

State Attorneys General Take the Reins in Policing Deceptive Advertising

6th Edition: Trends in Marketing Communications Law

It can be easy to focus solely on the Federal Trade Commission (FTC) when evaluating the regulatory landscape for advertising and marketing practices. But with the FTC still ramping up its new commissioners, who were sworn in between May and September of 2018, state attorneys general have taken up the mantle in pursuing deceptive advertising and marketing practices nationwide.

Often, this has come in the form of coordinated actions between various state attorneys general. In January 2019, 46 attorneys general reached a \$120 million consent judgment with Johnson & Johnson and DePuy Inc. to address allegations that the companies deceptively promoted their hip implant devices. The attorneys general alleged that both parties exaggerated the longevity (or “survivorship”) of their devices, claiming that the devices had a nearly 100% survivorship after five years, when, in fact, a substantial percentage of devices were failing, causing severe side effects for consumers.

Similarly, New York Attorney General Letitia “Tish” James and Florida Attorney General Ashley Moody both reached a settlement with social media marketer Devumi. Devumi made headlines in 2018 after the *New York Times* revealed that Devumi had been selling fake social media followers to influencers, celebrities, politicians and even CEOs, in order to make them appear more popular on platforms like Facebook, Twitter and YouTube. The Attorneys General found that this practice deceived a number of parties, including advertisers who compensate influencers based on their follower count, as well as consumers that are more likely to view influencers and politicians as credible when they have more social media followers.

Even alone, attorneys general have been successful in extracting multi-million dollar settlements from major companies. In December 2018, Charter Communications agreed to a \$174.2 million settlement with then-New York Attorney General Barbara Underwood over allegations that Charter inflated the internet speeds it promised to consumers. In particular, the attorney general’s office alleged that Charter aggressively marketed its superior internet speeds but failed to maintain enough network capacity to sustain the advertised speeds and leased consumers deficient modems that were unable to achieve the advertised speeds. The \$174.2 million settlement included \$62.5 million in direct refunds, touted as the largest payout to consumers by an internet service provider in United States history. Just days later, the attorney general’s office announced settlements with Altice, Frontier, RCN and Verizon, requiring the providers to articulate that their touted speeds were “wired” (i.e. not necessarily achievable via WiFi), to substantiate speed claims with regular speed testing, and to warn consumers that “wireless speeds may vary.”

Key Takeaways

- Regardless of the current federal regulatory environment, state attorneys general have the same consumer protection mandate as the FTC and are just as vigilant — if not more — in seeking out and redressing harm to consumers in their states.
- By coordinating across states, attorneys general have ample resources to redress consumer harms and, as recent settlements indicate, are just as effective as the FTC in securing substantial financial penalties.

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