreting the *substantive* meaning of those laws, which must be done without any thumbs on the scale. The Court in *Wyeth* definitively rejected that argument, stating that “this Court has long held to the contrary.” Slip op. at 9 n.3 (citing cases); *but see id.* at 22 n.14 (Alito, J., dissenting) (stating that it “remained an open question – before today – whether” the presumption against preemption “applied in conflict preemption cases”).

Congressional intent matters in conflict preemption cases.

A related contention by the pro-preemption forces was that congressional intent to preempt is irrelevant in conflict preemption cases. As Justice Alito put it in his *Wyeth* dissent, “the sole question is whether there is an ‘actual conflict’ between state and federal law; if so, then pre-emption follows automatically by operation of the Supremacy Clause.” Slip op. at 21. The majority in *Wyeth* emphatically disagreed. *Wyeth* had argued that Levine’s action was preempted because requiring it to comply with the state-law duty “would obstruct the purposes and objectives” of the federal drug laws, under which an FDA-approved label operates as both “a floor and a ceiling for drug regulation.” The Court did not deny that state-law verdicts finding labels inadequate might, in some circumstances, frustrate the FDA’s efforts to establish national labeling standards. But that was not the test applied by the Court. Instead, the Court emphasized early on that

one of the “cornerstones of our pre-emption jurisprudence” is that “the purpose of Congress is the ultimate touchstone in every pre-emption case.” Slip op. at 8 (internal quotation marks omitted). Applying that principle, the Court found that “all evidence of Congress’ purposes is . . . contrary” to the proposition that “Congress thought state-law suits posed an obstacle to its objectives.” *Id.* at 18.

The Court pointed out that Congress enacted the Food, Drug, and Cosmetic Act in 1938 “to bolster consumer protection against harmful products”; and that Congress has failed to enact an express preemption provision for FDA-approved drugs, even though in 1976 Congress added an express preemption provision for medical devices. The Court found that Congress’ “silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.” Slip op. at 18; *see also* Brief of Vermont, et al. as Amici Curiae Supporting Respondent at 16, *Wyeth* (“The Supremacy Clause tells us that *if* Congress intended to displace state laws when they frustrate the achievement of certain federal objectives, that federal command controls. The Clause does not, however, answer the predicate question whether Congress so intended. That issue is a matter of statutory construction.”).

State laws protecting consumers can coexist with federal regulatory regimes.

Supporters of preemption frequently contend that a state tort regime is incompatible with a federal regulatory regime in which an expert agency determines what products should be allowed on the market and with what warnings. The Court’s decision *Riegel* gave force to that argument, observing that Congress may have wanted to preempt state tort claims against manufacturers of medical devices because of Congress’ “solicitude for those

who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to all innovations.” 128 S. Ct. at 1009. And, added the Court in *Riegel*, “[s]tate tort law that requires a manufacturer’s [medical device] to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect.” *Id.* at 1008. Not surprisingly, Wyeth relied on precisely those arguments in asserting that state-law actions against drug manufacturers conflict with the federal regime just as much as state-law actions against medical-device manufacturers. The Court in *Wyeth* disagreed.

The Court did not deny that state tort suits against drug manufacturers might frustrate full achievement of certain federal objectives. But, found the Court, Congress had ample countervailing reasons to *permit* state tort suits against drug manufacturers. For example, the “FDA has limited resources to monitor the 11,000 drugs on the market”; “[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly”; and state torts suits “serve a distinct compensatory function that may motivate injured persons to come forward with information.” Slip op. at 22, 23. The critical point is not that the Court concluded the plaintiffs have the better of the policy argument. It is that reasonable policy arguments can be made both for and against allowing state tort actions to proceed. In that situation, it is for *Congress* to make that policy choice. And, as discussed just above, the Court found numerous reasons to conclude that Congress made the policy choice to allow state tort actions against drug manufacturers to proceed.

Agency assertions of preemption in preambles to federal regulations are not entitled to deference.

