

What To Expect From State Attorneys General This Year

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Tasseomancy won't prevent litigation, but reading the tea leaves can certainly help to prepare for enforcement from the state attorneys general. Several leading signals over the past year highlight where state AGs may inquire and investigate further in their consumer protection roles. As we enter 2016, engaging the AGs effectively requires knowing their interests and their motivations.

Attorneys general are not only lawyers for their states; they are political officials, policy advocates and even regulators. State AGs acting in concert have a significant voice nationally to advance and affect consumer and business interests. Relying regularly on their state's unfair and deceptive acts and practices (UDAP) statutes, AGs are able to reach a wide range of industries that have a direct, or indirect, consumer touch or effect.

State AGs can add UDAP claims to bolster other legal powers, whether antitrust, false claims or data breach statutes. Further, state AGs can join with the Federal Trade Commission and the Consumer Financial Protection Bureau to strengthen and extend their own enforcement actions. More and more, state attorneys general are stretching into areas of multistate and multiagency enforcement, with tenuous links at times to acts actually causing consumer harm.

For 2016, here are six things to watch with the state AGs:

Data Security and Privacy

Data breaches dominated 2015, and not even the tea leaves can predict what breaches may occur in the coming year. But certainly data security and privacy will be top issues for state AGs.

One motivating factor is the FTC's drive to hold companies liable for not having reasonable cybersecurity policies. As the FTC relies on the "unfair" prong of its UDAP statute, state AGs with similar authority may follow suit. Yet for the immediate future, AGs will closely watch the issues play out, as with the Wyndham settlement requiring future FTC audits and in the LabMD administrative ruling finding the FTC lacked enforcement ability where no consumer was harmed.

The inability of Congress to pass comprehensive data breach notification legislation keeps enforcement fully in the hands of the states. Forty-seven state AGs wrote Congress last year opposing preemption of state data breach laws. Some states are taking more dramatic steps to include privacy provisions under the veil of their data breach statutes. For instance, Illinois AG Lisa Madigan drafted legislation last year to require notification beyond identity theft or financial harm by including online browsing history or geolocation data.

Payment Systems

Along with cybersecurity, a hot topic at recent attorneys general conferences has been the focus on payment systems and related consumer-facing technologies. There is active discussion among state AGs over the degree to which chip and PIN technology effectively deters data breaches and addresses new consumer needs. For instance, Connecticut AG George Jepsen recently sent a letter with eight other AGs to major credit card issuers urging an immediate implementation of chip and PIN. Yet at the same time, some AGs have been urged by the banking industry not to join in support. More as regulators than litigators, the AGs' interest here is to influence public policy outcomes and to effectuate business practice changes.

Manufacturing

While manufacturing lacks the direct consumer contact of retail, certain manufacturers, particularly in the pharmaceutical and other health and wellness industries, can come under the consumer protection purview of state AGs. Certainly on the radar for 2016 are pricing issues.

The pharmaceutical industry has been a recurring target of state attorney general enforcement, and increasingly manufacturers are coming under scrutiny. Last year, an investigation, and eventual settlement, by several AGs addressed how price increases at the manufacturer may affect the availability of drugs used by health officials for opioid misuse. Seeking additional influence on federal policy, 47 state AGs called on the U.S. Food and Drug Administration to regulate opioid packaging.

While dietary supplements have been under AG scrutiny in the past, recently laboratories have been targets due to packaging and other marketing materials to retailers. For instance, New York AG Eric Schneiderman sent cease-and-desist letters to over a dozen manufacturers concerning mislabeling of, or alterations to, "devil's claw," a product used by athletes to soothe joint pain.

Student Lending

While private sector colleges have been under intense scrutiny for years, an expanded AG focus is on student loan debt practices. Emboldened by their past success with mortgage settlements, state AGs will shift that experience to student lending, loan servicing and related practices.

This is a prime example of state AGs taking action when supported by the enforcement efforts of the CFPB, as well as regulatory actions by the U.S. Department of Education. State AGs will use their UDAP authority to investigate repayment concerns, borrower interactions and debt-collection practices. And from the CFPB's upcoming rulemaking agenda, the writing on the wall points to further activity on student loan servicing.

Separately, the CFPB's intended rulemaking on arbitration clauses could provide the states with a significant enforcement tool on a variety of consumer financial products. Agitated by the U.S. Supreme Court's recent decision in *DirectTV v. Imburgia* upholding class arbitration waivers, some state AGs encourage a CFPB rule, which AGs could enforce, that sharply limits the effectiveness of such clauses.

Auto Finance and Other Lending

Similarly, state AGs are turning their attention to auto lending and other consumer lending areas. With the CFPB's supervision now in auto finance, AGs have a foothold to enforce agency regulation of the industry. Under Dodd-Frank, state AGs have a "triple threat": the ability to enforce rules promulgated by the CFPB; to enforce under the federal Unfair, Deceptive and Abusive Acts

and Practices authority; and to use their own state UDAP authority for consumer protection.

Expect AGs to follow up on CFPB exams of auto financing disclosures, accuracy of information provided for credit, and debt-collection practices. Massachusetts AG Maura Healy has investigated bank auto lending practices, and AGs have historically scrutinized auto dealers.

Additionally, the CFPB's expected rulemaking affecting auto title, payday and other lending products will have the interest of state AGs. With a likely focus on a consumer's ability to repay and collection practices, the AGs again have ready experience from their mortgage involvement.

Upcoming Supreme Court Cases

Finally, state attorneys general will advocate in a handful of federalism-oriented cases to be heard by the U.S. Supreme Court in 2016. Highlights include the following:

- To be argued on Jan. 11, *Friedrichs v. California Teachers Association* addresses the extent to which employees must actually opt out of funding the political activities of public sector unions to which they object. California AG Kamala Harris is representing the state, and a number of AGs are joining amicus briefs on each side.
- Following the court's *DirectTV* decision, the case *MHN Government Services v. Zaborowski*, to be heard on Feb. 24, considers whether the Federal Arbitration Act preempts California's arbitration-only severability rule. Look for a significant AG amicus brief.
- *Whole Women's Health v. Texas Department of State Health Services* is now set for oral argument on March 2 with the department represented by Texas AG Ken Paxton. The court will consider the government's interest in laws restricting abortion when applying the "undue burden" standard of *Planned Parenthood v. Casey*. AG amici to come.
- Last but not least, the challenge brought by Texas and 26 states over the president's executive order on immigration is expected to be discussed by the justices at their Jan. 15 conference.

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