A Modus Vivendi for Attorneys General and the Plaintiffs’ Bar
How a State Attorney General Can Set the Tone and Maximize Efficacy

*By Aaron J. Fischer

May 2006

I. Introduction

Tobacco. Microsoft. Global warming. Predatory lending. Vitamin price rigging. Lead paint. Each time a corporation or industry has severely harmed a large group of consumers, families, and citizens, there have been legal “cops on the beat,” fighting to stop the harm, compensate victims, and protect the public interest. Yet these “cops on the beat” remain a divided front, particularly in the context of the public lawyer versus the private lawyer or, more specifically, the state attorney general versus the private plaintiffs’ bar. Even as state attorneys general have increased collaboration through multi-state litigation in which settlements and remedies are coordinated, and private attorneys have mobilized in response to anti-class action legislation like the Class Action Fairness Act of 2005 and California’s Proposition 64, there remains a striking tension between these two blocs and the roles they play in vindicating the public interest.

From the perspective of the private attorney, litigation driven by private lawyers is more essential than ever to enforce laws meant to protect citizens who are vulnerable to malevolent, negligent, and irresponsible actors. Lieff Cabraser, a well-known plaintiffs’ class action firm, asserts on its web site that a “class action is often the sole means of enabling persons, even those with serious injuries, to remedy injustices committed by powerful, multi-million dollar corporations and institutions.” Supreme Court Justice Douglas voiced a similar level of support for the private plaintiffs’ attorney in 1974, writing that the “class action is one of the few legal remedies the small claimant has against those who command the status quo.”

1 Third year law student at Columbia Law School. I would like to thank Professors Jim Tierney and Cindy Lott for their insights and support in the writing of this paper. Also, California Deputy Attorney General Rick Frank and Rhode Island attorney Jack McConnell deserve great thanks for taking the time to discuss their experiences and thoughts with me.


Just the same, class action attorneys have come under significant fire in recent years, playing the role of scapegoat for the medical malpractice crisis, rising prices for consumers, and public cynicism towards our legal system. Not coincidentally, state attorneys general have faced their own allegations of self-serving legal activism and reckless use of the attorney general’s power.4

The recent academic literature on the role of class action attorneys pursuing legal advocacy that assumedly promotes the public interest offers some constructive criticism aimed at improving their image and enhancing their tangible contribution to the public good. John H. Beisner, whose paper on plaintiffs’ attorneys was presented at the 2005 Stanford Law Review Symposium, asks important questions in this regard, namely “What can be done to increase the accountability of class action lawyers so that they are subject to the constraints faced by true public servants?” and “What can be done to help restore public confidence in our class action system?”5 However, the basis of this analysis, while useful, does not get to what must be the key issue. That is, given the areas of overlap and tension between private plaintiffs’ attorneys and state attorneys general, the more compelling question asks how the two groups can achieve a maximum level of efficiency and efficacy in protecting the public interest. Surely, as Beisner highlights, public perception plays a role, as does the ethical framework under which both an attorney general and private attorney engage in legal advocacy.6 However, the fundamental issue guiding all analysis in this area ought to focus on the ultimate beneficiaries that motivate such advocacy – the injured parties and the public at large.

Accordingly, this paper explores issues that are front-and-center in contemporary discussions about both the tension and mutual benefit between the state attorneys general and private plaintiffs’ attorneys. I examine the situation of parallel litigation efforts – that is, situations in which separate lawsuits are filed in response to the same wrong and wrongdoer. The timing of these lawsuits proves tremendously consequential. First, state attorney general litigation may precede private lawsuits against powerful wrongdoer defendants. This subsequent private litigation is often referred to as “coattail class actions” and, more disdainfully, the “me toos.” Second, private attorneys may be the first “cops on the beat,” potentially framing,

---

6 Id.
limiting, or even attempting to preclude future attorney general litigation. Finally, the plaintiffs’ bar and the attorney general may work concurrently in enforcing laws that protect the public and discrete injured classes. This latter context of parallel litigation may function as it did in the famous Vitamins litigation, in which the two groups filed separate lawsuits that together accelerated towards the eventual strong outcome. In contrast, there is the somewhat rare but notable framework in which the state attorney general retains private outside counsel based pm a contingent fee arrangement in an effort to arm the state with the resources and expertise to bring a successful lawsuit. This kind of collaboration proves most important when the harm to the public interest is so far-reaching and the wrongdoer so formidable that the state could not effectively litigate otherwise. Examples of this joint effort in which attorneys general have retained private counsel include the highly publicized tobacco and Microsoft lawsuits. More recently, the Rhode Island Attorney General has achieved considerable success in a suit against lead paint manufacturers, offering a current and insightful example of how such collaboration can be useful and even critical in states’ efforts to promote the public interest to the maximum extent possible.

Working from the premise that citizens are entitled to representation and that “access to the courts is a good thing,”7 I argue that, by and large, private plaintiffs’ attorneys serve an integral role in vindicating the public interest, with the important caveat that the state attorney general ought to pursue and demand a robust role for herself in order to ensure that such private litigation in fact promotes the public interest. As will be discussed in some detail, the California Attorney General’s recent successes in this area should serve as a model for other state attorneys general in this context.

The objective of this paper is not to suggest or impose a single system through which the attorney general and private lawyer ought to collaborate and support one another. Instead, it is meant to contribute to the ongoing discourse on how these two institutions can realize a kind of modus vivendi such that citizens’ interests are best protected and represented.

II. The Attorney General versus the Private Plaintiffs’ Attorney

A. Contrasting Roles and Frameworks for Advocacy

7 Telephone Interview with Jack McConnell (April 18, 2006) [hereinafter McConnell Interview].
It is necessary to begin with a thumbnail sketch of the frameworks under which the attorney general and private plaintiffs’ attorney function. A state attorney general often will bring a claim under its *parens patriae* power, whereby she may pursue a civil action to vindicate the state’s sovereign and quasi-sovereign interests, particularly concerning the health, safety, and welfare of the state's citizens.\(^8\) Additionally, many state attorneys general are empowered to bring civil actions based on a particular statutory allocation of investigative and prosecutorial power,\(^9\) and several legal scholars have advocated for the increased role of attorneys general in resolving cases of widespread harm caused by a single entity.\(^10\) The Hart-Scott-Rodino Act, for example, is an explicit congressional acknowledgment of the state attorney generals’ ability to sue on behalf of consumers in their states to secure treble damages stemming from federal antitrust violations.\(^11\)

The attorney general’s unique legal position and capacity to vindicate the interests of her constituents allows her to develop a cause of action without building a discrete class or seeking specific restitution on behalf of a limited number of individuals. That is, evidence of harm to the state and its citizens is often sufficient for an attorney general to file a lawsuit or, less litigious but often equally damaging, initiate an investigation.\(^12\) It is in fact well established that the state’s ability to obtain judicial relief may often transcend a private party’s ability to obtain such relief.\(^13\)

---


\(^9\) Recently, New York State Attorney General Eliot Spitzer has made the state’s Martin Act the most well known of these kinds of statutes. N.Y. Gen. Bus. § 353 (McKinney 2006).


