The ABCs of the Tobacco Master Settlement Agreement

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The NAAG Tobacco Project coordinates and supports state enforcement, implementation and defense of the 1998 tobacco Master Settlement Agreement (MSA) and related state legislation. The project also serves as liaison on MSA matters between the states and (1) the tobacco company signatories to the MSA (called “Participating Manufacturers”), (2) the public health community, (3) the financial community and (4) various federal agencies that regulate and tax tobacco products.

The MSA settled state litigation against the four major tobacco companies for health care costs and other damages imposed upon the states by cigarette smoking. The payment provisions of the MSA were designed to compensate the states in part for the billions of dollars in health care costs associated with treating tobacco-related diseases under state Medicaid programs. To date, states have received more than $50 billion in settlement payments. For a copy of the MSA and its related documents, visit http://www.naag.org/settlement_docs.php.

State signatories to the MSA include 46 states (all but Mississippi, Minnesota, Florida, and Texas, which settled separately with the major tobacco companies), as well as the District of Columbia, Puerto Rico and four territories. Participating Manufacturers include the four (now three) major tobacco companies originally sued and about 45 smaller tobacco companies.\(^1\) Tobacco companies that elect not to sign the MSA are referred to as Non-Participating Manufacturers.

The MSA has succeeded in its fundamental objective of reducing cigarette smoking in the United States, the level of which has declined at an unprecedented rate since the MSA was executed. Youth smoking has declined even more. Cigarette consumption in the United States is currently at its lowest level since 1951 and per capita consumption has not been this low since the 1930s. This decline is even more impressive because the United States population has more than doubled since 1951. The MSA has made an important contribution to these results.

\(^{1}\) The three major tobacco companies that were the original participating manufacturers are Lorillard, Philip Morris and RJ Reynolds (Brown & Williamson, one of the original four, merged with RJ Reynolds in October 2003). For a complete listing of Participating Manufacturers, visit http://www.naag.org/backpages/naag/tobacco/msa/participating_manu/. For information on Non-Participating Manufacturers, contact NAAG’s Tobacco Project.

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The MSA’s basic elements consist of a release of state claims against the Participating Manufacturers in exchange for the Participating Manufacturers agreeing (1) to pay the states annually and in perpetuity billions of dollars; (2) to restrict permanently their advertising, promotion, and marketing of cigarettes; and (3) to contribute $1.5 billion to establish what has become the American Legacy Foundation, an entity dedicated to counter-advertising and public education against cigarette smoking. In helping the states retain their benefit of the agreement, the Tobacco Project counsels on legal and strategic matters, and engages in litigation, negotiation, and legislative efforts with or on behalf of the states. In simplest terms, the Tobacco Project’s work breaks down into three major areas: (1) protecting MSA payments to the states; (2) enforcing the MSA’s restrictions on the advertising, promotion and marketing of cigarettes; and (3) defending the MSA against legal challenges.

Much of the project’s energy currently is directed toward helping the states resolve disputes over the Non-Participating Manufacturers’ payment adjustment for the years 2003-2006. This adjustment is intended to motivate the states to act to offset the significant cost and marketing advantages Non-Participating Manufacturers have over Participating Manufacturers since the Non-Participating Manufacturers are not subject to the MSA’s payment provisions or marketing restrictions. Were the Non-Participating Manufacturers able to exploit such advantages unfairly, the MSA’s objectives would be subverted.

Accordingly, if certain conditions are met in any year, the states’ MSA payments are reduced by the amount of the Non-Participating Manufacturers’ adjustment. Those potential adjustments for 2003-2006 total approximately $3.6 billion. The states and the Participating Manufacturers, however, are currently litigating whether the conditions necessary to trigger the Non-Participating Manufacturers’ adjustment for any one of these years have been met.

Last month, NAAG hosted the third Tobacco Triennial Conference in Seattle, Washington, to discuss issues related to the MSA’s goal of reducing underage tobacco use and preventing youth access to tobacco products. Under the MSA, NAAG must convene one major national conference every three years for the states that signed onto the MSA, the directors of the American Legacy Foundation and three individuals representing each participating manufacturer. Public health advocates are also invited.

The purpose of the conference is to evaluate the success of the MSA and coordinate efforts by Attorneys General and the Participating Manufacturers to continue to reduce youth smoking. This year’s meeting focused on proposed federal tobacco legislation, tobacco in the retail environment, smokeless tobacco, trends in youth smoking and the American Legacy Foundation’s recent initiatives.
TOBACCO MASTER SETTLEMENT AGREEMENT (MSA)

GLOSSARY

Allocable Share — A Settling State’s percentage as listed in MSA Exhibit A. These percentages were developed by using factors such as population, smoking rates and medical costs borne by the State in question.

