

NAAG Gazette

A Newsletter of the National Association of Attorneys General

June 2009

Nebraska Attorney General Jon Bruning Elected NAAG President



Rhode Island Attorney General Patrick Lynch, left, hands the NAAG presidential gavel to Nebraska Attorney General Jon Bruning.

Nebraska Attorney General Jon Bruning was unanimously elected June 17 by the members of the National Association of Attorneys General (NAAG) to become the Association's 102nd president.

"Attorneys General are uniquely situated to lead the way in building a stronger and safer future for our states and our families," said President Bruning. "Serving as president of NAAG is an honor, and I look forward to working with my colleagues on issues that affect us on both the state and national level."

Elections were held during NAAG's 2009 Summer Meeting, June 16-18, in Colorado Springs where nearly 200 participants, including 30 Attorneys General and their key staff, met to discuss critical state legal issues.

The theme was "Public Protection in Challenging Economic Times" and topics included DNA database sharing, Ponzi schemes, and U.S.-Mexico border issues. In addition, Steven Schroeder, M.D., served as the first speaker for the William H. Sorrell Lecture Series on Tobacco Policy and Enforcement (see accompanying article).

North Carolina Attorney General Roy Cooper was elected president-elect, Washington Attorney General Rob McKenna as vice president, and Rhode Island Attorney General Patrick Lynch became immediate past president for the 2009-2010 term.

President Bruning said that his presidential initiative, "Virtual World - Real Crime," strives to shield children from sexual predators and protect consumers and businesses from fraud.

"Predators and scam artists know how to utilize the latest technology to prey on kids and consumers. Real

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

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crime runs rampant in the virtual world. I urge my NAAG colleagues to join me and bring emerging trends to the forefront, harness new technology and better combat the crime and corruption that come with it," said President Bruning.

Outgoing NAAG President, Attorney General Lynch, delivered his final remarks and concluded his presidential initiative, "The Year of the Child," with a goal of increasing online safety. "We will continue our work in fostering a safer social networking environment and in preventing predators and other criminals from using cyberspace as their own personal playgrounds," Attorney General Lynch said. "It's been an honor as NAAG president to work with incredibly talented and dedicated individuals who come together to ensure that justice is done."

The Association also announced its annual award winners:

- Idaho Attorney General Lawrence Wasden received the Kelley-Wyman Award, the Association's highest honor given to the Attorney General who has done the most to achieve the objectives of NAAG.
- The Marvin Award, given annually to individuals who serve on the staff of state Attorneys General and who have furthered the goals of NAAG, was awarded to Jay Chaudhuri, who served as special counsel to North Carolina Attorney General Roy Cooper and Connecticut Special Counsel Anthony Jannotta.



Lawrence Wasden, Idaho Attorney General, received the Kelley-Wyman Award.

- The Laurie Loveland Award was presented to Maryland Assistant Attorney General David Lapp. The award recognizes individuals within an Attorney General's office who have helped to advance the work of Attorneys General on tobacco-related issues.
- Individuals from the Alabama, Illinois, Maryland, New York and Texas offices of the Attorneys General were recognized for excellence in brief writing in the U.S. Supreme Court. Recipients of the Supreme Court Best Brief Awards were: Solicitor General Corey Maze and Assistant Attorney General Misty Fairbanks of Alabama; Solicitor General Michael Scodro and Deputy Solicitor General Jenny Notes of Illinois; Austin Schlick, Steven Sullivan, Joshua Auerbach and Michael McDonald of Maryland; Solicitor General Barbara D. Underwood, Deputy Solicitor General Michelle Aronowitz, and Assistant Solicitor General Richard Dearing of New York; and Solicitor General James Ho and Assistant Solicitor General Daniel Geysler of Texas.
- The Francis X. Bellotti Award, given to a former Attorney General who has served NAAG and worked diligently to further its vision and mission, was presented to former Michigan Attorney General Frank J. Kelley.

The Association elects its officers yearly, through geographical rotation by region. Election of the four officers—president, president-elect, vice president and immediate past president—takes place at the annual NAAG Summer Meeting. The president appoints all standing and special committee chairs. Committees are charged with studying all substantive matters within their jurisdiction and recommending policy positions and other matters to the Attorneys General for action by the full Association.

The Executive Committee is charged with the management of Association operations and yearly approval of a program plan of goals, objectives, and activities to guide its work. The Executive Committee comprises the four NAAG officers, four regional delegates and three presidential appointees and the chair of the NAAG Mission Foundation, which supports the work of the Association.

The 2009-2010 NAAG Executive Committee consists of the following Attorneys General:

- Attorney General Jon Bruning (Neb.), President
- Attorney General Roy Cooper (N.C.), President-Elect
- Attorney General Rob McKenna (Wash.), Vice President
- Attorney General Patrick Lynch (R.I.), Immediate Past President
- Attorney General Doug Gansler (Md.), Chair, Eastern Region
- Attorney General Steve Six (Kan.), Chair, Midwestern Region
- Attorney General Dustin McDaniel (Ark.), Chair, Southern Region
- Attorney General Larry Long (S.D.), Chair, Western Region (CWAG)
- Attorney General Bill Sorrell (Vt.), Chair, Mission Foundation
- Attorney General Kelly Ayotte (N.H.), Presidential Appointment
- Attorney General Martha Coakley (Mass.), Presidential Appointment
- Attorney General Tom Miller (Iowa), Presidential Appointment



Ambassador Harriet Babbitt talks with Iowa Attorney General Tom Miller after a U.S.-Mexico Border Issues panel.

