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ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
65102

REPLY TO:
Wainwright State Office Bldg.
111 N. 7th St.
Suite 204
St. Louis, Mo 63 101
(3 14) 340-68 16
Fax: (314) 340-7957

July 13, 1998

Docket Clerk
U.S. DOT Dockets, Room PL-400
400 Seventh Street, SW
Washington, D.C. 20590-000 1

Re: Docket No. FHYVA-97-2979 - 20

To Whom It May Concern:

Please find enclosed the Comments of the Attorneys General of Arizona, Arkansas, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maryland, Commonwealth of Massachusetts, Missouri, Nevada, New York, Ohio, Oklahoma, Oregon, Rhode Island, and Wisconsin on Proposed Federal Regulations Concerning Transportation of Household Goods and Consumer Protection 49 C.F.R. Parts 375 and 377 Federal Highway Administration (FHWA), Department of Transportation (DOT) Docket Number FHWA-97-2979 Federal Register, Vol. 63, No. 94 (May 15, 1998).

On behalf of the Attorneys General, we thank you for your consideration.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Loren Merklin von Kaenel
Loren Merklin von Kaenel
Assistant Attorney General

Michael J. Delaney
Michael J. Delaney
Assistant Attorney General

LMvK:adw
Enclosure

Comments of Attorneys General of Arizona, Arkansas, Florida, Hawaii', Illinois, Indiana, Iowa, Kansas, Maryland, Commonwealth of Massachusetts, Missouri, Nevada, New York, Ohio, Oklahoma, Oregon, Rhode Island, and Wisconsin
on Proposed Federal Regulations Concerning Transportation of Household Goods and Consumer Protection - 49 C.F.R. Parts 375 and 377
Federal Highway Administration (FHWA), Department of Transportation (DOT)
Docket Number FHWA-97-2979, Federal Register, Vol. 63, No. 94 (May 15, 1998)

Introduction

The Attorneys General of Arizona, Arkansas, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maryland, Commonwealth of Massachusetts, Missouri, Nevada, New York, Ohio, Oklahoma, Oregon, Rhode Island, and Wisconsin file these Comments in response to the Notice of Proposed Rulemaking of May 15, 1998 in the **above-**captioned matter. As the primary enforcers of the consumer protection statutes in our respective states, Attorneys General have a critical role in assuring that our citizens are not subject to unlawful or unfair business practices.

Because individuals who ship household goods do not have the ongoing business relationship with carriers enjoyed by corporations and other entities, they ordinarily lack market power in dealing with such carriers. In addition, consumers are generally not familiar with such esoteric matters as motor carrier tariffs, certified road scales, trailer tare weights, and the like. Inherent in any household move is the surrender of one's entire stock of personal goods into the possession of another for delivery to a location that may be hundreds or thousands of miles away. These factors

¹Hawaii is represented by its Office of Consumer Protection, an agency which is not part of the state Attorney General's Office but is statutorily authorized to undertake consumer protection functions, including legal representation of the State. For the sake of simplicity, references to "Attorney General" or "Attorneys General" include the Executive Director of the Office of Consumer Protection of the State of Hawaii.

combine to make consumers particularly vulnerable to being held economic hostage to carriers who engage in dishonest or unscrupulous business practices.

Deceptive and misleading conduct by household goods carriers subjects them to enforcement of the comprehensive state laws prohibiting illegal trade practices, just as would be true of other business enterprises. Attorneys General enjoy independent authority under their respective state statutes to bring such actions on behalf of their citizens, and will pursue them vigorously where such action is merited. In addition, Congress has enacted legislation that mandates federal regulation of motor carriers. This federal presence has the salutary effect of providing minimum national standards, and we strongly believe that state and federal authorities can and should work in a complementary fashion to enhance consumer welfare for all of our citizens.

Working in conjunction, the Attorneys General and the Federal Highway Administration (FHWA) must strive to create complementary regulatory structures which inform and protect consumers concerning their rights and obligations in the transportation of household goods. Certainly, moving companies that treat consumers fairly and do not engage in unlawful acts are also harmed by dishonest competitors. And, persons going through the stressful experience of a household move should not endure additional trauma caused by the unfair, overreaching practices of disreputable moving companies.