Allocated Payment — A Settling State’s Allocable Share of the aggregate MSA payments made by Participating Manufacturers in a given year.

Cigarette — Any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (a) any roll of tobacco wrapped in paper or a substance that doesn’t contain tobacco, or (b) tobacco in any form, including any roll of tobacco wrapped in a substance containing tobacco, that is likely to be offered to, or purchased by consumers as a cigarette. “Cigarette” includes RYO (“roll your own”).

Independent Auditor (IA) — The major, nationally recognized, certified public accounting firm that calculates and determines all payments due under the MSA.

Market Share — A tobacco product manufacturer’s percentage of the total number of individual cigarettes sold in the fifty states, the District of Columbia and Puerto Rico during the applicable calendar year, as measured by federal excise taxes collected and corresponding Puerto Rican taxes collected.

Market Share Loss — The difference between the Participating Manufacturer’s aggregate market share (a) in 1997 and (b) the year in question less two percent.

Non-Participating Manufacturer (NPM) — Any tobacco product manufacturer that is not a Participating Manufacturer.

Original Participating Manufacturer (OPM) — Companies sued that were original MSA signatories, i.e. Philip Morris, RJR, & Lorillard.

Participating Manufacturer (PM) — A tobacco product manufacturer that signs the MSA.

Qualifying Statute — A Settling State’s statute that effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the MSA provisions.

Settling State — Any state that signs the MSA.

State — Any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa and the Northern Mariana Islands.

Subsequent Participating Manufacturer (SPM) — A company that signed the MSA subsequent to its signing by Original Participating Manufacturers.

Tobacco Product Manufacturer — An entity that directly (and not exclusively through any affiliate) manufactures cigarettes anywhere that such manufacturer intends to be sold in the states.

Units sold — The number of individual cigarettes sold in a Settling State by a tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during year, as measured by excise taxes collected by the state on packs (or “roll-your-own” tobacco containers) bearing the excise tax stamp of the State.
Federalism in the Roberts Court

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One of the foremost legacies of the Rehnquist Court is its “Federalism Revolution.” During William Rehnquist’s tenure as chief justice, the U.S Supreme Court issued opinions limiting the United States’ powers under the Commerce Clause and § 5 of the 14th Amendment and expanding the states’ powers under the 10th and 11th Amendments.

As the third full term of the Roberts Court begins, it is timely to ask: Will there be a Roberts Court federalism revolution? And, if so, what direction will that revolution take? A review of the cases the Roberts court has already heard or has agreed to hear suggests that his court’s diet of federalism cases will be far different from his predecessor’s.

Since Chief Justice John Roberts Jr. has participated in the certiorari process, the Supreme Court has not agreed to hear a single case involving the constitutional federalism issues that formed the heart of the Rehnquist Court’s federalism revolution. Although the Supreme Court heard an 11th Amendment and a 14th Amendment case early in his tenure, both were on the Supreme Court’s argument calendar by the time Chief Justice Roberts joined the Supreme Court.1 Federalism cases in the Roberts Court have involved issues far different from the 10th, 11th and 14th Amendments, and Congress’ powers under the Commerce Clause. In the Roberts Court, the federalism battles have involved preemption and the dormant Commerce Clause.

Last term, the Supreme Court decided one preemption case and one dormant Commerce Clause case. This term, the Supreme Court has already agreed to hear three preemption cases and one dormant Commerce Clause case — and the Supreme Court still has three more months of arguments to fill. At a time when state enforcement actions are routinely challenged as being either preempted or in violation of the dormant Commerce Clause, the Supreme Court could not have chosen issues more significant to state power. Indeed, there is every reason to conclude that preemption and dormant Commerce Clause cases are more important to the states than 10th, 11th and 14th Amendment cases.

To paraphrase a noted federalism scholar, which is more important to state regulatory authority: saving sheriffs the trouble of conducting background checks for gun purchases (a 10th Amendment issue) or having authority to regulate predatory lending by subsidiaries of national banks (a preemption issue)?2 The answer seems self-evident. State regulatory authority is far more affected by the preemption case than the 10th Amendment case.