VALERIE GILLIS Accounting Clerk

From bookkeeping to handling invoices, Valerie Gillis has excelled in her position as accounting clerk at NAAG. After joining the staff in November 2008, Valerie quickly adapted to her new role. In this capacity, she handles accounts receivable, accounts payable, and other day-to-day accounting tasks. Her love of numbers and colleagues has made for a perfect fit during her short time at NAAG.

Although Valerie has performed well in her new position, she maintains a low-key presence in the office. “I love NAAG and everyone has been really supportive but I usually like staying out of the spotlight,” she joked.

Before joining NAAG, Valerie spent almost five years as payroll coordinator at Birmingham Green, a nonprofit long-term care facility in Manassas, Va. In that role, she routinely dealt with worker’s compensation cases and labor cost analysis.

Valerie is no stranger to the Washington, D.C., area as she was born in the District but has always lived in northern Virginia. She now resides in Centreville, Va., and enjoys reading and traveling in her spare time. Over the past 15 years, she has visited 12 countries in South America and Europe.

States Active in Recent Mega Bankruptcies



KAREN CORDRY, BANKRUPTCY COUNSEL

KAREN CORDRY

In recent weeks, the states have been extremely active in several major bankruptcies, often on very short notice, and on a wide variety of topics. Huge bankruptcies, such as GM and Chrysler are processed as “pre-packaged” cases, with the main assets being scheduled for sale within six weeks of the filing.

As such, these developments underscore the need for offices to develop bankruptcy expertise so that they can hit the ground running when these cases are filed. Moreover, in light of the major impact these cases have on state economies and the state of the law in future bankruptcy cases, the involvement of the Attorneys General has been critical in making changes in the terms of the agreements.

In the Circuit City case, after the company carried out its massive “going out of business sales” at its physical stores, it moved to sell its intellectual property, Internet domains, logos and the like, as well as its customer data. This is a new trend by which “bricks and mortar” retailers shut down, but their virtual shell is sold to a new party that resumes selling under the same name strictly as an Internet business. The states had two concerns with the proposed sale – first, that while the sale appeared to resurrect the prior company, the new owner insisted that the sale order state that it was not a successor, and second, that the sale of customer information might violate laws on consumers’ privacy rights.

The latter issue first emerged in the Toysmart bankruptcy in 2000 – a case involving a Web site catering to children (and gathering information from them) that proposed to sell all of its consumer data to the highest bidder in violation of a promise that it would not sell that data. Both the states and the Federal Trade Commission (FTC) initially objected that the proposed sale violated their “unfair and deceptive acts and practices” (UDAP) laws. The FTC, though, later offered to settle the case by allowing the sale to a “qualified buyer,” i.e., a legitimate party in the same line of business that would protect the data. The states though, continued to object, holding that a sale to any party would still be unlawful if it were made without the consumer’s consent. In the end, the motion was withdrawn, the settlement was never approved, and the data was, in fact destroyed. The states then worked

with Congress to have language added to the bankruptcy amendments that were eventually enacted in 2005. Under those changes, before information could be sold if a privacy policy was in effect, a consumer privacy ombudsman (“CPO”) must be appointed to investigate the issues and report to the court, and the court must find that the terms of the sale did not violate nonbankruptcy law.

The Circuit City case was the first where states became generally aware of a proposed sale of consumer data although prior sales had taken place without notice to state regulators. The states learned from this case (as well as similar developments in Chrysler and GM) that some CPOs have concluded that the FTC’s Toysmart contested approach should, nevertheless, be treated as “governing law.” Because prior orders were entered without notice to, or discussion with, the states, it appears that those CPOs were not fully informed of the states’ position on these issues. The CPO in Circuit City initially planned to use the limited Toysmart approach, but after many conference calls (attended by dozens of states), the final result was a sales order with much stronger privacy protections than originally proposed. It clarified that no data of the type that would trigger states’ “data breach” laws would be transferred, required opt-out rights for the contact data that was transferred, and had the opt out conducted by an independent third party. As to the first issue – the revival of the liquidated business – the states ensured that the opt-out notices and Web site contained conspicuous disclosure of the new entity. In addition, the order required that information about the change in ownership be sent to sites that rated Web sites, so they could let consumers know that the old ratings did not apply to the new site. NAAG’s Bankruptcy counsel helped coordinate the discussions and appeared for the states at the sale hearing to let the court know the basis for resolution of the states’ objections.

