

National State Attorneys General Program Columbia Law School

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Jim Tierney, Director, National State Attorneys General Program

Ellen Chapnick, Dean for Social Justice Initiatives

Newsletter 2005 #11

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Headlines:

- 1. WI Gov. agrees to AG push for FDA lawsuit**
- 2. 33-State Action May Result in Ameriquest Refund of \$295 Million**
- 3. MN not giving up on cigarette fee**
- 4. IN AG files suit to freeze foundation assets, remove board**
- 5. AZ AG settles with firm that charged workers to cash checks**
- 6. Executive's Article Revives Feud with NY AG**

Full Stories:

1. WI Gov. agrees to AG push for FDA lawsuit

by Carolyn Smith

Friday, December 9, 2005

UW Badger-Herald

Gov. Jim Doyle Wednesday granted Attorney General Peg Lautenschlager's request to bring a lawsuit against the Food and Drug Administration for its delay in approving the emergency-contraceptive pill Plan B for over-the-counter purchase.

Last week, Lautenschlager asked Doyle for the authority to bring a legal suit against the FDA if an investigation were to dredge up evidence the agency intentionally impeded the morning-after pill's over-the-counter approval for nonmedical reasons.

"FDA's postponement in making a decision is the result of politics, not science, and negatively impacts the health of women," Doyle said in a letter to Lautenschlager, officially giving her the power to file the suit.

Plan B has been available by prescription since 1999. The makers of the emergency contraceptive, Duramed Pharmaceuticals Inc., applied for over-the-counter FDA approval in 2003. Plan B is marketed to prevent pregnancy if taken within 72 hours, reducing the risk by at least 89 percent if taken in that time frame.

Lautenschlager, who, in a previous release, called the FDA's inaction "politically motivated," lauded Doyle's decision.

“I am pleased with the governor’s action,” Lautenschlager said in a statement released Thursday. “We want to ensure that this contraceptive drug is readily accessible to women who want to prevent pregnancy, especially women who are the victims of sexual assault.”

However, Marc Tuttle, communications director for Pro-Life Wisconsin, said the AG’s plan for a lawsuit is a waste of time and money.

“This is a frivolous lawsuit,” Tuttle said. “The FDA hasn’t broken any laws.”

Tuttle said because emergency contraception is a “super dose” of regular birth-control pills, it should only be dispensed with a doctor’s consent.

“These are hormones that are on the market in smaller doses with a physician’s oversight,” Tuttle said. “The notion that you could somehow sue because the same physician oversight is required for the morning-after pill defies common sense.”

But pro-choice advocates said women’s health is being sacrificed because politics have interfered in the FDA’s approval procedures.

“Obviously, this is about playing politics with women’s lives,” Kelda Helen Roys, executive director of National Abortion and Reproductive Rights Action League Pro-Choice Wisconsin, said. “It’s a very troubling trend that the agency charged to protect us and improve our health is putting conservative ideological opposition to birth control before the needs of America’s women.”

Roys said all women should have “ready access” to birth control, adding the delay in Plan B OTC approval is especially damaging to the health of women who do not have any, or adequate, health insurance.

“This really affects the working poor who might not have the money to go to a doctor and pay \$100 for a visit,” Roys said.

2. 33-State Action May Result in Ameriquest Refund of \$295 Million

LA Times

By E. Scott Reckard and Christian Berthelsen

December 15, 2005

Ameriquest Mortgage Co. would overhaul its business practices under supervision of an outside monitor to settle allegations by 33 states that it overcharged its home loan customers and pressured appraisers to inflate property values, according to a draft of the settlement.

The proposed deal includes a payment of \$325 million - \$295 million to repay borrowers and \$30 million to cover the cost of the states' investigation, according to a copy of the proposal obtained by The Times. It would be the second-largest settlement of its kind,

after Household International's \$484-million agreement in 2002 with attorneys general for all 50 states.

Once approved, the deal is expected to help clear the way for company founder Roland E. Arnall to be confirmed as ambassador to the Netherlands. A senate vote on the nomination was sidelined after Democrats on the Foreign Relations Committee said Arnall's company should first settle the probe.

State officials who negotiated for months with the Orange-based lender had hoped that both sides would approve the deal by the end of this week. But the current version, the fifth revision of the deal, was written by the states, and Ameriquest isn't satisfied yet, said Iowa Atty. Gen. Tom Miller, the leader of the multi-state task force.

"Some terms still could change," Miller said Tuesday, predicting the final agreement won't be signed until January.

