



The Potential for State Attorneys General to Promote the Public's Health: Theory, Evidence, and Practice

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Abstract: The Attorneys General of the 50 states have considerable legal authority to protect the public's health, yet their role in the development of health policy is often under-appreciated or misunderstood. This article analyses state Attorneys' General current powers and provides a logic model that illustrates how the use of these powers can lead to the protection and promotion of the public's health. The article then provides four brief case studies, to demonstrate how state Attorneys General have used their varied powers to influence policy-making and benefit the public's health. In addition, this article offers a roadmap for research that could be conducted to better understand the association between state Attorneys' General actions and the protection of the public's health. The article concludes with a series of recommendations intended to enhance state Attorneys' General ability to protect the public's health, along with suggestions for future research in this area.

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I. Introduction^{1,2}

In the United States, the chief legal officer of each state is known as the Attorney General.³ State attorneys general (SAGs) can take a wide range of actions on behalf of their state and the public interest, through litigation and law enforcement, investigatory activities, and law and policy reform work.

Forty-three states elect their SAG by popular vote.⁴ In five states, the SAG is appointed by the governor.⁵ Maine's SAG is elected by a vote among the state's legislature,⁶ and Tennessee's SAG is appointed by the state's Supreme Court.⁷ Requirements for SAGs' age, in-state residency, bar licensure, and term lengths vary among the states.⁸ All SAGs belong to the

¹ The research associated with this article was funded by Public Health Law Research, a national program of the Robert Wood Johnson Foundation.

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³ In addition, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands each have their own Attorney General. Nat'l Ass'n of Attorneys Gen., The Attorneys General, <http://www.naag.org/current-attorneys-general.php> (last visited Mar. 16, 2010).

⁴ Nat'l Ass'n of Attorneys Gen., About NAAG: The Attorneys General, http://www.naag.org/about_naag.php (last visited Mar. 16, 2010).

⁵ The five states in which the governor appoints the SAG are: Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming. Nat'l Ass'n of Attorneys Gen., *supra* note 4.

⁶ Office of the Maine Attorney Gen., Biography of Attorney General Janet T. Mills, <http://www.maine.gov/ag/about/message.shtml> (last visited Mar. 16, 2010).

⁷ Office of the Tennessee Attorney Gen. & Reporter, Attorney General Robert E. Cooper, Jr., <http://www.tennessee.gov/attorneygeneral/agcooperbio.html> (last visited Mar. 16, 2010).

⁸ NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 20–23 (Emily Myers & Lynne Ross eds., 2007).

National Association of Attorneys General (NAAG), which facilitates cooperation among the SAGs through meetings, training opportunities, and projects.⁹

SAGs have broad powers that allow them to protect and promote the public's health. In recent years SAGs have successfully tackled numerous public health issues, including end-of-life care, alcohol policy, tobacco control, prescription drug abuse, Medicaid fraud, and hospital mergers.¹⁰ This list is not exhaustive, and this manuscript will not attempt to cover all of the ways in which SAGs can promote the public's health; rather, we will provide selected examples of the exercise of different powers by which SAGs have addressed public health issues both within their own states and, through collaboration, across jurisdictions.

While SAGs have considerable legal authority to protect the public's health, this important subject has not been fully explored. This manuscript begins with a discussion of SAGs' powers, and an explanation of how these powers can be used to protect the public's health. It then offers four examples, from tobacco control, firearms regulation, food labeling practices, and pharmaceutical marketing, to demonstrate how SAGs have used their powers to benefit the public's health. The manuscript then summarizes the limited, empirical work examining SAGs and their ability to promote the public's health. In light of these findings, the manuscript offers an analysis of future actions SAGs can take to promote the public's health. It concludes with a set of recommendations intended to enhance SAGs' abilities in this area, along with suggestions for future research.

II. Logic Model of the Ability of State Attorneys General to Protect and Promote the Public's Health

⁹ Nat'l Ass'n of Attorneys Gen., About NAAG: About the Association, http://www.naag.org/about_naag.php (last visited Mar. 16, 2010).

¹⁰ Nat'l Ass'n of Attorneys Gen., NAAG Projects, <http://www.naag.org/projects.php> (Mar. 16, 2010).

State Attorneys General can draw upon diverse powers to protect and promote the health of their state’s population. Even without identifying every aspect of public health that SAGs can protect, one can classify the broad powers granted to SAGs and explore what mediating factors might enhance or detract from the use of these powers to benefit the public’s health. This overview can then contribute to a more nuanced understanding of how SAGs can use their powers to impact particular areas of public health.

The relationship between SAGs’ powers and their ability to protect the public’s health is depicted in Figure 1. As this logic model demonstrates, the path from an SAG’s initial grant of authority by law to the demonstrable protection of the public’s health involves important decision points, such as which power an SAG will use, and significant mediators, such as the tenor of the legal environment in which the SAG operates. By exploring each path within Figure 1, a comprehensive description of SAGs’ ability to protect the public’s health can be achieved.

A. Grants of Authority

The law grants SAGs the authority to use certain powers to carry out the requirements of their positions. This initial grant of legal authority can be traced to three different sources: common law, state constitutions, and state statutes. SAGs’ powers are grounded in the common law, also known as judge-made or case law. NAAG has identified many SAG powers that are derived from the common law, including “the duty to appear for and defend the state and its agencies . . . , the right to intervene in legal proceedings on behalf of the public interest . . . , [and] the authority to prosecute criminal activity, in the absence of express legislative restriction.”¹¹

¹¹ NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 8, at 44–47.

Many scholars recognize *State of Florida ex rel. Shevin v. Exxon Corporation* as the case that best articulates the development of these common law powers.¹² The case originated in 1973, when Robert Shevin, Florida’s Attorney General, brought an antitrust suit against several large oil companies in federal court. The oil companies challenged the SAG’s authority to bring the suit, since he had not explicitly received authorization from the state of Florida to do so. In its analysis of the Florida Attorney General’s powers, the 5th Circuit Court of Appeals provided a detailed account of the origin of SAGs’ common law powers. As the court explained,

[SAGs’] duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.¹³

In light of this analysis, the 5th Circuit concluded that, as Florida’s SAG, Shevin had the power to bring the lawsuit in federal court on behalf of Florida without receiving prior authorization from the state. *Shevin* has been repeatedly cited to clarify SAGs’ powers, with particular emphasis on SAGs’ “wide discretion” to bring lawsuits to protect the public interest.¹⁴

Some states have codified their SAG’s authority by explicitly mentioning the SAG’s common law powers in a statute or the state’s constitution.¹⁵ For example, according to Alabama’s state code, “[t]he attorney general shall have and retain all of the powers, duties, and

¹² Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 375–76 (2005); Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 508–09 (2006).

¹³ *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268–69 (5th Cir. 1976).

¹⁴ *Com. of Pa. v. Mid-Atlantic Toyota Distributors, Inc.*, 704 F.2d 125 (4th Cir. 1983); *State of Ohio v. United Transp., Inc.*, 506 F.Supp. 1278 (D.C. Ohio 1981).

¹⁵ Amy Dieterich, *The Role of the State Attorney General in Preventing and Punishing Hate Crimes Through Civil Prosecution: Positive Experiences and Possible First Amendment Potholes*, 61 ME. L. REV. 522, 524 (2009).

authority heretofore granted or authorized by the constitution, statutory law, or the common law.”¹⁶ Most state constitutions contain similar language regarding the SAG’s grant of authority.¹⁷ A few states require the SAG to rely upon authority granted only by a state statute rather than the common law.¹⁸ For instance, in *In re Sharp’s Estate*, a case which challenged the Wisconsin SAG’s authority to intervene in a lawsuit, the Supreme Court of Wisconsin explained that “Wisconsin, unlike numerous states, has specifically circumscribed the powers and duties of the office of the Attorney General . . . to those ‘prescribed by law.’”¹⁹

B. Litigation and Law Enforcement

As the paths designated by the number 1 in Figure 1 demonstrate, an initial grant of authority, under the common law, state statutes, or a state’s constitution, allows an SAG to take certain well-established actions. These actions fall within three general categories: 1) litigation and law enforcement; 2) investigative activities; and 3) law and policy reform. Within each of these categories, SAGs can draw on a variety of powers to accomplish their aims.

All states grant their SAG the power to participate in litigation on behalf of the state. New Jersey offers a typical codification of this power: “[The Attorney General] shall exclusively attend to and control all litigation and controversies to which the State is a party or in which its rights and interests are involved.”²⁰ Due to the broad nature of SAGs’ litigation responsibilities, many SAGs create specialized groups within their offices to handle certain types of recurring

¹⁶ ALA. CODE § 36-15-1.1 (2009).

¹⁷ NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 8, at 38.