\(^12\) Nicholas Thompson, *The Sword of Spitzer*, Legal Affairs, May/June 2004, at 50.

\(^13\) See Florida v. Mellon, 273 U.S. 12, 16 (1927) (“Judicial relief sometimes may be granted to a quasi-sovereign state under circumstances which would not justify relief if the suit were between private parties.”).
Reflecting this distinction between the private and public plaintiff, the Federal Rules of Civil Procedure impose particular requirements for private attorneys to file and prevail in a class action lawsuit. Rule 23 provides that, for a class action to be viable, (1) the class must be so numerous that actual joinder of all class members would be impracticable, (2) there must be questions of law or fact common to all class members, (3) the claims or defenses of the representative parties must be typical among the class, and (4) the attorneys representing the class must fairly and adequately protect the interests of the class.\textsuperscript{14} Significantly, the procedural and conceptual framework under which class action attorneys do their work indicates that the private lawyer has a complete and essentially fixed duty of loyalty to the distinct class that is represented in the lawsuit.\textsuperscript{15} The private attorney’s duty is to maximize recovery and compensation to the damaged class.\textsuperscript{16}

In contrast, the government lawyer, specifically the attorney general, carries a duty not simply measured in terms of a particular group of harmed citizens nor the maximization of recoveries, but rather to the “public interest more broadly conceived.”\textsuperscript{17} Such a duty may include balancing economic, social, and individual interests, as in the complex landscape of predatory lending.\textsuperscript{18}

Ultimately, the legal rules, historical development, duties and incentives defining the state attorney general versus class action lawyer have created a system, whether intentionally or inadvertently, of both tension and mutuality between the two institutions. Before delving into these areas of tension and collaboration, however, it is interesting to explore the warp and woof of the character who is both increasingly reviled by the large corporations he claims to be holding accountable for wrongdoings and increasingly misunderstood by the public whom he claims to protect – the private plaintiffs’ attorney.

\textsuperscript{14} Fed. R. Civ. P. 23(a).
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 26.
B. Private Attorneys General and Common Criticisms

Judge Jerome Frank of the Second Circuit is credited with coining the term “private Attorney General,” finding that private attorneys have the right and often the role of not only recovering a remedy for specific persons, but also “to vindicate the public interest.” Columbia Law Professor John Coffee highlights the historical role of the private attorney general as one who secures compensation for specific victims, generates deterrence, and supplements the attorney general’s resources committed to the detection and prosecution of illegal and injurious behavior. In J.I. Case Co. v. Borak, the Supreme Court reiterated this conception of the private attorney general as a “necessary supplement” to public law enforcement in order “to make effective the congressional purpose [of federal securities laws],” provided through implied private causes of actions. Beyond the supplementary role, some commentators have even suggested that private attorneys general perform an “important failsafe function” by ensuring that laws promoting the public interest are enforced regardless of the political climate, governmental law enforcement resources, or the personal preferences of a particular state attorney general. In other words, if a legal remedy is established by statute, its application should theoretically be largely consistent regardless of transitory political, social, and economic circumstances, and the supplementary (and, in some cases, substitute) role of the private plaintiffs’ attorney can contribute to this kind of consistency.

Just the same, there has been no shortage of attacks on private plaintiffs’ attorneys. As class action filings have more than tripled during the last decade, including concentrated explosions in particular counties known as “magic jurisdictions,” Americans have become

---

19 Associated Industries of N.Y.S., Inc. v. Ickes, 134 F.2d 684, 704 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943) (“Such persons, so authorized [by legislative conferral of standing] are, so to speak, private Attorneys General.”).
22 Coffee, supra note 20, at 227.
23 Beisner, supra note 5 at 1445.
24 Id.
more and more skeptical and even cynical about the value of class actions to consumers. Beisner suggests that this lack of trust is the logical product of a skewed system of incentives based on financial self-interest that bears “no resemblance to what motivates classic governmental law enforcement personnel … charged with promoting the public good and typically … paid the same modest salary” regardless of settlement or outcome of litigation.

This analogy, though easy to conceptualize, suffers from hyperbole. It assumes that there is a negligible and entirely ineffective check on private attorney “enforcement,” whether by the courts or open public discourse. Equally relevant, the logical endpoint of such a discussion is to denigrate any brand of “cop on the beat,” as state attorneys general have been criticized for enforcing the law based primarily on political self-interest.

III. Structures for Collaboration between Private Lawyers and Attorneys General

In reality, the apparent upsurge of class action lawsuits and complex private litigation is not the product of private attorneys’ malevolent self-interest. Instead, the rising prevalence of private complex litigation stems largely from a recognition of such a legal strategy as a viable and valuable tool to protect citizens from ubiquitous abuses by corporate actors that negatively and illegally affect consumer welfare, the environment, and public health. With this in mind, I


26 Beisner, supra note 5 at 1443. In an attempt to rebuke the image of the “private attorney general,” Beisner draws upon the common “cop on the beat” metaphor that is often applied to the role of attorney general as the lead enforcer of the law. While Beisner recognizes that “self-appointed cops on the beat” – referring to private plaintiffs’ attorneys – add an extra layer of deterrence against crime, the public will naturally and “justifiably…have no trust in – or respect for – such a system of law enforcement,” as this system is defined by law enforcers motivated by “overwhelming financial self-interest.” See also In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 788 (3d. Cir. 1995) (criticizing class action attorneys who pursue settlements that “create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members,” implicating serious “adequacy of representation concerns”).

27 Thompson, supra note 12.
turn to the tensions and mutuality that characterize the relationship between private plaintiffs’ attorneys and state attorneys general. The “mixing” of the roles that public and private lawyers play in mass litigation generally takes one of two forms that implicate strikingly distinctive issues. In the first form, private lawyers litigate separately from the attorney general, whether consecutively or concurrently. In its second form, attorneys general retain particular private lawyers to work collaboratively on a government claim. While neither form is without its problems, both possess significant potential to protect and promote the public interest. Equally significant, neither form is going away anytime soon, adding to the impetus that attorneys general understand and leverage each form in such a way to achieve maximum efficacy and social good.

The criticisms of private lawsuits that follow successful attorney general litigation, if nothing else, have effectively framed the discourse. Identifying such litigation as “coattail class actions,” “piggybacking,” “me toos,” and “free riding,” critics of the private plaintiffs’ attorney have sculpted an image of the plaintiffs’ attorney as one who unethically leverages the attorney general’s work to avoid the costs of investigation into alleged wrongdoing, discovery, and construction of legal arguments.