Ameriquest spokesman Chris Orlando said that although the settlement wasn't complete, the company believed that further discussions would yield a "well thought-out, comprehensive agreement that is good for consumers and fair to the company."

The draft proposal provides, for the first time, details of provisions that had been described only in general terms by representatives of the company and the states. It would:

- . Reshape Ameriquest's compensation practices, barring the company from rewarding employees for jacking up loan fees and interest rates and adding penalties for paying off a loan early.
- . Place restrictions on what loan agents can tell borrowers, requiring them for example not to say their loans are "better," "lower than" or "competitive with" other lenders unless that is true.
- . Attempt to keep Ameriquest loan agents from pressuring appraisers to inflate home values by barring them from discussing valuations with the people performing them and by requiring regular reviews of appraisers' work.
- . Require the appointment of an independent monitor, funded by the company, "with broad discretion to review Ameriquest's operations to ensure that the company complies with the terms of this settlement."

Ameriquest previously has reported setting aside \$325 million for the settlement. The draft proposal includes the first details of how that would be spent: \$230 million to repay borrowers, \$65 million that states would use for additional borrower restitution or replacement loans and \$30 million for the states' costs.

People familiar with the negotiations cautioned that terms, including the provision for an outside monitor, were still subject to change.

Ameriquest is one of the nation's biggest lenders in the fast-growing "sub-prime" market to people with credit blemishes, frequent job changes or other issues that prevent them from getting traditional "prime" mortgage loans. These customers are considered to have above-average risk, and they pay higher interest rates and fees as a result.

Former Ameriquest loan officers have told The Times that relentless pressure to make loans created a "boiler room" atmosphere at the company, leading loan agents to deceive customers and push appraisers to inflate property value estimates to help close deals.

At a Senate hearing this fall, Arnall conceded that "some of our employees did not do the right thing" but that the company had taken action to prevent abuses from occurring again.

"There already is general agreement on a set of prospective measures that will be a model for the lending industry," he told the committee.

Several attorneys general have said the settlement's "best practices" would go well beyond those found in earlier agreements when sub-prime lenders ran afoul of regulators and community groups. In one such case, Ameriquest made peace with a critical nonprofit group, the Assn. of Community Organizations for Reform Now, in 2000 by pledging to adopt practices that would serve as a model for the industry.

Consumer advocates said the provision for an independent monitor was key to the agreement. The only way to ensure that the settlement is "not merely a piece of paper" is for the states to make sure that an aggressive monitor gets appointed - and then be willing to reopen the case if the monitor finds compliance problems, said Ira Rheingold, general counsel of the National Assn. of Consumer Advocates, which represents attorneys who frequently sue lenders.

Bob Gnaizda, policy director of the Greenlining Institute in Berkeley, which lobbies on behalf of low-income communities, said the independent monitor should also be empowered to watch over what he called Ameriquest's misleading ad campaigns.

Those ads bill Ameriquest as the "Proud Sponsor of the American Dream" but often don't mention that it focuses almost exclusively on higher-cost sub-prime loans.

The company, which also sponsors Major League Baseball and the Rolling Stones on tour, has said that its advertising taken as a whole is not misleading for borrowers.

Industry groups Tuesday declined to speak about the specifics of the pending settlement, awaiting further details. But Dustin Hobbs, a spokesman for the California Mortgage Bankers Assn., said lenders already are "committed to fair, nondiscriminatory lending."

Hobbs said his association was planning a major push to educate consumers about the realities of borrowing, as a way to prevent misunderstandings.

"We recognize that people out there are not as educated as they should be," he said. "We're taking responsibility for that."

3. MN not giving up on cigarette fee

by Tom Scheck

Minnesota Public Radio

December 21, 2005

One day after a Ramsey County District Court judge threw out the 75-cent-a-pack surcharge, lawmakers were still a bit stunned by the ruling. When the "health impact fee" first passed last summer, the legal issue never came up.

Gov. Tim Pawlenty and others also ridiculed the lawsuit when it was first filed, saying a "first year law school student could beat it." Now everyone is taking the lawsuit more seriously.

"We were quite surprised by this judge's decision," Pawlenty acknowledged on Wednesday.

During a news conference Pawlenty said the ruling is troubling because agreements like the one reached seven years ago with tobacco companies shouldn't tie the hands of lawmakers to do business in the future. In terms of the budget gap, Pawlenty says he's not too concerned because it's only a fraction of the state's \$31 billion budget.

