

## **TORTS, COURTS AND ATTORNEYS GENERAL: TORT LITIGATION BY STATES**

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State attorneys general resort to courts frequently. Civil enforcement actions are customary and participation in criminal prosecutions is common. They are, and always have been, among the state proceedings entrusted to AGs. Among state officials, the AGs are uniquely capable of bringing actions of this sort on behalf of their constituents.

In recent years, however, state AGs have increasingly brought actions for which they are ill-equipped, occasionally acting contrary to the legislative and regulatory bodies that represent the same constituents. Relying largely on private contingency counsel, AGs are filing tort claims against companies and industries demanding that judges and juries award them money damages.

In tort litigation, AGs eschew the standards of conduct set by legislation and regulation and instead invoke nebulous theories of liability such as nuisance, negligence and product defect. They seek to have defendants judged according to vague notions of what conduct is “offensive” in the case of nuisance, or “unreasonable” in the case of negligence, or overly “risky” in the case of product liability. They even seek to punish defendants for conduct that is or was expressly authorized, or even compelled, by state law and regulations. They demand from juries both compensatory and punitive damages.

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Section I of this paper provides an overview of the chief differences between regulation and tort litigation, which illustrate important advantages of the former and limitations on the latter. Section II is a brief summary of the nebulous tort theories that state AGs invoke. Section III presents numerous examples of recent tort cases brought by state AGs. Section IV offers some practical suggestions for counsel defending against such cases.

## **I. LITIGATION *v.* REGULATION**

Courts have important roles to play in deciding enforcement actions brought by states, meaning litigation that states file in order to compel compliance with legislative or regulatory standards. In such cases, judges can amplify or clarify or limit or even invalidate legislative and regulatory standards. To that extent, judges augment the work of regulators and legislators, and they usually pay great deference to that work. Juries typically do not play a role in enforcement actions.

State AGs make very different use of judges and juries when they bring common law claims and seek money damages and even punitive damages. In these cases, they essentially pray for the courts, and especially juries, to apply vague common law notions rather than to enforce specific regulatory or statutory standards.

The use of common law litigation by state AGs in this context, rather than rulemaking or legislating, is questionable if not objectionable for a host of reasons, not least because the litigation process is ill-suited to the task of determining and applying standards of conduct or providing remedies other than money damages.

Three main features characterize the process by which states enact legislation and promulgate regulations: (1) an open and public comment period and hearings affording all interested parties an opportunity to participate and be heard; (2) substantive expertise among regulators and frequently legislative staff in the affected subject matter; and (3) a final product that provides clear and enforceable standards and directives which are broadly applicable. By contrast, litigation – especially litigation over common law claims -- may be defined by the very absence of these three attributes.

### **1. No Public Comment or Participation**

In rulemaking, a proposed standard is typically published for public review and comment, and stakeholders of all sorts are allowed to participate in the process. Usually, written comments are invited and made part of an official record. Also, usually, open hearings are held where stakeholders can present views directly to decision-makers, typically regulators. As a result, standards should reflect a range of interests, viewpoints and considerations. Activists and industry advocates and everyone in between can be heard.

Litigation, of course, is a form of dispute resolution involving just the parties before the court, the plaintiffs and the defendants. Other stakeholders can rarely be heard. And there is virtually never an open invitation for public comment. Amici can occasionally be heard, but that is rare and by no means assured.

## **2. No Expertise in Science Among Judges or Jurors**

In the rulemaking process, the initial proposals, the comments and debates, and the ultimate standards are usually developed by real experts, including specialists in such highly technical fields as pharmacology, public health, hydrogeology, toxicology, risk assessment, industrial operations, and social policy, not to mention in regulatory procedure. Most regulatory agencies have experts in these disciplines on staff, and many also engage outside experts for assistance. The agencies also have access to the full range of scientific literature on these subjects. Just as importantly, they have the time to spend assuring they gather all the data and science needed to inform a rational decision. As a result, standards should reflect sound science and a solid technical basis. Standards should also be protective of human health and welfare, as well as other public interests.

By contrast, judges and juries generally have no expertise in any of the many scientific and technical disciplines that bear on decisions in litigation. To be sure, the litigants may be experts in relevant fields and they can hire experts to submit reports and testify. Judges can also call on independent experts, though that is rare. Ultimately, however, the decision in any case rests with judges trained in the law, not in the substantive disciplines that matter, or by lay jurors with no special training whatsoever.

## **3. No Clear and Enforceable Standards or Guidelines**

The product of the rulemaking process is generally a specific standard or rule, or set of standards and rules. They are typically written by expert regulators and published for all to see. They can be applied in the field or the marketplace and can be understood and followed by the regulated community. As a result, standards should provide clear direction for all affected stakeholders, including regulators and businesses.

Judicial opinions and judgments, by contrast, especially those based on common law claims, merely adjudicate the disputes between the parties to any given case. Judicial opinions can set normative standards that others might do well to follow lest they face similar litigation. But, just as the common law reflects broad and vague principles, likewise court decisions on common law claims merely build on nebulous principles that might or might not be followed in subsequent cases.

## **II. NEBULOUS COMMON LAW TORT THEORIES**

The common law is the body of general rules and doctrines derived from basic and ancient principles and customs, and thence from court rulings applying those principles and customs over the ages in cases involving specific parties. Common law is generally and vaguely rooted in the unwritten law of ancient England. Common law is divined and applied by judges for particular cases. It is distinguished from the enactments of legislatures and executive or administrative bodies, which are applied to whole jurisdictions or large categories of people or entities. Common law is used in countries comprising only about one-third of the world's population, mainly in England and its former colonies, including the United States.

