

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

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# 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.



# 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.



# 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



Massachusetts example for required info to be submitted to the Attorney General:

- 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”



- Multiple enforcers, multiple penalties for the same act:
  - 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





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- Enforcers listen to consumer complaints.
  - Hear what the enforcers are hearing



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- **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.