Whether the Roberts Court will adopt a distinctive preemption and dormant Commerce Clause jurisprudence remains to be seen. Whereas the Rehnquist Court’s federalism cases were routinely decided by 5-4 votes, with the conservative block in the majority and the liberal block in dissent, preemption and dormant Commerce Clause cases do not break down so neatly. Preemption cases are, on one level, statutory construction cases. And justices’ reading of federal statutes often does not divide on ideological lines. The Supreme Court’s preemption jurisprudence has frequently been criticized for being ad hoc and unprincipled. Bringing order to this line of cases may be beyond even Chief Justice Roberts’ capable leadership.

The Supreme Court’s dormant Commerce Clause jurisprudence has also been frequently criticized for being incoherent. But in this area, Chief Justice Roberts has already made his mark. He wrote the majority opinion in last term’s dor-

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1 The two cases were Central Virginia Community College v. Katz, 546 U.S. 356 (2006), holding that the States have no sovereign immunity from proceedings brought pursuant to the Bankruptcy Clause; and United States v. Georgia, 546 U.S. 151 (2006), holding that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity with respect to conduct that actually violates the 14th Amendment. Both were argued in the fall of 2005 and decided early in 2006, shortly before Justice O’Connor’s retirement.

In the course of upholding a local flow control ordinance that required all local waste to be processed at a designated, publicly-owned processing facility, the Supreme Court established a general rule that laws favoring state or local governments themselves do not run afoul of the dormant Commerce Clause. The Supreme Court then went a step further and stated:

There is a common thread to the [haulers’] arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*, 198 U.S. 45 (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.

This language augers a significant narrowing of dormant Commerce Clause limitations on state actions, at least when states are not clearly discriminating in favor of local business.

The likelihood of there being a Roberts Court federal revolution depends, of course, on whether the chief justice strongly supports or opposes the principle of state sovereignty. The early indications are that he strongly supports the principle. His above-quoted opinion in *United Haulers* displays a striking deference to state prerogatives. And he joined Justice John Paul Stevens’ dissent in last term’s preemption decision, *Watters v. Wachovia*, 127 S. Ct. 1559 (2007) — a dissent that argued, “when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than Chevron deference.” (By contrast, Justice Samuel Alito, Jr. dissented in *United Haulers* and joined the majority in *Watters*. This represents the first notable dividing line between the jurisprudence of Chief Justice Roberts and Justice Alito.) As the new term unfolds, state attorneys interested in federalism would be well advised to keep a close eye on preemption and dormant Commerce Clause cases before the Supreme Court.

Rogue Internet Pharmacies: Is S. 980 the Answer?

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In May of this year, the National Center on Addiction and Substance Abuse (CASA) issued a white paper, “You’ve Got Drugs” IV: Prescription Drug Pushers on the Internet. The report noted that Internet sites advertising controlled substances increased by 135 percent, from 168 in 2006 to 394 in 2007. Sites actually selling controlled prescription drugs increased by 7 percent, from 174 in 2006 to 187 in 2007. Only two of these were certified by the National Association of Boards of Pharmacy as Verified Internet Pharmacy Practice Sites®. Eighty-four percent of these sites did not require a prescription. Those that did merely required that a prescription be faxed, making it easy for a person to forge or use a legitimate prescription over and over.

How do those rogue Internet pharmacies work? Affpower, recently indicted by a federal grand jury in San Diego along with 18 individuals, provides an example. In less than two years, the Affpower enterprise allegedly generated an excess of $126 million in gross revenue, receiving more than one million Internet orders for controlled and non-controlled prescription drugs from customers in all 50 states. According to the indictment, Affpower paid licensed doctors from different states and Puerto Rico to review “health” questionnaires filled out by customers, issuing prescriptions based solely on the answers. None of the doctors performed a physical or mental exam; no diagnostic tests were ordered or results received; there was no contact with customers; there was no physician-patient relationship. It is alleged that, in some cases, a non-physician wrote the prescriptions, using the stolen identity of a licensed physician.

Affpower was based in Costa Rica. Its computer servers, as well as several bank accounts and an accounting firm it used, were located in Cyprus. Credit card servicing was also conducted overseas. One of those companies was in Tel Aviv, Israel.

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Not all rogue pharmacies use such far-flung operations, however. Many of these operations are based entirely in the United States. They differ from lawful Internet pharmacies, which fill a critical need for rural customers, the elderly, and the home-bound; the rogue pharmacies do not require a valid prescription from a customer’s doctor with whom there is a genuine patient-physician relationship. The questionnaires that these rogue pharmacies ask consumers to fill out are not designed to provide information so that a doctor can properly diagnose a patient’s ailments. Instead, the questions asked are intended to elicit answers to two primary questions: what drug does the customer want and how is he going to pay for it?