We, therefore, support the efforts of the FHWA to improve the regulatory provisions applicable to household goods carriers. However, on behalf of the citizens of our respective states, we request that the FHWA enforce the proposed regulations by

all available means including, but not limited to, the periodic review of consumer complaints concerning disreputable practices in the industry, evaluation of industry compliance with the federal statutes and regulations, verification and/or audit of filed arbitration reports, and imposition of appropriate penalties, including license revocation for violations of federal law.

It is in the interest of all Americans that federal regulation of moving companies be as effective as possible. The proposed regulations are a great step forward. We are confident that if these proposed regulations are adopted and enforced they will curb abuses by disreputable carriers. As a supplement to the proposed regulations, we respectfully submit the following additional comments that we believe will further strengthen consumer protection in this area.

Estimates and Overcharges

[Proposed 49 C.F.R. §§375.401 et seq., 375.701 et seq.; 63 FR 27142, 27146]

The shipment of household goods, at least when undertaken without corporate or other third-party reimbursement, is often not an arms' length transaction. Rather, it is likely to be a commercial arrangement in which the consumer, or "individual shipper" as defined in proposed §375.103, is unable to bargain effectively. This is particularly true when the carrier has taken possession of the consumer's goods, thus giving rise to the potential for what the FHWA itself has called "hostage freight" [63 FR 27127 (May 15, 1998)].

Numerous consumer complaints that we have received over the past several years reveal a troubling pattern of misleadingly low estimates by carriers, coupled with

excessive delivery charges in clear violation of §375.3(d). In its current form, §375.3(b) allows non-binding estimates, but provides that such estimates must be “reasonably accurate.” In practice, a number of carriers have used artificially reduced “low-ball” bids to generate business, and then raised the delivery charges well in excess of the 110% of estimate limitation on immediate payment established in both the current and proposed regulations. In some instances that have been brought to our attention, the delivery charges have been enforced with extortionate threats to move the consumer’s goods into storage if payment of the previously undisclosed amounts is not made immediately, and in cash. The storage itself, of course, involves accompanying additional daily charges.

The proposed regulations governing this conduct are clearly needed, and represent a significant improvement over the current version of those regulations. We believe, however, that more specificity is needed in a number of areas, as indicated below.

Charge Cards as a Form of Payment

[Proposed §375.221, 63 FR 27141; proposed 5375.407, 63 FR 271431

Carriers’ use of a cash or cashier’s check requirement for the first time at delivery is indicative of still another problem. Both the current and the proposed regulations permit carriers to designate the form of payment that they will accept [49 CFR 5375.3; proposed 49 CFR §375.407(a)]. Proposed §375.221 is to the same effect - permitting, but not requiring, the use of charge cards. In our view, if the FHWA wishes to retain this form of payment election for carriers, it should mandate that their payment policy be the same at all stages of the transaction. If, for example, the use of

credit cards by consumers is permitted at the time the moving contract is entered into, such use should be permitted at the time of delivery. Moreover, there exists no apparent reason why consumers should not be informed of a carrier's payment policy, including the policy at the time of delivery, at the outset of the transaction. It is only at this stage - before entering into the contract - that consumers are truly in a position to exercise their bargaining power. At a minimum, these two changes should be incorporated into the new FHWA regulations.

The business practices reflected in the numerous consumer complaints filed with our offices dramatically demonstrate the need for stricter regulations. Frequently, consumers are told by carriers at, or immediately before, the time of delivery that they must pay a large, previously undisclosed sum for delivery of their goods. They are then informed that their credit card may not be used for this payment. Instead, the sum alleged to be due to the carrier must be tendered immediately. Based on the complaints that we have reviewed, this sum often exceeds the 110% regulatory limit on delivery charges for non-binding estimates, as discussed above. These excess charges have ranged as high as, for example, \$7849 on an original estimate of \$5334, and \$5796 on an estimate of \$2880. Customers are told that if they balk at paying such overcharges, the alternative is to see their goods put into storage.