¹⁸ *In re Sharp’s Estate*, 217 N.W.2d 258 (Wis. 1974); 7 AM. JUR. 2D *Attorney General* § 7 (2009).

¹⁹ *In re Sharp’s Estate*, 217 N.W.2d at 262.

²⁰ N.J. STAT. ANN. § 52:17A-4 (2009).

litigation, such as consumer protection or environmental lawsuits.²¹ Because they control all litigation that involves the State, SAGs are responsible for representing their state's agencies when legal challenges arise. Here, again, New Jersey provides a representative example; it has codified the SAG's responsibility to represent state agencies both when they are sued and when an agency initiates a lawsuit to enforce the laws for which it is responsible.²²

Under their common law authority, SAGs have the power to use litigation as a tool to protect "the public interest."²³ In recent years, SAGs have increasingly drawn on a subset of their common law authority, known as the doctrine of *parens patriae*, to bring lawsuits designed to protect the public. *Parens patriae* authority, which means "parent of the country," allows an SAG to bring litigation to "recover costs or damages incurred because of behavior that threatens the health, safety, and welfare of the state's citizenry."²⁴ SAGs have used their *parens patriae* power to bring lawsuits in diverse areas, such as securities and commodities and environmental law.²⁵

In addition to initiating and participating in civil litigation, SAGs play an important role in the enforcement of their state's criminal law. The scope of an SAG's authority in this area varies significantly among the states. In Rhode Island, the SAG has broad authority to prosecute criminal offenses, and is required to submit an annual report to the state's governor detailing

²¹ NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 8, at 83; Consumer Prot. Div., Office of the Maryland Attorney General, <http://www.oag.state.md.us/consumer/> (last visited Mar. 7, 2010); Env'tl. Prot. Div., Office of the Vermont Attorney General, <http://www.atg.state.vt.us/issues/environmental-protection.php> (last visited Mar. 7, 2010).

²² N.J. STAT. ANN. § 52:17A-4 (2009).

²³ NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 8, at 83; Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks?*, 44 WAKE FOREST L. REV. 923, 928 (2009).

²⁴ Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TULANE L. REV. 1859, 1863 (2000).

²⁵ NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 8, at 103.

these activities.²⁶ On the other hand, Connecticut’s Attorney General does not have the authority to supervise legal matters concerning criminal prosecutions²⁷; he is the chief legal officer of the state for civil matters. In most states, the SAG’s criminal law enforcement authority falls between these two extremes. Within this continuum, some states, like Michigan, grant the SAG statutory authority to use the state police to assist “in any investigation or matter under the jurisdiction of his or her department.”²⁸ Many SAGs with significant criminal law enforcement authority have established criminal justice divisions within their offices. For example, the Texas Attorney General’s Office contains five criminal law sections, including a criminal prosecutions division and a Medicaid fraud control unit.²⁹

C. Investigative Activities

In Figure 1, the paths designated by the number 2 indicate that SAGs’ investigative activities can contribute both to their litigation and law enforcement efforts as well as to their law and policy reform work. This is because, in civil and criminal contexts, SAGs can conduct investigations into issues such as “government misconduct . . . , criminal activity . . . , [and] issues of substantial public interest.”³⁰ For criminal investigations, most states grant their Attorney General the ability to issue subpoenas to obtain testimony or evidence.³¹ In some instances, an SAG will launch an investigation based on concerns raised by the citizens of his or

²⁶ R.I. GEN. LAWS §§ 42-9-2, -4, -12 (2009).

²⁷ CONN. GEN. STAT. § 3-125 (2009).

²⁸ MICH. COMP. LAWS § 28.6 (2009).

²⁹ Criminal Justice Divs., Office of the Texas Attorney General, <http://www.oag.state.tx.us/criminal/criminal.shtml> (last visited Mar. 7, 2010).

³⁰ NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 8, at 14.

³¹ *Id.* at 308.

her state. The results of these investigations, which are sometimes shared publicly through the issuance of reports, can provoke litigation or other advocacy efforts to address the perceived wrong. However, the investigation's findings may, on their own, lead to change based on recommendations contained within the SAG's report. For example, in 2007, after Lyme disease advocacy groups approached Connecticut's Attorney General to contest two medical associations' guidelines recommending against long-term antibiotic treatment for Lyme disease, the SAG launched an investigation to learn more about how these guidelines were developed.³² The investigation uncovered multiple conflicts of interest that may have prevented objectivity among those who drafted the guidelines. As a result of the investigation's findings, the medical societies agreed to have their 2006 Lyme disease recommendations reviewed by a panel of independent experts.³³

D. Law and Policy Reform

Several of the most frequently used powers among SAGs fall within the category of law and policy reform. As a state's chief legal officer, an SAG is frequently called upon to provide advice to the governor and administrative agencies.³⁴ This advice can pertain to any legal or policy issue. A related, but separate power, involves an SAG's issuance of opinions. Opinions are solicited from an SAG by the governor or a state agency, with the expectation that the SAG will provide a written response. For example, in 2008, Maryland's Attorney General issued an opinion, in response to a request by the Comptroller of Maryland, to clarify whether Baltimore

³² Brenda Patoine, *Guideline-Making Gets Tougher: Action by State Attorney General Over Lyme Disease Guidelines Stirs Debate*, 65 ANNALS NEUROLOGY A10 (2009).

³³ Press Release, Office of the Connecticut Attorney General, Attorney General's Investigation Reveals Flawed Lyme Disease Guideline Process, IDSA Agrees to Reassess Guidelines, Install Independent Arbitrator (May 1, 2008), <http://www.ct.gov/AG/cwp/view.asp?a=2795&q=414284>.

³⁴ 7 AM. JUR. 2D *Attorney General* § 9 (2009).

City could legally implement a proposed regulation to restrict the sale of cheap cigars.³⁵ While opinions can be written in response to a broad range of inquiries, in general SAGs' opinions should not address issues that are currently being litigated, hypothetical questions, and "issues unrelated to the requester's duties"³⁶ An SAG's opinion is not legally binding, but should be "entitled to great weight"³⁷ both by officers of the state and by the courts. SAGs can, however, promulgate legally binding regulations or rules, using authority granted to them by the state. For example, in Ohio, the Attorney General has been granted rule-making authority for "charitable law, consumer protection, crime victims services, criminal record checks, environmental background investigation, and peace officer training."³⁸

In addition to utilizing their formal powers, SAGs can engage in advocacy to promote change. Some SAGs do this by using the "bully pulpit" of their office to make their views known or to bring attention to a particular issue.³⁹ This can be accomplished by issuing press releases, granting interviews, or holding press conferences. An SAG can also raise awareness about a certain topic by using his or her ability to convene individuals. For example, some SAGs host summits to bring together experts in consumer protection, with the goal of identifying and

³⁵ 93 Op. Att'y Gen 149 (Md. 2008), <http://www.oag.state.md.us/Opinions/2008/93oag149.pdf>.

³⁶ NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 8, at 76.

³⁷ *Napa Valley Educators' Ass'n v. Napa Valley Unified Sch. Dist.*, 194 Cal.App.3d 243, 251 (Cal.App. 1987). *Cf. In re Proposal C. v. Kelley*, 185 N.W.2d 9, 15 n.2 (Mich. 1971) ("Although an opinion of the Attorney General is not a binding interpretation of law which courts must follow, it does command the allegiance of state agencies.").

³⁸ OFFICE OF THE OHIO ATTORNEY GEN., RULE-MAKING PROCESS, http://www.registerofohio.state.oh.us/pdfs/rmg/RMG_109_20031117.pdf (last visited Mar. 7, 2010).

³⁹ Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 641–42 (2006); JIM TIERNEY, STATE ATTORNEYS GENERAL, NUTRITION, AND OBESITY (Podcast, Rudd Center for Food Policy and Obesity, Yale University, 2010), <http://www.yaleruddcenter.org/podcasts.aspx>.

exploring areas in which SAGs could do a better job of protecting the public.⁴⁰ Finally, SAGs can use their collective force to engage in advocacy that targets an industry or company. In 2007, 29 SAGs sent a letter to the Chief Executive Officer of Anheuser-Busch, “to express [their] serious concern about [the] company’s promotion and sale of alcoholic energy drinks . . . [which] are highly attractive to underage youth.”⁴¹ Several weeks later, Anheuser-Busch announced that it would stop making Spykes™, the alcoholic energy drink that the SAGs had targeted in their letter.⁴²

For SAGs to ensure that the public benefits from their work, they must take steps to share information about their offices’ efforts.⁴³ To accomplish this, every SAG works with a public information officer.⁴⁴ These individuals liaise with the media and share information, promoting the SAG’s advocacy efforts and providing brief summaries of the SAG’s accomplishments and how they have benefited the state’s citizens. Additionally, public information officers disseminate pamphlets, reports, or other materials that an SAG creates for the public. In doing so, they promote a dynamic relationship between the SAG’s office and the individuals the SAG serves.