Chrysler and GM Bankruptcies

Since the beginning of May, the states have been consumed with numerous issues arising out of the Chrysler and GM bankruptcies, all of which have had to be dealt with at lightning speed. Among the issues have been: ensuring that the new entities would assume coverage for state “lemon law” liabilities; review of provisions for transfer of consumer data, ensuring workers’ compensation coverage, and treatment of states’ claims for taxes and environmental obligations. A full 140 staffers are now on the contact list for these cases as the number of issues to be addressed has grown. In Chrysler, the buyer eventually agreed to cover the vast majority of lemon law liability after many discussions with a working group made up of California, Connecticut, Florida, Iowa, Michigan, New

Hampshire, New York and Ohio and to pick up workers' compensation coverage in any state where it would continue to have employees. The states have also discussed concerns about the terms of a release for directors and officers, which they expect will be resolved consensually. (Ohio and Michigan filed short objections to formally note the concerns while those discussions are ongoing.)

Many of these same issues have arisen in the GM bankruptcy, and some discussions have been had with the debtor, although the results have not been as productive to date. As a result, a large number of states have objected to different aspects of the proposed sale order there. Texas kicked off with an initial objection, an omnibus objection was filed on June 19 by 37 states (a supplemental joinder was filed with four additional states) and numerous other states filed individual or joint objections dealing with various aspects of the order. In particular, Connecticut and Kentucky filed an objection (joined by 12 other states) that objected to the failure to transfer personal injury claims to the new company. At press time it is still hoped that many of these matters would be worked out before the sale hearing on June 30.

The most controversial area in both the GM and Chrysler bankruptcies are their plans to cease relations with a large number of their dealers. Chrysler moved to reject dealer contracts, a bankruptcy process that is a form of breach of contract (with specified consequences for the damage claims arising therefrom). GM has proposed to assume its contracts with all of its dealers – but only after they have been required to amend those agreements on pain of having them rejected. In both cases, the debtors sought to avoid application of dealer laws (enacted in all 50 states) that give dealers certain rights with respect to whether their contracts may be terminated and the remedies available to them if they are terminated.

In the states' view, while the decision to reject an agreement is one for the debtor and the bankruptcy court, in general, the Bankruptcy Code does not provide that the rejection eliminates all laws that relate to the end of the relationship. The original rejection order purported to decide many issues relating to the effect of the rejection and to do so in ways that greatly undermined state law. As a result, states filed two objections – one, by Ohio as the lead state that stated a short form objection, and the other, with Illinois as the lead state, that provided a more detailed analysis of the issues and the reasons why the relief sought by the motion was improper. The first was signed by 15 states, the second by seven states (some signed both). Eventually (again after much negotiation with the states and others), the debtors agreed to substantially modify the rejection order to remove virtually all language deciding the effect of the rejections, leaving

such issues to be decided as damage claims or requests for alleged injunctive rights.

Illinois' Counsel Jim Newbold, and NAAG Bankruptcy counsel appeared in the New York Bankruptcy Court on June 9 to explain why those changes appeared acceptable to resolve the states' objections. In addition to correcting the order, the states also closely monitored Chrysler's efforts to ensure that cars at rejected dealers would be transferred to other dealers, eliminating those costs for the rejected dealers. While that was not precisely the remedy provided to dealers under their state laws, those reallocation efforts were directed at the same goal and provided a substantial portion of the relief that was authorized under those laws.

The states are now looking at similar issues arising out of the new contract language that GM has insisted dealers must sign in order to have their agreements assumed. That language includes at least some provisions that most states believe violate their laws – such as placing continuing jurisdiction exclusively in the bankruptcy courts and requiring that the dealers waive any right to complain to the states. The states are also concerned that those waiver provisions are improper under their laws and that the very attempt to obtain them is also unlawful. In the omnibus objection (as well as the objection by Texas), the states argued that the Bankruptcy Code provisions on assuming contracts does not include any provision that immunizes such agreements from the normal application of nonbankruptcy law. Thus, to the extent that the agreements have unlawful terms or were obtained illegally, the states believe that the provisions would not be enforceable on a going-forward basis. A working group of Attorneys General, though, comprised of Jon Bruning (Neb.), John Suthers (Colo.), Richard Blumenthal (Conn.), Richard Cordray (Ohio), and Greg Abbott (Texas), have been engaged in discussions with the GM parties on these issues and hope that, as with Chrysler, a consensual resolution will be achieved.



“Flowers Which Are Born to Blush Unseen”: This Supreme Court Term’s Sleeper Cases



DAN SCHWEITZER, SUPREME COURT
COUNSEL

In his annual year-in-review speech at the Fourth Circuit Judicial Conference, Chief Justice William Rehnquist “liked to invoke Thomas Gray’s *Elegy Written in a Country Churchyard*, describing the latest Term’s sleeper cases as ‘flowers which are born to blush unseen and waste their sweetness on the desert air.’”¹ Often, the cases that prove most important to future litigants are not those that garnered the headlines or prompted a flood of amicus briefs. Sometimes the less-publicized cases, the sleeper cases, end up mattering the most. With that in mind, here is a quick look at some recent rulings by the Supreme Court that have so far “blush[ed] unseen,” but which, from the states’ perspective, ought to be studied quite closely.

Herring v. United States. Since the Court first applied the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), the rule has been one of the Court’s most controversial innovations. Opponents of the rule have had little success over the years, but several recent decisions suggest the Court may be prepared to narrow its scope considerably. *Herring* is another important step in that direction.

