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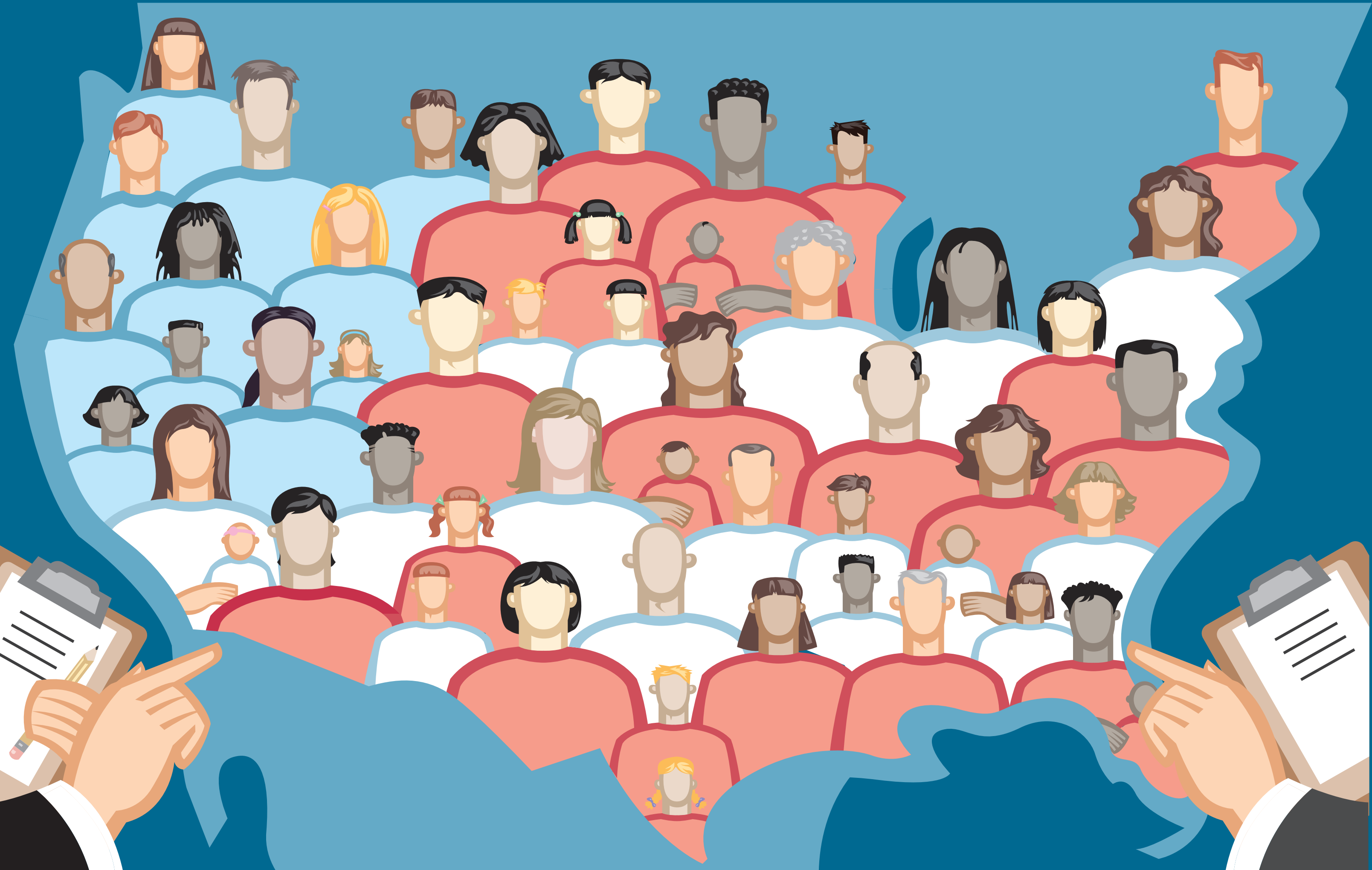
TRENDS IN STATE ATTORNEY GENERAL LITIGATION



BY SAUL P. MORGENSTERN, SAM LONERGAN AND DANELCO MOXEY

State attorneys general (SAGs) have become increasingly aggressive in bringing multifaceted, multi-state lawsuits against a broad array of companies and industries. Often brought in their home state courts, SAG lawsuits have resulted in multimillion dollar verdicts and settlements. In recent years, SAGs have secured victories against a growing list of industries, including the pharmaceutical industry, the insurance industry, the online social-media industry, the financial service industry, consumer product manufacturers and others.