One of the most prominent trends in preemption law has been federal agencies asserting that state law is preempted. The agencies have done this through a variety of means, including amicus briefs, adoption of rules expressly preempting state law, adoption of rules construing express preemption provisions, and adoption of rules establishing substantive federal law that displaces conflicting state law. *Wyeth* addressed still another method by which federal agencies have purported to preempt state law, namely, the assertion in a preamble to a notice-and-comment rule that certain state laws are preempted. In a preamble to a 2006 FDA regulation regarding the content and format of prescription drug labels, the FDA stated that FDA-approved labels constitute both a “floor” and a “ceiling” and that state-law failure-to-warn suits “threaten FDA’s statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs.”

The Court in *Wyeth* held that “the FDA’s 2006 preamble does not merit deference.” Slip op. at 20. The Court reasoned that the FDA failed to give interested parties notice and an opportunity to comment on its preamble; the preamble “is at odds with what evidence we have of Congress’ purposes[;] and it reverses the FDA’s longstanding position without providing a reasoned explanation, including any discussion of how state law has interfered with the FDA’s regulation of drug labeling during decades of coexistence.” *Id.* at 21.

The Court added that it was not deciding “the preemptive effect of a specific agency regulation bearing the force of law.” Slip op. at 24. The Court may resolve that issue in *Cuomo v. Clearing House Association*, which will be argued in late April. The case addresses the validity of an Office of the Comptroller of the Currency (OCC) regulation that construes the National Bank Act to preempt efforts by New York to enforce its non-preempted fair housing laws against national banks. The second question presented in the case is whether the OCC regulation is entitled to *Chevron* deference.

Justice Thomas will always reject claims of “purposes and objectives” preemption.



SUPREME COURT JUSTICE CLARENCE THOMAS

In several prior opinions, Justice Thomas had expressed skepticism about the doctrine of implied preemption. In an opinion concurring in the judgment in *Wyeth*, Justice Thomas went where his logic took him, and concluded that the Court should altogether abandon the concept of “purposes and objectives” preemption. He explained that the cases finding implied preemption based on

a conflict with a federal statute’s purposes and objectives “improperly rely on legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to pre-empt state law.” Slip op. at 13 (Thomas, J.). The consequence of a “freewheeling” implied preemption doctrine is “giving improperly broad preemptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress.” *Id.* at 23. Accordingly, absent an express preemption provision, Justice Thomas will not find a state statute preempted unless it is “impossible” to comply with both state and federal law. This approach to implied conflict preemption closely resembles the position advocated in the 47-state amicus

brief filed in *Wyeth*. See Brief of Vermont, et al. as Amici Curiae Supporting Respondent at 11-28, *Wyeth*.

All told, it has been a very good Term so far for state law. The Court's reasoning in its preemption decisions not only preserves state-law actions challenging "light" cigarette advertisements and drug labels; it should also assist states in defending myriad state laws against federal preemption challenges in the lower courts.

Decisions Affecting the Powers and Duties of State Attorneys General



EMILY MYERS, ANTITRUST AND SPECIAL PROJECTS COUNSEL

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

Alaska—Attorney General May Waive 11th Amendment Immunity. *Akiachak Native Community,*

et al. v. Department of the Interior, 584 F.Supp.2d 1 (D.D.C. 2008).

The state of Alaska, through its Attorney General, sought to intervene as of right (under Federal Rule 24(a)) in a case brought by four federally-recognized Indian tribes against the United States and the Secretary of the Interior. The case challenged the validity of a regulatory bar prohibiting the Secretary from acquiring land located in Alaska into trust status for most federally-recognized Indian tribes. The state of Alaska sought to intervene as a defendant, arguing that eliminating the bar to acquisition of land in Alaska would diminish Alaska's sovereign authority to tax the plaintiffs' land and to enforce regulations uniformly throughout the state and would undermine the integrity of the settlement reached in the Alaska Native Claims Settlement Act. The plaintiffs alleged, among other grounds for opposing the intervention, that "the Attorney General of Alaska cannot act on behalf of the state to seek intervention in this case because he has not fulfilled the necessary prerequisites to validly waive Alaska's Eleventh Amendment immunity."