Courts do not just apply common law, they create it, too. Frequently, courts will apply basic notions of equity and fairness to modern circumstances that were previously inconceivable. They use time-tested principles from the common law to define claims and fashion remedies for cyber torts, for example, or the private use of drones. Some judges even make up new principles and theories, and if those new theories are adopted by other courts also, the theories may attain the status of accepted doctrines forming part of the fabric of common law.

Common law is an ever evolving set of principles, adapted to the times, molded, shaped and sometimes created out of whole cloth by judges across the country. They hew to established principles. They show restraint. But they nonetheless make the common law, and that makes common law somewhat unpredictable.

The common law of torts, in particular, is that body of common law principles and doctrines that apply in cases involving a breach of duty from one person or entity to another, not involving a contract or agreement. Perhaps the most amorphous of all torts is nuisance.

### **1. Common Law Nuisance**

The common law definitions of nuisance vary widely and are extremely broad and general. According to Black's Law Dictionary, nuisance is "anything that unlawfully worketh hurt, inconvenience or damage." The definition is circular. A nuisance is anything that "unlawfully" causes damage. But a nuisance need not be against some written law such as a statute or regulation. Rather, a nuisance is unlawful if it is against the common law of nuisance. So, what is against the common law of nuisance is that which is against the common law of nuisance.

One federal appellate court (the Fourth Circuit in the *NC v. TVA* case, *infra*) described common law nuisance as an "all-purpose tort that encompasses a truly eclectic range of activities." That court offered a list of examples of activities deemed to have constituted a nuisance, taken from a compendium of older cases. The examples include the following:

“interferences with the public health, [such as] ... a malarial pond; with the public safety, [such as] ... storage of explosives ...; with public morals, [such as] ... public profanity; ... with the public comfort, [such as] ... odors, smoke, dust ...; and ... such unclassified offenses as ... being a common scold.”

Before the age of regulation, nuisance claims in courts played an important role in curbing annoyances such as blasting, roaming livestock and the discharge of wastewater. These activities are now closely regulated, of course.

## **2. Common Law Negligence**

Negligence is a likewise vague theory rooted in common law. It is meant to allow a remedy such as the recovery of damages from one who breaches a duty of care by acting in a negligent manner. That begs the question of what conduct is negligent.

Case law gives the concept of negligence a patina of objectivity by applying supposedly objective standards. Courts created the fiction of the reasonable person to define permissible conduct and distinguish it from negligence in actions involving individuals. In cases involving corporations, the standard is frequently derived from the conduct of other companies in the same industry, and conduct may be deemed negligent if it deviates from the standards of other corporations.

Negligence *per se* is a special brand of the common law theory applied where conduct violates a statute or regulation. In this sense, the common law draws on state-prescribed standards to determine what constitutes negligence.

In cases brought by state AGs, however, the conduct that the states allege should be actionable under a negligence standard is generally not contrary to a state regulation or statute. If it were, the state could simply bring an enforcement action and would have no cause to resort to common law theories. As will be seen in examples of recent tort suits by state AGs, the conduct the AGs challenge is frequently expressly permitted by state law, such as emissions by power plants; the use of MTBE in gasoline, which was not only permitted, but also effectively mandated, by both state and federal law; the lawful disposal of chemicals at facilities pursuant to state permits; and the distribution of drugs that are both approved and heavily regulated by state and federal laws.

## **3. *Parens Patriae* and Other Theories of Standing**

Another unique characteristic of common law tort litigation by states is the power or standing that states invoke purportedly on behalf of their residents. The *parens patriae* doctrine can authorize state AGs to bring certain actions under certain circumstances for the benefit of private parties who are subjects or citizens of the state, just as a parent or guardian might bring actions on behalf of minor children or incompetent persons.

State suits based on this doctrine present thorny issues of *res judicata* or claim preclusion. If a state asserts a claim on behalf of a private party then the state must also extinguish the right of the private party to bring that claim individually, lest the defendant would face the risk of double recovery. The potential conflict between the state acting as *parens patriae* and the interests of the individual can be acute. For example, where a state sues for groundwater contamination and seeks damages for the cost to treat private wells, that action effectively precludes a private well owner from suing for the same treatment of the same contamination. It is difficult to define the limits of a state's *parens patriae* power, but this much is clear: some claims are too private and personal for the state to usurp, such as claims for loss in property value and personal injury. Other claims might be brought by the state, though the conditions that would warrant the state to sue on behalf of private parties remain unclear. This ambiguity leaves room for defendants to contest virtually any *parens patriae* claims.

### **III. EXAMPLES OF TORT LITIGATION BY STATE AGs**

#### **1. State Suits Over Cross-Border Emissions**

Two cases over cross-border emissions provide illuminating examples of sharp contrasts among states and courts over the very viability of common law tort claims by states. As will be seen, in just these two cases, a total of 42 states took positions as parties or *amici* for or against the use of common law nuisance claims by states. Likewise, 7 trial and appellate court judges issued opinions on that subject in these cases. They all split in dramatic fashion. Of the states, 21 supported the nuisance claims, 21 opposed, and 2 took different positions in the different cases. Of the judges, 3 allowed the claims while 4 rejected them, and justices of the U.S. Supreme Court split 4 to 4.