On the surface, *Herring* appears to be nothing more than a modest extension of *Arizona v. Evans*, 514 U.S. 1 (1995), where the Court held that a recordkeeping error by a court clerk, which led to an unlawful arrest, does not trigger the exclusionary rule. The Court in *Herring* held that the same result obtains when the recordkeeping error was made by a clerk in a sheriff’s office. (Because the office’s computer database had not recently been updated, the clerk wrongly told an officer there was an outstanding warrant for *Herring*’s arrest.) On the surface, this appears to be a minor case about arrests (and subsequent searches) based on recordkeeping errors. The Court’s reasoning, however, lays the seeds for more dramatic changes to come.

The Court stated that “[t]he fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies.” 129 S. Ct. at 700. Rather, “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Id.* at 702. Quoting *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984), the Court stated that the question is “whether a reasonably well trained officer would have known that the search was illegal” in light of “all the circumstances.” 129 S. Ct. at 703.

If the Court in a future case reads those passages for all they are worth, the result would be a major retrenchment of the exclusionary rule. Many Fourth Amendment violations are committed by officers who acted on a good faith belief that they had the requisite reasonable suspicion or probable cause to stop, arrest, or search a person. Under current doctrine, the “good faith” exception adopted in *Leon* only applies when an officer in good faith relied on a search warrant issued by a magistrate, but ultimately found to be unsupported by probable cause. *Herring* suggests that the “good faith” exception may be extended to all instances in which an officer violates the Fourth Amendment when acting in good faith.

Ashcroft v. Iqbal. On one level, this case was not a sleeper. The front page of major newspapers reported that the Court rejected a 9/11 detainee’s lawsuit against former U.S. Attorney General John Ashcroft and FBI Director Robert Mueller. And legal publications noted the importance of the decision’s holding on how detailed a plaintiff’s factual pleadings must be to survive a motion to dismiss. But for states and other governmental entities, the big news in the opinion lay elsewhere — namely, in the Court’s rejection of supervisory liability in §1983 and *Bivens* actions.

As a predicate to determining whether the plaintiff, *Javid Iqbal*, pled sufficient facts against Ashcroft and Mueller, the Court had to determine the elements of his claim. *Iqbal* alleged that he and other Muslims, because of their religion and national origin, were mistreated when they were detained after the 9/11 attacks. As to Ashcroft and Mueller, specifically, one of *Iqbal*’s claims was that they personally “adopted and implemented the detention policies at issue” for discriminatory reasons. The Court ultimately held that *Iqbal* failed to plead sufficient facts to state that claim. His other claim against Ashcroft and Mueller was that they knew, and acquiesced in, “their subordinates’ use of discriminatory criteria to make classification decisions among detainees.” In rejecting this claim, the Court essentially eliminated the doctrine of supervisory liability in government-officer actions.

¹ Richard W. Garnett, *William H. Rehnquist: A Life Lived Greatly, and Well*, 115 *Yale L.J.* 1847, 1849 (2006).

It was common ground among the parties and all nine Justices that government officers may not be held liable in §1983 and Bivens actions under a theory of respondeat superior. Most lower courts, however, had held that government supervisors could be held liable for their subordinates' conduct in certain situations. For example, Judge Posner wrote for the Seventh Circuit that government supervisors may be held liable if they "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988). Other circuits had adopted gross negligence, recklessness, and deliberate indifference standards for supervisory liability. In its *qbal* decision, the Court rejected those approaches.

The Court held that supervisors' "knowledge and acquiescence in their subordinates'" unconstitutional conduct is not actionable under §1983 and Bivens. 129 S. Ct. at 1949. Stated the Court: "In a §1983 suit or a Bivens action — where masters do not answer for the torts of their servants — the term 'supervisory liability' is a misnomer. . . . [E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* Applied here, because "purpose rather than knowledge is required to impose Bivens liability on the subordinate for unconstitutional discrimination[,] the same holds true for an official charged with violations arising from his or her superintendent responsibilities." *Id.* In the dissent's words, this "does away with supervisory liability under Bivens" — and under §1983 as well. *Id.* at 1955. This should prove very helpful to many state officers represented by state Attorney General Offices.

Nken v. Holder and Abuelhawa v. United States. On the surface, these two cases have nothing to do with state attorneys' practice. *Nken* addressed when federal appeals courts may stay lower court deportation orders; *Abuelhawa* addressed the construction of a federal law making it a felony to use a "communication facility" (e.g., a cell phone) to facilitate the commission of a felony drug crime. State attorneys may be interested, however, in the reasoning the Court used to resolve these two cases. In particular, the decisions may provide some tools state attorneys can use when the plain language of a statute appears to cut against the state's position.

At issue in *Nken* was whether a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 barring appellate courts from "enjoin[ing]" the removal of an alien bars appellate courts from granting stays of removal orders pending appeal. The issue, in large part, revolved around whether the term "injunction" encompasses "stays." The Court held it does not, even though the Court acknowledged that "a stay might technically be called an injunction." 129 S. Ct. at 1758.