E. Mediating Factors

⁴⁰ Office of the Ohio Attorney Gen., Ohio Consumer Protection Summit, <http://www.ohioattorneygeneral.gov/ConsumerSummit> (last visited Mar. 7, 2010).

⁴¹ Letter from G. Steven Rowe, Attorney General of Maine, et al., to August A. Busch, President and CEO, Anheuser-Busch Companies, Inc. (May 10, 2007), available at <http://www.oag.state.md.us/Press/Spykes.pdf>.

⁴² David Kesmodel, *Anheuser Abandons Spykes Drink, Citing Sales and Rejecting Critics*, WALL ST. J., May 18, 2007.

⁴³ 7 AM. JUR. 2D *Attorney General* § 11 (2009).

⁴⁴ NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 8, at 108.

In Figure 1, the path designated by the number 3 highlights the mediating factors that can affect how the execution of an SAG's powers will protect the public's health. The overall legal environment in which the SAG operates can greatly influence his or her ability to bring about meaningful change. For example, researchers have consistently found that effective implementation, "the process of translating a law into action,"⁴⁵ is critical to the success of a legal initiative. If an SAG's efforts to protect the public's health are not implemented, then the intended public health measures will likely not be enforced. Because most SAGs are elected, their actions may be swayed by the political will of the voters. This may make an SAG more or less likely to vigorously pursue a particular public health issue, depending on its expected popularity with the electorate. Similarly, if an SAG is working with an unpopular governor, he or she may take actions to create perceived distance from the governor. Here, again, the SAG may choose to ignore or champion a particular public health issue to curry favor with voters. Furthermore, regardless of political motivation, an SAG may, for personal reasons, be motivated to address a certain public health issue within his or her state. Finally, SAGs may decide to tackle a particular public health issue because other SAGs around the country are focusing on a similar issue. SAGs can both learn from each other to bring about change in their own states and use their collective presence to stimulate change at the federal level.⁴⁶ The most visible example of this occurred in the 1990s, when SAGs across the United States brought lawsuits against the tobacco industry to recoup Medicaid costs associated with the treatment of individuals' smoking-

⁴⁵ Shannon Frattaroli & Stephen P. Teret, *Understanding and Informing Policy Implementation: A Case Study of the Domestic Violence Provisions of the Maryland Gun Violence Act*, 30 EVALUATION REV. 347, 348 (2006).

⁴⁶ Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998 (2001).

related diseases. These mediating factors are primarily understood through an evidence base consisting of legal or political science research and anecdotal reports about an SAG's actions.

F. Outputs: Improved Public Health

As path 4 indicates, the mediating factors discussed in the previous section determine the extent to which an SAG's use of his or her powers brings about change that will ultimately improve the public's health. The mediating factors along the path designated by the number 3 can both augment and hamper changes to the physical environment, the social environment, and individuals' behaviors. The results of these changes lead to path 5, improved public health.

While the outputs section of the logic model holds the greatest promise for understanding the specific ways in which SAGs may improve the public's health, it, unfortunately, lacks a strong evidence base. As this manuscript will explain, there is currently a dearth of empirical evidence that demonstrates the association between an SAG's actions and improved public health. This scarcity of evidence can, in many instances, be attributed to the fact that the causal chain connecting an SAG's actions to improved public health is often an indirect one. For example, if an SAG brings a lawsuit that leads to restrictions on the marketing of cigarettes to young people, it might be extremely difficult to construct an evaluation plan that could conclusively demonstrate that the lawsuit itself was associated with reduced youth smoking rates. Several intermediate steps (*e.g.*, decreases in youth-oriented cigarette advertising; greater enforcement of minimum age laws to purchase cigarettes; concurrent but unrelated campaigns designed to lower youth smoking rates) may comprise the causal chain that leads from an SAG's action to improved public health. This highlights the need for methodologically rigorous studies that can empirically evaluate the connections between SAGs' activities and improved public health.

III. Public Health Benefits Achieved by SAGs

Because SAGs have diverse powers and tools at their disposal, they can take a variety of actions intended to protect and promote the public's health. As path 3 in Figure 1 demonstrates, an SAG's approach to a public health issue is influenced by many factors, including the local legal environment, advocates' activities, the SAG's own priorities, and the actions of other SAGs. The following four cases offer a sample of both the types of public health issues that SAGs have successfully addressed in recent years and, drawing upon paths 1 and 2 from the logic model, the different powers they have employed.

A. Tobacco Control Litigation and the Master Settlement Agreement

Before the mid-1990s, hundreds of people in the United States had sued the major tobacco manufacturers for damages stemming from their addiction to cigarettes and resulting health problems, with little success. During this period, the tobacco manufacturers mounted well-financed defense efforts, disputing the scientific findings that associated smoking with cancer and other diseases and blaming individuals' lifestyle choices for their illnesses.⁴⁷ Because they had extensive financial resources, the tobacco manufacturers "filed every conceivable motion, contested every conceivable issue, took every imaginable deposition, and demanded every arguably relevant document."⁴⁸ This strategy allowed the tobacco companies to drain their opponents' emotional and financial reserves.

⁴⁷ Jon S. Vernick, Lainie Rutkow, Stephen P. Teret, *Public Health Benefits of Recent Litigation Against the Tobacco Industry*, 298 JAMA 86 (2007).

⁴⁸ Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DENV. U. L. REV. 457, 463 (2009).

On May 23, 1994, Michael Moore, Mississippi's Attorney General, took the first step toward changing the nation's approach to litigation against the tobacco companies. Moore filed a lawsuit against the tobacco industry to recoup the costs incurred by Mississippi's Medicaid program for treating persons with diseases and conditions related to smoking.⁴⁹ Unlike previous cases, Moore's lawsuit focused on harms to the state (*i.e.*, Medicaid costs) rather than harms to individuals. He drew on the financial and personnel resources of the Mississippi Attorney General's office, and established contingency fee agreements with attorneys outside the SAG's office who had extensive experience with personal injury law. These additional attorneys brought their own financial resources and familiarity with lawsuits against industries engaging in harmful practices.⁵⁰

For Moore, the lawsuit involved political risk, because he was a Democrat in a strongly Republican state. Kirk Fordice, Mississippi's Governor, who had received re-election support from the tobacco industry,⁵¹ attempted to extinguish Moore's lawsuit.⁵² Fordice's efforts were unsuccessful, and the case was allowed to proceed. Although the political climates of the other forty-nine states did not uniformly favor litigation against the tobacco industry, Moore and his colleagues knew that their chance of success would be "radical[ly] augmented" if other SAGs filed similar lawsuits.⁵³ Therefore, Moore and others "lobbied their colleagues from the state attorneys general's offices to file suits as well, in an effort to turn their suit into a nationwide

⁴⁹ Laurie Fisher, *Mississippi: The Unsung Hero of Tobacco Control, USA*, 12 CANCER CAUSES & CONTROL 965 (2001).

⁵⁰ Berenson, *supra* note 48, at 464; ALLAN M. BRANDT, THE CIGARETTE CENTURY 413 (2007).

⁵¹ *Id.* at 414.

⁵² *In re Fordice*, 691 So.2d 429 (Miss. 1997).

⁵³ BRANDT, *supra* note 50, at 415.

legal onslaught on the industry.”⁵⁴ Within a year, Minnesota, Florida, and West Virginia had filed similar lawsuits.⁵⁵ Other states increasingly recognized that this growing collection of lawsuits was sending a strong message to the tobacco industry, and by 1997, over forty SAGs had brought related lawsuits.⁵⁶

In light of this wave of litigation, the tobacco industry participated in a series of secret meetings with tobacco control advocates and several SAGs, including Moore, to develop a so-called global settlement.⁵⁷ During this time, the SAGs of four states—Florida, Minnesota, Mississippi, and Texas—settled their lawsuits against the tobacco industry.⁵⁸ The SAGs of the remaining forty-six states waited to learn about the details of the global settlement. In mid-1997, the terms of the agreement were announced. In essence, the global settlement “required Congress to grant the tobacco industry limited immunity from new lawsuits for past actions and to enact certain public health provisions.”⁵⁹ John McCain then introduced federal legislation to implement the settlement. Due to a variety of factors, including “lukewarm support from the Clinton administration, ambivalence on the part of the public health community, and vigorous opposition from the tobacco industry,”⁶⁰ the McCain bill failed.

⁵⁴ *Id.*

⁵⁵ State Lawsuits, Tobacco Control Archives at UCSF, <http://www.library.ucsf.edu/tobacco/litigation/states> (last visited Mar. 1, 2010).

⁵⁶ *Id.*

⁵⁷ MICHAEL PERTSCHUK, *SMOKE IN THEIR EYES* 70–77 (2001).