In response to this situation, Beisner asks how we can restore public confidence in mass civil litigation such that progressive private attorneys can engage in advocacy in a more supportive political climate. Yet this seems to be a case of the tail wagging the dog, as public confidence is framed as a precursor to effective advocacy. I suggest a kind of reverse strategy: by seeking to identify an optimal framework under which private mass litigation can supplement and reinforce the attorney general’s litigation, private and public lawyers will achieve the strongest, fairest, and most constructive result for the public interest. Once this framework – even if it is an elastic one – is identified and implemented, an open and honest public discourse

29 Id.
30 Id. at 6. See also Actions Without Class, Wash. Post (Editorial), Dec. 2, 1999, at A38 (highlighting the private bar’s litigation work after state attorneys general’s successes against Microsoft as a genuine “portrait of everything that is predatory about class-action plaintiff’s lawyers”); Marcus Redish, Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals, 2003 U. Chi. Legal F. 71, 88 (2003) (“[C]lass actions that follow successful governmental litigation…feed off the fruits of the governmental agency’s efforts.”).
should contribute to the public confidence that Beisner desires. In other words, effective advocacy becomes the foundation to public confidence, not the other way around.

One common recommendation by scholars addresses the percentage of a recovery that private counsel in a “coattail” class action deserves by way of attorneys’ fees.\(^\text{31}\) This recommendation follows the lodestar formula that is commonly used to calculate attorneys’ fees in large class actions, allowing a court to “upwardly or downwardly adjust [a preliminary fee estimate] by considering such factors as the quality of the counsel’s work, the probability of success of the litigation, and the complexity of the issues.”\(^\text{32}\) While the lodestar formula has become the primary tool for plaintiffs’ attorneys to pursue an enhanced fee, it should conceivably work to diminish the fee in “coattail” class actions in which class counsel’s work is less extensive, the probability of success much greater, and the issues less complex because they have already been analyzed and litigated in the government action.\(^\text{33}\) Even absent explicit statutory authority to participate in this kind of private litigation, as is sometimes the case,\(^\text{34}\) a state attorney general may influence a court to apply the lodestar formula and, in doing so, contribute to an appropriate fee reward for private attorneys and consequently a more optimal setting for these “me too” actions in terms of the public interest.

This lodestar formula is a valid and important judicial approach to diminish the threat of “me too” or “coattail” class actions that, at base, are aimed at producing high attorneys’ fee far more than compensating an injured class. Jack McConnell, a private attorney at Motley Rice in Providence, Rhode Island,\(^\text{35}\) expresses his support of “me too” litigation, asserting that “access to

\(^{31}\) Coffee, supra note 20 at 287.

\(^{32}\) In re “Agent Orange” Prod. Liability Litig., 818 F.2d 226, 232 (2d Cir. 1987).

\(^{33}\) The district court in In re First Databank Antitrust Litig. recognized this fact, providing class counsel with attorneys fees only related to the $8 million settlement “attributable to their efforts,” essentially engaging in a “value-added” approach that accounts for both the context of the class counsel’s work in the wake of government litigation and the contribution that work made to the public interest. 209 F.Supp.2d 96, 101 (D.D.C. 2002).

\(^{34}\) See discussion infra on California Proposition 65, Part III.

\(^{35}\) McConnell has engaged in both private litigation running parallel to government enforcement as well as direct collaboration with state attorneys general during the tobacco litigation and, more recently, during Rhode Island’s lead paint litigation.
the courts is a good thing” and expressing confidence that “the court has a system to make sure that junk does not get through.”

From the state’s perspective, Rick Frank, the Deputy Attorney General of California, recognizes that there is a considerable need for private enforcement in areas such as corporate securities law, consumer protection, environmental protection, and antitrust law, where the issues are markedly specialized and the state’s resources inadequate to achieve optimal enforcement. Yet while these two attorneys, both at the top of their respective fields, recognize the value of private enforcement, whether preceding, paralleling, or piggybacking on state enforcement, each also recognizes the risk of private enforcement efforts that do not serve the public interest. Jack McConnell, generally willing to trust courts’ ability to identify and dismiss “junk” litigation, nonetheless highlights that “me too” litigation is most problematic when executed by private attorneys who have little contact with the attorney general and who lack a sufficient understanding of the legal issues and ramifications of that litigation. Securities and antitrust litigation carry a particular risk of such a problem arising given their distinctive complexity.

Meanwhile, Deputy Attorney General Frank condemns those private plaintiffs’ attorneys who file “me too”-type litigation “for all the wrong reasons”; private enforcement of California’s “Unfair Competition Law” serves as a striking example of such harmful litigation brought under the guise of private attorney general’s efforts to protect the public. These “shakedown” lawsuits, according to Frank, are unscrupulous and in fact harmful to the public interest. That being said, it is important to note that Proposition 64, a 2004 voter initiative to significantly limit private enforcement of the Unfair Competition Law, while supported by big

---

36 McConnell Interview, supra note 7.
37 Telephone Interview with Rick Frank (April 18, 2006) [hereinafter Frank Interview].
38 McConnell Interview, supra note 7.
39 Id.
40 Frank Interview, supra note 37.
41 Cal. Bus. & Prof. 17200 (McKinney’s 2006).
42 Frank Interview, supra note 37. Deputy Attorney General Frank recounted anecdotes of small private firms filing Unfair Competition cases against small (and often minority-owned) businesses, with the attorneys’ objective being to “force settlements based on fear.”
43 Id.
business and industry special interests, was strongly opposed by California Attorney General Bill
Lockyer.\footnote{See Kevin Yamamura, \textit{California Attorney General Opposes Change to Unfair Business Law}, Sacramento Bee, Sept. 30, 2004 (quoting Attorney General Lockyer as saying that “Proposition 64 cracks the cornerstone of environmental and consumer protections and privacy,” and that “[a]ll the state and local prosecutors are having their budgets cut, so it becomes less and less likely that we’d be able to pick up the cases now taken up by public health groups and others” if Proposition 64 were to pass). Proposition 64 was passed by California’s voters in November 2004, radically limiting private enforcement actions to protect environmental, privacy, and consumer interests, leaving it to state enforcement entities, namely the attorney general, to bring such claims. \textit{See generally} Sharon J. Arkin, \textit{The Unfair Competition Law after Proposition 64: Changing the Consumer Protection Landscape}, 32 W. St. U.L. Rev. 155 (arguing for an interpretation of Proposition 64 such that the Unfair Competition Law can still be an effective tool to protect competitors and consumers from illegal behavior through private enforcement).}

Clearly, there ought to be a balance between unchecked private enforcement (that is, other than through judicial scrutiny) and a total rejection of private lawsuits aimed to protect an injured group through complex litigation. \textit{With this in mind, the question remains how the attorney general can play a role that supports the good work that plaintiffs’ attorneys do and that also protects against opportunistic and even harmful private litigation efforts that are pursued: 1) subsequent to attorney general litigation; 2) prior to any attorney general enforcement efforts; or 3) concurrently with attorney general involvement.} In the following sections, I discuss each of these situations and offer some recommendations for attorneys general in each context.

