

STATE ATTORNEYS GENERAL

Responding Successfully to Multi-State Regulatory Compliance Matters and Investigations

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History of State Attorneys General

- Ø The Offices of State Attorneys General serve as the law firm to their particular states. Each State Attorney General Office has separate sections or divisions that focus on a particular area of law such as antitrust, Medicaid, consumer protection and criminal law.
- Ø State Attorneys General are charged with protecting the interests and safety of citizens of their state.
- Ø Traditionally, State Attorneys General have protected their citizens from economic and environmental injury by:
 - enforcing civil and criminal laws passed by state legislatures
 - contesting federal positions which they view as contrary to the state's interest
 - upholding the principle of federalism and protecting state sovereignty
 - providing competent and professional representation to state agencies

What is the National Association of Attorneys General (NAAG)?

- Ø NAAG acts as a facilitator for the constituent Attorneys General and focuses on consumer protection, environmental, antitrust and securities matters. There is representation in NAAG for all 50 states, the District of Columbia and 6 territories.
- Ø What is the relationship between NAAG and Attorney General lawsuits / investigations?

State Attorney General Lawsuits

∅ State agency actions

- Government expenditure cases
- Government fraud statutes
- Third-party payer cases
- Traditional contract and warranty cases

∅ *Parens patriae* actions

- Promote general health, welfare and economic well-being of state's citizens (designed to be brought when individual claims are not available)
- Brought under consumer protection statutes

The Mechanics of an Attorney General Investigation

Ø Current issues of significant concern to State Attorneys General

- Consumer (unfair and deceptive trade practices)
- Antitrust
- Medicaid fraud
- Privacy

The Mechanics of an Attorney General Investigation *Continued:*

- Ø What can spark an Attorney General investigation?
 - Consumer complaints
 - Competitor concerns
 - Industry-wide issues
 - Self-reporting
 - Whistle-blowers / disgruntled employees
 - Media attention

The Mechanics of an Attorney General Investigation *Continued:*

Ø How are Attorney General investigations commenced?

- Civil Investigative Demands (“CID”) (Ex., Mass. Gen. Laws ch. 111, § 70F)
 - To issue a CID, it is only necessary for an Attorney General to believe that a person has, or may be, engaged in unlawful conduct.
 - Attorney General does not have the burden to prove unlawful conduct before issuing a CID.
 - Recipient who challenges CID bears the burden of showing arbitrary or capricious action.
 - Challenge must be timely.
- Administrative subpoena (Ex., Md. Code Ann. Com. Law II § 13-405)
- Formal demand letter (cease and desist)
- Informal communications

Ø Why do some investigations become multi-state actions?⁷

The Mechanics of an Attorney General Investigation *Continued:*

- Ø How are multi-state investigations managed?
 - Scope of inquiry: framed by subpoena and/or civil investigative demand
 - Document exchange
 - Public records (FOIA issues)
 - Confidentiality agreements
 - Waiver of attorney-client privilege
 - Negotiations
 - Discussion of business practice at issue
 - Meetings with business representative
 - Technical experts on the issues

The Mechanics of an Attorney General Investigation *Continued:*

Ø How are multi-state investigations resolved?

- Letter Agreement
- Investigation closed with no action (documents returned – assuming state law permits)
- Assurance of Voluntary Compliance (“AVC”)
 - Stipulated facts
 - State’s position
 - Private party’s position
 - Definitions
 - Injunctive relief
 - Monitoring and compliance plans
 - Monetary payments
 - Settlement amounts
 - Consumer redress fund
 - Attorneys’ fees
 - Investigative costs

Relationship between State Attorneys General and Federal Authorities under the Obama Administration

- Ø Under the Bush administration, the federal authorities tried to preempt state action in many areas.
- Ø Expect officials in the Obama administration and the federal agencies to cooperate more with the states, particularly in certain industries (consumer products, insurance, financial services, securities, food and drugs).

The Growing Authority of State Attorneys General

Federal Legislation

Consumer Financial Protection Agency Act of 2009

Section 141. Relation to State Law.

(a) In General

(1) Rule of Construction – This title shall not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this title from complying with, the laws, regulations, orders, or interpretations, in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this title and then only to the extent of the inconsistency.

(2) Greater Protection Under State Law – For the purposes of this subsection, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this title if the protection such statute, regulation, order or interpretation affords consumers is greater than the protection provided under this title, as determined by the Agency. A determination regarding whether a State statute, regulation, order or interpretation is inconsistent with the provisions of this title may be made by regulation, order or guidance adopted by the Agency on its own motion or in response to a nonfrivolous petition initiated by any interested person.

State Attorneys General Growing Authority *Continued:*

Federal Legislation

Consumer Financial Protection Agency Act of 2009

Section 142. Preservation of Enforcement Powers of States.

(a) In General

- (1) Action by State – Any State attorney general may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States or State court having jurisdiction of the defendant, to secure monetary or equitable relief for violation of any provisions of this title or regulations issued thereunder.
- (2) Rule of Construction – No provision of this title shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that related to the authority of a State attorney general or State regulator to enforce such Federal law.

State Attorneys General Growing Authority *Continued:*

Federal Legislation

Other examples of dual federal and State Attorneys General enforcement authority

- Ø SB 500 – Protecting Consumers from Unreasonable Credit Rates Act
- Ø Representative Barney Frank’s proposal to allow State Attorneys General to prosecute national banks
- Ø Consumer Product Safety Commission – Empowering State Attorneys General to enforce new standards for consumer products
- Ø HR 1214 – Payday Loan Reform Act
- Ø S 139 – Data Breach Notification Act

State Attorneys General Growing Authority *Continued:*

U.S. Supreme Court Decisions

(Cuomo, Attorney General of New York v. Clearing House Association, L.L.C., et al., June 29, 2009)

- ∅ The Supreme Court severely limited the extent to which national banks and their operating subsidiaries are exempt from compliance with state laws, such as fair lending and other consumer laws.
- ∅ The ruling is a profound one which severely curtails what was thought to be a special advantage that national banks had over state chartered banks, i.e., the ability to operate in multiple states without having to comply with many of the laws of the states in which they operate.

State Attorneys General Growing Authority

Continued:

U.S. Supreme Court Decisions

(Wyeth v. Levine, March 4, 2009)

- Ø Levine brought a state-law damages action, alleging, *inter alia*, that Wyeth had failed to provide an adequate warning about the significant risks of administering Phenergan by the IV-push method.
- Ø The Vermont jury determined that Levine's injury would not have occurred if Phenergan's label included an adequate warning, and it awarded damages for her pain and suffering, substantial medical expenses, and loss of her livelihood as a professional musician.
- Ø The Supreme Court held that federal law does not pre-empt Levine's claim that Phenergan's label did not contain an adequate warning about the IV-push method of administration. U.S. Supreme Court reaffirmed the important role state law plays in promoting consumer safety and providing compensation for injuries.

State Attorneys General Growing Authority *Continued:*

U.S. Supreme Court Decisions

(Altria v. Goode, December 15, 2008)

- Ø Cigarette smokers sued tobacco products manufacturer, alleging that manufacturer's claims that product was "light" and had "lowered tar and nicotine" were misrepresentations under Maine Unfair Trade Practices Act.
- Ø The Supreme Court held action was not implicitly preempted by FTC alleged longstanding policy regarding "light" cigarettes.

Conclusion

Ø Closing Comments

Ø Questions

