

Multistate Litigation

Environmental Law Forum

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Brigid Landy Khuri

K&L Gates, LLP

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Presentation Overview

- What is multistate litigation
- Players
- Benefits
- How and why
- Legal authority
- Case studies
- Cases to watch

What is Multistate Litigation?

- Two or more state attorneys general engaged in coordinated actions against a common defendant or defendants
- Sometimes joined by state agencies, such as Pennsylvania Department of Environmental Protection

Legal Areas of Multistate Litigation

- Anti-trust
- Consumer protection
- Unfair and deceptive acts and practices (UDAP)
- Data privacy
- Environmental protection
- Immigration policies

Defendants in Multistate Litigation

Industry



Federal Government



Why Multistate Litigation?

Benefits to States

- Consolidate otherwise limited resources
- Exert greater pressure on defendant(s)
- Impact national conversation and policy
- Raise profile of AG*

Benefits to Consumers/Constituents

- Settlement payments
- Policy changes

Benefits(?) to Defendants

- If litigation must happen...
 - Potential to resolve multiple lawsuits through single, coordinated effort
 - Obtain uniform settlement terms
 - Control the narrative

Note: Gov't entities must be willing to coordinate!

How Do Multistate Cases Arise?



How Do Multistate Cases Arise?



- **Standing Committees:**
 - Antitrust
 - Civil Rights
 - *Consumer Protection*
 - Criminal Law
 - *Energy and Environment*
 - Tobacco
- **Special Committees:**
 - Agricultural
 - Charities
 - Elder Justice
 - Financial Services
 - Gaming
 - Human Trafficking
 - Internet Safety
 - Substance Abuse
 - Marijuana Issues Working Group
 - Veterans Affairs
 - *Volkswagen Settlement Fund Committee*
 - *Federalism and Preemption*

What motivates Attorneys General?

- “patterns of participation”
- *An Integrated Model of U.S. Attorney General Behavior in Multistate Litigation*
 - Colin Provost, University College, London

What motivates Attorneys General?

Primary factors:

- Policymaking
- Electoral considerations
 - The more active the AG in multi-state litigation, the more likely he or she is to run for governor or U.S. Senate

Secondary factors

- Saliency of defendant
 - Size of company
 - Name recognition
- Complexity of issue
- Severity of perceived harm to constituents
 - Partisanship divide diminishes as severity of harm increases

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Case Study: Big Tobacco

- May 1994
- Mississippi first state to sue on behalf of taxpayers
- Sought reimbursement for cost of medical programs, including Medicaid, that supported smoking-related illnesses

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- Mississippi first state to sue on behalf of taxpayers
- Sought reimbursement for cost of medical programs, including Medicaid, that supported smoking-related illnesses
- States with highest Medicaid expenditures first to file
- States with large tobacco farming sectors more likely to file late
- Ultimately, all 50 states involved

What motivates Attorneys General?

Case Study: Big Tobacco

WHEREAS, the Participating Manufacturers recognize the concern of the tobacco grower community that it may be adversely affected by the potential reduction in tobacco consumption resulting from this settlement, reaffirm their commitment to work cooperatively to address concerns about the potential adverse economic impact on such community, and will, within 30 days after the MSA Execution Date, meet with the political leadership of States with grower communities to address these economic concerns;

What motivates Attorneys General?

Primary factors:

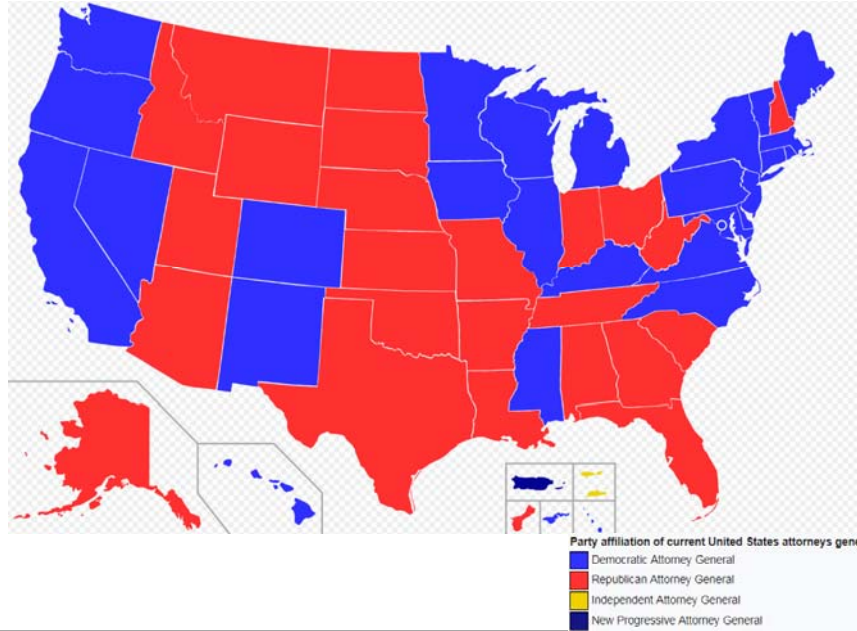
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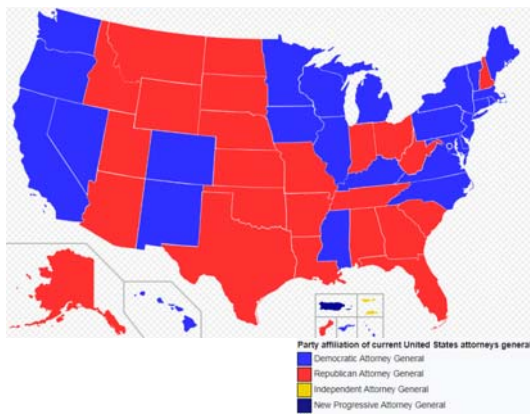
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- *An Integrated Model of U.S. Attorney General Behavior in Multi-State Litigation*
 - Colin Provost, University College, London, 2010

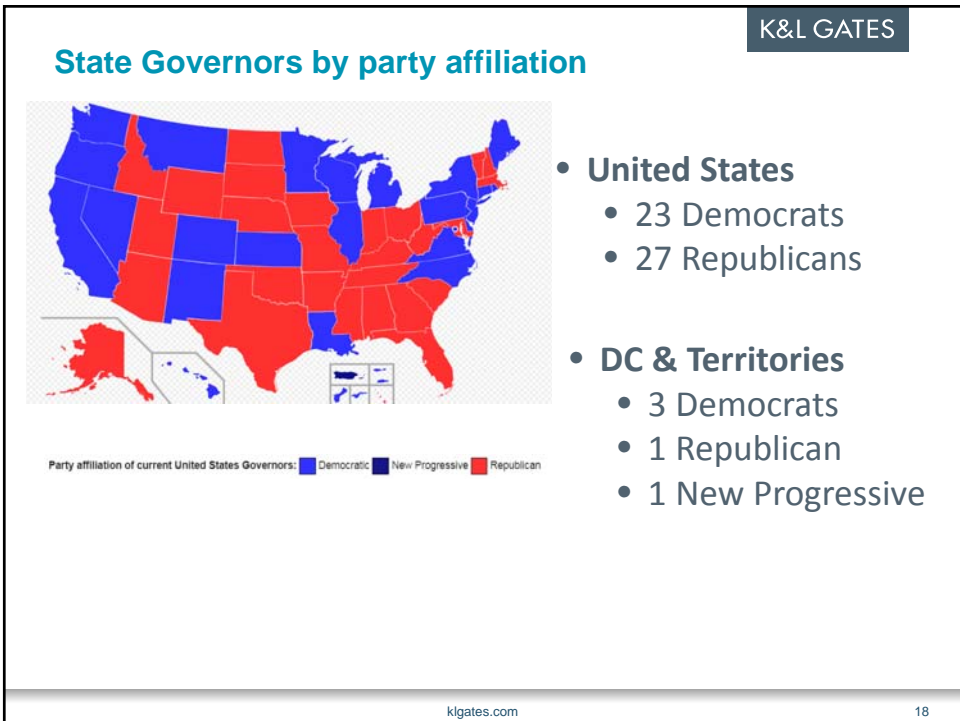
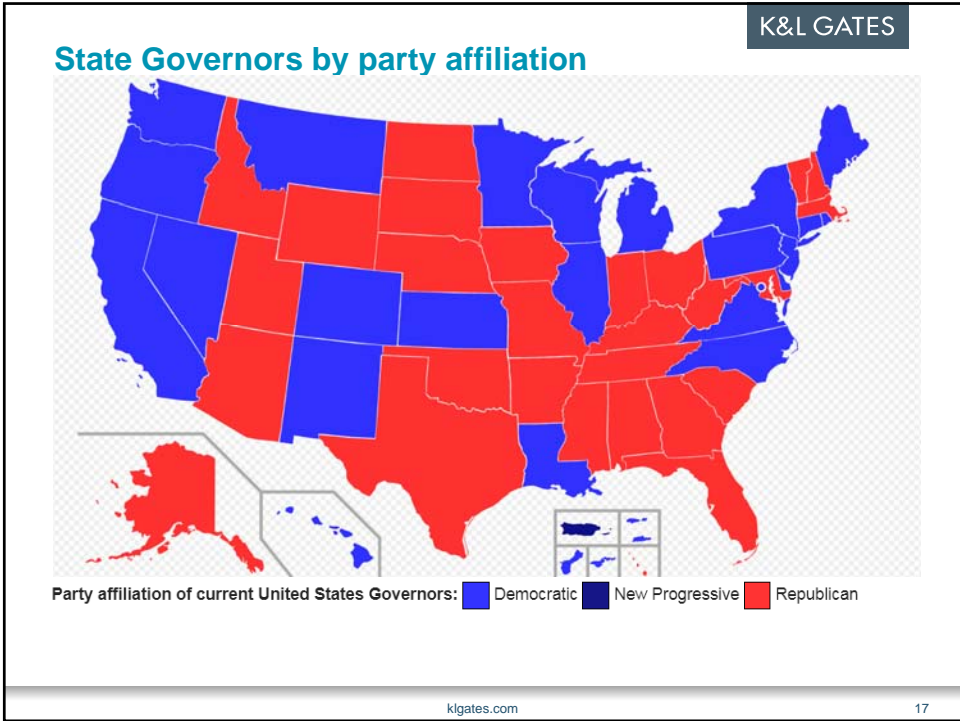
State Attorneys General by party affiliation