The form of payment issue is, of course, directly related to this egregious practice of overcharges in violation of **§375.3(d)**, as well as proposed **§375.703**. Why would carriers suddenly withdraw their acceptance of credit cards at the time of delivery? In our view, that action is taken to prevent the use of charge-backs or

legitimate requests for refunds by consumers. This would be a primary interest only of unscrupulous carriers who wish to mislead and overcharge their customers. The carriers' use of a cash or cash equivalent requirement effectively denies their customers recourse other than the cumbersome claims process. Indeed, it is difficult to see why carriers would change their policy on acceptable forms of payment at the time of delivery for any other reason.

Proposed §375.503(b)(9) states that the mover's bill of lading must include the terms and conditions for payment of the total charges. The regulations should be amended to require the carriers to clearly and conspicuously disclose to consumers at the outset of the transaction, and on all documents, including the estimate and bill of lading, what form of payment will be required upon delivery of the household goods if it is different from the form of payment received at the outset of the transaction. For example, if a carrier accepts a credit card as only a guarantee, the carrier should clearly and conspicuously disclose that the credit card is not the form of payment that will be accepted upon delivery and must then specifically disclose which form of payment will be required upon delivery. These requirements will ensure that the method of payment shall remain uniform throughout the entire transaction, including the time of delivery, and the consumer will be fully informed as to the method of payment required by the carrier.

Arbitration Program
[Proposed 5375.211, 63 FR 27141]

49 U.S.C. 514704 et seq. provides a private right of action for persons injured by carriers' violations of federal laws or DOT regulations, and §14706 specifically authorizes suits in federal or state court. However, the relatively low dollar amounts typically in dispute in household goods moves tend to make such court remedies ineffective.

For this reason, Congress, in enacting 49 U.S.C. §14708, has recognized the importance of arbitration procedures as an alternative to traditional civil suits. This has been particularly true since 1995, when the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §10101 et seq., was passed. That statute provided that the federal government would no longer have the direct role in individual shipper-carrier dispute resolution that it had before the passage of the ICCTA. The experience of the past three years demonstrates that market forces alone cannot be relied on to discipline dishonest carriers, and that the judicial system is not well suited to much of the dispute resolution needed in this area.

Therefore, it is critically important that the governing regulations establish an arbitration system that is fair to the consumers who are individual shippers of household goods. For this reason, we support the addition of proposed new 49 CFR 5375.211, which implements the Congressional mandate of 49 U.S.C. §14708 to require carriers to offer an arbitration program to individual shippers of household goods. We believe that the minimum requirements for such a program should be made explicit, since it is all too clear that many carriers will not participate in arbitration in good faith otherwise. In fact, some of our offices have had direct acknowledgments

from industry sources that they do not currently participate in the arbitration program, apparently based on their belief that there are no consequences for their failure to do so.

We strongly urge that the minimum elements be strengthened by requiring a clear and conspicuous disclosure to the consumer of the arbitration plan elements set forth in 5375.211 (a)(2)(i),(ii), and (iii). Our experience has been that consumers are often poorly informed concerning what arbitration is, how it operates, and the consequences that it carries. We therefore believe that the FHWA should require a prominent disclosure of the consumer's right to receive arbitration forms and information. This disclosure of the consumer's rights under §375.211 (a)(3) should be made mandatory at the outset of the transaction, and included in the terms of the contract for transportation of household goods. Specifically, we recommend modifying proposed §375.211 (a)(2) to include a subsection (iv) which would require conspicuous disclosure of the right to the information contained in 5375.211 (a)(3). While proposed §375.211(a)(1)(b) attempts to address this same issue, its language is too vague. For example, it requires production and distribution of a summary of each carrier's arbitration plan, but it provides no guidance as to either the timing or manner of such distribution. This directive needs to be considerably more explicit in order to be of genuine value to consumers.

Consumers also need to be informed of their right not to go to arbitration, but rather to pursue court action. The FHWA staff comments appear to reflect recognition of the fact that some carriers might attempt to "steer" consumers into an arbitration program. This is a concern of ours as well. While we recognize that Congress has

mandated the offering of arbitration services by carriers, we are concerned that customers may be misled into believing that they must participate. We therefore recommend that §375.211 specifically require that consumers be informed of their rights under 49 U.S.C. 514704 to seek judicial redress directly, and to not participate in the arbitration process.