1) Private Efforts \textit{Subsequent to Attorney General Litigation}

\textit{Recommendation – Frame potential future private litigation in a way that ensures ongoing advancement of the public interest}

Given the existence of a robust plaintiffs’ bar, we can be sure that, when an attorney general gets involved in litigation against a large wrongdoer who has allegedly inflicted considerable harm on the public, private attorneys general will be the second-in-line “cops on the beat” if such litigation proves feasible and potentially financially rewarding.

While we can and should scrutinize such “coattail” or “me too” litigation, we must also recognize that this relationship between attorney general and private enforcement may be one of
“symbiosis, an association of mutual advantage,” as the private attorney may be more appropriately situated – in terms of both resources and expertise – to ensure that all members of an injured class are sufficiently compensated for the harm inflicted upon them by a wrongdoer defendant. As coattail enforcement may be “cheaper by issue preclusion, legal analysis, and fact development,” it can be an effective means to achieve full enforcement an effect complete recovery for those injured. This reality also calls attention to an important responsibility of the state attorney general as she pursues a settlement or judgment.

Granted, defendants will almost certainly protect their own interests in the crafting of a settlement with the attorney general to limit further liability through future private lawsuits. Still, the attorney general should engage in litigation and settlement discussions with open eyes to the prospect of private litigation that may stem from whatever outcome she achieves. For example, there are at least seven class actions, representing the citizens of at least four states, pending against Ameriquest Mortgage Company regarding allegations that it misled, overcharged, and defrauded home-loan borrowers. These private actions remain ongoing even as the national lending company manifests its intention to enter into a $325 million settlement with more than thirty state attorneys general. The scope of remaining liability Ameriquest faces and the number of harmed borrowers who remain uncompensated and entitled to damages remains unclear. As the fate of these private actions becomes apparent, the attorneys general involved in the Ameriquest settlement will have to reflect on the job they did in ensuring a fair and comprehensive resolution while delineating a subsequent role for the private bar that is precise, evenhanded, and appropriate in terms of promoting an optimal level of enforcement, litigation, and recovery for those harmed.

With an awareness of this post-settlement reality, exemplified by the ongoing class actions against Ameriquest, the attorney general can ensure a “two-pronged attack” in which her efforts provide “impetus and information” to further valuable supplementary private litigation

45 Erichson, supra note 15 at 42.
46 Id.
47 Frank Interview, supra note 37.
that will “enhance the regulatory and deterrent effects of government suits.” Specifically, state attorneys general should be conscious of the issue and claim preclusive effects of their enforcement, settlements, and judgments, with an eye towards the private litigation that may follow.

2) Private Efforts that Precede Attorney General Litigation

Recommendation – Participate in private litigation that precedes attorney general litigation to ensure settlements or judgments that truly promote the public interest

Progressive social action to protect citizens’ individual rights, health, and safety requires the efforts of private plaintiffs’ attorneys, whether through class action litigation or individual representation. Statutes like California’s Proposition 64, which considerably curtails the private attorney’s ability to bring lawsuits on behalf of individuals and groups that are clearly and seriously harmed by powerful wrongdoer defendants in the state, cannot be supported by a state attorney general; these statutes represent a step backwards from effective and comprehensive enforcement of those protections necessary to protect the public. That is, these statutes do not promote and protect the public interest, but rather make citizens’ lives more precarious and vulnerable to wrongdoers who violate the law.

At the same time, plaintiffs’ attorneys who file actions “for all the wrong reasons” represent a risk to the public interest themselves, engaging in unmeritorious litigation that does very little to compensate any allegedly harmed individual and to ensure future compliance with the law. At a minimum, these irresponsible efforts undermine the public’s trust of attorneys who do fight zealously, conscientiously, and appropriately to protect citizens’ rights and welfare. Even worse, these attorneys threaten the unfairly targeted defendant, whose small businesses and personal livelihood are at stake in such litigation. I would argue that the actual prevalence of such irresponsible private enforcement informs but cannot direct this discussion. Regardless of

50 Erichson, supra note 15 at 46.
51 See, e.g., Yamamura, supra note 44 (citing California Attorney General Lockyer’s opposition to Proposition 64 and his implicit support for the integral role private plaintiffs’ lawyers play in securing “environmental and consumer protections and privacy,” among other public interest concerns).
52 Frank Interview, supra note 37.
53 See Beisner, supra note 5 at 1445.
54 Frank Interview, supra note 37.
the actual numbers and statistics regarding meritorious versus reckless private litigation, the attorney general remains the sole protector and promoter of the public interest writ large.\textsuperscript{55} In this role, it is her job to ensure that private enforcement of the law is done ethically and appropriately; a secondary but no less important benefit to be gained in this context is a renewed credibility of those attorneys – public and private – who advocate for the vulnerable citizen.

In contrast to Proposition 64, California’s Proposition 65, also called the Safe Drinking Water and Toxic Enforcement Act of 1986, highlights an important means for the state’s attorney general to effectuate both good public enforcement and appropriate private enforcement. This voter initiative requires companies that expose citizens to any chemical identified by the state as hazardous to issue a clear and reasonable warning to the public.\textsuperscript{56} Both the California Attorney General and private persons representing the public interest may bring an action against a company that violates the statute to seek injunctive relief, civil penalties, and attorneys’ fees.\textsuperscript{57} When such an action is brought by private persons in the public interest, however, certain requirements apply.\textsuperscript{58}

Among those requirements is that “[n]either the Attorney General, any district attorney, any city attorney nor any prosecutor has commenced and is diligently prosecuting an action against the violation.”\textsuperscript{59} When private parties are the \textit{first} to initiate litigation against a particular defendant, they must still involve the attorney general’s office on both the front and back ends of litigation. At the outset, the private plaintiff must provide notice to the attorney general at least sixty days before filing the action, and the attorney general must issue a “certificate of merit” declaring that there is a “reasonable and meritorious case for the private action.”\textsuperscript{60} Later, the

\begin{itemize}
\item \textsuperscript{55} Alfred L. Snapp, 458 U.S. at 600-01.
\item \textsuperscript{56} Cal. Health & Safety Code § 25349.6 (Deering 2006). The warning must read something to the effect of: “\textit{This product contains chemicals known to the State of California to cause cancer and/or birth defects or other reproductive harm.}”
\item \textsuperscript{57} Cal. Health & Safety Code § 25349.7(b)(1) and § 25349.7(f)(4) (Deering 2006).
\item \textsuperscript{58} Cal. Health & Safety Code § 25249.7(d) - (f) (Deering 2006).
\item \textsuperscript{59} Cal. Health & Safety Code § 25249.7(d)(2) (Deering 2006).
\item \textsuperscript{60} Cal. Health & Safety Code § 25249.7(d)(1) (Deering 2006). Without this certificate of merit, the private action cannot move forward with an actual filing. Courts have recognized that the purpose of this provision is to allow the state “to undertake a meaningful investigation and remedy the alleged violations prior to citizen intervention.” \textit{See Yeroushalmi v. Miramar Sheraton}, 88 Cal.App. 738, 740 (2001).
\end{itemize}
private plaintiff must submit to the attorney general a report of any proposed settlement or judgment, providing “the nature of the relief sought … the amount of the settlement or civil penalty assessed, other financial terms of the settlement, and any other information the Attorney General deems appropriate.” 61 Most significantly, the attorney general has the right to “appear and participate in any proceeding without intervening in the case.” 62

