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How to Avoid Run-ins with State AGs, the New Cops on the Block

From the Experts

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A significant shift has occurred in our consumer protection regulatory regime. This shift has very little to do with new laws or with changes to existing consumer protections laws, which continue to be strong and far-reaching. Instead, the shift has to do in part with how these laws are now being enforced--and who is doing the enforcing and the setting of policy.

In order to understand the importance of what is occurring, we first need to understand U.S. consumer protection laws and how they operate. The principal federal consumer protection statute is the Federal Trade Commission Act (FTC Act). This expansive law prohibits businesses from engaging in any "unfair" or "deceptive" acts in commerce. Each of the 50 states has its own version of the FTC Act, with similarly broad restrictions on business practices within the state (collectively, these laws are known as the "little Acts"). However, the little Acts differ from the FTC Act in that they are generally tailored to meet the specific policy preferences of each particular state. As a result, they are usually applied to state-specific matters, while the FTC Act is used to regulate broader consumer protection issues on a national scale.

Why is this distinction important? It has served to limit national consumer protection enforcement to the exclusive province of federal agencies; historically, the FTC Act has been enforced almost exclusively by that single agency from which it got its name. State regulators, on the other hand, have led more localized enforcement efforts.

U.S. Federal Trade Commission Building.

But times are changing. Today, state attorneys general are increasingly taking the initiative in policing the nationwide marketing practices of major industries. From Google to Mazda to Big Pharma to the nation's largest banks, state AGs are targeting huge companies across a vast array of product categories. And increasingly, state actions are undertaken not only with an eye towards correcting a perceived wrong and possibly collecting a big check for the state, but with the additional purpose of shaping national policy. More than ever before, today's state AG is assuming the role of national policymaker.

What is causing this trend? First, under most states' laws, the office of attorney general is given broad discretion to pursue matters of "public interest" and to decide what that may be at any given moment. While this mandate may not be new, what is new is the growing belief by state AGs that they should use their mandate to regulate business practices on a multistate or even national basis, including those issues that, in the eyes of the AGs, have been neglected by the political branches of government. As former New York State Attorney General Eliot Spitzer opined, "state attorneys general not only can, but also must step forward into a void to ensure that the rule of law is enforced." Of course, the fact that these actions can improve the state's finances by reaching into the deep pockets of large industry only sweetens the pot.

To understand how the AGs came to this conclusion, we needn't look further back than the tobacco settlements of the late

1990s. Those actions were among the first examples of state AGs collaborating on a large scale and successfully bypassing an inactive federal legislative body to prosecute for injuries to their constituents. And the results were impressive: Not only were the AGs able to get the cigarette makers to pay more than $200 billion to the states, but the companies also fundamentally changed the way they marketed their products to consumers across the entire nation. Suddenly, the AGs saw firsthand the strength they could project when they acted together, especially when the goal was not only to secure a large settlement, but also to force substantial and broad-based changes to business practices.

Today, state AGs no longer consider setting consumer protection policy as a tangential benefit to local enforcement actions; it's often a primary reason for acting. Consider the National Association of Attorneys General (NAAG) Consumer Protection Committee, which has as its mission statement for its member attorneys general to collectively be "a leading force in protecting the rights of consumers."

So it should come as no surprise that in recent years collaboration among AG offices has continued to increase, resulting in multistate AG actions that are growing in size and complexity. Whereas the most any defendant might once have expected to face was a few AGs from neighboring states acting together, in the new millennium, nearly half of all multistate cases involve 25 or more state AGs working together. What began as state-specific enforcements actions are now acts of national impact, not only bringing in billions of dollars to state coffers, but also significantly changing the regulatory landscape itself.

The U.S. Congress and federal agencies have also contributed to the increase in state-based consumer protection regulation by enhancing the power of state AGs to police federal law. Across many areas, state AGs have been granted concurrent power with federal agencies, including the ability to use the federal courts to pursue issues such as telemarketing fraud, home mortgage fraud and credit-reporting abuses. And the AGs have not been shy in using that power. Over the past two years, nearly half of all states have brought enforcement actions under state consumer protection laws against debt-relief services and short-term lenders, based in large part on misleading advertising claims. And it was state AGs that led the charge on the $26 billion settlement with the nation's five largest mortgage-servicing companies for alleged foreclosure abuses.

What's more, many of these cases involve the AGs teaming up with federal agencies--another trend occurring more often and on larger matters. As an example, just this past March alone, the FTC and various state attorneys general announced that they had joined to: file suit against a number of national companies engaged in initiating billions of robocalls, and to conduct a nationwide investigation encompassing 252 enforcement actions against automobile dealers and brands based on their sales and marketing practices.

Finally, it should come as no surprise that there exists a political element to this trend. After all, in 43 states the attorney general is an elected position, and cases that serve a valid public purpose can also serve a political one, too. The statistics explain the importance of this latter consideration: 37 percent of elected attorneys general seek higher office; 26 percent run for governor and more than 10 percent for the U.S. Congress. It's no wonder that in many states "AG" has come to mean "almost governor." And since the "people's lawyers" are free to enforce issues that are popular with their public, taking on high-visibility consumer protection challenges makes a lot of sense for career advancement. Consequently, studies are showing that cases that can generate publicity and are capable of raising the popularity of the attorney general, and growing his or her base, are often favored over those that do not.

Going forward we can expect that any attempts to move the national spotlight by clawing back any national policymaking authority will meet much resistance. Take, for example, the recent letter sent from the attorneys general of 47 states to Congress. It argues against federal pre-emption of state data breach and security laws. States are increasingly investigating privacy practices under unfair and deceptive acts and practices (UDAP) laws, and are establishing de facto privacy standards through litigation. The AGs claimed that any new federal laws in this area must not diminish the role that each state and its attorneys general play in protecting consumers from data breaches and identity theft. In their letter, the AGs wrote: "Our constituents are continually asking for greater protection. If states are limited by federal legislation, we will be unable to respond to their concerns."

So what should advertisers do in this environment of heightened state scrutiny? Whatever is necessary to reduce the risk of a state attorney general investigation. It's clear that the days of a slap on the wrist are over. State-initiated consumer protection actions today are not simply about the nuisance to your business of "being on the radar." They can mean damages in the tens if not hundreds of millions of dollars, and national-level mandated changes to your business practices. Considering this, now is the time to thoroughly review those practices, especially areas of your business with the capacity to generate high levels of consumer complaints, which can often be the spark to a state inquiry. A great place to start is a thorough review of all your marketing materials, including all your social media practices. At a time when the sheer quantity of marketing content is increasing so quickly, being ahead of the pack in terms of legal compliance can substantially reduce the risk of a state AG action. After all, the shift is on. Now is not the time to be caught unprepared.

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