Given current trends, it is safe to assume these lawsuits will continue to target a diverse group of industries. It is therefore imperative to understand the underlying drivers of the SAG actions and to develop coherent plans for avoiding these lawsuits, or defending against them should they arise.

State attorneys general are the chief lawyers for their respective states. While the specific scope of their authority varies, each is charged with protecting the interests and safety of the state and its citizens. There are many reasons for the increased aggressiveness of SAGs, including recent expansions of their powers to enforce federal law and recent pronouncements of the Supreme Court limiting federal preemption. As an initial matter, however, it is important to recognize that in almost every state, the attorney general is an elected position. Therefore, politics is a significant contributing factor to every decision. Suing an industry garners significant press, which is often dominated by SAG press releases.

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Given the outlook for most state and local budgets, any effort to pull money into state coffers from alleged wrongdoers is likely to be warmly embraced by most voters. This dynamic, combined with the fact the SAG may employ private counsel on a contingent fee basis to prosecute the claims, often makes these litigations irresistible opportunities to boost name recognition without appearing to spend state resources until the lawsuit is resolved on terms favorable to the state.

Legislative compromises that leave gaps or ambiguities in regulatory schemes are another factor, with state attorneys general attempting to fill these gaps through litigation and settlement agreements that govern future conduct. Such agreements often reflect the attorney general's political views, not that of Congress or the state legislature. This phenomenon – often referred to as "legislation through litigation" – is facilitated in part by the SAG's unique ability to prosecute claims on behalf of its citizens under each state's *parens patriae* doctrine. This doctrine allows SAGs to bring representative claims, similar to class actions, on behalf of a group of citizens (including individuals and corporations), while avoiding many of the procedural hurdles associated with a class action.

The potential exposure for a company facing such a suit is often enough to force settlement without even considering the merits of the claims. This is particularly true when individual harms are recast into broad harm to the public through various statutory and common law applications, such as the public nuisance doctrine, which typically contain significant civil penalty and fine provisions.

The tobacco litigations of the 1990s provide a good case study illustrating the tactical mind set that drives many of these litigations. After decades of successfully defending against claims in numerous states, the tobacco industry was humbled by litigation brought by 46 state attorneys general who, through the use of their state laws, unique positions, and effective coordination, were able to avoid many of the procedural and substantive obstacles private litigants face. The cases led to the 1998 Master Tobacco Settlement Agreement, which forced the industry to pay more than $200 billion to the states.

After settling fraud and antitrust claims with the New York State Attorney General for $850 million, Marsh Insurance found itself defending against an onslaught of other state regulatory claims and private class action suits.

This SAG success resulted from some relatively new tactics. First, increased communication turned what started as a single suit brought by the Mississippi attorney general into a lawsuit comprising 46 states and several U.S. territories.

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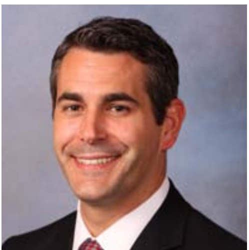

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Second, the SAGs retained private counsel on a contingency fee basis, essentially outsourcing their law enforcement function to lawyers with financial incentive to obtain money from the tobacco industry. Third, by raising both consumer protection and Medicaid subrogation claims against the tobacco industry, SAGs employed a multifaceted approach instead of a more traditional single claim approach.

Last but not least, the SAGs were permitted to aggregate individual damages into a single claim for harm to the general welfare, overcoming the obstacle of having to prove specific causation. Many, if not all of these tactics are still being employed by SAGs today.