These provisions of Proposition 65 bestow upon the attorney general a gatekeeper role in terms of private litigation efforts to enforce the law’s warning requirements, an authority the attorney general’s office utilizes regularly. 63 Because the attorney general is the sole player in the enforcement of Proposition 65 who possesses a duty to the public interest as a whole, it is good policy for him to be involved in private enforcement efforts, particularly because the chemical warning statute remains in flux insofar as what chemicals the state deems hazardous and what type of warning is sufficient.

Nevertheless, I would argue that this statutory framework is both admirably proactive and regrettably overreaching. The “certificate of merit” requirement emerges before an action is even filed, meaning that a significant amount of discovery has yet to take place. To ask the attorney general to determine the potential merit of the action at this point is to require a decision based on incomplete information. 64 In contrast, the pre-settlement/pre-judgment authorization for the attorney general to “participate” in the “proceeding” (and to appeal what he regards as a bad outcome for the public interest) 65 is smart policy. Such authorization reflects and honors the

61 Cal. Health & Safety Code § 25249.7(f)(2) - (3) (Deering 2006).
62 Cal. Health & Safety Code § 25249.7(f)(5) (Deering 2006). Recently, a California state court interpreted this provision to mean that the attorney general also has a right to appeal settlements he considers “collusive” or judgments he finds unsupportable. See Consumer Defense Group v. Rental Housing Industry Members, 137 Cal.App.4th 1185, 1205 (2006) (“The Attorney General’s right to ‘participate’ in a ‘proceeding’ would be meaningless if it carried no inherent right to appeal.”).
63 Frank Interview, supra note 37.
64 Of course, defendants are thrilled with this additional step, which is simply another point – and a distinctively premature one – at which an action can be precluded.
65 Consumer Defense Group, 137 Cal.App.4th at 1206 (finding that “[i]f the Attorney General has no right to appeal the approval of a settlement … then the most egregiously collusive settlement – contrary in every imaginable way to the public interest – would be insulated from attack if the trial judge were under the legal misimpression that he or she had no choice but to approve it”).
recognition that “[t]he one party who necessarily represents the public interest … is the Attorney General.”\textsuperscript{66} One poignant comment by the court in the recent Consumer Defense Group decision emphasizes “an even darker side to this settlement” between the private attorneys and the defendants. This “even darker side” is that “the large amount of [attorneys’] fees … are earned at the direct expense of the public interest,”\textsuperscript{67} reiterating the need for the attorney general to get – and stay – involved in private litigation that will have a potential adverse impact on the public interest.

In sum, this recommendation is meant to promote a broader authority – whether statutory or otherwise – for a state attorney general to advocate for the public interest in the context of private litigation, by supporting meritorious and positive private litigation and actively opposing litigation that is potentially harmful to the public interest. Proposition 65 offers a particularly strong authority for attorneys general to contribute to a particular kind of private enforcement – namely, warnings to the public regarding hazardous substances. I suggest a variation of the California statute, such that a state attorney general has the latitude to play a significant role in private litigation without unnecessarily frustrating proactive private efforts that aim to protect citizens. More broadly, state attorneys general should be on the lookout for the authority and means to monitor private settlements and judgments in order to promote positive outcomes. This is particularly vital if a private settlement or judgment may prevent future actions brought by the attorney general himself.\textsuperscript{68} Of equal importance, such proactive participation by a state attorney general in private litigation can contribute to avoidance of secret settlements that restrict public access to information that implicates a substantial danger to public health or safety.\textsuperscript{69}

3) \textit{Concurrent and United Litigation Efforts}

---

\textsuperscript{66} Id. at 1206.

\textsuperscript{67} Id. at 1218.

\textsuperscript{68} Id. at 1206 (“It is therefore unthinkable that private parties, acting unilaterally and over the objection of the Attorney General, could fashion a settlement that was contrary to the public interest, have that settlement insulated from appellate review, and \textit{perhaps even be given res judicata effect against future actions (say, by the Attorney General) that might necessarily be in the public interest.”) (emphasis added).

\textsuperscript{69} See generally David Luban, \textit{Settlements and the Erosion of the Public Realm}, 83 Geo. L.J. 2619, 2648-49 (arguing that openness is “at the core of democratic political morality” and that secret settlements are therefore “an unacceptable area of exceptions to democratic publicity”).

16 of 27
Recommendation – Promote open communication and opportunities for collaboration

While it is increasingly accepted that attorney general *parens patriae* suits may be based on the aggregate of private claims of injured individuals within a state when the claims implicate the public interest,\(^{70}\) there are certainly good reasons for state attorneys general to engage directly with the private plaintiffs’ bar in order to maximize efficiency and benefit to the public. At the very least, robust communication between the state attorney general’s office and private plaintiffs’ attorneys helps to ensure that those private attorneys understand the legal issues and implications of private litigation when the attorney general has already initiated, settled, or litigated a similar action.\(^{71}\)

Even more productive is the situation in which strong communication gives way to productive collaboration between the two entities. This collaboration can take on one of two forms: first, private attorneys and state attorneys general may support each other through parallel, concurrent litigation, as in the well known multi-state vitamins litigation that settled in October 1999;\(^{72}\) second, state attorneys general may retain outside counsel, tapping into the resources and expertise that private attorneys offer, as in the recent landmark victory against the lead paint industry by Rhode Island’s Attorney General Patrick Lynch.\(^{73}\) The lead paint case in Rhode Island is not a case of *concurrent* litigation, but rather *united* litigation, led by the state attorney general.\(^{74}\)

A. Vitamins: Maximizing Public Good through Concurrent Efforts

---


\(^{71}\) Both Jack McConnell and Deputy Attorney General Rick Frank expressed concern about private attorneys’ lack of understanding in such “me too”-type litigation, a problem that to some extent can be remedied through more dynamic communication channels with the attorney general.

