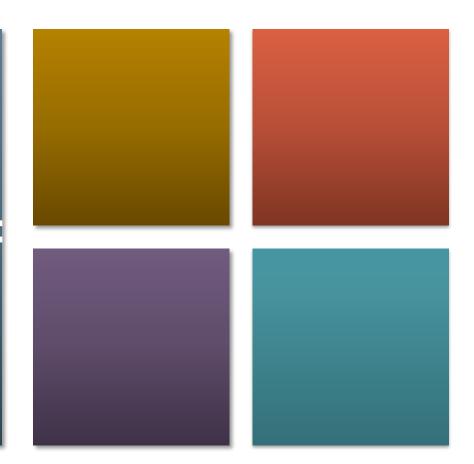
Reaching Out to
Government Officials:
State Attorneys
General and Federal
Agencies



Joe Jacquot Foley & Lardner

John Benton
Fidelity National Financial



State Attorneys General 1776

- The offices of Attorney General (AG) are older than the United States of America.
- Each of the 13 colonies had an AG who protected the public interest.



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State Attorneys General 2016

- 43 elected, 5 appointed by the Governor, 1 appointed by the state Legislature, and 1 appointed by the state Supreme Court
- 24 Republican AGs, 24 Democratic AGs

(Alaska, New Jersey, Wyoming AGs are appointed)



Major Functions of the AG Office

- Representation of state agencies and defense of state statutes
- Criminal Appeals
- Antitrust, Fraud Units, Solicitor General
- Consumer Protection

State Attorney General Actions

- On behalf of a state agency
 - For example, fraud / false claims
- In asserting state sovereign interests
 - For example, federalism litigation
- In enforcement of state law
 - For example, privacy / data breaches or consumer protection statutes

State AG / Federal Agency Action

- **■** Federal Trade Commission (FTC)
- **■** Federal Communications Commission (FCC)
- Federal Drug Administration (FDA)
- Environmental Protection Agency (EPA)

■ Consumer Financial Protection Bureau (CFPB)

Unfair and Deceptive Acts and Practices (UDAP)

- An act or practice (or omission) is unfair if:
 - It causes, or is likely to cause, substantial injury;
 and
 - The injury is not reasonably avoidable; and
 - The injury is not outweighed by benefits to consumers or to competition.

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Unfair and Deceptive Acts and Practices (UDAP)

- An act or practice (or omission) is deceptive if:
 - It misleads, or is likely to mislead; and
 - Consumer's interpretation of the act is reasonable; and
 - The act or practice is material.



Data Breach



- Nature of the breach
- Number of residents affected
- Steps taken and steps planned to take
- Notifications to be given

Dodd-Frank Act and UDA(A)P

- Dodd-Frank allows AGs to enforce the federal unfair, deceptive and abusive law against a consumer financial product or service
- Penalties for knowing violation up to \$1 mil. / day
- An act or practice is abusive if either:
- It materially interferes with a consumer's ability to understand a term or condition; or
- It takes unreasonable advantage of
 - a lack of understanding of risks, conditions or costs; or
 - reasonable reliance to act in the consumer's interests

Dodd-Frank and CFPB regulations

- Prior state preemption on financial services removed in Dodd-Frank
- State AGs urged to be "boots on the ground"
- Stacking of enforcement actions with CFPB rule, plus state UDAP, plus federal UDAAP



"Swarm Litigation"



- Enforcement from "lobbying" by plaintiff lawyers, competitors, consumer advocates
- Enforcement actions influenced by policy and politics, essentially enforcers' self-interest
- Novel interpretations of vague law, such as use of unfair and deceptive acts and practices
- Intent to force settlement through public pressure, never proceed to a finder of fact
- End result can be regulation-by-litigation in settlement terms changing business practices

Case Example: The Enforcers

- 60 Minutes
- US Attorney investigation
- State Attorneys General (AG) subpoenas
- Federal regulator consent order
- State AG civil lawsuit
- State AG criminal indictment
- US Senator inquiry

Case Example: The Company

- Countersuit
- WSJ opinion piece
- Congressional members
- Consumer advocacy group
- Main DoJ
- Small state settlements
- Multi-state settlement

Case Example: The Players

- Other enforcers CFPB
- Regulators collateral consequences
- Congress champions
- Media New York Times
- Investors Wall Street analysts
- Clients board of directors
- Influencers Chamber of Commerce

Enforcement Signals

- Enforcers will follow the money!
 - Watch for added or high fees



Enforcement Signals (cont.)

- Enforcers will follow the money!
 - Watch for added or high fees
- Enforcers listen to consumer complaints.
 - Hear what the enforcers are hearing



Enforcement Signals (cont.)

- Enforcers will follow the money!
 - Watch for added or high fees
- Enforcers listen to consumer complaints.
 - Hear what the enforcers are hearing
- Enforcers will consider every consumer touch for Unfair and Deceptive Acts and Practices.
 - Least sophisticated consumer

Practical Advice

- Understand AG motivations.
- Be mindful of the end-game.
- **■** Think proactive.