An earlier Alaska case held that the Attorney General of Alaska had the authority to invoke the federal court's jurisdiction as a plaintiff, but did not have the authority to waive the state's 11th Amendment immunity which limited the defendant's ability to counterclaim. However, the court noted that the U.S. Supreme Court has held that because a state's Attorney General waives the state's 11th Amendment immunity when he or she voluntarily brings suit in federal court, the state's grant of authority to its Attorney General to invoke a federal court's jurisdiction is consent to waive the state's 11th Amendment immunity by the Attorney General.¹

In light of this holding, the court examined the powers and duties of the Alaska Attorney General. Alaska statutes provide "[t]he Attorney General shall ... represent the state in all civil actions in which the state is a party ... [and] perform all other duties as required by law or which usually pertain to the office of attorney general in a state."² The language in this statute has been interpreted to give the Attorney General broad authority, including "those powers which existed at common law, except where they are limited by statute or conferred upon some other state official."³ Alaska case law also makes it clear that "The Attorney General has the power to intervene in cases in the public's interest."⁴ Therefore, the Attorney General, by filing the motion to intervene, is seeking to protect the state's interests, within his statutory authority, and may waive the state's 11th Amendment immunity.

California—Private Practice of Law by AAGs May Be Limited. *Gibson v. Office of the Attorney General*, ___ F.3d ___, 2009 WL 174915 (C.A.9 (Cal.)).

An assistant attorney general (AAG) in the California Attorney General Office (OAG) represented a paralegal in the office in a malpractice claim against her former divorce lawyer. The AAG did not seek permission before undertaking this representation. The office notified her that she must terminate the representation or she would be fired. The AAG sued, alleging that the office had violated here First Amendment rights and that the office policy on outside representation was an unconstitutional prior restraint.

The lower court held, and the appellate court affirmed, that the OAG had not violated the AAG's First Amendment rights. The appellate court also held that the OAG policy regarding outside legal representation was not an unconstitutional prior restraint. The court stated that in order

1 *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 at 624 (2002).
2 Alaska Stat. § 44.23.020.
3 *Botelho v. Griffin*, 25 P.3d 689, 692 (Alaska 2001).
4 *Berger v. Alaska*, 910 P.2d 581, 585

to show a violation of their First Amendment rights, the employee must show that he or she engaged in protected speech. Among other factors to be considered in determining whether the speech was protected, the court considers whether the speech was about a matter of public concern. The court held that malpractice arising from a private divorce matter did not constitute a matter of public concern, and the speech was therefore not protected by the First Amendment.

The court next analyzed the OAG policy regarding outside representation. The court applied a two part test: 1) whether the speech that led to the adverse employment action relates to a matter of public concern, and 2) whether, using a balancing test, the public employer can demonstrate that its legitimate interests outweigh the employee's First Amendment rights. In this case, the Attorney General's office policy states:

No lawyer employed by the Department of Justice shall engage in the private practice of the law, provided, however, that he may handle personal and family legal matters in which there is no conflict with his duties as a[n] employee of the state, after first obtaining approval of the Attorney General. Lawyers, upon becoming members of the Department of Justice, with the approval of the Attorney General, will be given a reasonable time within which to close pending legal matters.

The court held

[T]he OAG's policy here does not unduly restrict the constitutional rights of a state-employed lawyer. . . . The requirement to seek written permission before engaging in outside representation allows the OAG to assess whether the requested outside employment creates any conflict of interest or impedes any other legitimate interest of the state. . . . The OAG has a legitimate interest in regulating practice-related conduct of its lawyers to avoid any conflict of interest

and to avoid any potential prejudice to the OAG and its clients, as well as a legitimate interest in ensuring that its employees are devoting their full attention to the business of the OAG.

Noting that the policy did not even restrict all outside employment, but only the practice or law, the court concluded that the policy was not an unconstitutional prior restraint on OAG employees.

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Illinois-AG Does Not Have Standing To Challenge Illinois EPA Permitting Decision Upheld by EPA. *Citizens Against Ruining the Environment v. Environmental Protection Agency*, 535 F.3d 670 (7th Cir. 2008)

The Illinois Environmental Protection Agency (IEPA) approved permits under the Clean Air Act for a number of coal-fired power plants in Illinois. The federal EPA did not object to the issuance of those permits. The Illinois Attorney General's office and several environmental groups filed suit requesting the EPA administrator reject the permits. The administrator rejected the request, and the plaintiffs appealed.