⁵⁸ Steven A. Schroeder, *Tobacco Control in the Wake of the 1998 Master Settlement Agreement*, 350 *NEW ENG. J. MED.* 293, 294 (2004).

⁵⁹ *Id.*

⁶⁰ *Id.*

Several months later, after returning to settlement negotiations with the tobacco industry, the SAGs announced that a new agreement, known as the Master Settlement Agreement (MSA), had been reached. The MSA required the four major tobacco companies to pay \$206 billion to the states over the course of twenty-five years.⁶¹ The states could use this money in any way they chose, and, in exchange, they would drop their pending lawsuits against the tobacco industry. Among its many provisions, the MSA dissolved the industry-supported Tobacco Institute and established the American Legacy Foundation, to promote tobacco control activities. In addition, the MSA restricted “the advertising, marketing and promotion of cigarettes,”⁶² which included prohibitions against targeting young people and bans on outdoor cigarette advertising. The MSA did not need federal implementing legislation, because, unlike the proposed global settlement, it did not involve subjects that required Congressional approval.⁶³

Once the MSA was officially announced, in November 1998, the SAGs of the forty-six states that had not previously settled were given seven days to decide whether or not to participate. On November 20, 1998, Thurbert E. Baker, Georgia’s Attorney General, issued a press release about his decision to participate in the MSA that reflected the responses of many SAGs:

Our analysis of [the MSA] was based in large part on what we could realistically hope to achieve under Georgia law through our pending lawsuit, and what is being offered in the proposed settlement. Quite frankly, there are many things that this agreement accomplishes, particularly in the public health arena, that we could not achieve through our lawsuit in Georgia.⁶⁴

⁶¹ Master Settlement Agreement (1998), *available at* http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf/file_view.

⁶² Nat’l Ass’n of Attorneys Gen., MSA Background, <http://www.naag.org/tobacco.php> (last visited Mar. 1, 2010).

⁶³ Berenson, *supra* note 48, at 468.

⁶⁴ Press Release, Dep’t of Law, State of Georgia, Statement of Attorney General Thurbert Baker Regarding Georgia’s Tobacco Litigation (Nov. 20, 1998), http://www.georgia.gov/00/press/detail/0,2668,87670814_89151348_89525625,00.htm.

Ultimately, all forty-six SAGs decided to participate in the MSA. The drafting and acceptance of the MSA demonstrate how multiple SAGs, acting in concert to take on a particular public health issue or challenge a given industry, can use litigation as a catalyst to provoke changes that will protect the public's health.

B. Rulemaking to Prevent Firearm-Related Injuries and Deaths

Researchers have repeatedly demonstrated that handguns can be designed to reduce the likelihood that they will cause injuries or deaths.⁶⁵ For example, loaded chamber indicators are devices that indicate the presence of ammunition in a firearm. They serve an important purpose, because semiautomatic pistols “may retain one ammunition round in the firing chamber after the ammunition magazine has been removed”⁶⁶ By letting individuals know that a round remains in the chamber, loaded chamber indicators can prevent accidental shootings in which someone incorrectly assumes that a firearm contains no ammunition. A related device, known as a magazine safety, can also prevent accidental shootings because it prevents a gun from firing once its ammunition magazine is removed. Magazine safeties prevent a gun from firing even if ammunition remains in the gun's chamber.⁶⁷

In contrast to other consumer products, the design of handguns is not subject to federal regulation.⁶⁸ As a result, the federal government does not require firearms manufacturers to

⁶⁵ Jon S. Vernick et al., *Unintentional and Undetermined Firearm Related Deaths: A Preventable Death Analysis for Three Safety Devices*, 9 INJURY PREVENTION 307 (2003).

⁶⁶ Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PENN. L. REV. 1193, 1199 (2000).

⁶⁷ *Id.*

⁶⁸ Stephen P. Teret & Patti L. Culross, *Product-Oriented Approaches to Reducing Youth Gun Violence*, 12 FUTURE OF CHILDREN 119 (2002).

equip their products with safety features like loaded chamber indicators and magazine safeties. In 1997, Scott Harshbarger, Attorney General of Massachusetts, sought to close this regulatory gap in his state. Massachusetts law allows the Attorney General to develop rules and regulations to address illegal “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”⁶⁹ Relying on this statutory authority,⁷⁰ Harshbarger became the first SAG in the country to promulgate consumer protection regulations requiring firearms to contain certain safety features.⁷¹ Harshbarger explained that these regulations were meant to “stem the tide of handgun violence in the Commonwealth, and help make handguns safer for use by law-abiding citizens who purchase them to protect themselves, their families and their property.”⁷²

The regulations, which apply to handguns sold within Massachusetts, ban certain “unfair or deceptive practice[s]”⁷³ related to the distribution and design of handguns. Harshbarger’s regulations include provisions to prohibit the sale of certain inexpensive, low-quality, compact guns, often referred to as Saturday Night Specials. As the regulations explain, these guns are “prone to repeated firing based on a single pull of the trigger, prone to . . . explosion . . . during firing with standard ammunition, or prone to accidental discharge.”⁷⁴ In addition, the regulations

⁶⁹ MASS. GEN. LAWS ch. 93A, § 2 (2009).

⁷⁰ LEGAL ACTION PROJECT, BRADY CENTER TO PREVENT HANDGUN VIOLENCE, TARGETING SAFETY: HOW STATE ATTORNEYS GENERAL CAN ACT NOW TO SAVE LIVES (2001), *available at* <http://www.bradycenter.org/xshare/pdf/reports/targetingsafety.pdf>.

⁷¹ Benjamin Bejar, *Wielding the Consumer Protection Shield: Sensible Handgun Regulation in Massachusetts a Paradigm for a National Model?* 7 B.U. PUB. INT. L.J. 59, 59–60 (1998).

⁷² *Id.* at 60.

⁷³ MASS. REGS. CODE tit. 940, §§ 16.01–16.09 (1998).

⁷⁴ *Id.* § 16.04.

forbid the sale of handguns without either a loaded chamber indicator or a magazine safety,⁷⁵ and require handguns to be child-proofed in a way that “precludes an average five year old child from operating [them].”⁷⁶

Almost immediately, several firearms manufacturers and a trade association, the American Shooting Sports Council, brought a lawsuit in Massachusetts Superior Court to contest the regulations. Among their allegations, the plaintiffs argued that Harshbarger had “exceeded his authority” when he promulgated the handgun regulations.⁷⁷ The Superior Court Judge agreed with this claim, and she issued a preliminary injunction to prevent many of the new handgun regulations from being enforced.⁷⁸ Harshbarger appealed the case to the Supreme Judicial Court of Massachusetts. During this time, the Massachusetts legislature enacted a law that mirrored much of the language in Harshbarger’s handgun regulations.⁷⁹ Therefore, when Harshbarger’s appeal was decided, in June 1999, the Supreme Judicial Court noted that the Attorney General had the power to regulate in the area of handguns under both Massachusetts’s consumer protection laws and under the state’s newly passed gun control legislation.⁸⁰ As a result, the injunction was vacated, and the regulations were allowed to be enforced.

The actions of the Massachusetts Attorney General paved the way for other states to pass similar legislation. For example, in 1999, California’s legislature passed the Aroner-Scott-

⁷⁵ *Id.* § 16.05.

⁷⁶ *Id.* § 16.05.

⁷⁷ *Am. Shooting Sports Council v. Attorney General*, 711 N.E.2d 899, 901 (Ma. 1999).

⁷⁸ *Id.* at 901–02.

⁷⁹ MASS. GEN. LAWS ch. 140, §§ 121–131 (2009).

⁸⁰ *Am. Shooting Sports Council*, *supra* note 77, at 904–05.

Hayden Firearms Safety Act.⁸¹ Like the Massachusetts regulations and subsequent legislation, the California law requires a safety device, such as a trigger lock, to be included with any handgun sold in the state.⁸²

C. Investigation into Deceptive Food Labeling Practices

In October 2008, a coalition led by food and beverage manufacturers, food retailers, and scientists announced a new program, known as Smart Choices, which offered front-of-package labeling about an item’s nutritional content.⁸³ This voluntary program used a set of nutritional criteria, including information about fat, sugar, and sodium content, to determine whether an item could be deemed a “Smart Choice.”⁸⁴ Qualifying products could display a front-of-package logo indicating the Smart Choices seal of approval along with caloric information and the number of servings in each package. The program’s creators stated that Smart Choices was “intended to help consumers make smarter food and beverage choices based on their overall nutritional profile.”⁸⁵

Shortly after the program was launched, in 2009, the Smart Choices logo began appearing on “sugary processed cereals such as Froot Loops, Cocoa Krispies and Frosted Flakes” as well as ice creams and mayonnaise.⁸⁶ Researchers argued that, in essence, “the food industry

⁸¹ CAL. PENAL CODE §§ 12087–12088.9 (1999); Teret & Culross, *supra* note 68, at 128.