Unlike their legal counterparts, these rogue pharmacies typically provide primarily Schedule III and IV medications and lifestyle drugs. It is unlikely that any Internet surfer without a good pop-up blocker has not encountered advertisements for some of these operations and most have received their spam e-mails.¹

Facilitators find doctors to write prescriptions by targeting practitioners with debt problems and retired doctors wishing to earn some income. These facilitators tell the doctor that the consumer will provide a medical history. The usual pay to the doctors for every prescription authorized is from $10 to $25. Some doctors have been known to authorize hundreds of prescriptions a day.

These same facilitators will find regular pharmacies to fill the “prescriptions,” telling them that all they need to do is fill and ship, that all prescriptions are only for Schedule III or schedule IV substances (and are much less dangerous than Schedule II substances), and that the prescriptions have been approved by a doctor. Sometimes the Internet business is so lucrative, pharmacies involved in the scheme will shut their doors to regular customers and simply focus on the business sent to them by the websites that the facilitator sets up.

According to testimony by Joseph Rannazzisi, deputy assistant administrator, Drug Enforcement Administration (DEA), in 2006, 34 known or suspected rogue Internet pharmacies dispensed 98,566,711 dosage units of hydrocodone-combination products; that is enough to supply more than 410,000 actual patients with a one-month supply at the maximum amount recommended per prescription.

Controlled substances account for 11 percent of dosages at legitimate pharmacies; they account for 95 percent of dosages at the rogue Internet pharmacies.

Over the last few years, legislators have proposed a number of bills to address the burgeoning problem of prescription drug diversion that is facilitated by rogue Internet pharmacies. Although Schedule II drugs, such as OxyContin®, are usually illegally obtained from relatives and friends, through doctor shopping or on the street, Schedule III and IV drugs, such as some tranquilizers, anabolic steroids, and hydrocodone combination products are, in many cases, simply being ordered over the Internet and shipped to potential abusers and dealers. Former U.S. Secretary of Health, Education, and Welfare Joseph A. Califano, Jr., CASA’s chair and president, recently testified that “the Internet has become a pharmaceutical candy store stocked with addictive drugs, available at the click of a mouse to any kid with a credit card number.”

This legislative session, Senators Dianne Feinstein (D-CA) and Jeff Sessions (R-AL) are sponsoring S.980, the Online Pharmacy Consumer Protection Act.² Hearings were held in

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¹ The Controlled Substances Act (CSA), Title II and Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, is the legal foundation of the U.S. Government’s fight against the abuse of drugs and other substances. The CSA places all substances, which were in some manner regulated under existing federal law, into one of five schedules. This placement is based upon the substance’s medical use, potential for abuse, and safety or dependence liability. Schedule I and II drugs have a high potential for abuse, Schedule I drugs (like heroin, marijuana, or LSD) have no accepted safe medical use in treatment in the U.S. Schedule II drugs have an accepted medical use in treatment, oftentimes with severe restrictions. Abuse of the drugs can lead to severe psychological or physical dependence. Schedule III and IV medications have less potential for abuse and abuse of the drugs may lead to moderate or low physical dependence or high psychological dependence. For a more detailed explanation, visit http://www.usdoj.gov/dea/pubs/abuse/1-csa.htm#Controlling.

² The other bills introduced this session aimed at regulating prescription drug sales on the Internet are: H.R. 194, the Prescription Drug Affordability Act; H.R. 380 and S. 242, the Pharmaceutical Market Access & Drug Safety Act of 2007; S. 241, the Pharmaceutical Market Access Act of 2007; S. 554, the Pharmaceutical Market Access and Drug Safety Act of 2007; and S. 596, the Safe Internet Pharmacy Act of 2007. All of these bills are still in committee. Most of these bills are focused on ensuring that drugs purchased over the Internet are safe and, thus, offer amendments to the Federal Food, Drug and Cosmetic Act instead of the Controlled Substances Act.
May on the bill and it was reported out of the Judiciary Committee in September. Although it is extremely unlikely that the bill will come up for a vote anytime soon, with the issue very much on the DEA’s agenda, prescription drug abuse on the rise and the recent press coverage of anabolic steroid abuse among athletes, it is likely that the bill, or one similar, will remain on Congress’ agenda.

