

## AUTHORS

Kristalyn J. Loson  
Jonathan L. Pompan

## RELATED PRACTICES

Advertising and Marketing

## RELATED INDUSTRIES

Nonprofit Organizations  
and Associations

## ARCHIVES

2011 2007 2003  
2010 2006 2002  
2009 2005 2001  
2008 2004

## Articles

November 22, 2011

### **Cause-Related Marketing in the Crosshairs: What the New York Attorney General's Breast Cancer Investigation Means for Nonprofits and Their Corporate Supporters**

Related Topic Area(s): Antitrust and Trade Regulation

The New York Attorney General has recently crossed into what some consider to be the hallowed ground of charities, by launching an investigation into cause-related marketing of “pink ribbon” charities. In its own recognition of National Breast Cancer Awareness Month, the New York Attorney General's Office (the “NY AG”) is examining charities and commercial partners that are involved in a cause-related marketing campaign representing that a portion of the sales of a product or service will support breast cancer research or screening. Overall, this initiative highlights the focus of the NY AG in preventing charitable fraud in breast cancer charities. This action also demonstrates that organizations, both charities and marketers, engaging in increasingly popular cause-related marketing campaigns should pay close attention to state regulatory requirements for these activities.

#### **New York's Recent Investigations**

This new initiative is a continuation of the NY AG's focused effort on breast cancer charities. In June 2011, the NY AG filed a complaint against the Coalition Against Breast Cancer (“CABC”), which was alleged to be nothing more than a sham charity established to benefit its founders. According to the complaint, CABC solicited more than \$9.1 million from the public but spent virtually none of it on breast cancer programs. Instead, the founders used the contributions to provide benefits to themselves and their families. In addition, CABC allegedly deceptively advertised an affiliation with the Memorial Sloan-Kettering Cancer Center when, in fact, no such relationship existed. These activities provided the basis for multiple alleged violations of New York's not-for-profit and charitable solicitation laws. A preliminary injunction prohibiting the defendants from, among other things, soliciting or collecting charitable contributions from any person was granted by the court on November 1, 2011, and the case is ongoing.

Additionally, in August 2011, the NY AG secured guilty pleas against the founders of another breast cancer charity, the Coalition for Breast Cancer (“CFBC”), after the NY AG's office filed an action alleging the defendants operated a phony charity. The complaint alleged the husband and wife founders of CFBC solicited donations for breast cancer programs but instead diverted the money to pay for personal travel expenses, lavish meals, shopping excursions, and their daughter's sorority dues. As a result of these activities, the husband in this case pled guilty to two felony counts – one of grand larceny and one of scheme to defraud – while the wife pled guilty to one count of falsifying a business record for her role in opening bank accounts for the organization.

In the newest breast cancer charity investigations, the NY AG is spreading its reach to investigate nonprofits as well as for-profit businesses that engage in cause-related marketing. As the first step in its investigation, the AG has sent questionnaires to at least 40 charities and 130 companies. These questionnaires ask for detailed information specific to activities in which the sale of a product or service is advertised to benefit breast cancer causes. The NY AG is likely to use the information gleaned from the questionnaires to assess whether further investigation is needed in specific instances.

#### **New York's Requirements for Commercial Co-Venturers**

New York is typical of many states in that its charitable solicitation laws (specifically, The Solicitation and Collection of Funds for Charitable Purposes Act, N.Y. Executive Law Article 7-A) define a commercial co-venturer, or business that conducts cause-related marketing, and contain specific requirements for a commercial co-venturer. These requirements include having a written contact with

the charitable organization and maintaining accurate books and records of activities for three years following the cause-related marketing campaign. Unlike several other states (such as Alabama, Maine, and Massachusetts), New York does not require that the commercial co-venturer register, obtain a license, or file a bond with the Attorney General. New York does specify, however, that any charity with which a commercial co-venturer contracts must itself be registered.

The New York charitable solicitation laws also mandate that advertising surrounding the cause-related marketing campaign must contain specific disclosures such as the anticipated percentage of the gross proceeds or the dollar amount per purchase that the charity will receive. At the conclusion of the cause-related marketing campaign, the commercial co-venturer also is required to provide an accounting to the charity, including the number of items sold, the amount of each sale, and the amount paid or to be paid to the charity.

Aside from specific requirements for commercial co-venturers, the New York charitable solicitation laws also generally prohibit any person from engaging in a fraudulent or illegal act including “obtaining money or property by means of a false pretense, representation, or promise.” Importantly, New York does not require that either intent to defraud or an injury be shown to prove fraud. Therefore, it is very important for those involved in cause-related marketing campaigns to carefully review their advertisements to ensure that all regulatory requirements are met and that the campaign is not represented in a way that could be characterized as misleading or deceptive, such as by not including any maximum donation limits or implying that the money received will be given to a specific program if it is instead used for general purposes.

### **Recommendations for Marketers Conducting Cause-Related Campaigns**

The New York Attorney General’s investigation is rather unique in that its reach extends into examination of the activities of for-profit marketers. For many marketers, entering into a cause-related marketing campaign is the company’s first venture into charitable solicitation and the regulatory framework surrounding such activities. However, marketers should perform due diligence on potential partners when entering into any new commercial venture. In this case, cause-related marketing efforts should be no different. In fact, because charities are themselves subject to legal and regulatory requirements, the marketer is opening itself to some unique legal and relationship risks in cause-related marketing campaigns. For example, one risk may be that the charitable organization is not itself in compliance with applicable charitable solicitation requirements or is found to be a “scam” organization (such as the allegations in the complaints filed this summer by the NY AG against the two breast cancer organizations).

For these reasons, marketers should consider adopting contractual protections in their cause-related marketing agreements. These protections could address such areas as compliance with charitable solicitations laws and the Internal Revenue Code. The marketer also should develop a due diligence and reporting program in order to collect relevant information to confirm the charity’s compliance with applicable federal and state laws. Finally, provisions for indemnification of the marketer by the charity for any claim related to the legal or regulatory status of the charitable organization, as well as insurance to cover the indemnity obligation, also should be considered in the agreement with the charity.

### **Conclusion**

The most recent initiative by the NY AG highlights the increasing focus of state regulators on charitable solicitation in general and cause-related marketing campaigns in particular. Both charities and marketers involved in cause-related marketing should pay close attention to state requirements for charitable solicitation and prohibitions against fraudulent advertising. When it comes to accomplishing the mission of consumer protection, no cause, no matter how purportedly noble, is off-limits to scrutiny from state regulators.

\* \* \* \* \*

***Kristalyn J. Loson** is an associate at Venable LLP in the Washington, DC office. She focuses her practice primarily on nonprofit organizations. She represents nonprofit organizations engaged in charitable solicitation and advises for-profit companies on commercial co-venture regulation.*

***Jonathan L. Pompan** is of counsel at Venable LLP in the Washington, DC office. He represents nonprofit and for-profit companies in regulated industries in a wide variety of areas including advertising and marketing law and financial services regulation compliance, as well as in connection with Federal Trade Commission and state investigations and law enforcement actions.*

*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*