LETTER OPINION
2000-L-88

May 23, 2000

Representative Francis J. Wald, Chairman
Legislative Audit and Fiscal Review Committee
North Dakota Legislature
State Capitol
Bismarck, ND 58505

Dear Representative Wald:

In its letter to the Attorney General dated February 2, 2000, the Committee asks two questions:

1. Was the transfer of American Cyanamid settlement funds to the Commission on the Future of Agriculture and the North Dakota Farmers Union in compliance with constitutional and statutory provisions?

2. Could a state agency have served as the fiscal agent for the settlement moneys without violating the terms of the settlement agreement?

Your letter does not identify any specific constitutional or statutory provisions of concern. Thus, my response will address, generally, the Attorney General's authority under state and federal law to bring lawsuits of this type and to settle them on behalf of the public interest.

The American Cyanamid case, to which you refer, State of Missouri, et al. v. American Cyanamid Company, No. 97-4024 (W.D. Mo. judgment entered Feb. 7, 1997), resulted from a lengthy and intensive investigation by a number of state attorneys general into the company's pricing practices. The investigating states concluded there was substantial evidence American Cyanamid, through two of its dealer programs, had engaged in an unlawful combination or conspiracy with its approximately two thousand retail dealers to fix the resale prices of its farm chemicals. This practice is sometimes called resale price maintenance or RPM. By the time the case was filed in the Western District of Missouri, all 50 states and the District of Columbia had joined in the lawsuit.

The complaint alleged the RPM programs operated by American Cyanamid violated the federal Sherman Antitrust Act and the 50 individual state

and District of Columbia's antitrust laws. Allegations in multistate lawsuits that the underlying conduct violates both state and federal antitrust laws are common because of the close parallels between federal and state antitrust laws. North Dakota's antitrust law, for example, was revised in 1987, in part, to bring it into closer harmony with federal law. See Hearing on S.B. 2101 before House Judiciary Comm., 1987 N.D. Leg. (March 10) (testimony of Jay Buringrud).

The states brought their action against American Cyanamid acting "in their sovereign capacities, and as *parens patriae* on behalf of the welfare and economy of each of their states." (American Cyanamid, complaint at 5.) *Parens patriae* is a Latin phrase meaning literally, "parent of the country." Black's Law Dictionary, 1114 (6th ed. 1990). Like many legal doctrines, the doctrine of *parens patriae* originates in England where it referred to the authority of the king. In this country it refers to the sovereign power of the state to protect the interest and general welfare of its citizens. See generally Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972); see also North Dakota v. Minnesota, 263 U.S. 365 (1923).

In Hawaii, the U.S. Supreme Court held that, while a state may have *parens patriae* authority to seek injunctive relief in federal antitrust cases, it did not have *parens* authority to seek treble damages for injury to its general economy. 405 U.S. at 261-64. Four years later, Congress passed the Hart-Scott Rodino Antitrust Act of 1976 explicitly giving state attorneys general authority under federal law to "bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State." 15 U.S.C. § 15c(a)(1).

In North Dakota, the ability of the Attorney General to exercise the state's *parens* authority arises out of the Attorney General's authority to represent the state's interest in litigation. See e.g., N.D.C.C. § 54-12-02 ("The attorney general and his assistants are authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state so to do.")

The American Cyanamid lawsuit was filed in Federal District Court in Missouri with the Attorneys General from all 50 states and the District Columbia signing on as plaintiffs. Following extensive negotiations between the Attorneys General and the company, a settlement ultimately was reached, thereby avoiding complex and protracted litigation. Under federal court procedures, the presiding judge must approve any negotiated settlement. In this case, Federal District Court Judge Scott O. Wright approved the settlement on February 7, 1997, and a Consent Decree and Final Judgment (the "Consent Decree") was entered.

