



Professional Perspective

State Attorney Activism and Enforcement Trends

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State attorneys general continue to become more influential as they drive legal innovation and policy change at the state and federal levels. This article discusses trends in AG activity, enforcement priorities, the impact of their expanding public and political profile, and areas companies should consider as they develop AG strategies.

Activism on the Rise

Political and policy activism is continuing to increase, wherein AGs use their office to assert legal, political, and policy views through litigation and public advocacy. They remain in a position to exercise broad authority and discretion, as well as influence policy on a national scale. This combination also provides a powerful springboard for their political ambitions, including higher political office. In addition, the office is itself becoming more political as the parties invest in AG races as a stepping stone to higher office.

In spite of divisive politics, one of 2019's most interesting trends was collaboration among AGs from both sides of the political spectrum to bring multistate enforcement actions on issues of national concern. This trend is likely to continue, despite the country's polarized political environment, and even given AGs' significant political ambitions.

But while AGs have demonstrated bipartisan unity, there has also been a notable uptick in the number of individual AGs who have split off from multistate actions to launch their own cases. This could be attributed in part to the success AGs have enjoyed in reshaping entire industries through their consumer protection, antitrust, and more recently data privacy and security investigations and settlements. Rarely has an AG had to litigate a case to verdict to influence policy change.

AGs' growing political ambitions also have been a factor in the decision to initiate breakaway actions. Their increasing savvy in public relations and on social media has led to more effective publicity regarding their accomplishments. In short, AGs have become much better at telling their constituents what they are doing, and the federal government and the private sector are taking notice.

The increasingly political nature of the AG office is further reflected in the activism of some AGs who are currently focused on checking the Trump administration, be it over rollbacks to environmental regulations or new employment rules. Those AGs are filling the void of federal inaction but also affirmatively suing the administration over such issues as deregulation of emission standards or the constitutionality of the travel ban.

Antitrust Laws

AGs are likely to scrutinize anticompetitive actions as they both initiate traditional antitrust cases and start to test the use of antitrust laws in novel applications. In a recent example of traditional antitrust action, a bipartisan coalition of state AGs, representing the full ideological spectrum, challenged the merger of T-Mobile and Sprint, two of the country's largest telecommunications companies, despite the merger's blessing from the Department of Justice and the Federal Communications Commission.

AGs are also using novel antitrust theories to probe their concerns about how some companies, notably but not exclusively in the technology space, have come to dominate their space, and how they buy startups and potentially limit competition.

In addition, they are looking into alleged bias against conservative voices and other free speech issues on social media platforms. They are also considering antitrust theories to challenge companies' data collection practices and disclosures to consumers regarding the privacy of their data.

AGs are likely to use antitrust theories to probe how personal information is collected, shared, and used by companies in every industry, and to investigate concerns about personal data privacy.

Another novel area in which AGs are using state antitrust laws is to address restrictive labor practices, such as non-compete clauses in employment contracts. Certain states like New York and Massachusetts have the ability to bring labor and employment claims, but many states do not, so they find creative ways to use their antitrust authority and look at labor practices through an unlawful restraint on trade lens.

Data Privacy and Security

In addition to serving as a weapon in the antitrust war, data privacy and security stands on its own as a growing target for AGs. Increasing activity around data breaches at the state level has been fueled in part by the lack of a national data privacy framework. AGs have historically relied on their traditional consumer protection authority, and more recently their state-specific data breach notification laws, to regulate how companies secure their customers' personal information.

Because AGs have built significant expertise in this area through dozens of investigations and settlements that require deployment of technical safeguards, they want to contribute to a national framework to address these issues. AGs generally oppose any national data breach standard that preempts their state authority. Absent a national standard, for now, companies must continue to rely on ad hoc guidance from data breach-related settlements.

AGs are also using their authority under state consumer protection laws to investigate statements that companies make to consumers and investors regarding how they can protect sensitive consumer information in their possession. AGs may consider whether or not an organization that suffered a data breach should have known that its statements were inaccurate or potentially misleading to consumers.

States will also continue to update their privacy and data breach laws. In 2019, many companies prepared for the California Consumer Privacy Act, which, like the European General Data Protection Regulation, provides consumers with the right to find out what information is stored about them and to request the deletion of that information. Because the CCPA law impacts companies of a certain size that do business with residents of California or store certain information on California residents, the law will end up affecting most national companies, and many companies have been working to become CCPA-compliant.

Other states are likely to introduce legislation similar to the CCPA in the future, but states may wait until California works out the kinks before creating their own versions of this law.

Public Nuisance Law

Another trend that will likely continue is the attempt by AGs to use public nuisance law to tackle a broad spectrum of societal problems. They are attempting to apply the law to the opioid epidemic, climate change, and vaping. Until the U.S. Supreme Court weighs in, there will not be a definitive ruling on whether public nuisance law can be successfully applied in this way.

Public nuisance cases of this type often generate interest from the plaintiffs' bar and from localities. Therefore, AGs find themselves in an environment where they do not necessarily control the pace and direction of litigation.

Disruptive Technologies

AGs have shown strong interest in disruptive technologies in the financial services, health care, and transportation sectors. State AGs have been very welcoming of innovative products, but are also positioned to quickly address any unintended consequences or unforeseen problems that arise with innovation. AGs are very agile because of their consumer protection powers, which give them the ability to investigate the impact of new technologies like self-driving cars and telemedicine much faster than any legislature, or even many federal regulators.

Several industries have significantly changed their practices after being in the crosshairs of AG investigations, including pharmaceuticals, mortgage and student loan originators and servicers, and dietary supplements. And AGs have a keen sense of their influence. They have been very successful at reforming industries, and their successes are driving further enforcement efforts. As their enforcement priorities evolve, companies that dominate markets, use customer data, address society-wide issues, and disrupt industries will be on their radar.