The Court held that this technical meaning (what might sometimes be called a "literal" meaning) is "beside the point" because "that is not the label by which it is generally known. The sun may be a star, but 'starry sky' does not refer to a bright summer day. The terminology of [the provision] does not comfortably cover stays." *Id.* at 1759.

Abuelhawa involved §843(b) of the Controlled Substances Act, which makes it a felony "to use any communication facility in . . . facilitating" certain felonies under the Act. Does "someone violate[] §843(b) in making a misdemeanor drug purchase because his phone call to the dealer can be said to facilitate the felony of drug distribution"? 129 S. Ct. at 2104. The government argued that the answer is yes, based on the plain meaning of the statutory terms. No one disputed that a phone counts as a "communication facility." The question, then, is whether the drug purchaser's use of the phone can be said to have "facilitated" the felonious sale by the dealer. The plain meaning of facilitate is to "make easier." And no one seriously disputes that the use of a phone can make the drug sale easier. *Q.E.D.*

Not so fast. The Court unanimously ruled against the government, stating that its "literal sweep of 'facilitate' sits uncomfortably with common usage." 129 S. Ct. at 2105. When an event, like a sale, requires two participants, "it would be odd to speak of one party as facilitating the conduct of the other No buyer, no sale; the buyer's part is already implied by the term 'sale,' and the word 'facilitate' adds nothing." *Id.* The Court also pointed to its "traditional" rule "that where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature." *Id.* at 2106. For example, absent §843(b), the law would not treat the purchaser of a small quantity of marijuana as a felon on the ground that he was aiding and abetting the felonious sale.

And so we have two examples where the Supreme Court rejected the literal reading of the statute in favor of



a reading that better comported with “common usage.” Perhaps one day soon, you will have a case where you can remind the court that “[t]he sun may be a star, but ‘starry sky’ does not refer to a bright summer day.” If so, Nken will no longer be one of those “flowers which are born to blush unseen and waste their sweetness on the desert air.”

Reform Plan Proposes to Restructure Financial Industry



ELLEN TAVERNA, PROJECT MANAGER AND COUNSEL, CONSUMER PROTECTION PROJECT

ELLEN TAVERNA

Americans continue to suffer from the economic crisis facing our nation. Not only did the financial crisis create multi-billion dollar company bailouts, extensive job losses and a troubled housing market, but it also exposed the many inadequacies in consumer and investor protection of our financial services industry. In hopes to restore confidence in the integrity of our financial system and help prevent future economic damage to American consumers and businesses, President Obama, joined by Treasury Secretary Timothy Geithner, recently unveiled a comprehensive regulatory reform plan to restructure the financial sector.²

The administration’s reform plan lists the protection of consumers and investors from financial abuse as one of its five main objectives.³ One of the key ways the administration proposes to protect consumers is the creation of a new Consumer Financial Protection Agency (CFPA). The CFPA’s top priority would be the protection of consumers and it would be given the “authority and accountability to make sure that consumer protection regulations are written fairly and enforced vigorously.”⁴ It would oversee financial products and services such as bank accounts, annuities, mortgages, and credit cards, as well as the institutions that provide these services. The CFPA would also have enforcement authority to write rules for banks, bank affiliates, and nonbank firms and enforce the rules through orders, fines, and penalties.⁵

While the CFPA would have supervisory authority over nonbanking institutions, the plan does clarify that “states should be the first line of defense.”⁶ However, if a state enforcement agency brings an action against any institution within the CFPA’s jurisdiction for a violation of one of the agency’s regulations, the CFPA could intervene in the action for all purposes, including appeals.⁷ The CFPA would work with the newly proposed Financial Consumer Coordinating Council, comprised of the heads of the Securities and Exchange Commission, the Federal Trade Commission (FTC), the Department of Justice, and other state and federal regulators, to conduct periodic reviews of the effectiveness of enacted regulations and promote consistency within the agencies. The Coordinating Council would “establish mechanisms for state attorneys general, consumer advocates and others to make recommendations to the Council on issues to be considered or gaps to be filled.” The Council would report to Congress, and make recommendations for regulatory improvements.⁸

Most importantly from the states’ perspective, while the CFPA would be charged with setting high federal minimum standards for these consumer protection and fair lending laws, it would allow the states to impose tougher requirements if necessary. The plan also proposes that “federally chartered institutions be subject to nondiscriminatory states consumer protection and civil rights laws to the same extent as other financial institutions.”⁹ According to the plan, “the states would be able to enforce these laws, as well as regulations of the CFPA, with respect to federally chartered institutions, subject to appropriate arrangements with prudential supervisors.”¹⁰ As for state banks supervised by a federal prudential regulator, the CFPA will be the primary consumer compliance supervisor at the federal level.¹¹

The CFPA would also assist the states in unifying and strengthening standards for registering, licensing and improving the quality of financial service providers and intermediaries, which may include debt collectors, debt counselors and mortgage modifications outfits.¹² With these registration systems, the reform plan asserts that the state enforcement agencies “should be able to weed out bad actors wherever they may operate.”¹³ In order to meet the challenge of vigilantly enforcing these bad actors, the plan stresses that there must be adequate funding at the state and federal levels.