The final judgment provided, in part, that American Cyanamid would pay to the Attorney General of New Mexico, on behalf of the states, the sum of $7.3 million. It was the responsibility then of the New Mexico Attorney General to distribute this amount among the 50 states and District of Columbia according to the provisions of the Consent Decree. The Consent Decree directed a portion of the $7.3 million settlement fund be "deposited in the previously-established account at the National Association of Attorneys General to enhance future state antitrust enforcement." (Consent Decree at 8.) Another portion of the $7.3 million was apportioned among states identified in an Appendix A to the Consent Decree. (Consent Decree at 8-9.)

The amounts identified in Appendix A were required to "be used to benefit the agricultural community in individual states, at the sole discretion of the Attorney General of each State so designated." (Consent Decree at 8.) North Dakota was one of the states identified in Appendix A and $100,000 was allocated for that purpose. North Dakota's Appendix A allocation is the source of the funds that were eventually transferred to the North Dakota Farmers Union as fiscal agent for the Commission on the Future of Agriculture (COFA). The remainder of the settlement moneys was apportioned among the states according to Appendix B. Appendix B funds could be used for six different uses; none of which were specifically related to agriculture. (Consent Decree at 9.)

I consulted with Roger Johnson, the state Commissioner of Agriculture, to determine an appropriate use of the settlement funds to benefit the state's agricultural community. Based upon the recommendation of Commissioner Johnson and the state's two largest farm organizations, the North Dakota Farm Bureau and the North Dakota Farmer's Union, I determined that funding for the Commission qualified as a "benefit [to] the agricultural community [of North Dakota]" within the meaning of the Consent Decree. Consequently, I directed the funds be distributed to COFA. Because COFA was not a legal entity at that time, its steering committee designated the Farmers Union as fiscal agent to hold and disburse the funds.

The Attorney General derives her legal power and authority in this case from a number of different sources, both state and federal. The recent case of State v. Hagerty, 580 N.W.2d 139 (N.D. 1998), contains an excellent discussion under state law of the express and implied powers of the office. See Hagerty, 580 N.W.2d at 145-47.

As noted by the North Dakota Supreme Court in Hagerty, the Attorney General's office was established under the original North Dakota Constitution adopted in 1889. Id. at 145. The office of Attorney General is an historic one, with an history of common law powers predating statehood, of which "the framers of the Constitution of North Dakota were aware." Id. In its discussion of the statutory

duties and powers of the office, the court observed, "[A]mong the core duties imposed upon the Attorney General was that of instituting and prosecuting litigation on behalf of the state." Id. at 146. Citing a 1943 North Dakota case, the court stated "that the legislature has no constitutional power to abridge the inherent powers of the attorney general despite the fact that the constitution provides that the 'duties of the Attorney General shall be as prescribed by law.' (Const. sec. 83)." State v. Erickson, 7 N.W.2d 865, 867 (N.D. 1943).

In addition to the general authority to litigate cases on behalf of the state and its agencies, the Attorney General's actions in American Cyanamid are also grounded in a number of more specific antitrust statutes. For example, state law authorizes the Attorney General to establish a consumer protection and antitrust division and to have the division "investigate antitrust violations and enforce antitrust laws." N.D.C.C. § 54-12-17.

N.D.C.C. § 51-08.1-07 provides, "The attorney general, or a state's attorney with the permission or at the request of the attorney general, may bring an action for appropriate injunctive relief and civil penalties in the name of the state for a violation of this chapter." Finally federal law, as previously noted, grants state attorneys general the power and authority to enforce federal antitrust laws. See 15 U.S.C. § 15c; Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945).

The Hagerty case involved an unsuccessful challenge to authority of the Attorney General to employ special assistant attorneys general under contingency fee arrangements. In determining that the Attorney General possessed the requisite authority, the Hagerty court first analyzed the status of the funds recovered in the asbestos litigation. "[M]oneys awarded to the State of North Dakota as a result of legal action brought by the Attorney General on behalf of the State," the court pointed out, "are public funds." 580 N.W.2d at 147. Nevertheless, the court went on to conclude: "In view of [the] long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe she has the authority to employ special assistant attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute." Id. at 148.

