

ARTICLE

Expect Aggressive Consumer-Related Investigations from State AGs

Corporate Counsel

January 4, 2019

State Attorneys General nationwide have been incredibly active in challenging the Trump Administration, on topics ranging from off-shore oil drilling, withholding of federal funds for so-called “sanctuary” jurisdictions, and of course, the travel ban.

During the midterm election, and even in statewide elections during the Obama Administration, many State Attorney General candidates have continued to run on the platform of protecting states from federal action to which they object.

But fighting the federal government is not the only platform State AGs have aggressively run on.

This past midterm election, a large number of candidates pledged to more aggressively enforce consumer protection laws. Democrats won new attorney general offices in Colorado, Michigan, Nevada and Wisconsin, and come January, they will outnumber Republican AGs 27 to 24.

This pledge to vigorously enforce consumer laws, however, is not solely a Democratic issue. Republican AGs have also toughened up on consumer protection issues. For example, Florida recently sued the nation’s two largest drugstore chains in connection with opioid sales and reached a settlement with one of the country’s largest non-bank residential mortgage servicers. And all 50 states and the District of Columbia recently teamed up on a \$148 million data breach settlement with a ride-sharing app company. That resolution itself set a marker for future data breach settlements.

Authors

Duane C. Pozza
Partner
202.719.4533
dpozza@wiley.law

Practice Areas

Litigation
State Attorneys General
Telecom, Media & Technology
White Collar Defense & Government
Investigations

It was therefore unsurprising when, immediately following a large hotel company's recent announcement of a customer data breach, New York Attorney General Barbara Underwood stated she would investigate the breach. And so did Ken Paxton, the newly re-elected AG of Texas, who quickly announced his office had served an investigative subpoena regarding the same.

Notably, the New York Attorney General also announced settlements last week with five companies regarding the security practices of their mobile apps. A surprising turn in the announcement was that the office stated that the settlements resulted from the AG office's own initiative to itself test dozens of mobile apps. This stands in contrast to more conventional forms of investigatory intake at most AG offices—through consumer complaints, for example. It showed just how aggressively the office would be pursuing these types of cases.

The D.C. Attorney General too, recently filed a privacy-related lawsuit against a major tech company under the D.C. Code related to disclosure of data to a third party in 2016.

On the environmental protection front, earlier this year, the Minnesota Attorney General Lori Swanson resolved a multimillion-dollar case against a large manufacturing company for allegations that the company produced chemicals that damaged drinking water and other natural resources.

And just recently, California Attorney General Xavier Becerra announced a \$7.4 million settlement with a merchandise retailer to resolve allegations that it unlawfully disposed hazardous waste in California. The same office resolved similar allegations against a home repair store a few months prior to that for over \$27 million.

This upward trend in State AG enforcement actions should put every consumer-related industry on notice, whether it's tech, health care, energy, financial services, sports and entertainment—take your pick. Enforcement actions like the ones above are just a harbinger of what is likely to come in the new year and beyond.

What is more, expect State AGs to also look at enforcing federal laws that confer authority for consumer-related enforcement, such as Title X of the Consumer Financial Protection Act.

In fact, just days ago, under the federal Children's Online Privacy Protection Act, New York Attorney General Barbara Underwood announced a \$5 million settlement with an online provider for violations of that statute, which confers such enforcement authority to states and the federal government.

What is increasingly clear is that regardless of what the federal government does, State AGs will not be sitting on the sidelines. In fact, even lower profile State AG offices are working with other offices to pool resources to vigorously enforce laws.

Over the past few years, organizations such as the National Association of Attorneys General, the Democratic Attorney General Association, and the Republican Attorney General Association, have each made it a priority to coordinate efforts among their membership and foster "cooperative" leadership among each of the offices.

This invariably allows states that don't have the kind of resources that New York or California have to leverage other offices' resources to bring impactful multi-state investigations.

Becoming deeply familiar with these organizations, as well as the individual State AG's themselves, has never been more critical for every entity that is subject to consumer-related laws.

Reprinted with permission from the January 4, 2019 edition of the Corporate Counsel © 2019 ALM Media Properties, LLC. All rights reserved.