⁸² CAL. PENAL CODE § 12088.1 (1999).

⁸³ Joanne R. Lupton et al., *The Smart Choices Front-of-Package Nutrition Labeling Program: Rationale and Development of the Nutrition Criteria*, AM. J. CLINICAL NUTRITION (epub, Feb. 24, 2010).

⁸⁴ Smart Choices Program, For Health Professionals, <http://www.smartchoicesprogram.com/professionals.html> (Mar. 15, 2010).

⁸⁵ Lupton et al., *supra* note 83.

⁸⁶ Richard Blumenthal, *Food-Makers Promote Bad Eating Habits*, HARTFORD COURANT, Nov. 10, 2009.

[had] set its own nutritional standards and applied a Smart Choices label to products it considered healthy.”⁸⁷ The U.S. Food and Drug Administration (FDA) viewed the Smart Choices program with skepticism, and contacted the program’s general manager in August 2009. In its letter, the FDA explained that it

would be concerned if any [front-of-package] labeling systems used criteria that were not stringent enough to protect consumers against misleading claims . . . or had the effect of encouraging consumers to choose highly processed foods and refined grains instead of fruits, vegetables, and whole grains.⁸⁸

While the FDA took no formal action against Smart Choices, it indicated that it would conduct research to better understand the effectiveness, particularly in terms of public health benefits, of front-of-package labeling.⁸⁹

A few months after this exchange, Richard Blumenthal, Attorney General of Connecticut, became frustrated by the Smart Choices program’s “potentially misleading and deceptive labeling of nutritional value . . .”⁹⁰ Because of this possible deception, Blumenthal initiated an investigation to discern what scientific evidence had contributed to the labeling of certain “nutritionally suspect foods,” including “sugar-laden cereals,” as Smart Choices.⁹¹ Specifically, Blumenthal sought to determine if the Smart Choices program had violated Connecticut’s

⁸⁷ Kelly D. Brownell et al., *Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue*, 29 HEALTH AFFAIRS 378, 384 (2010).

⁸⁸ Letter from Michael R. Taylor, Senior Advisor for Food Safety, U.S. Food and Drug Administration, and Jerold R. Mande, Deputy Undersecretary for Food Safety, U.S. Department of Agriculture, to Sarah Krol, General Manager, Smart Choices Program (Aug. 19, 2009), *available at* <http://www.fda.gov/Food/LabelingNutrition/LabelClaims/ucm180146.htm>.

⁸⁹ *Id.*

⁹⁰ Press Release, Office of the Connecticut Attorney General, Attorney General Investigates “Smart Choices” Food Labels that Endorse Mayonnaise and Sugary Cereals (Oct. 15, 2009), <http://www.ct.gov/ag/cwp/view.asp?A=2341&Q=448880>.

⁹¹ *Id.*

consumer protection laws, which prohibit misleading and deceptive labeling.⁹² As part of his investigation, Blumenthal sent letters to Kellogg’s, General Mills, and PepsiCo, which had voluntarily implemented the Smart Choices labeling system, to express his concerns about their participation in the program.⁹³ He noted that the investigation, which received national media attention, was “ratcheting up pressure for truthful answers”⁹⁴ In a radio interview, Blumenthal explained that, although he hoped the companies would voluntarily cooperate with his investigation, he was willing to use subpoenas, if necessary, to compel production of the information he had requested.⁹⁵

On October 20, 2009, within days of the initiation of Blumenthal’s investigation, Margaret Hamburg, FDA Commissioner, announced that FDA would renew its focus on front-of-package labels and take action against “labels that are false or that mislead consumers.”⁹⁶ She explained that FDA would draft a regulation that would employ “a single set of science and nutrition-based criteria” to govern front-of-package labeling.⁹⁷ When asked what had motivated this decision, Hamburg provided several reasons, including the Smart Choices program. That

⁹² William Neuman, *Connecticut to Scrutinize Food Labels*, N.Y. TIMES, Oct. 14, 2009.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *How ‘Smart’ are Smart Choices* (WBZ 1030 radio broadcast, Oct. 21, 2009).

⁹⁶ Transcript of FDA’s Media Briefing on Front-of-Pack Labeling, Oct. 20, 2009, <http://www.fda.gov/Food/LabelingNutrition/ucm202726.htm>.

⁹⁷ *Id.*; Letter from Barbara O. Schneeman, Director, Office of Nutrition, Labeling and Dietary Supplements, U.S. Food and Drug Administration, to Industry (Oct. 2009), *available at* <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm187208.htm>.

day, Blumenthal issued a press release welcoming the FDA’s support of his Smart Choices investigation.⁹⁸

The Smart Choices program halted its operations on October 23, 2009, stating that, while it would not forbid food and beverage manufacturers to use its logo, it would no longer encourage them to do so. The program acknowledged that it was acting in response to the FDA’s announcement regarding its plan to regulate front-of-package labels.⁹⁹ In addition, Smart Choices mentioned that it would cooperate with Blumenthal’s investigation and would provide him with “information about the development of the program”¹⁰⁰ Shortly after this increase in state and federal attention to the Smart Choices program, eight of the largest manufacturers participating in Smart Choices suspended their use of the program’s logo.¹⁰¹

After the Smart Choices program and its participating manufacturers had voluntarily ended their allegedly misleading activities, Blumenthal noted that the combination of his investigation and the FDA’s regulatory action “mark[ed] the beginning of a strong state and federal enforcement partnership to stop false food claims”¹⁰² Those with expertise in

⁹⁸ Press Release, Office of the Connecticut Attorney General, Attorney General Says FDA Will be Powerful Enforcement Partner in Fighting False Food Labels (Oct. 20, 2009), <http://www.ct.gov/ag/cwp/view.asp?Q=449216&A=3673>.

⁹⁹ Press Release, Smart Choices Program, Smart Choices Program Postpones Active Operations (Oct. 23, 2009), http://www.smartchoicesprogram.com/pr_091023_operations.html.

¹⁰⁰ *Id.*

¹⁰¹ Press Release, Office of the Connecticut Attorney General, Attorney General Announces All Food Manufacturers Agree to Drop Smart Choices Logo (Oct. 29, 2009), <http://www.ct.gov/ag/cwp/view.asp?Q=449880&A=3673&agNav=|42249|>; William Neuman, *Food Label Program to Suspend Operations*, N.Y. TIMES, Oct. 23, 2009; Jennifer Pomeranz et al., *Advancing Public Health Obesity Policy Through State Attorneys General* (Mar. 2010) (unpublished manuscript, on file with author).

¹⁰² Blumenthal, *supra* note 86.

SAGs' powers have heralded this as a prime example of how an SAG can act, using his or her investigatory powers, to protect the public's health.¹⁰³

D. Working with the Federal Government to Address Illegal Marketing of Pharmaceuticals

In the United States, the Food and Drug Administration (FDA), under the auspices of the Federal Food, Drug, and Cosmetic Act, "is responsible for protecting the public health by assuring the safety, efficacy, and security of . . . drugs."¹⁰⁴ A drug can only be sold legally in the U.S. after it receives FDA's approval.¹⁰⁵ In late 1993, the Warner-Lambert Company received approval from the FDA to market gabapentin, known commercially as Neurontin, as a drug therapy for adults with a particular type of epilepsy.¹⁰⁶ After a year of sales, Neurontin had met with modest commercial success by pharmaceutical standards, with sales revenues of about \$100 million. Approximately ten years later, Neurontin's sales had jumped to almost \$3 billion a year, making it one of the most popular drugs in the United States.¹⁰⁷ This spike in sales was unusual for a drug with limited FDA-approved uses and a relatively static patient population.

By 2000, ninety percent of Neurontin prescriptions were written for off-label, or non-FDA-approved, uses including bipolar disorder, migraine prophylaxis, and the amelioration of certain types of pain.¹⁰⁸ Because it is legal to prescribe a drug for off-label use, the physicians

¹⁰³ TIERNEY, *supra* note 39.

¹⁰⁴ U.S. Food and Drug Admin., About FDA: What We Do, <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (last visited Mar. 17, 2010).

¹⁰⁵ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(a) (2009).

¹⁰⁶ U.S. Food and Drug Admin., FDA Approved Drug Products: Drug Details: Neurontin, <http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm?fuseaction=Search.DrugDetails> (last visited Mar. 17, 2010).

¹⁰⁷ *In re Neurontin Marketing and Sales Practices Litigation*, 244 F.R.D. 89, 103 (D.Ma. Aug. 29, 2007).