In the asbestos litigation, the Attorney General represented the state and several state agencies as defendants in an action brought by the W. R. Grace & Co. seeking a declaratory judgment regarding the company's rights and duties associated with construction products containing asbestos that the company had designed, manufactured, or sold that had been used in buildings owned or operated by the state.

Representing the state's proprietary interest as a building owner or operator, the Attorney General filed an answer and a counterclaim for damages resulting from installation of Grace asbestos in state buildings. Thus, any recovery on the counterclaim would necessarily flow to the state in its proprietary capacity as a building owner or operator as damages to compensate for asbestos-related injuries. In this context, the state was acting no differently than a private party owner of asbestos-contaminated buildings.

By contrast, in American Cyanamid the Attorney General represented the state in its sovereign capacity and in its role as *parens patriae*. The complaint did not allege any direct injury to any proprietary interest of the state. Unlike the asbestos case, the state had not purchased any product. The state had incurred no out of pocket expenses correcting a problem. The state did not risk liability for having permitted the price fixing to occur. In short, unlike the case against W.R. Grace & Co. no injury to the state's proprietary interests had been alleged.

Instead, the suit sought to enjoin the illegal practices, to recover the states' investigation and litigation expenses, and to deprive the company of the profits resulting from the illegal price-fixing scheme. By agreeing to the settlement negotiated with the company, the states largely achieved these objectives without the necessity of further litigation.

For a variety of reasons, both legal and practical, direct reimbursement to those who had actually paid the higher prices was not possible. Therefore, a "next best" solution was sought, namely use of a portion of the settlement to benefit the agricultural community in the state. See e.g., State v. N.Y. by Vacco v. Reebok Intern. Ltd., 96 F.3d 44, 49 (2d Cir. 1996) (approving settlement of antitrust suit brought by state attorneys general in which settlement proceeds were to be distributed to states or non-profit organizations where it was not practical to distribute small amounts of money to large unidentified class of possible claimants).

Unlike the damages for injury to the state's building owner interest recovered in the asbestos litigation, the $100,000 of settlement funds used to fund COFA was not "public moneys" as that term is used in the North Dakota Constitution. "The North Dakota Supreme Court has recognized that not all moneys in the custody of the state constitute 'public moneys' as contemplated by N.D. Const. art. X, § 12." Letter from Attorney General Nicholas Spaeth to S.F. Hoffner at 3-4 (May 23, 1988).

One class of moneys consistently excluded from the "public" category by opinions issued by this office is funds that come into the hands of a state official, which are, at the time of receipt, "impressed with

a trust for the benefit of a class of individuals with a recognizable equitable interest in the funds." 1993 N.D. Op. Att'y Gen. L-2, L-3 - L-4 (Jan. 25 to Al Jaeger) (quoting letter from Attorney General Nicholas J. Spaeth to S.F. Hoffner (May 23, 1988)).

The settlement funds from the American Cyanamid case fall within this class. These funds represented distributions from a federal court approved settlement for a designated purpose. Under the Consent Decree, they could be expended only for that purpose. As such, they are not within the meaning of public moneys contemplated by the constitutional provision considered in Hagerty.[1] In the same manner as the New Mexico Attorney General was required to distribute the $7.3 million among the states as provided in the consent decree, the North Dakota Attorney General was similarly required to distribute the $100,000 Appendix A allocation to "benefit the agricultural community in [North Dakota]." (Consent Decree at 8.)

Thus, it is my conclusion that the use of funds from the settlement of a federal multistate antitrust lawsuit to fund the Commission on the Future of Agriculture comports both with state law and the terms of the Consent Decree.

In answer to your second question, I find nothing in the language of the Consent Decree that would prevent a state agency from acting as the fiscal agent in disbursing these funds. As it was not a part of your question, however, this opinion does not address any issue of the authority under state law of a state agency to act as fiscal agent under the circumstances of this consent decree.

Sincerely,

Heidi Heitkamp
Attorney General

dwh/vkk

[1] Since the settlement proceeds are not "public funds" within the meaning of N.D. Const. art. X, § 12, they need not be deposited with the state treasurer or be appropriated before they are expended.