The bill amends the Controlled Substances Act. It prohibits an Internet pharmacy from dispensing or selling a controlled substance without an in-person examination by a physician. It imposes disclosure standards for Internet pharmacies, requiring them to disclose the name and address of the pharmacy, a list of states in which the pharmacy is licensed to operate, and contact information for the pharmacist in charge. It increases the penalties for illegal distributions of Schedule III, IV and V substances. Internet pharmacies must specifically registered for dispensing over the Internet and would be required to report the controlled substances dispensed under that registration. The pharmacies must also be licensed in each state in which they will dispense medications.

Venue may be where business is transacted or as governed by 28 U.S.C. § 1391. Prior service on the U.S. Attorney General and the U.S. Attorney for the district is required or, where not feasible, concurrent service is appropriate. The federal government then has 120 days to intervene. The state action will not affect any other independent action. The bill specifically states that the authority given to state Attorneys General does not affect any other rights that are afforded by a particular state.

The bill contains some of the recommendations that CASA has put forth. Perhaps, the most troubling aspect for the states is the requirement of an in-person examination. If a state were to allow physicians to prescribe controlled substances in a telemedicine environment, this bill would preempt such authorization. The Department of Veteran Affairs and the Bureau of Indian Affairs have also expressed concern that such a broad prohibition might affect delivery of services to their clientele. Those concerns could be alleviated if a provision were added exempting the in-person examination requirement prescriptions written in strict accord with telemedicine rules and regulations promulgated by a state or federal agency. Another objection to the bill has been that the National Association of Boards of Pharmacy views the problem of Internet pharmacies as a state issue, not a federal one.

Some states, such as Kentucky, have passed their own laws that require pharmacies that ship to residents of that state to register with the state board of pharmacy. In lieu of federal legislation, states may want to pursue this option as a way to protect their citizens. Those states with a prescription-monitoring program could then require these Internet pharmacies to report sales of controlled substances covered by those programs.

There is some opposition by advocates for chronic pain patients on any legislation that would curtail consumers from obtaining controlled substances over the Internet. States considering legislation will have to balance their concern that patients receive appropriate and adequate medications with the need to protect their citizens, especially young people, from the lure of obtaining controlled substances over the Internet.

S.080 would also permit the Attorney General of a state to apply for injunctions or obtain damages and other civil remedies against an online pharmacy that poses a threat to state residents in federal district court, no matter where that pharmacy is headquartered.

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The Housing Bust and Approaches to the Mortgage Foreclosure Crisis

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For many homeowners, the unexpected housing boom that started in 2001 represented double digit gains in the value of their homes and newly found untapped equity. For buyers, the housing boom represented a frenzied period with increased competition for an ever-shrinking inventory of homes. Multiple offers and waived home inspections became the rule rather than the exception in some markets. Lenders began to hand out loans more freely. Potential homebuyers could obtain a mortgage loan easily, and even borrowers with questionable credit were hoping to obtain a mortgage loan.

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The Evolution of Creative Financing

Over the next several years, lenders began offering new mortgage products that were very different than the mortgages of the past. When home ownership solidified in the United States in the 1950s, the mortgage of choice was the 30-year, fixed-rate mortgage with 20 percent down. But as home prices increased, lenders found it more difficult to qualify borrowers for loans using traditional underwriting standards, i.e., a monthly mortgage payment including taxes and insurance not exceeding 28 percent of a borrower’s gross monthly income. Interest-only loans, adjustable rate mortgages (ARMs), most notably the “2/28,” and no documentation loans became rampant. Subprime mortgages increased tremendously, as did the number of people using the “zero down” loans. According to Merrill Lynch, 28 percent of the people who bought a home in 2003 did so with no money down, and, in 2005, it was 43 percent.

Many borrowers were approved based on teaser rates and interest-only loan payments. Lenders gave out these loans knowing that once the interest rate adjusted and the payments reset, borrowers would not be able to afford these mortgages.

The Housing Boom Ends

Six years later, as houses remain on the market much longer and sellers begin lowering their prices, reports of today’s mortgage foreclosure crisis appear daily in news outlets across the country. The days of rising home values and increased home sales have given way to homeowners’ struggles with their mortgage payments and their inability to refinance due to the drop in home values.

According to the Mortgage Bankers Association, foreclosure activity in the past decade is running at a rate 10 percent higher than at any other time over the past 50 years. A recent study conducted by the Center for Responsible Lending (CRL) reveals that millions of Americans will lose their homes and as much as $164 billion due to foreclosures in the subprime mortgage market. CRL finds that despite low interest rates and a favorable economic environment during the past several years, the subprime market has experienced high foreclosure rates, and projects that one out of five (19.4 percent) subprime loans issued during 2005-2006 will fail.