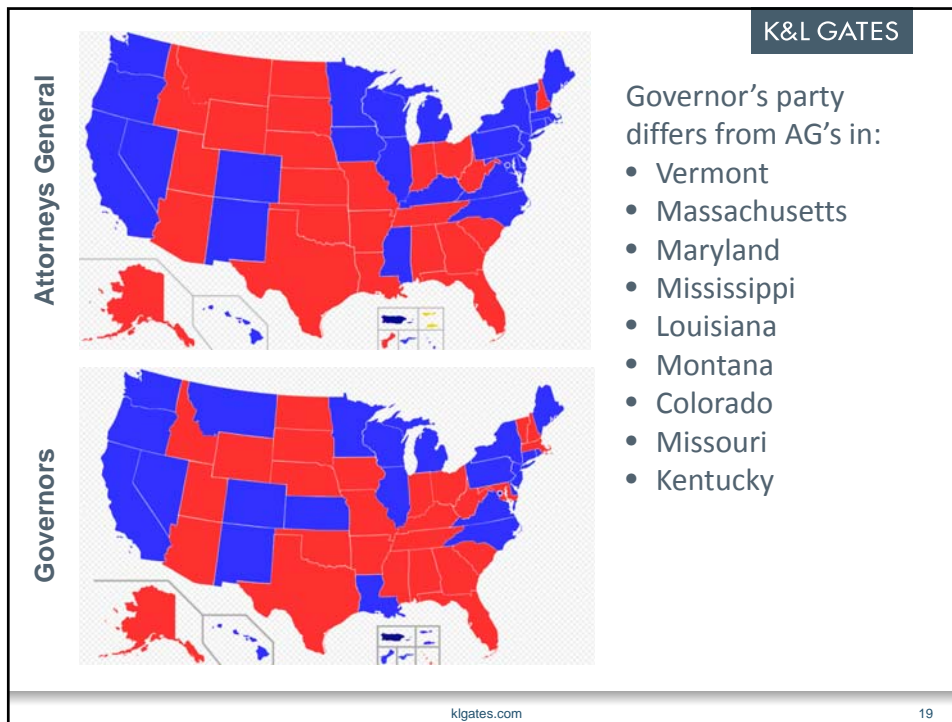


State Attorneys General by party affiliation



- **United States**
 - 26 Democrats
 - 24 Republicans
- **DC & Territories**
 - 4 Democrats
 - 2 Independents