\(^{72}\) David Barboza, *$1.1 Billion to Settle Suit on Vitamins*, N.Y. Times, Nov. 4, 1999, at C1 [hereinafter *$1.1 Billion to Settle Suit*].


\(^{74}\) This discussion of a state attorney general’s retaining private counsel in complex government litigation and the Rhode Island lead paint case study will be discussed in Section III.B.
In 1999, seven of the world’s largest drug companies, who had been conspiring to fix vitamin prices for several years, settled a class action lawsuit brought on behalf of direct consumers by agreeing to pay $1.1 billion in damages. The settling companies controlled over 80 percent of the world’s vitamins market. The settlement was certified and approved by a federal judge in Washington D.C. and was the largest civil settlement in a class action antitrust lawsuit at the time. In May, 2001, a Master Settlement Agreement (MSA) was given preliminary approval by a court in Washington D.C. in regards to the indirect purchasers harmed by the improper and conspiratorial dealings of the vitamins companies, who impudently called themselves “Vitamins, Inc.” The MSA covered a Consumer Settlement Class that was divided into 23 sub-classes, one for each of the settling states.

What is significant about the indirect purchaser litigation against “Vitamins Inc.” was the structure of collaboration between private class action lawyers and state attorneys general from the 23 states involved in the final settlement. The alliance of these two entities was “created and maintained” by the distinctive contributions each made towards the effort’s ultimate success. The private class action lawyers were the original movers in bringing the claim, which stemmed from the victories of a few years earlier, when the Justice Department settled a criminal complaint, with the wrongdoing companies’ agreement to pay significant criminal penalties and an impressive settlement on behalf of direct consumers. It was the private attorneys who located clients, developed the legal issues and factual underpinnings, and invested considerable resources. Meanwhile, the participating state attorneys general played a critical role in the

75 $1.1 Billion to Settle Suit, supra note 72.
77 $1.1 Billion to Settle Suit, supra note 72.
79 Berge, supra note 78 at 11-12.
80 Id. at 15.
81 $1.1 Billion to Settle Suit, supra note 72. In a sense, the indirect purchaser litigation began as an example of “me too” litigation, with private attorneys filling the gap left by government enforcement efforts in order to compensate the indirect purchaser population.
82 Berge, supra note 78 at 15.
coordination effort and in establishing credibility for the action. Specifically, the state attorneys general could assert parens patriae claims indicating that the proposed settlement was in line with the public interest, a step that reassured the court in its decision to certify the class and validate a creative cy pres remedy.

The vitamins litigation was by no means the first time that state attorneys general have played this kind of role in advancing massive private class actions. In truth, this collaboration seems to require the overcoming of a cognitive divide between public and private lawyers who may consider their counterpart to be less skilled, less ethical, or simply less enthusiastic about such joined efforts. Yet the potential benefits are significant for each group. For private attorneys considering such collaboration with state lawyers, benefits include the bolster in credibility, as seen in the Vitamins litigation, as well as potential assistance in fast-tracking discovery, as the attorney general often has greater authority to expedite the discovery process. For the attorney general, private attorneys offer considerable resources and class-building proficiency that can ensure a strong case aimed at compensating more injured parties.

Moving forward, while this particular kind of role in a united effort with private attorneys runs against the grain of some attorney general’s modus operandi, there is no doubt that, under the right circumstances, such collaboration can be highly effective in achieving an impressive outcome on behalf of an injured class and the public at large. The process of building

---

83 Id. The support of the state attorneys general particularly contributed to the impression that class representation was adequate insofar as fairness, reasonableness, and equity across class members.
84 Id. at 15-16. A cy pres remedy, also referred to as the “next best use” doctrine, refers to a remedy that is deemed appropriate when full restitution to all injured victims is impossible or infeasible. This may include a donation to a charitable organization or public interest project that will vindicate injured victims’ rights or further their interests in the future.
85 See, e.g., In re Toys “R” Us Antitrust Litigation, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) (“[T]he participation of the State Attorneys General furnishes extra assurance that consumers’ interests are protected.”); In re Mid-Atlantic Toyota Antitrust Litig., 564 F. Supp. 1379, 1386 (D. Md. 1983) (“[T]he presence of public law enforcement officers in the settlement process is an appropriate element for the Court to consider in approving that settlement.”).
86 Deputy Attorney General Rick Frank made clear in our interview that the California Attorney General’s office, composed of 1100 attorneys, is meant to be a “full service litigation law firm,” signaling a significant reluctance to work with private counsel in this kind of litigation. Likewise, the New York Attorney General’s office has also shown its reluctance to engage in collaborative parallel litigation efforts under the leadership of Eliot Spitzer.
trust and developing collaborative plans begins with communication between the private and public lawyer, a step that the attorney general is unquestionably in the best position to lead.

**B. Lead Paint: Communication-Driven Collaboration and Retaining Private Counsel**

As an alternative to the parallel litigation framework, attorneys general may be more comfortable in the driver’s seat in complex *parens patriae* litigation. Increasingly, states are becoming more comfortable with retaining private outside counsel who can play a vital role in the successful pursuit of large claims. Under the right circumstances, private attorneys, a state attorney general, and a state’s citizens have much to gain by this structure of collaboration.

The proliferation of class actions has largely taken place in state courts, as private attorneys find state statutes and case law to be most favorable in prospective litigation. As a result, private attorneys are generally seeking to leverage the same legal avenues to compensate an injured class of citizens that a state attorney general leverages to protect a similar class or the state citizenry more generally under the *parens patriae* power. The Class Action Fairness Act of 2005 likely reinforces this congruence in terms of representation of an injured class, as the act makes it much more difficult to represent a class of citizens from different states in a single state court.88

Thus, with most national class actions almost certainly removable to federal court – known as a more hostile environment for plaintiffs – the multi-state collaboration of attorneys general (in which identical claims are brought in state courts across the country in order to secure a single and comprehensive settlement between the defendant corporation and multiple states) becomes an even more important tool to remedy wrongs caused across the United States. Potentially, this development could drive a greater impetus for private attorneys to work with attorneys general in order to remain in more plaintiff-friendly state courts, whether as part of a multi-state or single state effort.

---

87 See Beisner, supra note 5 at 1444. This observation also comes from my own experience as a summer intern at Goldstein, Demchak, Baller, Borgen, & Dardarian, a plaintiffs’ class action firm that litigates cases regarding employment discrimination and unfair labor practices in Oakland, California.

If and when state attorneys general choose to retain private outside counsel to contribute to a mass litigation effort, the question arises as to how that collaboration should be structured. When small state attorney general offices hire private attorneys to conduct more minor government litigation or to litigate matters in remote regions of the state, hourly and set attorneys’ fees may be a practical and sensible choice. Private attorney David Boies was retained by the United States Department of Justice to become the chief lawyer in the Microsoft antitrust litigation in 1998, with Boies contracting with the government so that he would earn $250 per hour. It seems, however, that Boies’ hourly fee arrangement in the Microsoft antitrust action may be anomalous in this kind of large-scale, long-term litigation, as such an arrangement makes it very difficult for the government to anticipate the ultimate cost of retaining counsel.