Attorneys General Tackle the Mortgage Foreclosure Crisis

Although the mortgage foreclosure crisis threatens the national economy, the fact remains that mortgages foreclosures are local in nature. Too many foreclosures can devastate neighborhoods, and city, county and state governments bear significant costs. According to the CRL, a city can lose nearly $20,000 in lost property tax and other costs for every property foreclosed.

State Attorneys General, using a multi-pronged approach, have been in the forefront of addressing the mortgage foreclosure crisis issue through a number of initiatives.1

Attorneys General and banking regulators from 10 states have formed a task force aimed at persuading mortgage-servicing companies and investors to restructure troubled subprime loans and explore ways to find long-term solutions for borrowers facing foreclosure, such as lowering the borrower’s mortgage interest rate, rather than creating a repayment plan that only offers a quick fix.

In addition to working collaboratively, Attorneys General continue to address the mortgage foreclosure issue individually, through enforcement, legislative and consumer education initiatives. For example, Massachusetts Attorney General Martha Coakley filed suit against Fremont Investment and Loan, alleging it used predatory lending practices to sell loans to borrowers who eventually lost their homes. Fremont allegedly paid high commissions to independent mortgage brokers who sold risky mortgages with high payments that borrowers could not afford, a violation of the state’s anti-predatory lending law.

The suit is one of a growing number of actions brought by Attorneys General in Connecticut, New York, Ohio and other states against subprime lenders to prevent them from selling new loans. Furthermore, Attorneys General in Florida, Illinois, Texas and other states have filed enforcement actions against mortgage foreclosure rescue scams.

1 The purpose of this article is to provide you with just a sampling of various state initiatives. It is neither exhaustive nor inclusive of all state initiatives.
This past summer, Illinois Attorney General Lisa Madigan convened the Illinois Homeownership Preservation Summit, bringing together lenders, servicers, regulators, housing counselors, lawyers and consumer advocates to lay the groundwork for a comprehensive strategy to assist homeowners who are currently facing foreclosure. Attorney General Madigan’s office will convene on-going working groups to coordinate with housing counselors and community advocates to ensure that lenders and servicers are following through on their commitments to offer assistance to borrowers in trouble.

Maryland, Massachusetts, New Jersey, New York, Ohio and Pennsylvania have rolled out mortgage programs intended to refinance loans by homeowners at risk, using proceeds from state bond issues and money from federal lending agencies.

On the legislative front, North Carolina passed legislation that limits the ability of mortgage brokers to charge customers above-market rates and prepayment penalties and protects subprime borrowers from high risk adjustable-rate mortgages. Colorado passed legislation that creates a duty of good faith and fair dealing for mortgage brokers in their communications and transactions with borrowers, including the duty not to recommend or induce the borrower to enter into a transaction that does not have a reasonable, tangible net benefit to the borrower. Illinois passed legislation that requires brokers and lenders to assess a borrower’s ability to repay a loan, including the borrower’s ability to repay both the initial monthly payment and the higher monthly payment when adjustable loans reset. Licensees also must act in good faith toward borrowers and offer them the best loan options available. Furthermore, lawmakers in several states have passed measures to tighten restrictions on subprime lending.

Massachusetts issued a regulation that prohibits a specific type of rescue plan in which a business or individual claims to offer assistance to distressed homeowners facing foreclosure if the homeowner gives over ownership of the property. The ban does not apply to rescue plans offered by members of the homeowner's family or by nonprofit or housing organizations that are attempting to help the troubled borrower. The regulation also will not apply to short sales, in which a homeowner sells the house for less than the outstanding balance and gets the lender to agree to accept a smaller settlement.

On the consumer education side, Iowa initiated a Mortgage Hotline that will enable borrowers to reach the Iowa Mediation Service for assistance. Massachusetts, in partnership with several bar associations, legal services organizations and advocacy groups, also announced the establishment of a Pro Bono Foreclosure Assistance Hotline, where legal advocacy and resource center staff could determine how to best assist the caller and provide general advice. Ohio and the District of Columbia have held town hall meetings on the issue of predatory lending and mortgage foreclosures.