##### *A. North Carolina v. The Tennessee Valley Authority*

In 2006, the AG of North Carolina brought a common law nuisance suit against the Tennessee Valley Authority seeking to reduce the amount of emissions generated at various TVA coal-fired power plants in Alabama and Tennessee. Three years later, in 2009, the federal district court in North Carolina issued its decision. The judge acknowledged in the decision that the principles of public nuisance “are less well-adapted than administrative relief to the task of implementing the sweeping reforms that North Carolina desires,” yet the judge ruled in favor of the state and ordered the TVA to install certain pollution control technologies on four plants within 100 miles of North Carolina at an estimated cost of several billion dollars. The emissions of which North Carolina complained, and which the district court ruled constituted an unlawful nuisance, were all expressly authorized by permits issued in compliance with clean air statutes and regulations of the federal government and the states of Tennessee and Alabama where the plants were located. It was undisputed that the TVA was complying with regulatory standards. Still, the court held that its emissions were impermissible under common law principles of nuisance.

The TVA appealed to the Fourth Circuit Court of Appeals. Twenty-one states weighed in as *amici curiae*, submitting their views in opposing briefs. Six filed in support of the TVA; fifteen filed in support of North Carolina urging that the courts allow a common law nuisance claim to trump legislative and regulatory standards.

In 2010, the appeals court issued a thorough opinion reversing the district court. Some excerpts from the appellate court decision bear quoting:

- “It is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance.”
- “The district court's well-meaning attempt to reduce air pollution cannot alter the fact that its decision threatens to scuttle the extensive system of anti-pollution mandates that promote clean air in this country.”
- “If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern. Energy policy cannot be set, and the environment cannot prosper, in this way.”
- “To replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country.”
- “It is crucial therefore that courts in this highly technical arena respect the strengths of the agency processes.... Regulations and permits, while hardly perfect, provide an opportunity for predictable standards that are scientifically grounded.”
- “It is not open to this court to ... overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of source states and permit holders in favor of the nebulous rules of public nuisance.”

North Carolina filed an appeal with the Supreme Court, but the TVA entered into a settlement with the state before that Court had a chance to hear the case. Under the pressure of litigation, the TVA agreed in 2011 to shut down 18 of 59 coal plants, install additional emissions controls on the remaining plants costing billions, and pay North Carolina \$11 million.

B. *Connecticut, et al. v. American Electric Power, et al.*

In 2004, a group of eight states led by Connecticut, along with the City of New York and five NGOs, sued five of the nation's largest electric utilities, including the TVA, in federal court in New York to curb emissions that allegedly contributed to global warming. The states sued for nuisance. They claimed that the levels of emissions of carbon dioxide and other greenhouse gases from the defendant utilities should be declared unlawful and be halted or enjoined based on common law claims of public nuisance.

This time, the lower district court ruled against the states, and then a federal appeals court reversed in their favor – just the opposite of what happened in *North Carolina v. TVA* – and then the US Supreme Court reversed the appeals court, but left open a key question concerning the viability of nuisance cases such as this.

More specifically, in 2005, the federal District Court for the Southern District of New York rejected the claims of the eight states and dismissed the case based on a rarely applied doctrine known as the political question doctrine. That court cited the many fundamental policy issues implicated by the debate over climate change, the critical national interests at stake, and the numerous national and international efforts underway to curb global warming. It concluded that in the absence of a clear policy determination by the federal executive and legislative branches on such a major issue as global warming, the court should not decide the policy issues presented. As the judge wrote, “Because resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, ‘an initial policy determination of a kind clearly for non-judicial discretion’ is required. ... Thus, these actions present non-justiciable political questions that are consigned to the political branches, not the Judiciary.”

The eight states appealed and, four years later in 2009, the Second Circuit Court of Appeals reversed. That court ruled that the political question doctrine did not preclude jurisdiction and that courts should treat this case like any other nuisance case. The court stated:

- “[F]ederal courts have successfully adjudicated complex common law public nuisance cases for over a century.”
- Prior cases displayed “the federal courts’ masterful handling of complex public nuisance issues.”
- “Well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs’ claims and the federal courts are competent to deal with these issues.”

- “Federal courts have long been up to the task of assessing complex scientific evidence in cases ... based ... upon the federal common law.... They are adept in balancing the equities and in rendering judgment.”

The Second Circuit ruled that the case should go back to the district court to be decided based on federal common law of nuisance. The defendants appealed and in 2011 the U.S. Supreme Court reversed, but on a narrow ground that raised more questions than it answered. Notably, 23 states joined in an *amicus* brief submitted to the Supreme Court opposing the use of common law nuisance actions to supplant regulatory processes. They wrote: “The unsurprising inefficacy of the common law ... led to the enactment of extensive statutory regulation of pollution that has displaced the nuisance remedy in the major areas of pollution controversy.” They urged the court to reject the claims of the 8 state plaintiffs, which these 23 states said “seek to roll back the administrative state and exalt the courts in terms of how society regulates emissions....” As for the ability of judges to decide important environmental nuisance claims, these 23 states were harsh in their criticism: “judges have no particular ability to make scientific determinations themselves or to balance costs and benefits of various courses of action suggested by scientific findings.” Moreover, they said, “Judges, being ‘electorally irresponsible,’ do not possess the right to make such complex and disputed cost-benefit assessments for society.”

The Supreme Court split on the basic question presented, whether the political question doctrine divested the courts of jurisdiction even to consider the case, as the district court had ruled. In an odd twist, Justice Sotomayor was disqualified from ruling on the case because she was one of the three court of appeals judges who heard the case at the Second Circuit, even though she never participated in that court’s ruling as she was elevated to the Supreme Court after the case was heard but before it was decided. Thus, she never got to cast her vote. That left eight Supreme Court justices to decide the case, and they split 4-4 on the political question doctrine. All 8 joined, however, in deciding that the case should be dismissed on the narrow ground that federal common law was displaced by the federal Clean Air Act and the authority that Act vested in the U.S. EPA, and thus federal common law could not apply. The court left open the possibility, however, that state common law nuisance claims might be applied in cases such as this.