In addition, it should be incumbent on carriers, when they participate in the arbitration programs, to do so expeditiously. Much of the rationale for the very existence of arbitration programs lies in their supposed advantage in permitting rapid, low-cost dispute resolution. However, many consumers complain that some carriers refuse to participate in their own arbitration process. In other instances, the carriers participate in a dilatory fashion that appears calculated to delay legitimate compensation to individual shippers.

Accordingly, we also recommend that the cost of the arbitration program be reasonable, that it be reasonably located for all parties, and that the proceeding should occur within a reasonable time, without undue delay before an impartial neutral independent third party. To ensure that the arbitration process is expeditious and that all parties participate in good faith, the arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.

Congress, by its enactment of 49 U.S.C. §14708, has recognized the need for a prompt, fair and equitable resolution of consumer-carrier disputes. The proposed regulations, as amended, would help to effectuate that goal. As noted above, we believe that the FHWA should further strengthen considerably the directive language in

proposed subsection (b) of §375.211 and should more clearly outline the rights and responsibilities of all parties in the arbitration process.

Liability For Loss and Damage

[Proposed 9375.303, 63 FR 27142]

Unscrupulous carriers appear to use liability coverage for loss or damage as another means of deceiving consumers. These carriers aggressively sell high premium coverage to consumers, and then use a number of pretexts to avoid paying on loss or damage claims. Consumers have reported carrier sales tactics to induce the purchase of the most expensive coverage, but an unwillingness on the part of certain carriers to respond to claims, even when made on so-called premium or deluxe coverage. In one typical case brought to our attention, a consumer purchased, at considerable expense, the best coverage offered by a commercial carrier. When a number of articles of furniture and art objects which had been declared at the outset were damaged or lost in the move, the consumer made a claim which was summarily rejected by the carrier. This scenario, unfortunately, is not atypical.

Proposed 5375.303 contains modest improvements when compared to its predecessor, 5375.11, but it is essentially a restatement of the earlier section, with the use of more subsections. In our view, an even more explicit statement is needed, given the abuses that we have observed in this area. Unfortunately, our consumer complaints have vividly demonstrated the need for strict limitations. All too often, carriers make extravagant promises at the outset in an effort to sell the most expensive

coverage. Later, when a loss claim is filed, the posture taken by the same carrier is entirely different. Some carriers deny at that stage that they even offer additional coverage, while others rely on hyper-technical or fabricated defenses to avoid liability.

In one sample complaint, a carrier contended that a timely claim for loss or damage was not made at the time of delivery when under the regulations a consumer has nine months to report loss or damage, and two (2) years for bringing suit for loss or damage. In another example, a carrier denied coverage claiming that the consumer was not protected by the purchased coverage for claims of damaged that occurred during loading and unloading. Finally, in another example, a carrier denied coverage for the loss of two rifles because the consumer had not specifically listed the items with their make, model and serial numbers.

In actual practice, of course, a consumer is hardly in a position to make a complete inventory of his or her goods and to file a claim when a shipment arrives. It may be days or weeks before all of a consumer's shipping cartons are opened, and their contents inspected. Nevertheless, some carriers appear to have taken the position that virtually any delay by a consumer in making a claim is fatal. Moreover, the carriers do not disclose at the outset of the transaction timing requirements for loss and damage claims, inventory requirements for goods, and any exclusions or limitations to coverage liability. Additionally, the use of liability releases by carriers in their delivery documents is prohibited under both the current and proposed regulations, as it should be [§375.10, proposed 9375.701 (a)].

In that connection, we wish to express a concern about the text of proposed 5375.701 (b). As written, it tends to undercut the force of 375.701 (a), because it fails to make clear the right of a consumer to inspect their goods before signing off on their presence and good condition. We believe that some carriers are using the “apparent good condition” language in 701(b) to attempt to hold consumers to the purported satisfactory condition of their goods, even before the customers have had a chance to inspect them. This subsection should be amended to make it explicit that the “apparent good condition” language is not binding.

Furthermore, carriers should be required to clearly and conspicuously disclose to consumers all limitations on liability coverage and any inventory requirements needed for the valuation of their shipments. Carriers should also be required to disclose to consumers at the time of delivery whether any agents were used during the move and whether the consumers’ goods were stored during the shipment. Upon the request of the consumer, carriers should provide information concerning the agents or subcontractors used during the move, their liability coverage for that move, identification of all storage facilities used, and the liability coverage attendant to that storage.