¹⁰⁸ Michael A. Steinman et al., *The Promotion of Gabapentin: An Analysis of Internal Industry Documents*, 145 ANNALS INTERNAL MED. 145, 284–93 (2006).

who prescribed Neurontin for non-FDA-approved uses acted within the bounds of the law. It is, however, illegal for pharmaceutical manufacturers to promote a drug for off-label uses.¹⁰⁹

Therefore, Neurontin's blockbuster sales record raised concerns with the federal government and numerous SAGs, who began to question the legality of Warner-Lambert's marketing practices.

In 1996, David Franklin, once a Warner-Lambert employee, brought an action against his former employer under the federal False Claims Act. The False Claims Act allows an individual to bring a lawsuit, on behalf of the federal government, against a person or entity that has knowingly caused the federal government to receive false claims for payments.¹¹⁰ Franklin alleged that 1) Warner-Lambert fraudulently promoted Neurontin for off-label uses; and 2) this illegal marketing campaign caused the submission of false claims to Medicaid, a program with ties to the federal and state governments.¹¹¹ The Medicaid claims were considered "false claims" because, generally speaking, Medicaid will not provide reimbursement for off-label drug use.¹¹² Franklin estimated that, during his time at Warner-Lambert, twenty-five percent of Neurontin's sales were wrongly reimbursed by the federal government because they were for off-label uses. In addition, Franklin alleged that Warner-Lambert went to great lengths to hide its off-label marketing activities from the FDA.¹¹³

While the federal government pursued the Franklin litigation, several SAGs announced their plans to investigate Warner-Lambert's off-label marketing of Neurontin, to determine

¹⁰⁹ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(a) (2009).

¹¹⁰ False Claims Act, 31 U.S.C. §§ 3729, 3730 (2009).

¹¹¹ U.S. ex rel. Franklin v. Parke-Davis, 147 F.Supp.2d 39, 43 (D.Ma. 2001).

¹¹² 42 U.S.C. § 1396(i)(10) (2009).

¹¹³ U.S. ex rel. Franklin, supra note 111, at 45.

whether the company had violated state consumer protection laws.¹¹⁴ Hardy Myers, Attorney General of Oregon, was one of the leaders of the investigation.¹¹⁵ On May 13, 2004, Warner-Lambert reached a settlement with the federal and state governments, “in conjunction with [a guilty plea] to federal criminal charges of violating the Food, Drug, and Cosmetics Act.”¹¹⁶ The settlement announcement explained that

Warner-Lambert’s strategic marketing plans, as well as other evidence, show that Neurontin was aggressively marketed to treat a wide array of ailments for which the drug was not approved. . . . Warner-Lambert promoted Neurontin even when scientific studies had shown it was not effective.¹¹⁷

As a consequence of the settlement, Warner-Lambert agreed to pay over \$430 million to the federal and state governments. This included payment for criminal fines, restitution to the states’ Medicaid programs, and SAGs’ costs incurred while conducting their investigations.

The settlement included provisions for the creation and funding of a program to educate consumers and prescribers about the marketing of drugs,¹¹⁸ and the establishment of an Assurance of Voluntary Compliance, prohibiting Warner-Lambert “from deceptive and misleading pharmaceutical marketing practices in the future.”¹¹⁹ Because Oregon’s Attorney

¹¹⁴ In the Matter of Warner-Lambert, LLC, Assurance of Voluntary Compliance (May 13, 2004).

¹¹⁵ Press Release, Oregon Dep’t of Justice, Myers Announces Prescription Drug Education Grants (Nov. 1, 2006), <http://www.doj.state.or.us/releases/2006/rel110106.shtml>.

¹¹⁶ Press Release, Oregon Dep’t of Justice, AG Announces \$430 Million Global Settlement Against Warner-Lambert, a Subsidiary of Pfizer (May 13, 2004), <http://www.doj.state.or.us/releases/2004/rel051704.shtml>.

¹¹⁷ *Id.*

¹¹⁸ Consumer and Prescriber Grant Program, <http://www.consumerprescribergrantprogram.org/> (last visited Mar. 17, 2010); In the Matter of Warner-Lambert Company, LLC, No. 04C14403 (Or. Cir. Ct. May 13, 2004) (order governing administration of multistate grant and advertising program).

¹¹⁹ Press Release, Oregon Dep’t of Justice, *supra* note 116.

General had spearheaded the states' investigation, he was designated as the SAG responsible for overseeing the implementation of the consumer and prescriber education program.¹²⁰

The Warner-Lambert settlement was notable for several reasons, including its multi-million dollar figure and its resolution of multiple actions and claims made by the federal and state governments. While several SAGs drew upon either their consumer protection or Medicaid fraud resources, Oregon and Florida's SAGs employed a novel approach by using both their consumer protection and Medicaid fraud units during the Warner-Lambert investigation and settlement negotiations.¹²¹ This settlement marked the first time that a pharmaceutical marketing case was jointly settled by the federal Department of Justice and the National Association of Medicaid Fraud Control Units in concert with SAGs' consumer protection divisions.¹²²

IV. SAGs' Effectiveness in Promoting the Public's Health

To date, SAGs' efforts to improve the public's health have not been extensively studied. While legal and political science researchers have clearly explained what powers are available to SAGs, as summarized in paths 1 and 2 of the logic model in Figure 1, little evidence exists to demonstrate how, from an empirical perspective, these powers have been employed to improve the public's health.

Brief examples of SAGs' effectiveness in promoting the public's health have appeared in the scholarly literature through review articles or anecdotal reports. Some SAGs, or their close colleagues, have provided an insider's view of successful public health endeavors by publishing

¹²⁰ In the Matter of Warner-Lambert Company, LLC, No. 04C14403 (Or. Cir. Ct. May 13, 2004) (order governing administration of multistate grant and advertising program).

¹²¹ Press Release, Oregon Dep't of Justice, *supra* note 116.

¹²² *Id.*

first-hand accounts of their work. In 1997, Craig R. Mayton, an assistant Attorney General in Ohio, wrote an article for *Health Affairs* detailing his approach, along with Ohio’s Attorney General, Betty D. Montgomery, to the conversion of non-profit health care institutions into for-profit entities. Mayton explained that, as an assistant SAG, he sought to ensure that, as part of the conversion process, the “full value of the [hospital’s] non-profit assets [were] preserved for the community.”¹²³ Specifically, his office worked to determine whether a non-profit hospital’s charitable assets were being purchased for “full and fair value” by a for-profit entity and whether the proceeds from this purchase would be “applied to proper charitable purposes,” such as the creation of a charitable foundation to address health care needs in the affected community.¹²⁴ Mayton discussed several ways in which Ohio’s Attorney General approached this issue, including litigation and support of legislation to clarify the conversion process and the conveyance of a non-profit hospital’s charitable assets.¹²⁵

Review articles in the legal literature have provided overviews of SAGs’ successful public health efforts. For example, in a 2002 article for the *Oklahoma City University Law Review*, W.A. Drew Edmondson, former Attorney General of Oklahoma, reviewed SAGs’ attempts to improve end-of-life care. He explained that, during his time as President of the National Association of Attorneys General, he developed and promoted an initiative “focused on the current and emerging role of Attorneys General in protection of consumers of health care near the end of their lives.”¹²⁶ To illustrate the scope of this initiative, he mentioned two SAGs.

¹²³ Craig R. Mayton, *The View from Ohio*, 16 HEALTH AFFAIRS 92, 92 (1997).

¹²⁴ *Id.*

¹²⁵ *Id.* at 94–95.

¹²⁶ W.A. Drew Edmondson, *Improving End-of-Life Care: The Role of Attorneys General*, 27 OKLA. CITY U. L. REV. 911, 911–12 (2002).

First, Edmondson discussed the “positive ‘policy environment’” for end-of-life issues established by Maryland Attorney General Joseph Curran, Jr. He noted that Curran “maintain[ed] proper law enforcement focus, [did] not overburden good practitioners, and bolster[ed] advocates for better pain management.”¹²⁷ Edmondson then turned to the efforts of Rhode Island Attorney General Sheldon Whitehouse, which included the co-sponsorship of conferences about end-of-life issues with multiple stakeholders, the establishment of a task force to assess end-of-life care recommendations, and the creation of a medical-legal steering committee charged with improving Rhode Island’s end-of-life care laws.¹²⁸

Some researchers have used qualitative research methodologies, such as the case study approach, to better understand how SAGs can contribute to the development of health policy. For example, in 1984 Ronald C. Lippincott conducted a case study to explore the role of SAGs in bringing antitrust lawsuits, with a focus on lawsuits targeting health care institutions that had engaged in practices to limit competition. The case study, which was grounded in political science theory, was situated in Ohio, because during the 1970s, William J. Brown, Ohio’s Attorney General, had filed seven antitrust lawsuits against health care institutions, making the state “a leader in this area.”¹²⁹ Lippincott found that, as an SAG, Brown’s “ultimate interest was electoral survival, [and his] strategy was to model the Attorney General’s Office on a ‘public interest’ law firm which advocated the ‘consumer interests’ of Ohio’s citizens. Health care was perceived as a salient consumer issue”¹³⁰ In addition, Brown and his political advisors had

¹²⁷ *Id.* at 914.