## **2. State Suits Over MTBE in Gasoline**

To date, 7 states plus the Commonwealth of Puerto Rico have filed suit against the oil industry seeking mostly money damages for alleged groundwater contamination from methyl tertiary butyl ether or “MTBE.” The states, and the years when they filed, are as follows:

2003	State of New Hampshire
2003	State of New Mexico
2007	State of New Jersey
2007	Commonwealth of Puerto Rico I
2013	Commonwealth of Puerto Rico II
2014	Commonwealth of Pennsylvania
2014	State of Vermont
2016	State of Rhode Island
2017	State of Maryland

MTBE is a chemical that was added to gasoline in the U.S. between 1979 and 2006. It is still widely used in gasoline in other places around the world. MTBE served as a so-called oxygenate, meaning it increased the oxygen content of gasoline. The addition of MTBE to gasoline made engines run cleaner and reduced harmful air emissions, especially from older carbureted vehicles.

In 1990, Congress amended the Clean Air Act by adding a requirement that gasoline sold in certain areas with poor air quality contain a minimum amount of an oxygenate such as MTBE. The amendments required that “any gasoline sold, or dispensed, to the ultimate consumer in carbon monoxide nonattainment area ... shall be blended ... to contain not less than 2.7 percent oxygen by weight.” 42 U.S.C. § 7545(m)(2)(B). Thus, Congress sought, through use of oxygenates such as MTBE, to reduce vehicle emissions to improve air quality.

The legislative record establishes that Congress not only anticipated that MTBE would be the primary oxygenate used to meet the oxygenate mandate, but also encouraged the use of MTBE. *See, e.g.*, 136 Cong. Rec. 10792 (1990) (remarks of Sen. Daschle) (“EPA predicts that the amendment will be met almost exclusively by MTBE”); 136 Cong. Rec. S 16954 (1990) (remarks of Sen. Chafee) (Clean Air Act Amendments “will encourage the use of oxygen-containing additives like ethanol and MTBE”); 136 Cong. Rec. S 16922 (1990) (remarks of Sen. Durenberger) (“reformulated gasoline is to have not less than 2 percent oxygen by weight. This requirement can be met by blending gasoline with a variety of additives like ethanol or MTBE”); 136 Cong. Rec. 3513 (1990) (remarks of Sen. Daschle) (the use of oxygenates such as MTBE in gasoline was “good for energy security and our balance of trade, as well as the environment,” because the addition of MTBE would expand the gasoline supply and diminish reliance on foreign oil). The public record shows that EPA considered available scientific and economic data and specifically approved MTBE as an acceptable fuel oxygenate to meet the Clean Air Act requirements. 56 Fed. Reg. 31154 (July 9, 1991). Thus, both Congress and EPA considered the relevant environmental, scientific, economic and political factors, and came to the considered judgment that the use of MTBE in gasoline was not just acceptable, but desirable.

The other principal oxygenate aside from MTBE was ethanol. But ethanol alone could not meet the federal mandate. Refiners nationwide had to blend nearly three billion gallons of oxygenates into gasoline to satisfy both the law and

consumer demands for gasoline. The entire ethanol industry produced only a fraction of that quantity when the oxygenate mandate took effect. In addition, ethanol requires a special infrastructure that was not available at the time, because unlike MTBE ethanol cannot be blended into gasoline at refineries and cannot be shipped along the national grid of pipelines. Instead, it must be delivered by rail, truck or barge to local terminals where it is blended at the last stage of the distribution process. In effect, then, refiners had no choice but to use MTBE to comply with federal law.

Certain states, too, encouraged or effectively required the use of MTBE – including some of the states that have since sued refiners for using MTBE or, put differently, sued them for doing what those states and the federal government required them to do. For example, only certain urban areas in New Jersey had such poor air quality that they were subject to the federal oxygenate mandate, but New Jersey chose to opt in to the federal program in its entirety, thus requiring an oxygenate throughout the state. New Jersey then enacted regulations that effectively precluded the use of ethanol as an oxygenate. When one oil company sought a waiver of those regulations in order to use ethanol, the state declined. That company sued the state for a waiver, but the state opposed and won. In 2004, years after the federal and state mandates took effect, and fully aware of the risks of MTBE to groundwater, the then-Commissioner of the New Jersey Department of the Environment stated “I continue to believe the air quality benefits of MTBE outweigh the groundwater impacts, which, while serious, are not a public health threat.” Three years later, the state sued the oil industry for groundwater impacts from MTBE.

Likewise, the latest state to sue over MTBE, Maryland, had previously lauded the air benefits that MTBE provided. In a press release issued in 2004, Maryland’s Department of the Environment stated: “MTBE makes important environmental and economic contributions by improving Maryland’s air quality and keeping gas prices affordable.” Press Release, Md. Dep’t of Env’t (Aug. 11, 2004), <http://mde.maryland.gov/programs/Pressroom/Pages/651.aspx>.

The state suits over MTBE all assert mainly common law claims for strict products liability, negligence and nuisance. Using these vague common law theories, they seek to have juries hold those who made and marketed gasoline with MTBE liable for all alleged damages caused whenever and wherever the product was spilled or leaked into soil and groundwater, regardless of who caused the spill or leak.