The court first addressed whether the Attorney General had standing to pursue this claim. The Attorney General asserted standing as both a sovereign state and as *parens patriae* for its citizens. The court rejected the Attorney General's argument that she could pursue the case as a sovereign state. The state cited *Davis v. EPA*, in which California had petitioned for a review of EPA's denial of the state's waiver request. The court distinguished *Davis* because California had an interest in the litigation because "it was the direct recipient of the EPA's denial. Here, by contrast, the IEPA issued permits to Midwest, which were reviewed (but not objected to) by the EPA. Thus, the EPA's actions were entirely consistent with Illinois' position, as advanced by the IEPA."

The court also rejected the Attorney General's standing as *parens patriae*. The court noted that a state may not bring a *parens patriae* suit against the federal government because there the United States, and not the state, represents the people's interests. *Massachusetts v. Mellon*, 262 U.S. 447, 485-86, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). Although the state could sue to vindicate its rights under federal law (as was the case in *Massachusetts v. EPA*, when the rising sea levels associated with global warming harmed the state itself), in this case, "the general interests of the people of Illinois would seem to be represented (at least informally) by the IEPA." The court distinguished between formal and informal representation, acknowledging that "the authority to represent the State in litigation . . . is possessed exclusively by the Illinois attorney general when the State is the only real party in interest." The court acknowledged that the Attor-



ney General has “broad authority to protect public rights, which indicates that she has *capacity* to sue, *standing* must be independently established in every case.” That standing was not established here.

Kentucky–AG Tobacco Settlement Protected by State Action Immunity. *Vibo Corp. v. Conway*, — *F.Supp.2d* —, 2009 WL 32845 (W.D.Ky.)

A subsequent Participating Manufacturer sued the Attorneys General of the states who entered into the Master Settlement Agreement (MSA) with the tobacco companies, alleging that their actions violated the Sherman Act. The court dismissed the challenge to the actions of the Attorneys General, saying,

A state simply is *incapable* of entering an agreement that violates the Sherman Act. The state-action doctrine traditionally is applied to acts of the legislature or regulatory schemes constructed by states. However, it also applies to actions by officials in the state’s executive branch. . . . A state attorney general, as a member of the executive branch of government, is entitled to immunity for his or her executive actions. Any decision made by the defendant Attorneys General, therefore, either in negotiating and executing the MSA or in deciding not to execute the Amended Adherence Agreement, is direct state action falling completely outside the scope of the Sherman Act. . . . Other courts have held that the acts of the Attorneys General in negotiating and entering into the MSA are direct state action. [citations and footnotes omitted]

The court also dismissed the plaintiff’s Constitutional claims and held that the Attorneys General are immune from suit on the claims of fraudulent inducement.

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New York–Attorney General Can Represent Out-of-State Plaintiffs. *People by Cuomo v. H&R Block, Inc.*, 870 N.Y.S.2d 315 (N.Y. Sup. Ct. App. Div. 2008)

Defendants appealed a lower court decision in a case brought by the Attorney General alleging that the defendants engaged in a fraudulent scheme involving an investment product, Express IRA. The court of appeals specifically upheld the ability of the Attorney General to recover for plaintiffs outside the state. The court stated, “New York’s vital interest in securing an honest marketplace in which to transact business was threatened when defendants used a New York business to complete the deceptive transactions at issue here by administering their money market fund, and advised customers that the New York business would be their ‘authorized agent’.”

Federal Response to the Mortgage Foreclosure Crisis: The Homeowner Affordability and Stability Plan



DENNIS CUEVAS

DENNIS CUEVAS, PROJECT DIRECTOR AND CHIEF COUNSEL, CONSUMER PROTECTION

National estimates and data continue to paint a bleak picture of the housing and foreclosure landscape. According to investment firm Goldman Sachs, approximately 13 million defaults will occur between now and 2014. The Mortgage Bankers Association estimates that 1 in 10 homeowners are currently delinquent on their mortgage payments. Meanwhile, mortgage lending in this country has plummeted. In 2008, lending fell 40 percent to \$1.61 trillion – down from \$2.65 trillion a year before. The National Realtors Association reports that existing home sales dropped 24 percent, while new home sales and new home construction dropped 54 percent and 58 percent respectively.