¹²⁸ *Id.* at 915–16.

¹²⁹ Ronald C. Lippincott, *Redressing the Imbalanced Political Market for Health Policy: A Role for the State Attorney General?*, 9 J. HEALTH POLITICS, POL’Y & L. 389, 391 (1984).

¹³⁰ *Id.* at 393.

determined that “although [the antitrust] actions might jeopardize future political support from the health industry, such losses were . . . minimal [H]ealth providers were not his natural constituency.”¹³¹ Given the beneficial outcomes of Brown’s antitrust enforcement activities for consumers, Lippincott concluded that antitrust law provided one tool that an SAG could successfully draw upon to protect the public’s health. Lippincott underscored, however, that Brown’s motivation to enter the health policy arena was driven in large part by political considerations related to his chances of reelection.

Finally, statistical modeling has been employed to study how SAGs have worked together to tackle public health issues, particularly in the context of tobacco litigation. In 2003, Thomas A. Schmeling published a study in which he used collective action theory to guide the creation of statistical models that tested hypotheses about SAGs’ cooperation while litigating against the tobacco industry.¹³² Schmeling suggested that the litigation that ultimately led to the Master Settlement Agreement with the major tobacco companies in 1998 can “be best understood not as forty-two SAGs independently trying to win at trial against the tobacco companies, but as an effort to bring enough resources to bear to force the companies to settle to avoid the cost and uncertainty of litigation.”¹³³ After conducting an event history analysis, Schmeling concluded that SAGs’ apparent coordination in suing the tobacco industry between 1994 and 1998 “emerged from a process of interdependent decision-making, in which the SAGs influenced each other as each observed and reacted to the decisions of the rest.”¹³⁴ In addition,

¹³¹ *Id.* at 402.

¹³² Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 L. & POL’Y 429 (2003).

¹³³ *Id.* at 433.

¹³⁴ *Id.* at 450.

Schemling found that the heterogeneity of SAGs' political environments contributed to cooperation among SAGs affiliated with different political parties. Specifically, he suggested that the many lawsuits initiated by Democratic SAGs likely served as a motivator for Republican SAGs, who, for political reasons, may have been less motivated to sue the tobacco industry. This, in turn, led to actual and perceived bipartisan cooperation, which may have stimulated other SAGs to participate in the lawsuits.

V. SAGs' Current and Future Ability to Improve the Public's Health

SAGs have repeatedly used their powers, in both traditional and novel ways, with the goal of improving the public's health. To better understand SAGs' current and future ability to improve the public's health, several types of information are needed. First, the research base that empirically demonstrates the association between SAGs' efforts and improved public health must be expanded. This requires two evaluative approaches. The first should involve studies that assess the utility of the varied powers available to SAGs. There is a compelling need for a state-by-state survey of SAGs' existing powers, with a standardized ranking system to indicate the strength of different powers to improve the public's health. Using a mixed methods approach, this type of national mapping study could then be supplemented with a series of case studies to better understand how, in states with stronger powers, SAGs have acted to protect the public's health. Additional types of quantitative or qualitative work could help to explain how states with stronger SAG powers have fared relative to states with weaker SAG powers for specific public health problems (*e.g.*, do SAGs with stronger powers draw on them more frequently to tackle public health issues than SAGs in states with weaker powers?; are certain powers deployed in a uniform way across states to address a particular public health problem?). The second evaluative approach would involve the selection of a specific public health policy

promoted by an SAG and an assessment of the policy's effectiveness, given the SAG's intended public health goals. These complementary approaches would provide information about SAGs' varied powers and about SAGs' approaches to particular public health issues.

The second way to develop a better understanding of SAGs' ability to improve the public's health involves the examination of SAGs' perceived public health victories and failures. This manuscript has provided examples of SAGs' perceived victories in the areas of tobacco control, firearms regulation, food policy, and off-label marketing of drugs. Much can also be learned from examining instances in which an SAG has tried, unsuccessfully, to tackle a particular public health issue. Although these instances may initially be perceived as failures by the public health community, they can provide important insights for SAGs as they strategize and plan their future public health endeavors.

One widely publicized, and unsuccessful, public health effort by an SAG began in 1999 when Sheldon Whitehouse, Rhode Island's Attorney General, brought a lawsuit against lead pigment manufacturers and a trade association.¹³⁵ On behalf of the state of Rhode Island, Whitehouse argued that the defendants were responsible for creating a public nuisance, due to the health hazards associated with exposure to residential paint that contained lead.¹³⁶ In 2006, a jury found the defendants guilty, making this case "the first time in the United States that a trial resulted in a verdict that imposed liability on lead pigment manufacturers for creating a public nuisance."¹³⁷ Initially, this seemed to introduce a novel legal theory that SAGs could draw upon to protect the public's health, particularly because the defendants would have been required "to

¹³⁵ State of Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2008).

¹³⁶ State of Rhode Island v. Lead Indus. Ass'n, 2007 WL 711824 (R.I. Super. Ct. 2007).

¹³⁷ Lead Indus. Ass'n, 951 A.2d at 434.

pay billions of dollars to clean up contaminated homes.”¹³⁸ However, in 2008, following an appeal, the Rhode Island Supreme Court overturned the jury’s verdict, after concluding that the SAG’s lawsuit had not met each element required for a successful claim of public nuisance.¹³⁹

While this lawsuit did not benefit the public’s health, it provided useful lessons to SAGs in other states who were contemplating or in the midst of similar lawsuits.¹⁴⁰ Rhode Island’s Supreme Court noted that public nuisance remained “a legally viable cause of action,”¹⁴¹ meaning that it could one day be effectively applied to a different area of public health, in which the facts of the case more favorably met the public nuisance criteria. This finding proved helpful to other SAGs. For example, in 2009, Indiana’s Attorney General brought a lawsuit against two landlords who, he alleged, had ignored warnings from their county health department to engage in lead paint abatement.¹⁴² This lawsuit offered a new twist on a public nuisance theory of liability, since it was brought to force landlords to comply with their duties to their tenants. If successful, this case could provide other SAGs with a promising model for the use of public nuisance theory in litigation related to lead paint and other public health issues.

When SAGs contemplate their approach to a public health issue, they must decide which of their powers to employ. As the Rhode Island case demonstrates, although a power, like litigation, may seem promising, it may not ultimately be successful. In light of this realization, SAGs are increasingly balancing the threat or use of litigation against the exercise of other

¹³⁸ Abha Bhattarai, *Rhode Island Court Throws Out Jury Finding in Lead Case*, N.Y. TIMES, July 2, 2008.

¹³⁹ Lead Indus. Ass’n, 951 A.2d at 452–58.

¹⁴⁰ Bhattarai, *supra* note 138.

¹⁴¹ Lead Indus. Ass’n, 951 A.2d at 445.

¹⁴² Press Release, Office of the Indiana Attorney General, Attorney General Zoeller Files Suit to Correct Lead-Paint Hazard (Nov. 12, 2009), <http://www.ai.org/attorneygeneral/press/Suit.filed.to.correct.lead-paint.hazard.html>.

powers, such as rule-making or the employment of their bully pulpit. With the promulgation of a rule or regulation, an SAG can comprehensively address a public health issue and possibly avoid engaging in several rounds of litigation with multiple defendants. On the other hand, legal challenges may arise to an SAG's authority to promulgate a particular regulation, as occurred in the case of Massachusetts Attorney General Scott Harshbarger and his gun control regulations. While Harshbarger successfully defended his authority to develop and enforce these regulations, the lawsuit exemplifies the types of legal hurdles that an SAG may face when engaging in rule-making.

Some SAGs have, in recent years, made greater use of their bully pulpit to protect the public's health. After the 1998 Master Settlement Agreement with the tobacco industry, Joseph Curran, Maryland's Attorney General, remained concerned that, despite the MSA's strict prohibitions of tobacco companies' efforts to place their products in the media, smoking and tobacco products, including brand names, continued to be featured in movies.¹⁴³ Curran, along with twenty-seven other SAGs, wrote a letter to Jack Valenti, President of the Motion Picture Association of America, in 2003 asking the film industry to "reduc[e] the depiction of smoking in movies."¹⁴⁴ This led to a series of conversations involving SAGs, film industry executives, and tobacco control researchers. One result of this dialog was a pledge from the Directors Guild of America to "create antismoking public service announcements" that could be played in movie theaters before films that featured smoking.¹⁴⁵ Curran and his colleagues did not use any of their

¹⁴³ NAT'L CANCER INST., THE ROLE OF MEDIA IN PROMOTING AND REDUCING TOBACCO USE 415 (Ronald M. Davis et al. eds., U.S. Dep't of Health and Human Servs. 2008), *available at* http://cancercontrol.cancer.gov/TCRB/monographs/19/m19_10.pdf.