Each of these states – indeed, every state in the nation – has a comprehensive statutory and regulatory scheme that imposes liability for spills and leaks of gasoline where it belongs: on the party that caused or allowed the discharge, generally the owner and operator of any site where a discharge occurs. These states also require that owners and operators demonstrate financial responsibility, or the wherewithal to pay for remediation in the event of a discharge. The states also have funds, typically financed by fees or taxes imposed on the oil industry, to

cover the costs of remediation in those instances where the owner or operator cannot be identified or cannot afford to pay for cleanup. Some states even have special funds devoted to paying the costs of remediating MTBE.

The states have enormous statutory and regulatory authority to impose all manner of standards and requirements to prevent spills and to require remediation of spills of gasoline with or without MTBE. And they all exercise that authority. They all regulate the equipment required for the handling, storage and sale of gasoline, as well as a wide range of leak and spill prevention procedures. They all set and enforce exacting standards for remediation. The regulations and standards are the product of open, public legislative and rulemaking procedures. The procedures allow experts in science, technology and policy to develop the most effective means available for protecting human health and the environment and, where necessary, restoring the environment.

The states that have sued over MTBE are essentially asking that jurors disregard the states' own established statutory schemes which require that owners and operators of sites remediate discharges or pay for the remediation. Instead, they urge jurors to shift liability to those who made or marketed the spilled product. The states also seek to have jurors revamp the states' own standards for remediation. As an example, every state that has sued over MTBE has set a regulatory standard, usually designated a "maximum contaminant level" or MCL, for MTBE in groundwater and drinking water. New Jersey, for instance, imposes an MCL of 70 parts per billion or ppb for MTBE in both groundwater and drinking water. Hence, a party responsible for remediation of groundwater must reduce the level of MTBE to 70 ppb; likewise, a water utility must treat water to remove MTBE in excess of 70 ppb. By contrast, in the MTBE litigation, New Jersey and the other states demand that defendants pay to remove MTBE down to 1 ppb or below the method detection limit of water quality testing.

The states do not seek to compel cleanup so much as they seek to compel defendants to pay for what cleanup would cost. In other words, they seek money damages, measured by the cost to cleanup MTBE down to 1 ppb or lower, without any corresponding requirement that they actually use the money to remediate to that standard. Indeed, there is no reason or incentive for the states to use the money for cleanup. After all, they still compel owners and operators responsible for discharges to pay for the very same cleanup, albeit to a less demanding standard, say 70 ppb rather than 1 ppb. Moreover, in setting the less demanding cleanup standards, the states effectively declare that cleanup below those standards is unnecessary, and so there is no cause for them to use money exacted through litigation to do more. Lest there be any question about the states' motivation, consider the case brought by the State of New Hampshire. That case went to trial against one defendant, and a state court jury in the state's capital awarded the state every cent it sought from that defendant, some \$236 million. Most of the award was for estimated future damages to test for and remediate or treat MTBE in groundwater and drinking water. The defendant moved to impose a trust on those estimated damages requiring that they be used for the very

purposes for which they were awarded. The state opposed the motion. The trial court granted the motion. The state appealed. The New Hampshire Supreme Court reversed the ruling, holding that the state could use the funds for any purpose it chose.

These MTBE cases stand as examples of the trend of states seeking to supplant regulatory standards that are rooted in science and produced by thorough administrative processes with court decisions, or even jury verdicts, based on nebulous principles of common law. All of the MTBE cases brought by states were filed by private lawyers working on contingency agreements with the AGs. These lawyers have taken, or stand to take, large portions of whatever damages they can extract.

### **3. State Suits Over PFCs and Other Contaminants**

A notable recent example of common law litigation by a state is the case of *State of Minnesota v. 3M Company*. The Minnesota AG, along with outside contingency counsel, filed that case in 2010. The state alleged that 3M had disposed of, discharged and released perfluorochemicals or PFCs used in a variety of products including stain repellants such as Scotchguard™, non-stick cookware, fire retardants and chemical products. PFCs include PFOA and PFOS.

According to the complaint, 3M manufactured PFCs in Minnesota for more than 50 years. 3M reportedly stopped producing PFCs in Minnesota in 2002. During production, 3M routinely disposed of wastes including PFCs in landfills. According to 3M, it did so lawfully with state-issued permits. Nonetheless, in the litigation, the state claimed damages for PFCs that leached from landfills to groundwater and surface water.

In the 2010 complaint, the state alleged that PFCs are persistent in the environment, in that they resist biodegradation, and that they bioaccumulate in aquatic life, animals and humans. More pointedly, the state alleged that PFCs pose serious risks to human health.

The state asserted claims for natural resource damages or NRD based on a state statute which authorized the state to recover such damages in appropriate cases as trustee of the state's resources. But the state was not so much enforcing statutory or regulatory standards as it was suing for damages based on common law theories. The state asserted claims for nuisance, negligence and trespass. Based on those tort claims, the state also sought punitive damages. In other words, the state sought to have a jury award not only compensatory damages or NRD, but also punitive damages based on nebulous common law notions of nuisance and negligence.

In support of its claims, the state relied largely on an expert witness it engaged, David Sunding, a natural resources economist from U.C. Berkley. Dr. Sunding conducted a regression analysis of fertility rates, birth rates and incidences of

cancer in one community that was home to a landfill containing PFCs. He concluded, and the AG alleged in the litigation, that PFCs caused lower birth rates and higher cancer rates in that community.