2 <http://www.ustreas.gov/initiatives/regulatoryreform/>.
3 Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation at p. 3-4.
4 *Id.* at 56.
5 *Id.* at 59

6 *Id.*
7 *Id.* at 59-60.
8 *Id.* at 73.
9 *Id.* at 61.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*

So it can perform its functions effectively, the plan calls for providing various tools to the CFPB. The CFPB would seek to collect information through the authority of its supervisory process as well as through data collection statutes and use the data to develop regulations, improve compliance, and promote community development. Since complaints are one of the best ways to measure consumer concerns, the CFPB would be given the duty to collect and track complaints about consumer financial services and assisting complaint resolution with respect to federally supervised institutions.¹⁴ However, “the states would retain primary responsibility for tracking and facilitating resolution of complaints against other institutions, and the CFPB should seek to coordinate exchanges of complaint data with state regulators.”¹⁵ The Agency would play a leading role in improving efforts for financial literacy and education literacy and education initiatives government-wide and “engage in a wide variety of activities to help financial institutions, community based organizations, government entities and the public understand and address financial service issues that affect low- and middle-income people across various geographic regions.”¹⁶ The CFPB would also collect data and study mandatory arbitration clauses in consumer financial services and products contracts to ascertain to whether they promote fair adjudication and effective redress for consumers.¹⁷ The plan also proposes to give the FTC the necessary financial and technical resources to effectively do its job to protect consumers in areas such as debt negotiation and mortgage foreclosure rescue and loan modification fraud and “to conduct rulemakings for unfair and deceptive practices under standard notice and comment procedures, and to obtain civil penalties for unfair and deceptive practices.”¹⁸ However, the FTC as the primary authority for financial product and services protections would be moved to the CFPB, and “the FTC should retain backup authority with the CFPB for the statutes for which the FTC currently has jurisdiction.”¹⁹

The plan goes on to explain in detail the proposals for regulatory, legislative and administrative actions by the CFPB to reform consumer protection based on principles of “transparency, simplicity, fairness, accountability, and access for all.”²⁰ The Agency would have authority to define standards for simple “plain vanilla” products, such as mortgages that would have to be offered “prominently” by companies.²¹ It also proposes the Agency define stan-

dards for such products and require firms to offer them alongside whatever other lawful products a firm chooses to offer. To encourage the fair treatment of consumers, the CFPB would have the authority to regulate unfair, deceptive, or abusive acts or practices and impose duties of care that financial intermediaries, such as stock brokers and financial advisers, must follow.²² The regulatory authority given to the CFPB would be applied fairly and consistently to regulation to similar financial products. For example, the CFPB would regulate overdraft protection plans more like credit card cash advances. An important component of the CFPB’s mission would be to promote access to financial services, especially for households and communities that traditionally have had limited access.²³ The CFPB would be given “primary fair lending jurisdiction over federally supervised institutions and concurrent authority with the states over other institutions.”²⁴

Most likely the reform plan will be reworked by Congress if it is turned into legislation. The CFPB is modeled after the Financial Product Safety Commission proposed in S. 566, which was introduced in March 2009 by Sens. Richard Durbin (D-Ill.) and Charles Schumer (D-N.Y.). The House version, H.R. 1705, was introduced by Rep. William Delahunt (D-Mass.). The U.S. House Financial Services Committee has already held two hearings to evaluate the Administration’s regulatory reform plan and consumer financial products regulation.



14 *Id.* at 62.

15 *Id.*

16 *Id.*

17 *Id.* at 63.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 66.

22 *Id.* at 67-68.

23 *Id.* at 69.

24 *Id.* at 70.

Inaugural Sorrell Lecture on Tobacco Policy and Enforcement Given

The National Association of Attorneys General (NAAG) and the American Legacy Foundation® were proud to kick off the William H. Sorrell Lecture Series on Tobacco Policy and Enforcement June 17 during the 2009 NAAG Summer Meeting in Colorado Springs. Steven A. Schroeder, M.D., professor of medicine at University of California San Francisco and former president of the Robert Wood Johnson Foundation, delivered the inaugural Sorrell lecture to the Attorneys General, their staff and other meeting attendees. The series is funded by Legacy in honor of Vermont Attorney General William Sorrell who served as chair of Legacy's Board.

Dr. Schroeder, a founding Legacy Board member and former chair, focused on the public health implications of the landmark Master Settlement Agreement (MSA) which was reached between the Attorneys General and the tobacco companies more than a decade ago. He described the MSA as an unprecedented opportunity for the public health and legal communities to work together to combat the growing tobacco epidemic. His speech set out seven concrete steps the Attorneys General can take to make a difference in the fight against tobacco.

Remarks by Dr. Schroeder:

1. **Become an active voice in your state.** Highlight the disparity between the torrent of dollars that flow into states because of smoking and the meager trickle of resources used for tobacco control.
2. **Continue to watch the industry.** Continue to be vigilant and actively enforce the MSA's prohibitions against predatory marketing practices. Even with the new Food and Drug Administration legislation, there continues to be a very important role for the states.
3. **Continue to Fight Smoking in Movies.** Despite the major decline in population smoking, movie characters continue to smoke at much higher rates. The evidence is clear that movie smoking is a powerful inducement for young people to smoke. The Attorneys General have already been active in this area, but there is much more to be done. Please advocate for the R rating for movies that feature actors who smoke and keep smoking out of films marketed to and seen by our nation's youth.