In reality, the contingency fee contract has been the more common route for mass litigation, especially in consumer fraud and antitrust litigation, driving the question of how contingency fee frameworks should apply for private lawyers who contribute their experience, resources, and expertise to litigation efforts in large government claims. For example, in the multi-state tobacco litigation, nearly all the states involved in the litigation retained private lawyers, and criticisms of contingency-based fee awards were common and often defined by allegations of greed, corruption, and impropriety. Some commentators have argued that such contingent fee arrangements allow a state attorney general to overextend his power beyond that which has been granted to him through a budgetary allocation decided upon legislatively. Former Alabama Attorney General Bill Pryor has criticized state suits against large corporations and industries that, through the utilization of retained private counsel’s resources, allow the state

---


90 Beisner, *supra* note 5 at 1464.

91 *McConnell Interview, supra* note 7.

92 Reportedly, only Colorado, California, and Nebraska chose to pursue the case without private lawyer collaboration. *Erichson, supra* note 15 at 18.


94 Bacak, *supra* note 93.
to use the judiciary to obtain revenue when the political or legislative arms of the government are likely better suited to do so.\textsuperscript{95}

While such a philosophical contention seems reasonable at first blush, the assumptions it requires are anything but rational. It assumes that the government – and thus a state’s citizenry – considers an “optimal” level of enforcement of its own democratically driven laws to be something less than full enforcement. That is to say, it resembles logic used in saying that a decrease in funding to the police force indicates a democratic desire for fewer criminals to be apprehended and fewer potential crimes to be prevented. In other words, a limited budgetary allocation for attorney general enforcement should not imply a limited mandate to enforce the laws and to protect and promote the public interest. Rather, citizens desire complete and evenhanded enforcement of the law, making the responsible and efficient use of private outside counsel towards achieving such enforcement an appropriate and even necessary strategy for a state attorney general.

One obvious but important fact is that some (if not most) of the loudest voices against this framework are the corporations and industries who have lost or stand to lose the most by the collaborative and highly effective relationships between public and private lawyers in taking on defendants armed with considerable financial and legal resources.\textsuperscript{96}

Compounding the attack on the contingent fee-based collaboration between private lawyers and the state attorney general in a state’s mass litigation efforts, some states have set

\textsuperscript{95} \textit{Id.} An example might be a preference for a legislative decision to tax cigarettes more heavily rather than securing considerable monetary damages against tobacco companies as determined by an individual court.

\textsuperscript{96} \textit{See, e.g.}, Bob Van Voris, \textit{Gun Cases Use Tobacco Know-How}, Nat’l L.J., Dec. 7, 1998, at A1 (quoting New Orleans Mayor Marc Morial in his support of hiring top plaintiffs’ lawyers to handle the government’s lawsuit against gun manufacturers as saying “You want lawyers who can take on giants”). Notably, state attorneys general have used contingency fee contracts to retain private lawyers in litigation against gun manufacturers across the country. \textit{See also Rhode Island v. Lead Industries Association}, Case No. 2004-63-M.P. Chamber of Commerce of the United States and the American Tort Reform Association as \textit{Amici Curiae} in Support of Petitioners (May 13, 2005), at http://www.instituteforlegalreform.org/pdfs/Rhode_Island_brief.pdf (arguing that the contingent fee agreement between the Rhode Island Attorney General and private outside counsel, primarily from the Motley Rice firm, should be declared “unlawful and void” as against public policy).
rules limiting contingency fees in such partnerships. Several states, including Kansas, Colorado, North Dakota, Texas, and Virginia, have enacted laws restricting the attorney general’s retention of outside counsel, whether by capping hourly rates, mandating competitive bidding, or requiring legislative approval for such contracts. Connecticut and Minnesota, where attorneys general are considered aggressive in pursuing corporate wrongdoers, have passed similar legislation over the last year, and a similar bill is pending in Mississippi. Significantly, New York Attorney General Spitzer seems to have chosen to avoid such contingent fee arrangements as a matter of practice and principle.

Jack McConnell, having worked extensively with state attorneys general during the tobacco litigation and, more recently, the lead paint litigation in Rhode Island, offers unique experience-based insights into the dynamics of direct attorney general-private counsel collaboration. He highlights three factors influencing whether such collaboration will be used in litigating against a large corporation or industry: 1) the philosophy and style of the attorney general in office; 2) the magnitude of the harm that citizens have incurred; and 3) the size and malevolence of the wrongdoer defendants. Accordingly, it makes sense that New York and California remain disinclined to engage in this kind of collaboration, given the size and resources of their attorney general offices. In contrast, in the recent lead paint litigation in Rhode Island, it is clear that the Rhode Island Attorney General would never have been able to bring an effective lawsuit against the country’s four largest lead paint companies.

The story of Rhode Island’s lead paint litigation is one of fortuity and effective partnership. Several years ago, the state’s Attorney General Jeff Pine, who had worked with Jack McConnell and the Motley Rice plaintiffs’ firm throughout the tobacco litigation, had

---

97 See Beisner, supra note 5 at 1465-68.
98 Id.
101 McConnell led litigation efforts against the tobacco companies in twelve states, contributing significantly to the landmark $246 billion tobacco settlement in 1998.
102 McConnell Interview, supra note 7.
developed a strong working relationship with McConnell. Recognizing that Rhode Island had one of the highest rates of childhood lead poisoning in the country, Attorney General Pine asked McConnell to investigate the situation and identify any opportunities for legal advocacy. McConnell soon realized that there were striking similarities between the lead paint and tobacco companies’ products and behavior. Believing that the state attorney general would be in a strong position to take on the lead paint industry, Motley Rice assembled a binder identifying the relevant laws and facts for potential future litigation. However, Attorney General Pine left office without initiating any formal investigation or lawsuit of his own.

Fortuitously, the chief of staff for Attorney General Sheldon Whitehouse, Pine’s successor, found McConnell’s binder, leading to a new and productive relationship between Motley Rice and the Rhode Island Attorney General. Attorney General Whitehouse, calling Rhode Island the “Lead Paint Capital of the World,” retained Motley Rice as private outside counsel and filed suit against four lead paint companies, Sherwin-Williams, NL Industries, Millennium Holdings, and DuPont. Attorney General Whitehouse set the parameters for the collaboration. He required that the private attorneys front all legal fees, which over the last seven years has added up to millions of dollars in hard costs. He also set a contingent fee structure such that private counsel would receive 16.7% of any award, a percentage exactly half of the usual contingent fee structure used by the state’s plaintiffs’ bar.