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Legal Authority for Multi-state Litigation

- Federal common law
- Federal statute
- State common law
- State statute

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American Electric Power, Inc. v. Connecticut, 564 U.S. 410 (2011)

Federal Common Law: Public Nuisance Claim vs. Private Industry

- Eight states and New York City sued operator of fossil-fuel fired power plants
- Claimed contributions to climate change public nuisance under federal common law
- SCOTUS held, in relevant part, Clean Air Act and EPA authority thereunder displaced any federal common law right to seek abatement of CO₂ from fossil-fuel fired power plants
- States have enforcement remedies under Clean Air Act

Clean Power Plan, 80 FR 64661 (Oct 23, 2015)

Federal Statute: Claimed EPA overstepped authority under Clean Air Act

- Regulations enacted under Clean Air Act in late 2015
- Set CO₂ emissions limit goals for each state
- States were to develop their own plans to meet established limits, including from electric generating units
- Caught attention of states around the country

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCT 23 2015

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STATE OF WEST VIRGINIA,
STATE OF TEXAS,
STATE OF ALABAMA,
STATE OF ARIZONA CORPORATION
COMMISSION,
STATE OF ARKANSAS,
STATE OF COLORADO,
STATE OF FLORIDA,
STATE OF GEORGIA,
STATE OF INDIANA,
STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA,
STATE OF LOUISIANA DEPARTMENT
OF ENVIRONMENTAL QUALITY
ATTORNEY GENERAL BILL SCHUETTE,
People of Michigan,
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STATE OF MONTANA,
STATE OF NEBRASKA,
STATE OF NEW JERSEY,
STATE OF NORTH CAROLINA
DEPARTMENT OF ENVIRONMENTAL
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STATE OF OHIO,
STATE OF SOUTH CAROLINA,
STATE OF SOUTH DAKOTA,
STATE OF UTAH,
STATE OF WISCONSIN, and
STATE OF WYOMING,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
and REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency,

PETITION FOR REVIEW

Case No. 15-1362

K&L GATES

- Petition to set aside regulation
- Claim: beyond scope of CAA
- February 2016: Stayed by SCOTUS while suit pending

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- Litigation still pending in DC Circuit
- New administration intends to repeal Clean Power Plan
- Docket activity: plaintiffs withdrawing from suit

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Hyundai Motor Company

State Statutes: Consumer Protection

- Misstated fuel economy estimates for 2011, 2012, and 2013 vehicles
- Over one million cars involved
- Late 2012, voluntarily adjusted fuel economy estimates
- Voluntarily established customer reimbursement program

- *Then* contacted National Association of Attorneys General's Auto Working Group to disclose this information
- "Multistate Working Group" established to investigate

- \$41.2 million settlement to **33 states** under various UDAP statutes
- Complaint filed and consent agreement signed on same day

Hyundai Motor Company

Federal Statute: Clean Air Act

- October 2014
- \$56.8m civil penalty paid to EPA and California Air Resources Board (CARB)
- Also surrendered use of 2.7 million greenhouse gas emissions credits, worth ~\$200m
 - *Represented difference between original and restated emission data*
- Committed additional \$50m to testing and oversight enhancements

Cases in the news...

- **ExxonMobil**
 - AGs allege company misled investors regarding risk that climate change regulations posed to its business
 - Mass. AG seeking information pursuant to civil investigation demand (CID)
 - SCOTUS declined to hear challenge to Mass. AG's authority to do so
 - Investigation moving forward
- **Opioid Crisis**
 - Purdue Pharma reached settlement with Okla. AG on March 26, 2019
 - \$270m, including \$200m endowment for OSU Center for Wellness & Recovery
 - Other defendants set for trial May 28, 2019
 - 40+ other states involved
 - Local municipalities