Coordination among state attorneys general has been driven, in part, by the National Association of Attorneys General. NAAG is dedicated to fostering increased cooperation among the states on all legal and law enforcement issues and serves as their central communication hub. Among other things, NAAG organizes meetings to discuss potential claims and notifies members when investigations are initiated. For example, a collaboration fostered by NAAG enabled a small coalition of states investigating DISH Network, LLC, to evolve into a 46-state litigation.

Under the authority of state and federal laws, SAGs arguably now have the power to bring suit and launch investigations concerning virtually any industry. Every investigation or litigation spearheaded by a state attorney general is replete with unique legal, political and tactical considerations that must be identified and evaluated from the outset of the matter.

The following are some practical issues to consider when faced with such a situation:

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Appropriateness of Outside Counsel Fee Agreement: As noted above, SAGs increasingly rely on private counsel to prosecute claims on a contingent fee basis. Depending on one's perspective, this is a course that avoids budget-driven enforcement choices or facilitates the filing of cases lacking merit because there is no direct cost for bringing them. With more than $290 billion in cuts to state budgets over the past five years, this tactic has been used frequently.

The lawfulness of outsourcing law enforcement judgments to private counsel with financial interests in the outcome is open to question. Several states limit the SAG's ability to enter into contingency fee agreements by requiring a bidding process, capping hourly wages and/or requiring extensive documentation. Additionally, where a state's constitution or statutes vest the power to spend state money in the legislature, a SAG's decision to enter into a contingency fee agreement with private counsel may violate the separation of powers doctrine. The Louisiana Supreme Court has invalidated such a contingency fee agreement on that basis. Similar arguments are currently working through other state courts.

These agreements may be similarly susceptible to due process arguments, and also may give rise to ethical considerations in the context of agreements to pay the state's counsel fees directly. These issues should be examined and possibly addressed early in a case.

The Scope of the Conduct at Issue: Because SAGs routinely meet and are in constant communication, it is important to determine whether the conduct at issue is limited to one state or extends to multiple states. If the conduct extends beyond a single state, multiple state legal regimes are likely to apply, and it is critical to identify their similarities and differences. The outcome of that analysis will likely affect both defense and settlement strategy.

Any settlement consideration must also involve analysis of whether a settlement

may expose the settling defendant to future lawsuits. Indeed, these cases are often instigated by private counsel who pitch potential lawsuits to SAGs, and the pitch is more persuasive if the potential defendants have shown a propensity for settling similar claims. For example, after settling fraud and antitrust claims with the New York State attorney general for $850 million, Marsh Insurance found itself defending against an onslaught of other state regulatory claims and private class action suits.

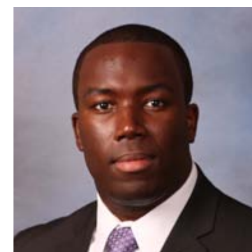
If the claims at issue implicate other industry members, it may present an opportunity to share legal costs, contribute to advancing settlement terms and present a host of other practical benefits to the defense group.

Local State Politics: Understanding local state politics is crucial to gaining a better understanding of the SAG's concerns and motivations. Each state is unique. For example, in some states the law is clear that the governor has no authority to interfere with the attorney general's litigation strategy. In such states, barring the governor's ability to enforce his or her will politically, the attorney general enjoys a great deal of autonomy to direct litigation strategy and tactics. In such states, the legislature is the more influential institutional check on the state attorney general. In other states, it may be the governor.

Statute of Limitations and Other Initial Issues: Depending on the state and the posture of the suit, a statute of limitations may be operative. Because application of the statute of limitations often limits liability or, in some instances, precludes a claim altogether, analyzing applicability is a critical early case assessment task.

An often-related question is whether the lawsuit has been brought on behalf of the proper party. In certain instances, SAGs may attempt to circumvent the application of the statute of limitations by filing suit on behalf of the state, which may be immune to the statute, rather than on behalf of the state agency or citizens who "own" the claim and to whom the statute may apply. This is another issue that should be analyzed and addressed early.

Every investigation or litigation spearheaded by a state attorney general's office is unique and has the potential to grow in both the number and type of plaintiffs and claims, and any party that is the object of a SAG investigation or lawsuit should retain counsel experienced in defending against such actions. ■



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