If the appeal fails, Pawlenty suggested lawmakers could find another way to fill the budget hole or use a portion of the state's budget surplus to make up the difference.

"We have the money in the bank to address this matter. We have extra money, so to speak, in the tax relief account," according to Pawlenty.

The state has been collecting the fee from wholesalers since August. Pawlenty said his office may consider imposing it at the retail level, which they believe would circumvent any legal challenges.

Several lawmakers say the governor doesn't have authority to make such a change. Pawlenty also seemed to lean against the idea of adding the 75-cent-a-pack fee to the state's current tobacco tax. He said the state's economy is improving and they may not need the money.

Rep. Ray Vandever, R-Forest Lake, agrees. He says they shouldn't appeal the decision and abandon the fee altogether.

"We didn't need the tax in the first place, and so I don't think I would be too sad to see it just go away," he said.

But that doesn't sit well with some lawmakers. The fee was a critical to a budget solution that ended two special sessions and a partial government shutdown. Much was made at the time of whether the charge was a fee or a tax. Pawlenty, who had pledged not to raise taxes, insisted on calling it a fee. And the judge seemed to rely at least in part on that distinction when declaring it invalid.

Sen. Sheila Kiscaden says an increase in tobacco prices reduces smoking rates and costs from smoking-related illnesses. The Independence Party member from Rochester says she doesn't care if it's called a fee or a tax.

"What matters is that we raise the cost of cigarettes, because it has a very positive impact on health, health outcomes, chronic disease," she said.

The ruling has also prompted some confusion in the state Capitol. Some suggested that the judge's ruling could not be appealed because the tobacco settlement gives Ramsey County District Court the final decision on legal issues involving the agreement. Both Pawlenty and Attorney General Mike Hatch disagree and say they have the right to appeal.

There's also the issue of whether the state should continue collecting the tobacco surcharge. The Minnesota Department of Revenue says it will continue to collect until it receives a notice from the judge. But Kris Eiden, with the Minnesota Attorney General's office, says that notice is the judge's order itself.

"The order indicates that this fee cannot be enforced and I read that as meaning it can't be enforced... as of today," she said.

Eiden says her office asked the judge to allow the state to continue collecting the money until all of the appeals are exhausted. If all of the appeals fail, the state is required to give back the \$65 million it collected since August first.

A hearing has been scheduled on the state's request for January 18th.

Some smokers are greeting the legal decision with delight. AbdelRahman, who works at the Phoenix Food and Tobacco store in downtown St. Paul, says he's a smoker who wants to quit. He says he and many other customers were unhappy when the increase was enacted.

"Customers didn't like the increase to start with, they were really mad," he said. "A lot of customers had to shift and change the brand of their cigarettes from name brands to generic brands."

It isn't clear if the smokers who paid the fees through higher prices will ever see a return if the judge's order stands. The order says the tobacco companies and distributors who filed the lawsuit should receive rebates or credits for the money they already paid.

Pawlenty disagreed with the order and said the smokers, not the tobacco companies, should receive the rebates.

4. IN AG files suit to freeze foundation assets, remove board

By Dan Stockman

The Journal Gazette,(Fort Wayne Indiana)

Indiana Attorney General Steve Carter filed a lawsuit against the Olin B. and Desta Schwab Foundation and its board members today, seeking to freeze its assets and remove its entire board.

The lawsuit, filed in Allen County Superior Court, names current board members Richard H. Blaich and Jon Garver as defendants, as well as former members John Dortch and Charles Conville, and Asset Funds LLC, the Delaware corporation used to buy a \$1.5 million luxury home outside Las Vegas with foundation money.

The lawsuit says the board acted illegally when it dissolved the Fort Wayne-based foundation and merged it into a Nevada foundation with the same name and board members. When that merger took place, all of the assets of the Indiana foundation became property of the new Nevada foundation, including the luxury home in a gated resort outside Las Vegas.

The lawsuit asks the court to return those assets to Indiana. Additional legal action was expected to be filed in Nevada today.

“We believe that the merger was an illegal attempt to evade government oversight in Indiana,” Carter told The Journal Gazette.

The suit also asks the court to remove the current board members and permanently bar the defendants from any official duties with the foundation.

5. AZ AG settles with firm that charged workers to cash checks

Associated Press

November 20, 2005

The Attorney General's Office has settled a case against a day labor company that charged workers to cash their daily paychecks and prohibited them from taking full time jobs with a client company.

