



Litigation Versus Legislation: *The Emerging Role of State Attorneys General as National Policymakers*

By Andrew Ketterer

As the twentieth century drew to a close, the role of state attorneys general began to undergo a quantum shift. The traditional role of a state attorney general was to serve as that state's chief legal officer. The attorney general properly dispensed advice to the governor and members of the state legislature, prosecuted certain criminal cases, represented the state's boards and commissions, and generally served as the state's legal counsel.

As such, some of the duties, while essential, were relatively mundane. For example, the attorney general has responsibility for defending state employees who are sued. Another example lies in the attorney general's traditional relationship with the legislature. Although work with the legislature involved giving legal advice and drafting legislation, it usually was on behalf of a member of the House or Senate. In other words, the attorney general was not making public policy; instead, he or she was simply drafting documents on which decisions would ultimately be made by others.

Historically, public policy was created by members of Congress or state legislatures debating and enacting laws on any number of public policy matters. The legislative body was viewed as the branch of government closest to the people. If, for any reason, the majority of House or

Senate members could not agree, or if the governor or president refused to sign a bill, the cause was defeated. Many times when this happened, corporate America could breathe a sigh of relief. They had survived another two-year legislative cycle without any changes to existing laws; hence, the corporate business practices remained the same.

However, that all began to change in the last decade of the last century. In 1994 state attorneys general, frustrated with the lack of congressional response to the perils of tobacco use and abuse, began to talk of joining forces to form a multi-state attack on the marketing of a dangerous product—tobacco. As 1995 turned into 1996, momentum grew as attorneys general filed suit against an industry that, up to that time, had seemed immune from legislative action at the federal and state level. Initially, the attorneys general of four states took the lead in suing the tobacco companies. They demonstrated in a dramatic way that the Office of the Attorney General could be used to bring about major changes in public policy.

Ultimately, the remaining forty-six states filed suit and then settled their individual cases for a whopping \$206 billion. As Maine's attorney general, I oversaw the entry of the largest civil judgment in the history of the state. Maine was awarded

\$1.4 billion. All of this from an industry that said, “We have never lost a case, and we will never settle or pay the states any money.” It’s important to note that much of what the tobacco industry agreed to in the settlement had nothing to do with money. They agreed not to market their products to children. They agreed not to use cartoon characters or advertise at certain sporting events. In other words, they agreed to major changes in the way a major, international industry conducted business. Clearly, something historic was happening.

What was happening was the realization on the part of attorneys general that their role could be proactive, rather than simply reactive. The combined strength of forty-six attorneys general and the weight of public opinion brought the tobacco industry to the settlement table. Suddenly there emerged throughout this country the understanding that public policy could not only be enforced by attorneys general, it could be formulated and developed by them as well. Since the inception of the tobacco lawsuits in 1994, the attorneys general have formed task forces and working groups to review actions taken by many groups such as the film industry, manufacturers of firearms, pharmaceuticals, automobiles, and even the high technology industry. Clearly, the nineteen attorneys general who brought an antitrust action against Microsoft have gotten the nation’s attention as well as the attention of corporate America.

In order to avoid costly and uncertain litigation, major national and multinational corporations are listening and reacting to state attorneys general. In order to settle their differences, corporate America has

agreed to refrain from marketing practices and advertising that they have historically claimed to be constitutionally protected free speech. In short, state attorneys general, when acting together in a multi-state investigation or complaint in court, have been able to achieve results not obtainable through more traditional policymaking methods. Indeed, negotiations led to practices that would, in all likelihood, have been challenged by the industry if mandated by a legislative body whether state or federal. It is of considerable importance to constitutional scholars that the Congress or state legislatures would not be able to enact legislation regarding marketing of services or products that infringed on the constitutional right of free speech, while attorneys general are able to obtain voluntary concessions from an industry that does just that.

As we turn to the future, of what significance is there that attorneys general are becoming national policymakers? The legislative process is slow and deliberative. Committees of jurisdiction hold public hearings where testimony is taken and report to the full legislature with a recommendation. If, after debate, the bill is passed, it must go to the governor or president for a signature or veto. This is a time-consuming and cumbersome process. Unless a majority in both houses agree and the blessing of the governor or president is obtained, nothing happens.

In comparison, the state attorney general does not need to take testimony, obtain a majority or seek the approval of the governor. Without much delay an attorney general can file a civil enforcement action or suit for money damages and injunctive relief. However, the real

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key to success is not in the speed of the process, but rather in the power packed by multi-state actions. It is, in essence, the combined strength and weight of a group of attorneys general acting in concert with each other in targeting the same defendant corporations in each state that make the difference. No industry welcomes the prospect of fighting numerous state actions at the same time.

Another factor in multi-state attorney general court action has been the role of the local and national media. When a critical number of attorneys general file suit against large corporate defendants, they have the power to create not only legal problems, but public relations problems as well. The new power of the state attorney general includes the power to effectively utilize the media to influence public opinion and galvanize support for the state's position. While corporate America may feel that lawsuits are part of the "cost of doing business," the negative public relations generated by the image of an attorney general astride a white horse riding to the rescue of his or her constituent's interests is an image not many industries want to combat.

The lessons to be learned from this new stance of attorneys general are many, and are important to both attorneys general and corporate America. While attorneys general must be careful to not alienate their state legislatures by appearing to preempt their authority, corporate America must recognize that attorneys general have tremendous power to influence not only legal policy, but legislative policy as well. It is critical that multi-state actions be pursued in a manner that allows the targeted industry to make

concessions without looking weak to their stockholders and nonsettling competition. Both sides must seek the proverbial "win-win" solution, rather than going for the knockout punch. 🐉



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