Without attempting to provide an exhaustive list of all of the abuses encountered in the area of liability coverage, we would ask the FHWA to incorporate these suggestions and to develop even more specific regulations that will sharply limit the use of disreputable tactics by some carriers to avoid their legitimate liability coverage obligations.

Shipment Weight Issues

[Proposed 5375.505 et seq., 63 FR 271441

We strongly agree with the FHWA's stated opposition to the use of non-certified on-board trailer scales (at 63 FR 27128). The entire subject of shipment weight is one that exposes consumers to severe disadvantages in dealing with those carriers, or carrier agents, who are less than honest. On-board scales are the latest, and perhaps the most dangerous manifestation of this problem. Consumers who ship household goods are of course in no position to say what they weigh, and must therefore rely on the carrier to provide that information.

Even under the current regulatory scheme, with the requirement of using certified public or warehouse scales, abuses can occur. Under the best of circumstances, it is difficult and inconvenient for individual consumers, for example, to follow a trailer to a public weigh station that may be located miles away, and to fully understand the weighing process that takes place there.

Our concerns in this area are not merely theoretical. We have had anecdotal accounts from consumers of carriers' use of partial or split loads to overstate weights, and carriers' creation of obstacles to prevent consumers from exercising their right to re-weigh, or to observe the weighing process. A recent consumer complaint revealed that upon insisting on his right to re-weigh the shipment, an individual found that his original load weight had been overstated by the shipper by more than a thousand pounds.

The use of non-certified on-board scales, or even those represented to be “certified”, would only make dishonest load weighing much easier to accomplish. A disreputable carrier has every incentive to overstate the load weight, and the means to readily do so, particularly if that carrier controls access to the scale, and its calibration accuracy, or lack thereof. Under no circumstances should the use of such on-board scales be permitted.

Another deceptive practice relating to shipment weights is not addressed in the announced regulations, but we strongly believe that it should be. While proposed §§375.509 and 375.519 deal with the issues of determining weight, and obtaining weight tickets, they fail to provide the consumer disclosures necessary to assure that carriers do not double bill on so-called split loads. Currently, it is too easy for a dishonest carrier to produce a weight ticket as provided in 9375.519, but to fail to disclose to customers that their goods account for only a portion of the total load on the truck. A number of our complainants have voiced suspicions that such a practice was used by carriers with their freight. For example, at the time of delivery, a consumer might be presented with a recently issued official weight ticket from a nearby certified public scale. However, the consumer is unaware that a partial load bound for another destination remains **onboard**, and that it formed a portion of the total load reflected on the ticket. Of course, the dishonest conduct could just as easily be perpetrated against the second customer in this scenario. Such a person could easily be persuaded that the entire amount on the weight ticket referred to his freight alone, since nothing would put him on notice of the existence of the first customer who received a partial load

delivery. As most customers lack the technical expertise to judge even the approximate weight of their freight, they would hardly be in a position to challenge the carrier's assertions.

We believe that every consumer should have an accurate statement reflecting the actual weight of their shipment and should be charged accordingly. Certainly, carriers should disclose the existence of partial or split loads. We would ask the FHWA to incorporate these concerns and to promulgate a requirement that each consumer shipment should be weighed separately.

Filing Annual Arbitration Reports

[Proposed §375.901 et seq., 63 FR 27147]

The Annual Performance Report, currently required by 49 CFR §375.18, is to be eliminated. The FHWA **concededly** does not now have, and is not likely to obtain, the resources to investigate and verify all of the claims made by carriers in their reports. For this reason, the Performance Reports have largely devolved into a marketing tool for individual motor carriers, and provide little or no discernible consumer benefit.

Accordingly, the FHWA proposes to replace it with a mandatory annual Arbitration Report, as set forth in proposed §375.901 et seq. This change is a welcome one, and should provide consumers with far more useful information. In addition, the information required under §375.907 is more readily subject to confirmation by the FHWA than are the claims made in the current performance reports under §375.18. This fact alone should reduce the incidence of "puffing" and outright misrepresentations by carriers in their reports. More importantly, it will avoid giving the

imprimatur of the FHWA and DOT to critical consumer information that has not been verified.

