

State AGs Lead the Way in False Advertising Enforcement

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Advertisements are everywhere. As we are constantly bombarded with information about the latest trends in every area from health and nutrition to finance and technology, it can be difficult to determine what information we can trust versus what may be “fake news.” Over the past few years, we have seen state attorneys general (AGs) seek to take the lead in combatting the information overload through enforcement of consumer protection laws, namely through lawsuits alleging claims for false advertising. This article explains the sources of the state AG power to investigate and prosecute false advertising claims, discusses enforcement trends through 2021, and predicts what we may see from state AGs in the area of false advertising in 2022.

I. State AGs and Their Authority to Protect Citizens Against False Advertising

A. Sources of Authority

State AGs are the “primary enforcers of consumer laws within their state.”^[1] They take on this responsibility in part due to their position as *parens patriae*, the parent of the dominion.^[2] The Federal Trade Commission Act (FTC Act) also assigns state AGs certain enforcement authority in the area of “unfair or deceptive acts or practices in or affecting commerce.”^[3] However, the most significant source of authority for state AGs in the consumer protection space derives from state consumer protection laws, most of which explicitly grant the AG chief enforcement responsibility within his or her state.^[4]

The FTC Act has prohibited unfair or deceptive acts and practices since 1938, but until the 1970s, there were no state equivalents. By extension, there were generally no state agencies with a mandate to focus on consumer fraud and abuse. In the 1970s and 1980s, states began to adopt their own forms of consumer protection statutes, largely modeled on the FTC Act. Today, each of the 50 states and the District of Columbia has some form of a consumer protection law, often referred to as the state’s “Unfair and Deceptive Acts and Practices Act” (UDAP) or “Consumer Protection Act” (CPA). Generally, these state consumer protection laws prohibit deceptive practices in consumer transactions, and although the substance of the statutes varies widely from state to state, many also prohibit unfair or unconscionable practices.^[5] State UDAPs and CPAs are primarily civil statutes, but others also create criminal penalties for severe violations.

Enforcement in the specific area of false advertising is largely implemented under state UDAPs and CPAs. For example, the Pennsylvania Unfair Trade Practices and Consumer Protection Law includes a catch-all provision that prohibits businesses in Pennsylvania from engaging in “fraudulent or deceptive conduct which creates a

likelihood of confusion or misunderstanding during a transaction.”^[6] Meanwhile, California has a separate False Advertising Law that prohibits any company or individual from making false statements or statements likely to mislead consumers about the nature of a product or service — which is independent of the California AG’s authority under the California Unfair Competition Law.^[7] Under state consumer protection laws, as well as specific false advertising statutes, state AGs are typically permitted to initiate and conduct investigations and bring lawsuits on behalf of the states’ citizens. Once a lawsuit is initiated, liability for consumer protection act-based claims for false advertising can be found without a showing that anyone was actually harmed or defrauded by the false advertising — the law merely requires that deception was *likely*.^[8] Such a low threshold makes the state UDAPs and CPAs particularly potent tools for state AGs seeking to hold companies liable for false or deceptive advertisements.

B. Available Remedies

State AGs frequently use settlements with companies under investigation or defending an AG-initiated lawsuit to influence the applicable legal standards in an industry. For instance, a settlement term may directly prohibit a defendant from making specific claims in the future unless they meet some express condition, which is not otherwise required by law. This type of injunctive relief warns other participants in the industry of the consequences that they could face if they do not conform their behavior appropriately. While settlement agreements do not bind third parties, they nevertheless often influence the industry standard on a go-forward basis.

For those cases that do not settle, the state AGs have a large and powerful menu of remedies from which to choose if they prevail on their underlying theory of liability. For example, statutes often empower the state AGs to obtain injunctive relief, monetary damages, restitution, and some form of civil penalty. Settlements vary tremendously. Some settlements enjoin future conduct and have no damages component, while others include a significant financial component (particularly where multiple AGs work together as part of a multistate investigation).

II. False Advertising Headlines in 2021

In 2021, state AG enforcement in the area of false advertising stretched across a broad range of industries and included allegations with varying degrees of severity. This article highlights several areas of notable AG enforcement activity.

A. AGs Seek to Protect Consumers From False Advertising in Sale of Drugs, Medical Devices, and Experimental Treatments

The year 2021 saw state AGs prioritize consumer protection in the health care space.