Construction Staffing Services has a roving shuttle that picks up day laborers in and around Phoenix for day jobs.

According to the Attorney General's Office, the company charged workers a small percentage of their daily check to cash them, which is illegal in Arizona. They also illegally barred workers from taking permanent jobs with clients during the first 90 days of a work assignment.

Under the settlement agreement, the company is prohibited from charging check cashing fees, preventing workers from taking permanent jobs or paying less than minimum wages. They also must pay \$10,000 in civil penalties and attorney's fees to the state.

6. Executive's Article Revives Feud With NY AG

By Jonathan D. Glater

December 23, 2005

The New York Times

In an op-ed article in The Wall Street Journal yesterday, John C. Whitehead, the former chairman of Goldman Sachs, who now heads the corporation responsible for rebuilding Lower Manhattan, accused Mr. Spitzer of declaring "war between us" and warning that Mr. Whitehead would "pay dearly for what you have done."

Mr. Whitehead wrote that Mr. Spitzer's remarks came days after another op-ed article by Mr. Whitehead in The Journal in April. In that earlier article, Mr. Whitehead had attacked Mr. Spitzer for making fraud accusations against Maurice R. Greenberg, the former chief executive of the insurance giant American International Group.

Mr. Whitehead did not respond to messages left at the Lower Manhattan Development Corporation.

Mr. Whitehead wrote that Mr. Spitzer's "increasingly relentless crusade against boards and senior executives, particularly when they are unfairly singled out because they have antagonized him, goes too far."

Mr. Spitzer's office replied yesterday, with a spokesman denying that the attorney general had threatened Mr. Whitehead and questioning the motive for yesterday's article.

"That whole quote that he had from Mr. Spitzer was fabricated," Darren Dopp, the spokesman for Mr. Spitzer, said in a telephone interview yesterday.

"Eliot did call him. They did have a discussion. Eliot took exception to some of the things" that Mr. Whitehead wrote in the April op-ed article, Mr. Dopp continued. "And it did conclude with Eliot telling him, focus on your day job."

Mr. Dopp questioned whether the timing of Mr. Whitehead's article was intended to assist Mr. Greenberg, who faces a civil lawsuit brought by Mr. Spitzer's office.

A spokesman for Mr. Greenberg, Howard Opinsky, said that his client had not talked to Mr. Whitehead to plan the article yesterday. "I was as surprised as everyone else was to see it," Mr. Opinsky said.

In the suit filed in May, Mr. Spitzer accused Mr. Greenberg, A.I.G. and its former chief financial officer of manipulating financial statements to bolster company results and mislead regulators and investors.

Mr. Spitzer has decided not to pursue criminal charges against Mr. Greenberg, although federal prosecutors and the Securities and Exchange Commission have also been investigating.

Last week, Mr. Spitzer released a report contending that Mr. Greenberg unfairly enriched himself and other A.I.G. executives in a series of transactions that violated the will of Cornelius Vander Starr, the company's founder, and defrauded a foundation he created.

The Starr Foundation, established to benefit educational and cultural institutions, is one of the nation's largest charitable organizations, with \$3.5 billion in assets. Mr. Greenberg has denied any wrongdoing.

To critics, Mr. Spitzer's actions against Mr. Greenberg are just one part of a broader pattern of overstepping the bounds of his office, overzealously pursuing corporate executives whose actions were not criminal.

Mr. Whitehead's April article summarized this view, stating that Mr. Spitzer's "actions are beginning to do more harm than good."

In that earlier article Mr. Whitehead also suggested that Mr. Spitzer was pursuing Mr. Greenberg so aggressively in part because the two men disagreed over the necessity of changing the state's tort laws - something that Mr. Spitzer's spokesman said did not make sense, because Mr. Spitzer was not opposed to the idea of modifying the civil justice system.

But attorneys general have considerable discretion in how they wield their authority, said James E. Tierney, former attorney general for the state of Maine and now director of the Attorney General Program at Columbia Law School.

"As any person who views 'Law & Order' knows, there's a lot of judgment that goes into those decisions" whether to prosecute someone, said Mr. Tierney, who said he has supported Mr. Spitzer's aggressive approach to corporate malfeasance. "A prosecutor has to make those decisions based on the facts that they have at the moment."

He added: "There are lots of ways to restrict so called runaway prosecutors: you can limit their budget; you can change the underlying statutes that provide their authority; you can defeat them at the polls. You can do all these things and more."

Even, apparently, write op-ed articles for The Wall Street Journal.