On February 22, 2006, with the current Rhode Island Attorney General carrying the torch in the now seven-year litigation, a six-person jury returned a verdict declaring that three of the lead paint companies are in fact liable for Rhode Island’s lead paint problem under the state’s

103 Id.
104 Creswell, supra note 73.
105 McConnell Interview, supra note 7.
106 Id.
107 Creswell, supra note 73.
108 McConnell Interview, supra note 7. Whitehouse’s terms for the collaboration stemmed from his experience as the Rhode Island Governor’s General Counsel in 1991, when he negotiated an identical contingent fee contract with private attorneys to recover money from the Depositors’ Economic Protection Corporation in the wake of the state’s 1991 banking crisis. As a result, private counsel’s fee structure in the lead paint litigation proved to be a kind of fait accompli.
nuisance theory.\textsuperscript{109} While an award for damages has not yet been determined, some commentators anticipate that it could be in the billions of dollars.\textsuperscript{110}

On April 3, 2006, the lead paint companies argued an appeal before the Supreme Court of Rhode Island, asserting that the framework of collaboration between the state attorney general and private counsel violates public policy.\textsuperscript{111} The defendants’ core argument is: 1) that this fee structure in attorney general-private counsel partnerships is driven by the profit motive rather than the state attorney general’s duty to promote and protect the public interest; and 2) that the contingent fee arrangement is meant to increase access to courts for individuals without the resources to pay for representation and should not be used by a state government.\textsuperscript{112} The Rhode Island Attorney General’s response has been simple and commonsense: the state attorney general “cannot go disarmed when the harm is so vast and the wrongdoer is a large financial interest” with overwhelming resources to litigate.\textsuperscript{113} Further, the lead paint defendants have attempted to portray the collaboration between the attorney general and Motley Rice such that the private attorneys were controlling and directing the litigation.\textsuperscript{114} However, McConnell labels this argument as a “smoke and mirrors” game, as the attorney general has controlled the litigation throughout, leading the development of legal strategies, directing discovery, and requiring ongoing contact multiple times per day.\textsuperscript{115} After the lead paint defendants first leveled this accusation early in the litigation, the attorney general revised its contract with the private attorneys to make clear that the attorney general controlled all litigation.\textsuperscript{116} At this point, the Rhode Supreme Court has not issued its ruling on this issue, and it remains in question to what


\textsuperscript{110} Creswell, \textit{supra} note 73. DuPont entered into a settlement with the state prior to the verdict.

\textsuperscript{111} Peter B. Lord, \textit{State’s Deal with Law Firm in Paint Case Challenged}, Providence Journal, Apr. 4, 2006. The issue at stake is whether “the State’s law enforcement power [may] be exercised by lawyers who have a personal financial interest in using the State’s police power to seize a defendant’s money, because they will personally receive a share of the amount seized.” See \textit{State of Rhode Island v. Lead Industries Ass’n., Inc.}, Case No. 2004-63-M.P. Amici Curiae Brief of the Chamber of Commerce of the U.S. and the Am. Tort Reform Ass’n., May 13, 2006, at 2.

\textsuperscript{112} \textit{Id.} at 2-3.

\textsuperscript{113} McConnell Interview, \textit{supra} note 7.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}
extent this ruling will serve as a bellwether for future state attorney general-private counsel contractual collaborations across the country.

What is clear, however, is the responsibility an attorney general must take on if she chooses to retain outside counsel in an effort to utilize the resources, expertise, and leverage such a partnership can contribute in complex litigation on behalf of the public interest. The attorney general must be careful to draft an arrangement that avoids both actual and perceived impropriety such that the public interest is unmistakably represented and advanced. In complex and presumably prolonged litigation, as in the lead paint lawsuit that is now into its seventh year, hourly and set fees simply are not practical. Instead, contingent fee percentages and other fee agreements should be considered carefully and with the public in mind.

In the class action context, there has been considerable criticism of the contingent fee model, as critics condemn the system as one in which lawyers’ financial self-interest drives the litigation. With the tobacco and lead paint lawsuits, among others, this argument has now been expanded to the attorney general-private attorney context. Some argue that a state’s contingency fee structure “permits the power of the state to be exercised by attorneys with a direct financial stake in the exercise of that power.” This attack, however, seems to be a kind of tilting at windmills. That is, the attorney general is retaining the private counsel, and the exercise of state power is framed and directed by the attorney general alone. One can either conceive of the two entities’ relationship as employer-employee, such that the state-employer is in charge of all efforts, or as a partnership in which one party simply acts as indisputable leader. With either conception, critics’ concerns become the “smoke and mirrors” that can mislead the public to mistrust an attorney general’s efforts.

Nevertheless, this issue of control cannot be ignored. In cases in which an attorney general retains private counsel in its large-scale litigation efforts, she must remain in control of the litigation from beginning to end, setting the scope of the litigation and directing the process.

---

117 See, e.g., Sarah Northway, Non-traditional Class Action Financing and Traditional Roles of Ethics: Time for a Compromise, 14 Geo. J. Legal Ethics 241(Fall 2000) (attacking the contingency fee framework as ethically incompatible with class action litigation).

towards an optimal settlement or judgment in relation to the public interest. It is the attorney
genral who is publicly accountable as well as democratically entrusted with using the state’s
power fairly and prudently. In the same vein, in multi-state efforts, attorneys general will be
more likely to trust retained private counsel when other attorneys general support the process
and, even more significantly, when a particular and well respected state attorney general
spearheads the effort and asserts himself as the principal leader. Mississippi Attorney General
Mike Moore, for example, assumed this essential role during the tobacco litigation of the 1990’s,
ensuring maximum buy-in from other attorneys general, the courts, and the general public.119
Ultimately, with the right leadership and a deliberate strategy, an attorney general’s retention of
private outside counsel can be effective both in achieving a strong outcome for the public interest
and in promoting a stronger public image of both state lawyers and private plaintiffs’ attorneys.

IV. Conclusion

The harms inflicted on the public by powerful wrongdoer defendants are increasingly on
the radars of state government and of the general public. These harms reach to the deepest
aspects of our individual lives and social welfare, from public health to the environment to
market fairness. With greater awareness of these social ills and the commitment to combat them
should come a renewed support for those legal advocates who are well positioned and passionate
to stand up for the public good.

The state attorney general should be a leader in ensuring that these advocates’ efforts
amount to legal and social outcomes that best promote and protect the public. This responsibility
means engaging fully with private plaintiffs’ attorneys – framing and impacting private litigation
efforts that precede, parallel, and follow the state’s legal efforts as well as collaborating directly
in order to maximize efficacy. Robust communication between state attorneys general and
experienced private lawyers is unquestionably an essential step towards this end. Most
importantly, there must be a willingness to engage in questions about how the public can benefit
from a united front of public and private lawyers to fight the illegality and wrongdoing of some
at the expense of all.

119 McConnell Interview, supra note 7.