In an effort to stem the tide of foreclosures and stabilize the housing market, President Obama announced this past February his \$275 billion housing plan. The plan would help nine million troubled homeowners refinance their mortgages and stabilize neighborhoods devastated by foreclosures. Dubbed the “Homeowner Affordability and Stability Plan,” the plan has three components: a refinancing program, a modification program, and a Fannie Mae and Freddie Mac strengthening component.

The first component would help homeowners who are current on their mortgage payments, but who are paying high interest rates and cannot refinance because they lack enough equity in their homes, a growing problem as home values continue to fall. The program would give 4 to 5 million homeowners an opportunity to refinance into more affordable monthly payments.

Under the refinancing program, borrowers must be current on their payments (no more than 30 days late on the mortgage payment in the last 12 months), the property subject to refinancing must be owner-occupied, and

the loan must be owned or guaranteed by Fannie Mae or Freddie Mac. In addition, eligible loans must not exceed 105 percent of the current market value of the property, i.e., the amount owed on the mortgage is about the same or slightly less than the current value. Lastly, borrowers must show sufficient income to support the new mortgage payments. Interest rates will be based on market rates in effect at the time of the refinance and any associated points and fees quoted by the lender. The refinanced loans will have no prepayment penalties or balloon payments.

The second component of the housing plan is the modification program, which commits \$75 billion to keep 4 million Americans in their homes by preventing avoidable foreclosures. It would provide incentives to lenders who alter the terms of loans to make them affordable for troubled borrowers. Although the plan has broad coverage – the loan balance must be less than \$729,750, modification must yield a greater return than foreclosure, and there must be imminent risk of default – the plan is narrow by requiring that the subject loan originate on or before January 1, 2009, that loans be modified only once under the program, and modifications start from now until December 31, 2012.

Servicer participation [organizations that collect payments from borrowers] in the modification program is generally not required; however, Obama's housing plan provides several incentives for participation. Servicers that modify loans, according to the Treasury guidelines, will receive an up-front fee of \$1,000 for each modification, plus "pay for success" fees on still-performing loans of \$1,000 per year. Homeowners who make their timely payments are eligible for up to \$1,000 of principal reduction payments each year for up to five years. The program will provide one-time bonus incentive payments of \$1,500 to lender/investors and \$500 to servicers for modifications made while a borrower is still current on mortgage payments.

In order to obtain these incentives, servicers are required to follow modification guidelines, aimed at reducing the monthly payment to no more than 31 percent of gross monthly income. These guidelines include using a net present value (NPV) test on each loan that is at risk of imminent default or at least 60 days delinquent (NPV is comparing the value of money now with the value of money in the future). The test will compare the NPV of cash flows with modification, as well as without modification. If the NPV of expected cash flow is greater in the modification scenario, the servicer must modify the loan. Modification requires a reduction in the interest rate then, if necessary, extending the term or amortization of the loan up to a maximum of 40 years. Principal forgiveness is also an

acceptable alternative. The borrower's monthly payment must include principal, interest, taxes, insurance, flood insurance, and homeowner's association fees.

Other guidelines under the program include acceptable discount rates, property valuation methodologies, home price appreciation assumptions, foreclosure costs and timelines, and borrower cure and redefault rate assumptions.

The third component of the plan would increase the credit available for mortgages by giving \$200 billion of additional financial backing to government-sponsored enterprises Fannie Mae and Freddie Mac. Increasing the funding commitment to Fannie Mae and Freddie Mac would ensure the strength and security of the mortgage market and help maintain mortgage affordability.