Steven Schroeder, M.D., left, Vermont Attorney General William Sorrell and Ellen Vargyas of the Legacy Foundation and Idaho Attorney General Lawrence Wasden.

4. **Ensure No State Agency Takes Tobacco Money.** Actively take the position that no state agency, no state university, no public school system, no police department, life skills training or substance abuse program will take *anything* from the tobacco industry.
5. **Serve on Legacy's Board.** Continue the history of sending strong representation from Attorneys General of both parties to the governing board of the American Legacy Foundation.
6. **Be Vigilant About Emerging Products.** One product currently gaining popularity is the electronic cigarette. Unless and until its safety and effectiveness is established, e-cigarettes should not be on the market. The Attorneys General are in a unique position to protect the public, both through the MSA and state consumer protection laws.
7. **Advocate for What Works.** The Attorneys General can accelerate the decline in tobacco use by advocating for interventions that we already know work:
 - Excise tax increases to raise the price of cigarettes
 - Clean indoor air initiatives
 - Effective counter-marketing programs for youth and smoking cessation for adults
 - Safeguarding state funds for tobacco control programs such as the toll-free telephone quitlines
 - Continuing to address the issue of smoking in the movies
 - Encouraging the medical system to do a better job in helping smokers quit.

Law Allows Government to Regulate Tobacco Products



BLAIR TINKLE

BLAIR TINKLE, ASSOCIATION GENERAL COUNSEL AND CONGRESSIONAL LIAISON

President Obama signed into law June 22 a bill authorizing the Food and Drug Administration (FDA) to regulate the advertising and manufacturing of tobacco products. The Family Smoking Prevention and Tobacco Control Act, sponsored by Sen. Edward Kennedy (D-Mass.) and U.S. Reps. Henry Waxman (D-Calif.) and Todd Platts (R-Pa.), passed in the Senate 79 to 17 on June 11. The following day the bill passed in the House with a 307 to 97 vote.

The act gives the FDA authority to reduce or eliminate harmful ingredients, additives and constituents contained in cigarettes and other tobacco products, including menthol. In addition, the new law also reinstates the FDA's 1996 rule that banned outdoor advertising of tobacco within 100 feet of schools and playgrounds as well as all tobacco-brand sponsorships of sports and entertainment events. The bill also imposes limits on full-color advertising for cigarettes, limits vending machines to adult-only facilities and requires packages to carry larger warning labels. The regulatory enforcement action will be funded through user fees on tobacco product manufacturers.

The legislation was controversial to some who argued that allowing the FDA to regulate tobacco would imply that at some level it is a safe product, such as prescription drugs—a tacit implication that some in the health community refute. However, the new law, which requires changes in current and future tobacco products, was proposed as a public health measure and received the support of many groups in the public health community, as well as industry, including the Altria Group, parent company of Phillip Morris USA, one of the largest tobacco manufacturers worldwide.

On Sept. 8, 2004, the National Association of Attorneys General sent a letter signed by 37 state Attorneys General in support of similar legislation giving the FDA authority to regulate tobacco products. The letter also recommended that Congress pass legislation calling for the Tobacco Quota Buyout, which eliminated the Depression-era quota program of federal farm price support for tobac-

co, creating a more free market system. That legislation was eventually signed into law by President Bush.

Attorneys General Convene to Discuss Children and the Internet



HEDDA LITWIN, CYBERSPACE LAW COUNSEL

“While the Internet offers our children greater knowledge of our world, it also exposes them to danger from harmful influences, and from individuals who seek to take advantage of them and hurt them,” said National Association of Attorneys General President and Rhode Island Attorney General Patrick Lynch at the opening of

HEDDA LITWIN

his “Year of the Child: Protecting and Empowering the Next Generation” Summit in May. He was joined by Attorneys General from across the country, academics, Internet service providers and other stakeholders as they addressed strategies to empower children and their parents on the safe use of online technology.

The Summit, held in Philadelphia on May 12-13, provided an overview of the latest developments, research and challenges on keeping children safe on the Internet. Guest speakers included Rear Admiral Steven Galson, acting surgeon general of the U.S. Department of Health and Human Services; Ernie Allen, president and chief executive officer of the National Center for Missing and Exploited Children; David Finklehor, director of the Crimes Against Children Research Center and co-director of the Family Research Center at the University of New Hampshire; and Ed Smart, father of Elizabeth Smart on behalf of radKIDS.

Attorneys General participated in several of the Summit sessions. Missouri Attorney General Chris Koster presented a case study of the Megan Meier suicide and the resulting state legislation. Maryland Attorney General Doug Gansler and Washington Attorney General Rob McKenna discussed their Internet safety initiatives on a panel entitled “Getting the Word Out on E-Safety: Outreach, Education and Partnerships.” Mississippi Attorney General Jim Hood presented “Operation Fairplay,” a new software package that targets purveyors of child pornography.



Vermont Attorney General William Sorrell, left, talks with Rear Admiral Steven Galson, acting U.S. surgeon general.