Remarkably, about a week before trial was due to start, the Minnesota Department of Health publicly released a report that contradicted the allegations in the litigation. The Department had conducted its own study of birth rates and cancer rates in the same community Dr. Sunding studied as well as others, covering longer time periods. That more fulsome study found no increased incidence of cancer and no decreased incidence of birth rates. The press quoted both the AG and Health Department officials criticizing each other and the conflicting findings that each advanced. The trial was postponed briefly to allow the parties time to take account of the new state study.

The AG pressed forward, seeking \$5 billion in damages. On the veritable eve of trial, the parties reached a settlement. While still denying liability, 3M agreed to pay \$850 million into a special fund known as the “3M Grant for Water Quality and Sustainability Fund.” The settlement agreement, which is available at <http://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CV-10-28862/Agreement-and-Order.pdf>, sets forth “priorities” for the use of the fund, but also leaves the state wide discretion to spend the settlement money as it chooses.

This case is notable for many reasons, not least because the AG sued one of the state’s largest homegrown companies, formerly known as Minnesota Mining and Manufacturing Company, which remains one of the state’s biggest employers. It also bears repeating that the suit sought damages for discharges and disposals that the state had permitted over the course of many years.

The case presented another twist worth mentioning. The AG delegated the litigation to a private law firm working on a contingency which eventually received a large portion of the settlement, reportedly \$125 million. That firm previously represented 3M in various matters, including environmental matters and regulatory proceedings over PFCs. The firm withdrew from representing 3M just weeks before filing the case for the state. For some five years, the case was mired in collateral litigation as 3M sought to disqualify the firm due to an alleged conflict. One judge ruled in favor of 3M; a state appeals court affirmed; then the Minnesota Supreme Court sent the matter back to determine whether 3M waited too long to raise the conflict objection. Eventually, 3M and the firm reached an agreement that settled the objection.

#### **4. State Suits Over Opioids**

Perhaps the most numerous and active current state tort litigation is being waged over the manufacture and distribution of opioids. At present, more than half the states in the U.S. have filed suit, typically against manufacturers and distributors.

At the same time, hundreds of state political subdivisions, including cities, towns and counties, have filed similar suits.

To be sure, the opioid epidemic is real. State governments and their AGs have important roles to play in abating this crisis. Options for addressing the threat include stricter legislation and regulation, aggressive investigation of suspected wrongdoers, tighter enforcement of existing laws, and criminal penalties for those who violate the laws. AGs should be at the vanguard of all these efforts.

Solving the crisis involves balancing important and often-competing public interests. Some might prefer to ban all addictive pain medication, but millions of people suffering chronic pain would likely disagree. Some may want the government directly involved in prescribing certain medications, but many doctors and patients treasure the sacred relationship between them and probably want the government to stand clear.

Addressing the crisis must also entail sound scientific analyses of the risks and benefits of particular pharmaceuticals in the context of complex medical assessments of widely different conditions and diagnoses. Expertise in pharmacology, toxicity and medicine, as well as alternative treatments, the science on addiction, and public policy must be considered in formulating solutions.

Judges and jurors lack the requisite expertise to develop solutions. Civil litigation is incapable of accommodating all the competing interests at stake. And jury awards of money damages cannot solve the crisis. Yet AGs assert tort claims demanding damages.

The AG suits over opioids assert a variety of claims including statutory claims such as violations of state consumer protection laws. In most cases, however, the remedies for statutory violations are limited and do not yield large money awards. Hence, the AGs also typically assert common law tort claims for compensatory and punitive awards, as well as for injunctive relief. The most common tort claims in the opioid litigation are negligence, unjust enrichment, product liability and the catch-all claim of nuisance.

The very vagueness of these common law tort claims enables AGs to assert them for a wide range of conduct, including both acts and omissions. So, for example, a manufacturer of opioids might be liable for negligence and product liability if a jury finds that the risks of its drugs outweighed the benefits. Likewise, a distributor might be liable for negligence and unjust enrichment if a jury concludes that it sold opioids too widely and thereby reaped undeserved profits. And all can be forced to pay damages if jurors determine that opioids cause harm that constitutes a nuisance.

Frequently, state AGs announce their filing of tort claims with press releases. Some excerpts from these public statements provide insight into the motivation that spurs these tort cases. Note the references to vague theories of liability and the demands for money damages.

*From Alaska AG Jahna Lindemuth, Oct. 25, 2018:*

"We are determined to address the opioid epidemic in Alaska, and to hold accountable those who created it," said Attorney General Jahna Lindemuth. "There's no denying that the oversupply of highly addictive opioids led to the public health emergency in our State. Those responsible for this must answer for their actions in order to make the necessary changes for us to move forward."

\* \* \*

The State claims the defendants deliberately disregarded their duties to maintain effective controls and to identify, report and take steps to halt suspicious orders. As a result, the State claims the defendants created a public nuisance, were negligent, engaged in unfair trade practices, and were unjustly enriched.

*From former New York AG Eric Schneiderman, Feb. 1, 2018:*

Although [a certain drug] was approved by the Food and Drug Administration (FDA) to treat excruciating cancer-related breakthrough pain, the complaint alleges that [the drug manufacturer] recklessly marketed the drug for much wider use, covering a much broader set of patients. Additionally, the company allegedly engaged in a pattern of deceptive and illegal conduct by downplaying the drug's risks of addiction, bribing doctors to prescribe the drug, and lying to healthcare providers to skirt their authorization process. As a result, the Attorney General's office is seeking penalties and disgorgement of all revenues accumulated during the period of misconduct up to \$75 million.