Under the program, the Treasury is increasing its Preferred Stock Purchase Agreements to \$200 billion each from their original level of \$100 billion each and will continue to purchase Fannie Mae and Freddie Mac mortgage-backed securities. Treasury will increase the size of Fannie Mae and Freddie Mac's mortgage portfolios to \$900 billion, up from \$50 billion. These initiatives are aimed at enabling Freddie Mac and Fannie Mae to continue to provide affordable mortgages and provide confidence in the mortgage market.

The Homeowner Affordability and Stability Plan is one of President Obama's initiatives to revive the economy and stem foreclosures. At its core, the plan will get troubled borrowers' loan balances below the value of their houses, and it will reduce their payments to a sustainable level. The ultimate success of the program will depend on the participation of troubled borrowers and servicers.



Photo courtesy Brendel

Summer Meeting: Public Protection in Challenging Economic Times

Finding ways to protect the public with fewer state dollars will be the focus of discussion among the state Attorneys General and others during the NAAG Summer Meeting, June 16-18 in Colorado Springs, Colorado.

This public meeting allows attendees to discuss the latest state legal issues and potential solutions and offers extensive networking opportunities, all in a great location, the Cheyenne Mountain Resort, an environmentally-friendly hotel. Colorado Attorney General John Suthers and his wife, Janet, are the meeting hosts.

The agenda will include panel discussions on such topics as the Mexico-U.S. border action and the first speaker selected as part of the William H. Sorrell Lecture Series on Tobacco Policy and Enforcement. The series is in honor of Vermont Attorney General Sorrell through an endowment provided by the American Legacy Foundation.

During the state dinner, the gavel is passed from current NAAG President and Rhode Island Attorney General Patrick Lynch to the incoming NAAG President and Nebraska Attorney General Jon Bruning, and a variety of NAAG awards are presented to recognize significant accomplishments by an Attorney General, SAGE member, an assistant attorney general, and Attorney General staff.

The meeting concludes June 18 with a cowboy trail dinner and a Western Show at the Flying W Ranch. NAAG will also offer a children's program and a social program for family members in attendance.

For more information or to register, go to <http://www.naag.org/naag-summer-meeting.php> or contact Jeffrey Hunter, jhunter@naag.org.

NAAG Welcomes Spring Supreme Court Fellows



Mark Fowler and Margaret Paton-Walsh

The NAAG Supreme Court Fellows program gives state lawyers an opportunity to obtain direct and intensive hands-on exposure to Supreme Court practice. The Fellows come to D.C. for three- to four-month periods during the Court's argument session. They watch oral arguments, participate in moot courts, prepare an amicus brief in a Supreme Court case, and draft the Report. The following Fellows joined NAAG for the spring term:

Mark Fowler is the assistant attorney general in the Montana Office of the Attorney General. In this role, he

prosecutes death penalty cases in Montana state and federal trial courts, the Ninth Court of Appeals and the United States Supreme Court. In addition, he also argues on behalf of the state in criminal and post-conviction appeals in the Montana Supreme Court. Mark has enjoyed a long tenure in this office where he previously worked in the Gambling Control Division. Prior to his current position, Mark worked as the assistant attorney general in the Tennessee Office of the Attorney General. Mark holds a BA in history from Jacksonville University. He is also a graduate of the University of Florida College of Law.

Margaret Paton-Walsh is the assistant attorney general in the Alaska Office of the Attorney General. Margaret works in the Labor and State Affairs Section where she conducts employment litigation and does appellate work, including civil appeals before the Alaska Supreme Court and the Ninth Circuit of Appeals. She also serves on the office appellate group, which reviews office appellate briefs and conducts moot courts. Previously, Margaret worked as an associate at Delany, Wiles, Hayes, Gerety, Ellis, Young, Inc., where she researched legal issues relating to employment law, oil and gas development and worker's compensation. She holds a BA in history from the University of Durham in England, MA and PhD from The Ohio State University and University of Washington, respectively. She also obtained a JD from Harvard Law School.