Notably, lawsuits involving stem cell clinics garnered significant attention. In November 2021, New York AG Letitia James announced a \$5.1 million judgment against Park Avenue Stem Cell, a “now-defunct New York City for-profit stem cell clinic,” and its managing doctor for falsely advertising their stem cell products.^[9] Filed in 2019, the lawsuit alleged that defendants scammed each patient out of thousands of dollars for unproven and potentially harmful medical treatments involving stem cells. The defendant advertised widely on its website and on social media, as well as in foreign language newspapers and televisions commercials, claiming that it could treat a

variety of serious, chronic medical conditions using a patients' own stem cells.[10] The clinic also falsely represented its products as (1) a "medical breakthrough," (2) as FDA-approved, and (3) as endorsed by other medical organizations, despite a lack of any adequate scientific substantiation that stem cells can effectively treat chronic medical conditions.[11] A similar suit was also recently filed in August 2021 by Georgia AG Chris Carr against Elite Integrated Medical LLC for similar "bogus claims" about stem-cell therapy.[12]

In February 2021, Hawaii AG Clare Connors announced the entry of an \$834 million state court order against Bristol-Myers Squibb Company and three U.S.-based subsidiaries of the French pharmaceutical company Sanofi for violating Hawaii's unfair and deceptive practices laws.[13] In a complaint filed in 2014, the Hawaii AG asserted that the defendants had engaged in false advertising of the drug Plavix by, among other things, failing to disclose on the Plavix label that the drug had diminished effect or no effect on a significant percentage of the patient population and by making misleading statements about the drug's efficacy and safety.[14] For example, the defendants falsely marketed Plavix as being more effective and safer than aspirin.[15] After a four-week trial that ended in November 2020, a Hawaii circuit court judge found that each distribution of Plavix with its misleading package labeling constituted a violation of the Hawaii law and imposed a penalty of \$1,000 per violation.[16]

Similarly, in March 2021, the AGs from California and Washington announced a \$188.6 million multistate settlement with Boston Scientific Corporation (Boston) based on allegations that the company deceptively marketed its surgical mesh products for women.[17] The California complaint filed against Boston alleged that the company misrepresented the safety of the surgical mesh by failing to disclose the full range of potential serious and irreversible complications that could be caused by implantation of the products.[18] The 2021 settlement included 47 states and the District of Columbia, and in addition to the \$344 in monetary relief, the settlement included injunctive terms, including requirements that Boston disclose significant complications in certain marketing materials and during trainings for health care providers regarding the procedures for insertion and implantation.[19]

B. Oil Companies Remain Under Intense Scrutiny.

In September 2021, Vermont AG TJ Donovan announced that Vermont would follow other states and local governments in filing a lawsuit against the state's largest fossil fuel suppliers.[20] The new suit alleges, among other things, that the defendant companies misled consumers about their products' contribution to climate change in violation of Vermont's false advertising law.[21] In this somewhat atypical false advertising suit, the Vermont AG claims that the defendant companies "have intentionally concealed and disseminated information that is likely to mislead Vermont consumers regarding the acceleration of global warming, and the fact that continued increase in fossil fuel product consumption creates severe environmental threats and significant economic costs for communities." [22] The complaint asserts that the defendants' misrepresentations and omissions about their fossil fuel products will likely affect Vermont consumers' decisions about the purchase and use of the products.[23] The Vermont AG seeks civil penalties and fines, as well as injunctive relief. Specifically, he asks the court to force the defendants to include stickers or labels at gas pumps that warn Vermonters about the products' impact on the environment.[24]

The Vermont AG's suit follows a wave of state AG suits against oil companies, which was kicked off by Rhode Island AG Peter Kilmartin in 2018.[25] AGs in New York, Massachusetts, Minnesota, Delaware, Connecticut, and the District of Columbia also have filed complaints against oil companies, several of which contained claims based

on false advertising.