*From Texas AG Ken Paxton, May 15, 2018:*

My office is holding [defendant manufacturer] accountable for fueling the nation's opioid epidemic by deceptively marketing prescription painkillers ... when it knew their drugs were potentially dangerous and that its use had a high likelihood of leading to addiction, Attorney General Paxton said. As [defendant] got rich from sales of its opioids, Texans and others across the nation were swept up in a public health crisis that led to tens of thousands of deaths each year due to opioid overdoses.

Sales of [defendant's] opioids are worth billions of dollars every year nationwide. Attorney General Paxton's lawsuit seeks significant penalties

from the company for its illegal conduct, and a permanent injunction to prevent future harm to Texans.

*From Kentucky AG Andy Beshear, Nov. 6, 2017:*

"Today we are taking action to hold [defendant manufacturer] responsible for unlawfully building a market for the chronic use of opioids in the name of increasing corporate profits, knowing all along the dangers of [its drug] that led to devastating effects on the Commonwealth," Beshear said.

\* \* \*

As part of Beshear's multifaceted strategy to combat the opioid crisis, on Sept. 22, 2017, Beshear's office awarded a contract to the legal team his office will partner with in the investigation and prospective litigation against opioid drug manufacturers distributors, and retailers. ...

Beshear said the contract ... provides that the contracting law firms and not the Commonwealth will pay the costs of any litigation.

Beshear emphasized the importance of the timely approval of the contract and noted that Kentucky needs the experience of local and national attorneys who have the resources and knowledge to help this office secure funds for the Commonwealth and to help repair the harm caused by those who have played a role in Kentucky's opioid crisis.

*From Tennessee AG Herbert Slatery, March 21, 2018:*

Attorney General Herbert H. Slatery III filed motions to intervene in three lawsuits brought by district attorneys general against several opioid manufacturers and health care providers. This Office moved to intervene to protect the interests of the entire state and its citizens while fulfilling our statutory duty to direct the opioid litigation in the state.

"[W]e are pursuing a dual track: conducting multiple investigations while also exploring settlement options," said General Slatery. "We want a global resolution that will provide comprehensive injunctive relief as well as remediation to assist with prevention, treatment, and education efforts."

The Tennessee Attorney General's Office is leading a coalition of approximately 40 states ... [which] is currently engaging in settlement discussions with certain manufacturers and distributors....

"Although this coordinated approach makes the State's claims stronger and more efficient by addressing them in a statewide manner, the ultimate goal is to maximize a recovery in order to address the epidemic in every community, particularly those hardest hit," General Slatery said.

We share the District Attorneys objectives of resolving a devastating epidemic and holding those responsible accountable. But, the Office disagrees on who should represent the State and assert the State's claims. The role of District Attorneys is traditionally in the criminal field, and we respect that role. These claims are civil claims, not criminal charges. ... Further, many of these issues may be eventually negotiated, and it is not practical to have 14 District Attorneys and the Attorney General represent the State's position. Each state cannot bring 14 people to the table and expect to accomplish anything.

[T]he District Attorneys have hired outside counsel without following the statutory requirements. By statute the Governor and Attorney General approve engaging outside counsel. That approval was neither sought nor given and in these cases proves problematic. Our consistent position has been that all recoveries go to the state and affected areas, not to outside attorneys.

One article on the state AG litigation against opioid manufacturers and distributors describes the overarching objective of amassing the combined strength of AGs with an army of outside counsel to force massive money settlements. *See Note, The Role of Direct Injury Government-Entity Lawsuits in the Opioid Litigation*, 87 Fordham L. Rev. 1141 (Dec. 2018). As the author of that article explains:

State AGs already have “greater litigation resources and moral authority than is typically present in mass tort actions initiated by private attorneys.” When these state AGs combine with other AGs and private attorneys, “their resources and moral authority are even more powerful.” Informal aggregations as large in scope as the tobacco and opioid litigation create a “combined litigation muscle, moral authority, and [high] potential for winning overwhelming judgments.” Most importantly, the combined muscle allows plaintiffs to procure “large settlements even when their underlying legal claims are questionable.”

*Id.* pp. 1182-83 (footnotes omitted), quoting Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685, 689-90 (2000).

## **5. State Suits Over Other Activities**

State common law suits have been brought over a wide array of products and activities. Just for example, until 2008, when the Rhode Island Supreme Court dismissed the case, that state's AG had sued the manufacturers of lead paint in a case that lasted years and went through two lengthy jury trials. Although the state set levels of permissible lead in buildings, and heavily regulated places where such paint is still found, it sued the industry for damages in a jury trial solely on a claim of common law nuisance.

As another example, the former AG of California Jerry Brown, sued major automakers for damages the state incurred due to climate change, all on a nuisance theory.

Large-scale cases have also been brought against financial services companies and numerous manufacturers based principally on consumer protection theories.

#### **IV. PRACTICAL ADVICE FOR LITIGATING AGAINST STATES**

##### **1. Get To Know State Officials**

A state is not just a government of laws, at least not when it resorts to common law litigation. In this context, the state is a litigant acting through individual representatives. Chief among the representatives is typically an AG or influential members of an AG's office, as well as a Governor with a staff. Each may have different or even competing interests and objectives. These state officials also delegate substantial authority, and sometimes near total control of litigation, to outside lawyers. Add to all this the fact that litigation can last longer than the political careers of state officials and so the individuals representing the state can change periodically during the course of a case.