NAAG Gets Support to Reduce Crime Through Early Education and Child Care



NAAG Executive Director Jim McPherson, right, presents a NAAG coin to Joey Weedon with Fight Crime: Invest in Kids

Fight Crime: Invest in Kids, a national non-profit anti-crime organization, has awarded NAAG a \$10,000 grant to foster efforts on effective strategies to reduce crime and violence through early education and childhood care programs. NAAG's education and awareness activities under the grant will include distribution of articles and materials on these programs as a tool to prevent child abuse and neglect, press events at NAAG meetings highlighting the importance of early childhood programs and participation in the development of a research brief focused on the crime prevention aspects of these programs. This is the third grant NAAG has received from the organization.

"Preventing child abuse and neglect is a vital concern for Attorneys General across the country," said Hedda Litwin, NAAG Cyberspace Law counsel. "The National Association of Attorneys General welcomes the support from Fight Crime: Invest in Kids so that we may assist our members in this effort."

At least 20 Attorneys General are members of Fight Crime: Invest in Kids and have been active in their support of the organization's initiatives. For example, NAAG Presi-

dent and Rhode Island Attorney General Patrick Lynch met with congressional leaders to urge increased federal funding for the Head Start program and Child Care Development Block grants as part of the effort to stimulate the economy. Nevada Attorney General Catherine Cortez Masto has urged Congress to expand the federal child tax credit as a way to reduce crime. Additionally, Kansas Attorney General Steve Six and Illinois Attorney General Lisa Madigan have both supported studies by Fight Crime: Invest in Kids that indicate federal funding for early childhood programs is insufficient to cover many of the eligible children in their states.

Additional information about the organization can be found on its Web site, <http://www.fightcrime.org>.

NAAG's Community Outreach: Legal Food Frenzy

It is no secret that there are many people living with or on the brink of hunger. Due to the economic downturn, food banks throughout the Washington, DC area are currently experiencing a historic rise in the demand for assistance. As a result, NAAG once again participated in Virginia Attorney General Bill Mim's "Legal Food Frenzy". This was the 3rd annual food-and-funds drive organized by the Virginia Attorney General's Office, the Virginia Bar Association and the Federation of Virginia Food Banks. This two-week philanthropic contest ran from March 30 to April 10 and was open to all members of the Virginia legal community to encourage giving to local food banks during a traditionally slow period for donations. Last year the competition supplied enough groceries for 1,067,501 meals by raising 1,366,401 pounds of food. At press time, it looked like this year's race will set another record.



Donated food is boxed and delivered to local food banks. Image courtesy ABC-13, Roanoke, VA.

NAAG's Charities Committee coordinated events for the NAAG staff to encourage donations while promoting a positive and fun atmosphere. Thanks go to Committee members Ellen Taverna, Erjona Fatusha, Veronica Ricca and Judy McKee. They organized a potluck NAAG luncheon kindly requesting a monetary or food donation for admission. Several NAAG volunteers contributed to the occasion by bringing in delicious dishes from crock-pot cuisines like marinated meatballs to BBQ pork sliders and homemade hummus (in your choice of mild or spicy). NAAG staff came with big appetites along with equally-sized hearts. With just one lunch, \$200 was raised, which is equivalent to 800 pounds of food according to contest specifications. This event alone assisted in exceeding last year's total of 745 pounds. At first, NAAG was hopeful that its efforts this year would double last year's food drive total and when the donations were tallied, NAAG received over 1,500 pounds of food topping their initial goal!

Everywhere people turn, they are easily reminded about today's economic crisis and the financial hardships of Americans. Despite these difficult times, NAAG staff demonstrated a tremendous amount of generosity. The association hopes to continue this spirit of charity in future volunteer projects with a local elementary school.



The Year of the Child Presidential Summit



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 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.

For more information and/or to register, contact Hedda Litwin, NAAG Cyberspace Counsel, at 202-326-6022 or hlitwin@naag.org.

UPCOMING EVENTS

NAAG Presidential Initiative: Year of the Child: Protecting and Empowering our Next Generation

May 12 -13, 2009
Philadelphia, PA
Contact: Hedda Litwin

Western Region Trial Practice

June 7 -14, 2009
Denver, CO
Contact: Dennis Cuevas

NAAG Summer Meeting

June 16 -19, 2009
Colorado Springs, CO
Contact: Jeffrey Hunter