Other Summit highlights included a presentation by Frontline producer Rachel Dretzin on her film, “Growing Up in a Digital World,” and The Alicia Project by Alicia Kozakiewicz.

As the Summit concluded, President Lynch noted that the work on this issue would continue. “As the chief legal officers in our jurisdictions, we must continue to push for legislation, prosecute Internet predators and work with social networking sites to ensure the safety of our children,” he said.

Consumer Protection Fellow Begins Work



NADINE BALLARD

The National Attorneys General Training and Research Institute (NAGTRI) and the Center for the State Enforcement of Antitrust and Consumer Protection Laws (State Center) are pleased to welcome Nadine Ballard from the Ohio Attorney General’s Office as the second NAGTRI/State Center Consumer Protection fellow this year. Funded by the State Center, the Consumer Protection Fellowship program is designed to provide consumer protection assistant attorneys general an extraordinary opportunity to develop expertise in a specific discipline in consumer protection, which would in turn provide tangible and meaningful assistance to his or her colleagues around the country. The fellow’s work can be divided into two major areas: research/publication and information sharing/liaison work. Grant funds will be used to cover housing and related costs for a three-month period. Nadine will be working in the NAAG office until the end of July.

Nadine is excited about the opportunities to attend congressional hearings and hear from national advocacy groups while in Washington. When working for the Ohio Attorney General’s Office, she only spends a small amount of time researching and writing about legislative issues.

“It’s really a treat to be able to devote all of my time into one project,” she said.

She is currently researching and writing a paper that examines the roles of regulatory supervision and enforcement of the new financial regulatory legislation, including the Credit CARD Act of 2009.

“I hope the paper is something that can help support the enforcement role of the state Attorneys General in future consumer protection legislation,” Nadine said.

Nadine decided in high school that she wanted to enter the consumer protection field and has dedicated much of her career to working on such issues. Nadine has been with the Ohio Attorney General’s Office since February 2007 and served as the section chief in Consumer Protection from February 2007 to May 2009. She also worked there from 1980 to 1985. In addition, Nadine worked for the UAW GM Legal Services Plan for seven years, handling consumer litigation, and then served as a magistrate judge for the Montgomery County Common Pleas Court for 15 years.

She has been teaching consumer law at Sinclair Community College for six years, receiving a national award for Innovation in Distance Learning, and for the Ohio Judicial College for 15 years. Nadine has also co-authored Ohio Consumer Law, a practice manual, since 1986.

Although she is a native of Michigan, Nadine now resides in Dayton, Ohio where she enjoys spending time hiking with her dog, Ellie.

For more information on the NAGTRI/State Center Consumer Protection Fellow program, please contact Dennis Cuevas, NAAG project director and chief counsel, Consumer Protection Project, at dcuevas@naag.org.

NAAG Welcomes Summer Interns



JENNIFER ADCOCK

It's not every day that NAAG introduces a Miss USA 2005 top 10 semi-finalist to its staff but this month Miss Mississippi 2005, Jennifer Adcock, began her work with the Cyberspace Law Project. Jennifer quickly grasped her duties as a summer law intern and has already attended several congressional hearings on crime-related issues. She also writes legislative updates for the NAAG Web site, while working on research projects and various other tasks.

"It's really exciting as a law student to be able to head to the Supreme Court when cases are being read and attend congressional hearings," she said. "The National Institute of Justice Conference will be here next week which I am also looking forward to."

Jennifer will begin her third year at the University of Mississippi School of Law in the fall where she is the notes and comments associate editor for the Mississippi Law Journal. She was also distinguished as a dean's scholarship recipient and the winner of the William Prentice "Pete" Mitchell Award in Ethics.

Jennifer received her bachelor's degree in speech communication from the University of Southern Mississippi, graduating with honors. This Hattiesburg, Miss., native has enjoyed playing the piano since she started taking lessons in the first grade and also enjoys reading biographies and autobiographies.

NAAG welcomed another distinguished intern this month as Michelle Noyer, the 2008-2009 Bill Brown Scholarship recipient and second-year law student at the Ohio Northern University, began her work with the Energy & Environment Project. Bill Brown served as Ohio Attorney General from 1971-1983 and received his law degree from Ohio Northern University. The school established a scholarship in his honor, which is awarded to an incoming first-year student.



MICHELLE NOYER

Thus far, Michelle has tackled a number of projects, including her involvement with the Green Office project which provides state Attorneys General with information on how to "green" their offices. She also collaborates with Nadine Ballard of the Consumer Protection Division by conducting research.

Michelle said her time at NAAG has been very rewarding and would ultimately like to work for a nonprofit dealing with public interest cases. At Ohio Northern University School of Law, Michelle is a member of PILA, the Public Interest Law Association.

"I enjoy the work that I do and I have learned a lot so far," she said.

Before entering law school, Michelle graduated from Walsh University in North Canton, Ohio, with a degree in both English and political science. During her time there, she was a member of both the English and political science honor societies, Sigma Tau Delta and Pi Sigma Alpha.

In her spare time, this Erie, Pa., native enjoys reading and practicing martial arts. She currently holds a blue belt in that sport.