III. What to Expect in 2022

A. State AGs Will Continue to Prioritize Enforcement in Health Care Space as Pandemic Continues.

As the COVID-19 pandemic approaches Year Three, we expect to see state AGs escalate enforcement activity relating to false information in the health care space. As the Food and Drug Administration (FDA) has warned, “some people and companies are trying to profit from this pandemic by selling unproven and illegally marketed products that make false claims, such as being effective against the coronavirus.”^[26] To the extent any of these individuals or companies have been successful in promoting their fraudulent products, false advertising laws can serve as a powerful tool to hold them accountable for their deceptive schemes.

B. Climate Change Concerns May Continue to Drive State AG Action

At international climate talks in Glasgow last year, President Joe Biden pledged that the United States would cut its emissions at least 50% below 2005 levels by the end of the decade. However, the president has made little progress toward that goal. His “Build Back Better Act” spending bill, which contains \$555 billion in climate action — including \$320 billion in tax incentives for producers and purchasers of wind, solar, and nuclear power — is now in limbo on Capitol Hill.^[27] With midterm elections later this year, Democrats in Congress are pondering moving forward with standalone climate-focused legislation, but climate change-concerned state AGs may take it upon themselves to join the fight against major oil companies and other climate contributors in hopes of moving the emissions needle, however slightly, toward the president’s announced goal.

C. Tech Giants May Be the Next Major Targets

Providing one of the first major false advertising headlines of 2022, a bipartisan collection of state AGs — including the District of Columbia, Texas, Washington, and Indiana — filed lawsuits, claiming that Google made misleading promises to its users about its ability to protect their privacy through Google account settings.^[28] The complaints followed months of scrutiny of Big Tech companies related to privacy, as well as marketing of services and apps. On December 8, 2021, Instagram CEO Adam Mosseri appeared before the Senate Subcommittee on Consumer Protection, Product Safety, and Data Security to answer questions about the social media platform’s effects on children and teens. His appearance followed an announcement by another bipartisan coalition of state AGs regarding an investigation into whether Instagram promoted its platform to children and young adults despite knowing that its use was associated with physical and mental health harms. That appearance arose out of internal documents leaked by whistleblower Frances Haugen that suggest the company’s own researchers have found that Instagram can damage young users’ mental health and body image and can exacerbate dangerous behaviors, such as eating disorders.^[29]

Big Tech scrutiny from both sides of the aisle is expected to continue in the new year. Members of Congress have already begun to suggest that new legislation, specifically targeting the regulation of social media and tech giants, is coming. In the meantime, false advertising law may provide the best option for state AGs seeking to address concerning practices in the tech industry.

IV. Conclusion

In closing, state AGs play a critical role in developing law across regulatory regimes, one of which is in the area of regulating advertising and its truthfulness. Recent enforcement actions suggest that the state AGs will play a role of increasing prominence in this arena in the years ahead. That is especially true with the state AGs electing to cooperate with the FTC on an increasingly frequent basis, which largely flows out of the U.S. Supreme Court recently declaring that the FTC cannot seek restitution (or any other form of monetary damages) as a form of equitable relief.^[30] For that reason, this trend will be a critical one to watch for businesses, companies, and individuals who market and advertise in the public domain.

[1] National Association of Attorneys General (NAAG), “Consumer Protection 101” (last visited Dec. 27, 2021), <https://www.naag.org/issues/consumer-protection/consumer-protection-101/>.

[2] *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600–01 (1982) (citation omitted); see also *Parens Patriae*, Black’s Law Dictionary (11th ed. 2019) (“A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen”).

[3] 15 U.S.C. § 45(a)(1).

[4] NAAG *supra* note 1.

[5] Carolyn L. Carter, “Consumer Protection in the United States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes,” National Consumer Law Center, Inc. (Feb. 2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf.

[6] See 73 P.S. § 201-2(4)(xxi).

[7] Cal. Bus. & Prof. Code § 17500 *et seq.* (False Advertising Law); *id.* at § 17200 *et seq.* (Unfair Competition Law).

[8] See, e.g., *People v. Glubo*, 158 N.E.2d 699, 705–06 (N.Y. 1959).

[9] Press Release, Off. of N.Y. Att’y Gen., “Attorney General James Secures \$5.1 Million Judgment Against New York Stem Cell Clinic for Scamming Patients Out of Thousands Through False Advertising” (Nov. 24, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-secures-51-million-judgment-against-new-york-city-stem>.

