STATE OF TENNESSEE

# Office of the Attorney General

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*Via U.S. Mail and E-Mail*

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**Re: Opioid Cases Filed By District Attorneys General**

Dear Generals:

I write to address the opioid litigation you have initiated. Like you, I am deeply troubled by the destruction opioid abuse is causing in our state. My office has devoted significant resources to this issue and is leading a coalition of approximately 40 states actively investigating opioid manufacturers and distributors. Although I share your interest in holding those responsible for this crisis accountable, the lawsuits you have filed are of concern for several reasons.

First, the cases are brought, in part, on behalf of the State of Tennessee. Not only is that the legal effect of your bringing the cases in your official capacities as district attorneys general, but the complaints also explicitly assert that you are bringing claims on behalf of the State. *See, e.g.*, Effler 2nd Amd. Compl. at ¶¶ 14–19; Staubus 2nd Amd. Compl. at ¶¶ 15–17; Dunaway Compl. at ¶¶ 8–12. As your complaints recognize, numerous state agencies have expended funds to respond to the opioid crisis, including the Tennessee Department of Mental Health and Substance Abuse Services, the Tennessee Department of Children's Services, and the Division of TennCare. The Office of the Attorney General regularly represents these departments, not district attorneys general. And, any relief obtained under the public nuisance statute must be "paid equally into the general funds of the State and the general funds of the political subdivision or other public agency, if any." Tenn. Code Ann. § 29-3-101(d). As the Attorney General, my duties include the "trial and direction of all civil litigated matters . . . in which the state or any officer . . . or instrumentality of the state may be interested." Tenn. Code Ann. § 8-6-109(b)(1); *accord State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990). These cases impede my ability to prosecute all of the opioid litigation implicating the State's interests.

Second, the Office of the Attorney General is in the best position both to represent the interests of the State *and* to obtain the best possible monetary recovery for key governmental stakeholders. The Office has broad and *exclusive* authority to bring a statewide civil enforcement action pursuant to the Tennessee Consumer Protection Act, under which the State is in a strong position to establish liability for deceptive or unfair acts. Tenn. Code Ann. §§ 47-18-108, 8-6-301. Through a Consumer Protection Act case, we could obtain restitution on behalf of any individual or governmental entity that has suffered an ascertainable loss as a result of an unfair or deceptive act or practice. Tenn. Code Ann. §§ 47-18-108(b)(1), -103(13), -2102(1), -2102(9). Further, through the Office's participation in the larger multistate effort, we have the ability to seek relief for the State and its political subdivisions through a global resolution. Your litigation complicates that effort.

Third, the district attorneys general in the *Staubus* action have challenged the constitutionality of a state statute—namely the state tort damages caps. As district attorneys

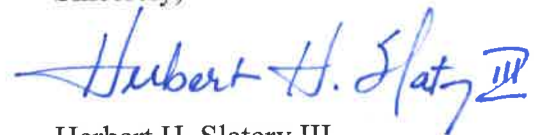
general, you do not have the authority to challenge the constitutionality of this statute on behalf of the State. In fact, "the district attorneys general are under an affirmative duty to defend the constitutionality of statutes of statewide application . . . ." *State v. Chastain*, 871 S.W.2d 661, 667 (Tenn. 1994). You have placed this Office in the untenable position of having to defend the constitutionality of a statute that you have challenged in the name of the State.

Last, you retained outside counsel to represent the State without the authorization required under state law:

> In all cases where the interest of the state requires, in the judgment of the governor and attorney general and reporter, additional counsel to the attorney general and reporter or district attorney general, the governor shall employ such counsel, who shall be paid such compensation for services as the governor, secretary of state, and attorney general and reporter may deem just . . . .

Tenn. Code Ann. § 8-6-106(a). The statute leaves no doubt that, although district attorneys general may institute civil suits in certain matters, they may not retain outside counsel without approval from the Attorney General and the Governor. *See State v. Culbreath*, 30 S.W.3d 309, 314–15 (Tenn. 2000). As neither I nor the Governor approved the retention of outside counsel, the representation agreements with the firms retained to represent you in these cases are "plainly void *ab initio* because [they were] without legal authority." *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 776 (Tenn. Ct. App. 2001). Because the retention of the firms representing you in these cases did not conform to the statutory requirements, "[t]he law provides no basis for compensating these lawyers for their efforts in this matter." *Id.* Though my approval to retain outside counsel was not sought, I would not have approved such a request for these cases. As previously stated, the Office of the Attorney General has the expertise and is best positioned to seek statewide relief. I want to be clear, outside counsel may not represent the State of Tennessee in these cases. Accordingly, we intend to take the necessary steps to resolve this situation.

Sincerely,



Herbert H. Slatery III
Attorney General and Reporter

cc: District Attorneys General Conference