**Federal Responses**

Barney Frank (D-MA), chairman of the House Financial Services Committee, unveiled legislation aimed at curbing abusive lending practices. The bill, H.R. 3915: The Mortgage Reform and Anti-Predatory Lending Act of 2007, allows homeowners to sue lenders for relief from mortgages that the borrowers never had a realistic chance of repaying, and would require any mortgage lender to verify that the borrower has a “reasonable ability to repay” based on documented income, credit history and debt level. Under the new bill, states would be required to set standards for mortgage brokers and lending. States that do not develop a standard would be subject to relatively strict federal standards, to be developed by the U.S. Department of Housing and Urban Development, which would require mortgage brokers to act “solely in the best interest” of the consumer.

In October, a House Judiciary subcommittee narrowly approved a measure that would allow bankruptcy courts to change the terms of home mortgages in order to prevent foreclosures. The bill would repeal a provision in current law that prohibits bankruptcy courts from modifying a primary home mortgage.

The White House recently announced initiatives at the federal level to help homeowners in need of assistance to avoid foreclosure. President Bush announced “HOPE NOW,” a new mortgage industry coalition that would help coordinate ef-
forts by financial companies to help an estimated two million homeowners whose introductory mortgages with low rates are now resetting at much higher rates. Eleven of the largest mortgage service companies, representing 60 percent of all mortgages in the country, agreed to join the new coalition. In August of this year, the White House also made changes in the Federal Home Loan Administration (FHA) insured-loan program so that more people could qualify for FHA-insured loans.

Cooperative Solutions
The mortgage foreclosure crisis is a complex issue that “mushroomed” into a problem, seemingly all at once. While there are numerous discussions about possible solutions to the crisis, what has become apparent is that regulators, legislators, industry representatives, investors, and consumer advocates must all work together to ensure that the economy remains strong, and that, more importantly, homeowners keep their homes.

FTC Commissioner Cites Benefits of Cooperative Law Enforcement
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Harbour Urges States to Revise Vertical Restraints Guidelines During NAAG Centennial Symposium
One hundred years ago, Missouri Attorney General Herbert S. Hadley called his fellow Attorneys General together in St. Louis, Missouri to discuss ways to attack the monopolistic behavior of Standard Oil. Attorney General Hadley felt that the federal government was not moving aggressively enough, and was convinced that the Attorneys General, working collectively, could challenge anticompetitive behavior on the part of the oil giant.

To celebrate the 100-year anniversary of this historic meeting, NAAG held a centennial symposium on state antitrust enforcement last month in St. Louis. The distinguished symposium panelists included antitrust academics, a number of past chairs of NAAG’s Multistate Antitrust Task Force and several federal officials.

Pamela Jones Harbour, a commissioner for the Federal Trade Commission, was the keynote speaker, highlighting the historic role of Attorneys General and their significant influence on antitrust law today.

Commissioner Harbour previously served as Assistant Attorney General in the New York Attorney General’s Antitrust Section, and as Chief of the Attorney General’s Public Advocacy Division, which includes both antitrust and consumer protection.

In 1907, the Sherman Act had not yet been interpreted to include all of the conduct that it covers today and states’ actions were important because they filled an enforcement vacuum, Commissioner Harbour said.

Citing Attorney General Hadley, Commissioner Harbour explained that NAAG’s initial missions were 1) promoting information exchanges among state Attorneys General; 2) coordinating the investigation and litigation of matters of common concern; 3) amici support for litigation involving other states; 4) coordinated lobbying; and 5) law reform. Those are the same missions associated with NAAG and its Multistate Antitrust Task Force today.

Cooperative law enforcement has evolved greatly from the “open warfare” between state and federal enforcers in the 1980s, to the modern day cooperative model in which the comparative enforcement advantages of each party are successfully applied.

“Coordinated federal-state enforcement can provide consumers with a scope and diversity of relief that neither state nor federal agencies could obtain working alone,” Commissioner Harbour said.

Turning to the current state of antitrust law, Commissioner Harbour expressed her strong disagreement with the recent Supreme Court decision in Leegin v. PSKS, in which a slim majority of the Court voted to overturn the long-standing per se rule against vertical price fixing in favor of a “rule of reason” analysis. Commissioner Harbour quoted University of Utah S.J. Quinney College of Law Professor Emeritus John Flynn, who said, “Law is a human institution designed to fulfill human aspirations as well as to curb human excesses.”

The “human aspirations” being fulfilled by the Leegin Court are those of manufacturers, not those of consumers, Com-
missioner Harbour explained. The “human excesses” the Court would curb are not those of manufacturers seeking to avoid competition, but those of consumers who might have the temerity to prefer a lower price and fewer frills over unneeded services, she added.