The annual disclosure requirement in §375.901 should also encourage more good faith participation in the arbitration process as a result of the salutary “sunshine” effect of carriers having to make periodic reports on their programs. As noted above, consumers tell us that carriers’ refusal to participate, or slowness in participating in arbitration, constitutes a serious problem. The arbitration disclosure requirement embodied in this proposed regulation will not eliminate that problem, but it should have a beneficial effect on consumers, and will undoubtedly be an improvement over the outdated current requirement.

In order to be most effective, however, provision should be made in the regulations for FHWA verification or audit of the reports. The failure to insist on such confirmation of the accuracy of the reports could potentially leave consumers in a worse position by giving them the illusion of an effective regulatory scheme without its substance.

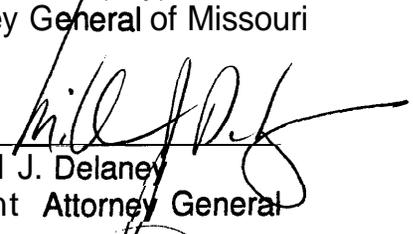
Carriers should be required to furnish their customers with copies of their own arbitration reports and insert summaries of such reports in the booklet “Your Rights and Responsibilities When You Move.” In addition, a summary of the annual arbitration reports should be compiled and made readily available to consumers by the FHWA and should be posted on the FHWA **website** at appropriate intervals. These requirements would materially assist consumers in making an informed choice among competing household goods carriers.

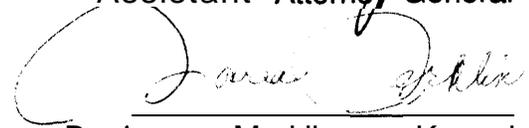
Conclusion

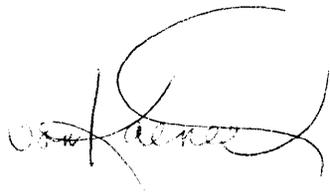
The foregoing comments are offered in the hope of making the proposed federal regulations more effective in protecting our citizens. We thank the FHWA for the opportunity to comment on the proposed regulations and related issues. Please contact us if we can answer any questions regarding our comments, or if we can otherwise be of assistance.

Respectfully submitted on behalf of the Attorneys General named herein.

Jeremiah W. (Jay) Nixon
Attorney General of Missouri


By: Michael J. Delaney
Assistant Attorney General


By: Lorena Merklin von Kaenel
Assistant Attorney General



GRANT WOODS
Attorney General of Arizona
by Sydney Davis
Assistant Attorney General

WINSTON BRYANT
Attorney General of Arkansas
by Jordan Abbott
Assistant Attorney General

ROBERT A. BUTTERWORTH
Attorney General of Florida
by Heidi M. Perlet
Assistant Attorney General

JO ANN M. UCHIDA
Executive Director, Office of Consumer Protection
State of Hawaii

JAMES E. RYAN
Attorney General of Illinois
by Deborah Hagan
Assistant Attorney General

JEFFREY A. MODISETT
Attorney General of Indiana
by David Paetzmann
Deputy Attorney General

THOMAS J. MILLER
Attorney General of Iowa
by William Brauch
Special Assistant Attorney General

CARLA J. STOVALL
Attorney General of Kansas
by Kelli J. Benintendi
Assistant Attorney General

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
by William Leibovici
Assistant Attorney General

SCOTT HARSHBARGER
Attorney General of Massachusetts
by Pamela S. Kogut
Assistant Attorney General

FRANKIE SUE DEL PAPA
Attorney General of Nevada
by Jo Ann Gibbs
Deputy Attorney General

DENNIS C. VACCO
Attorney General of New York
by Keith H. Gordon
Assistant Attorney General

BETTY D. MONTGOMERY
Attorney General of Ohio
by Helen **MacMurray**
Assistant Attorney General

W.A. DREW EDMONDSON
Attorney General of Oklahoma
by Phillip L. Stambeck
Assistant Attorney General

HARDY MEYERS
Attorney General of Oregon
by Peter Shepherd
Assistant Attorney General

JEFFREY B. PINE
Attorney General of Rhode Island
by Christine S. **Jabour**
Assistant Attorney General

JAMES E. DOYLE
Attorney General of Wisconsin
by Barbara Tuerkheimer
Assistant Attorney General