Precisely because a case of this sort involves vague common law notions, the positions that a state takes in litigation involve wide-ranging discretion exercised by these various individuals acting on behalf of the state. If a defendant is to influence the exercise of discretion by the state's representatives, it would do well to know those representatives and what drives them.

##### **2. Appeal to Political Interests**

A common motivation driving many a state official is political gain. Moreover, when officials file suit purportedly on behalf of the residents of a state, there should be good reason for the officials to want to satisfy those residents. This natural political motivation can frequently provide opportunities for defendants to affect positions states take in litigation.

##### **3. Seek a Favorable Forum, Likely a Federal Court**

Litigation by states can be significantly affected by the venue, including by the difference between state and federal court. The latter is generally, though not always, preferable. The potential grounds for federal jurisdiction of claims asserted by states are varied and differ in different cases. Suffice it to say here that a defendant seeking federal jurisdiction may have numerous options, not all of them obvious, and would be well served to consult an expert in jurisdiction or at least a counsel with experience litigating jurisdictional issues with states.

#### **4. Challenge Standing and Primary Jurisdiction**

Litigation with states can involve specialized issues of standing, such as the *parens patriae* issue described earlier. To cite another example, litigation with a state could involve thorny issues over the relative authority or standing among the state and its political subdivisions, such as counties, cities and towns. For instance, conduct for which a state seeks damages might have been permitted by a local authority, pitting one against the other. Conversely, a local authority might already have asserted and resolved a claim for some of the same conduct or damages the state asserts.

A related issue concerns the authority of a court to hear claims that are or should be within the primary province of a state regulatory agency. It is ironic, perhaps, but permissible for a defendant to seek dismissal of a claim brought by a state on the ground that the court should defer the claim to a state agency based on the doctrine of primary jurisdiction.

#### **5. Invoke Statutory and Regulatory Standards**

As noted, states frequently seek to have judges and juries impose on defendants standards based on common law that are more stringent or exacting than those set by the state itself through regulation or legislation. Occasionally, such claims can be barred by the doctrine of preemption, especially if the statutory or regulatory standard is embodied in federal law. Even if not preempted, the claims may be effectively barred, defeated or at least mitigated by demonstrating compliance with the set standard or urging that the set standard provide the norm for future conduct. There is room for creativity in arguing against such claims. For example, if a state routinely applies a regulatory cleanup standard and then sues a non-resident corporate defendant demanding a different standard, that defendant might challenge the different standard under the Commerce Clause of the U.S. Constitution or the separation of powers doctrine.

#### **6. Oppose State-Wide Claims and Demand Proof of Causation**

In some cases, such as those over MTBE, states seek damages for hundreds or even thousands of sites at once. States may find it expedient to try to dispense with site-specific proof over such issues as causation or damages. In the MTBE case brought by the State of New Hampshire, the state did just that, with approval of the state court. It was allowed to rely mostly on sweeping expert opinions based on statistical extrapolation to prove liability and damages for numerous sites state-wide, essentially depriving defendants of the ability to disprove causation or show a lack of damages at particular sites. This approach raises fundamental concerns of due process.

Similar issues are presented in other cases also such as opioid litigation where states would be hard-pressed to show specific damages caused by particular acts of any given defendant. So, too, in climate change litigation, it is virtually

impossible for a state to show a causal link between actions of a particular defendant and specific damages, given that global warming is global and the contributors are countless. Likewise, in cases over PFCs or other contaminants, causation is challenging for states to the extent the contaminants emanate from numerous sources. In all these cases, defendants would do well to insist that states carry the essential burden of every claimant to prove proximate causation.

## **7. Assure that Payments Are Properly Earmarked**

### **A. Seek To Impose a Trust on a Judgment or Settlement**

Defendants in cases brought by states frequently have two main interests in assuring that any monies a state secures by judgment or settlement be used to remedy the alleged harm. *First*, dedicating the funds to remedy alleged harm better protects the defendant from claims by others over the same harm. *Second*, limiting the use of the funds may limit the incentive of state officials to demand the funds in the first instance, or at least mollify the extent of their demand. Case law is split on whether and under what circumstances a court can impose a trust over a judgment. For instance, as noted earlier, in the *State of New Hampshire MTBE* case, the trial court granted a motion to require that a jury award for future cleanup costs be held in trust for future cleanup, but the state Supreme Court reversed that order. In a settlement, the parties are generally free to earmark the settlement funds. As explained previously, the parties did just that in the *Minnesota v. 3M* case, albeit to a limited extent.

### **B. Avoid Fines and Penalties**

Defendants have lots of reasons to want to avoid having to pay fines or penalties. One reason is that such payments are generally not tax deductible. *See, e.g., IRS Publication 535, "Business Expenses"* at p. 47 (Mar. 16, 2018) ("generally, no deduction is allowed for penalties or fines paid to a government...").

### **C. Get Tax Advice on Any Payments**

A recent change in the Tax Code presents a trap for the unwary defendant settling claims brought by states. The Tax Cuts and Jobs Act enacted in late 2017 includes an amendment to Section 162(f) of the Tax Code affecting the deductibility of monies paid to state or other governments by way of a settlement or judgment. Under this amendment, even previously deductible payments to a government for restitution or to come into compliance with the law are no longer deductible unless the settlement agreement with the government or a court order expressly states that the payments are for restitution or to achieve compliance with the law. As the IRS has explained: "As of December 22, 2017, no deduction is allowed for the restitution amount or amount paid to come into compliance with the law unless the amounts are specifically identified in the settlement agreement or court order." *IRS Publication 535, "Business Expenses"* at p. 47 (Mar. 16, 2018).