In light of the Supreme Court’s Leegin decision, Commissioner Harbour also urged Attorneys General to revisit the NAAG Vertical Restraints Guidelines, last revised in 1994. The Leegin decision, and before that, State Oil v. Khan (in which the Court found that maximum resale price maintenance was not per se illegal) had so changed the landscape that the NAAG guidelines were out of date.

The revised guidelines should be “used as a mechanism to establish a law of vertical restraints based on principles of law and economics that accurately reflect how consumer goods markets work in the real world,” Commissioner Harbour said, emphasizing that the “real world” includes countries other than the United States, since convergence of antitrust standards need not mean only movement toward the standards applied in the United States.

Other symposium highlights included remarks by Thomas Barnett, assistant attorney general for antitrust at the U.S. Department of Justice on federal-state cooperation. Panelists also prodded historical perspectives on state antitrust enforcement, including enforcement during the early part of the 20th century, the Supreme Court’s antitrust jurisprudence during the past 30 years, and the development of antitrust standards during the past century, including compensation to victims and consumer welfare.

Participants also examined the resurgence of state antitrust enforcement in the 1970s and 1980s, issues of antitrust federalism, future directions in state antitrust enforcement, including the effect of the Supreme Court’s antitrust decisions in its most recent term, the ability of Attorneys General to limit anticompetitive behavior by state agencies, new developments in health care cases, ways to “re-set” the balance between antitrust plaintiffs and defendants and ways to continue to pursue vertical restraints using state law.

“NAAG exists to make state Attorneys General, individually and collectively, more effective law enforcement officers. And NAAG has, in my opinion, been very successful in accomplishing that goal.”

- Pamela Jones Harbour

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**Professional Opportunity**

NAAG is seeking an Executive Director to manage the day-to-day legal and non-legal operations of its 50-person staff. The Executive Director serves all the Attorneys General and reports directly to the Executive Committee. The Executive Director will have oversight in the areas of program, financial and operational planning and management. The Executive Director will work with membership to advance the goals of the Association fostering interstate cooperation on legal and law enforcement issues, policy research and analysis of issues, and facilitating communication between the states’ chief legal officers and all levels of government. The Executive Director must demonstrate strong leadership and maintain high ethical standards. Flexibility in a fluid environment, strong communication skills, creativity, and innovation are essential.

Qualified applicants must have a JD from an accredited law school; substantial experience managing professionals in a dynamic environment, and; substantial experience in a legal environment. Public sector or not-for-profit experience preferred but not required. Salary range: $150,000-$170,000 with excellent benefits. Submit resume with cover letter and salary history/requirements to: Scott Messing, NAAG, 2030 M Street, NW, 8th Floor, Washington DC 20036 or email:jobs@naag.org. A complete job description can be found at http://www.naag.org/executive_director.php. EOE

**About NAAG**

The National Association of Attorneys General (NAAG) was founded in 1907 to help Attorneys General fulfill the responsibilities of their office and to assist in the delivery of high quality legal services to the states and territorial jurisdictions. NAAG’s mission is: "To facilitate interaction among Attorneys General as peers. To facilitate the enhanced performance of Attorneys General and their staffs." NAAG fosters an environment of "cooperative leadership," helping Attorneys General respond effectively - individually and collectively - to emerging state and federal issues.

The Association fosters interstate cooperation on legal and law enforcement issues, conducts policy research and analysis of issues, and facilitates communication

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**EOE**
between the states’ chief legal officers and all levels of government. The Association’s members are the Attorneys General of the 50 states and the chief legal officers of the District of Columbia, the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands. The U.S. Attorney General is an honorary member.

NAAG’s goals are to:

♦ Identify, produce, and disseminate key information related to the independence, scope, and management of the office of the Attorney General;

♦ Create and maintain a collegial network among the chief legal officers of the states and jurisdictions by providing a meeting ground for cooperation and learning;

♦ Promote cooperation and coordination on interstate legal matters to foster an even more responsive and efficient legal system for state citizens;

♦ Advise Attorneys General and their staffs of significant legal developments and emerging trends occurring in the states and federal government through information exchange, programs, and training;

♦ Increase citizen understanding of the law and law enforcement’s role to ensure both protection of individual rights and compliance with the law;

♦ Influence the development of national and state legal policy through such means as Supreme Court advocacy training and dialogue with other national, state, and local policy makers and pursue policy objectives as determined by the membership.