[10] *Id.*

[11] *Id.*

[12] Press Release, Off. of Ga. Att’y Gen., “Carr Sues Elite Integrated Medical for Deceptive Claims Made to Elderly and Disabled Consumers Regarding Stem Cell Therapy” (Sept. 14, 2020), <https://law.georgia.gov/press-releases/2020-09-14/carr-sues-elite-integrated-medical-deceptive-claims-made-elderly-and>.

[13] Press Release, Haw. Dep’t of Att’y Gen., “\$834 Million Order Entered in Hawaii State Court Against Bristol-Myers Squibb and Sanofi For Failure to Investigate and Disclose Ineffectiveness of Plavix” (Feb. 15, 2021), <https://ag.hawaii.gov/wp-content/uploads/2021/02/News-Release-2021-13.pdf>.

[14] See Complaint at ¶¶ 84-85, *State of Hawaii v. Bristol-Myers Squibb Co.*, No. 14-1-0708 (2014).

[15] *Id.* at ¶ 86.

[16] Press Release, *supra* n. 9.

[17] Press Release, Cal. Dep’t of Just., “California Department of Justice Announces \$188.6 Million Multistate Settlement with Medical Device Manufacturer Boston Scientific Corporation” (Mar. 23, 2021), <https://oag.ca.gov/news/press-releases/california-department-justice-announces-1886-million-multistate-settlement>.

[18] *Id.*; Complaint at ¶ 29, *The People of Cal. v. Boston Sci. Corp.*, No. RG21092570 (2021).

[19] Press Release, *supra* n. 17.

[20] Press Release, Off. of Vermont AG, “Attorney General Donovan Files Consumer Protection Suit Against Fossil Fuel Companies” (Sept. 14, 2021), <https://ago.vermont.gov/blog/2021/09/14/attorney-general-donovan-files-consumer-protection-suit-against-fossil-fuel-companies/>.

[21] Complaint at ¶¶ 176-85, *Vermont v. Exxon Mobil Corp., et al.*, No. 2:21-cv-0060, (2021), <https://legislature.vermont.gov/Documents/2024/WorkGroups/Senate%20Judiciary/Bills/S.259/Witness%20Documents/S.259~Charity%20Clark~State%20of%20Vermont%20v.%20Exxon%20Mobil-%20Complaint~2-28-2024.pdf>.

[22] *Id.* at ¶ 180.

[23] *Id.* at ¶ 182.

[24] *Id.* at § V(a).

[25] Nate Raymond, “Rhode Island sues major oil companies over climate change,” *Reuters* (July 2, 2018), <https://www.reuters.com/article/us-oil-climatechange-rhode-island/rhode-island-sues-major-oil-companies-over-climate-change-idUSKBN1JS28M>.

[26] FDA, “Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments” (Nov. 18, 2021).

[27] Lisa Friedman, “Biden ‘Over-Promised and Under-Delivered’ on Climate. Now, Trouble Looms in 2022,” *The New York Times* (Jan. 4, 2022), <https://www.nytimes.com/2022/01/04/climate/biden-climate-change.html>.

[28] Press Release, Off. of Att’y Gen. for D.C., “AG Racine Leads Bipartisan Coalition in Suing Google Over Deceptive Location Tracking Practices That Invade Users’ Privacy” (Jan. 24, 2022), <https://oag.dc.gov/release/ag-racine-leads-bipartisan-coalition-suing-google>.

[29] Press Release, Off. of Mass. Att’y Gen., “AG Healey Co-Leads Nationwide Investigation into Instagram’s Impact on Young People” (Nov. 18, 2021), <https://www.mass.gov/news/ag-healey-co-leads-nationwide-investigation-into-instagrams-impact-on-young-people> ; see also Stephen Piepgrass, Chris Carlson, and Abbey Thornhill, “Changes Ahead for Social Media Regulation?,” *Regulatory Oversight* (Dec. 29, 2021), <https://www.regulatoryoversight.com/2021/12/changes-ahead-for-social-media-regulation/>.

[30] *AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1342 (2021); see also Keith J. Barnett, et al., “Unanimous Court Cuts FTC’s Power to Seek Monetary Redress,” *Troutman Pepper* (Apr. 23, 2021), <https://www.troutman.com/insights/unanimous-court-cuts-ftcs-power-to-seek-monetary-redress.html>.

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