¹⁴⁴ *Id.* at 419.

¹⁴⁵ *Id.* at 417.

formal powers as SAGs to accomplish this. Instead, they used the clout of their collective request to sway the movie industry.

To brainstorm approaches to urgent public health issues, SAGs can capitalize on the cachet of their office and invite public health and other experts to convene. For example, in February 2010, William Sorrell, Vermont's Attorney General, held a summit as part of "a new initiative to identify and develop actions to reduce obesity in Vermont."¹⁴⁶ This meeting included experts in food and obesity policy, nutrition, and state and federal physical activity programs. As a result of the summit, working groups were formed to focus on diverse aspects of obesity control efforts.¹⁴⁷ Going forward, Sorrell will work with these groups to determine the best ways in which his office can address obesity.

By recognizing mutually beneficial opportunities, SAGs can leverage their own efforts to bring about even greater public health protections. These opportunities may arise in a variety of contexts. For instance, SAGs can work with their state legislatures to promulgate regulations that complement recently passed legislation. If SAGs work with their SAG colleagues in other states to take on a particular public health issue, they can use their collective power to impact policy-making at the federal level. While the Master Settlement Agreement, which involved forty-six SAGs, offers the most well-known example of this type of collaboration, smaller groups of SAGs can wield significant influence on the federal government's approach to a public health issue, particularly if they can provide examples of their own state's successful efforts. Finally, borrowing from the concepts behind social mobilization theory,¹⁴⁸ SAGs can respond to

¹⁴⁶ Office of the Vermont Attorney Gen., Attorney General's Obesity Initiative, <http://www.atg.state.vt.us/issues/consumer-protection/obesity.php> (last visited Mar. 10, 2010).

¹⁴⁷ *Id.*

¹⁴⁸ DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 217–27 (2002).

the demands of existing grassroots coalitions, such as the environmental protection movement, with the understanding that these groups are likely to provide strong support for the development and implementation of policies that correspond to their agendas.

VI. Recommendations for Enhancing SAGs' Ability to Improve the Public's Health

Due to their wide-ranging powers, connections to multiple government actors, and ability to act in concert, SAGs are uniquely positioned to protect and promote the public's health. By developing a better understanding of SAGs' extensive abilities, public health professionals can take steps to contribute to SAGs' public health efforts. The creation of a more synergistic relationship between SAGs and the public health community would foster mutually beneficial goals, such as the translation of research into policy.

By sharing their own research with SAGs and summarizing the relevant work of other researchers, public health professionals can provide an evidence base that will drive SAGs to take action. For example, on September 21, 2009, five researchers with expertise in substance abuse sent a letter to the three SAG co-chairs of the NAAG Youth Access to Alcohol Committee “in response to the concerns raised by State law enforcement officials regarding the safety of caffeinated alcoholic beverages.”¹⁴⁹ After providing an evidence-based presentation of the problem and summarizing the empirical research base, the researchers explained that

there is no general consensus among health professionals and the scientific research community that the use of caffeine in alcoholic beverages has been demonstrated to be safe. On the contrary, the consumption of caffeinated alcoholic beverages has been associated with increased risk of serious injury to

¹⁴⁹ Letter from Amelia M. Arria, Associate Director, Center for Substance Abuse Research, et al., to Attorneys General Richard Blumenthal, Mark Shurtleff & Alicia G. Limtiaco (Sept. 21, 2009), *available at* <http://www.fda.gov/downloads/Food/FoodIngredientsPackaging/UCM190372.pdf>.

oneself and to others, as the result of driving while intoxicated, sexual assault, and other dangerous behaviors.¹⁵⁰

The letter was accompanied by a list of references that included the studies the researchers had mentioned as well as relevant literature reviews and citations for additional empirical work that had examined the health effects associated with caffeinated alcoholic drinks. A week later, the three SAG co-chairs and fifteen additional SAGs sent a letter, which included the researchers' original letter as an attachment, to the Commissioner of the FDA, to express concern about the rise of caffeinated alcoholic beverages. The SAGs' letter repeatedly referenced the substance abuse researchers' findings, noting that "experts in the field agree that the use of caffeine added to alcohol poses a significant public health threat"¹⁵¹ Several weeks later, the FDA launched an investigation into the safety and health issues associated with caffeinated alcoholic beverages. In a press release, the FDA noted that eighteen SAGs had contacted the agency regarding concerns about caffeinated alcoholic beverages.¹⁵²

As this example demonstrates, SAGs use research to guide and strengthen their efforts to protect the public's health. Public health professionals can share their findings by contacting SAGs directly or by seeking out opportunities to present at NAAG events. NAAG hosts three formal meetings a year for all SAGs, which are supplemented by additional workshops and smaller gatherings.¹⁵³ For those whose research involves public health law and policy, NAAG

¹⁵⁰ *Id.*

¹⁵¹ Letter from Attorneys General Richard Blumenthal, Mark Shurtleff & Alicia G. Limtiaco, to Margaret A. Hamburg, Commissioner, U.S. Food and Drug Administration (Sept. 25, 2009), *available at* <http://www.fda.gov/downloads/Food/FoodIngredientsPackaging/UCM190371.pdf>.

¹⁵² Press Release, U.S. Food and Drug Administration, FDA to Look Into Safety of Caffeinated Alcoholic Beverages (Nov. 13, 2009), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2009/ucm190427.htm>.

¹⁵³ Nat'l Ass'n of Attorneys General, When Does the Association Meet?, http://www.naag.org/when_does_the_association_meet.php (last visited Mar. 3, 2010).

meetings present a chance to educate SAGs about innovative ways to protect the public's health, such as using existing consumer protection powers to regulate in previously ignored areas.

To ensure a bi-directional exchange of information, public health professionals should invite SAGs to share their experiences through conference presentations or brief journal articles. By communicating directly with the public health community, SAGs can educate public health professionals about areas in need of an evidence base. This, in turn, can stimulate new public health research, which can strengthen SAGs' public health efforts.

By engaging in research to better understand and analyze SAGs' public health successes and failures, public health professionals can develop knowledge to bolster SAGs' future efforts. The logic model in Figure 1 provides a useful organizational tool for identifying the types of studies that should be conducted. Paths 1 and 2 denote the different types of powers that SAGs can use to improve the public's health (*e.g.*, litigation and law enforcement; investigative activities; law and policy reform). Although the research base is far from exhaustive, these powers and their execution have been studied by legal and political science scholars. Little empirical work has been conducted to better understand the mediating factors that follow Path 3. A handful of studies, such as Lippincott's theoretically grounded case study to explore the role of SAGs in bringing antitrust lawsuits and Schmeling's event history analysis of SAGs' involvement in the lawsuits that led to the Master Settlement Agreement, have addressed mediating factors, such as an SAG's concerns about reelection or how the actions of SAGs throughout the nation can influence other SAGs. Future research about the factors that mediate SAGs' efforts to improve the public's health might involve case studies. Because SAGs' powers vary among the states, and each SAG operates in a unique political climate, case studies can offer important insights into how a particular SAG approached a given public health issue.

Multiple case studies can be conducted to capitalize on findings that may be revealed during so-called natural experiments. These experiments may arise when SAGs use different powers to address the same public health issue (*e.g.*, regulation versus litigation to combat lead paint).

Research devoted to studying Paths 4 and 5 – namely the outputs that constitute improved public health in light of SAGs’ actions – is largely lacking. A variety of study designs could be employed to fill this gap. For example, researchers can employ mapping studies to understand how SAGs throughout the United States have used their powers to take on a specific public health issue. These types of studies can also assess the extent to which SAGs’ interventions are being enforced. In addition, statistical modeling can be used to empirically assess the effects of SAGs’ efforts on public health outcomes. Finally, for areas in which the public health impacts of an SAG’s actions are unclear, researchers can use health impact assessments to help SAGs appreciate the extent to which their actions will help or harm the public’s health.

VII. Conclusion

SAGs have tremendous potential to protect and promote the public’s health. Although they have a broad grant of authority and a wide range of powers to draw upon, SAGs’ abilities are not well understood by public health professionals. Yet, through both formal and informal powers, SAGs have repeatedly brought innovative approaches to well-entrenched public health issues. Acting alone, an SAG can influence a public health issue in his or her own state, but SAGs can also act together to bring about change at the federal level. By learning more about SAGs’ public health successes and failures, public health professionals can develop a better understanding of how to collaborate, through research or practice efforts, with these promising partners.

Figure 1: Logic model of the ability of state Attorneys General to improve public health

