



NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY



Public Health
Law Center

AT WILLIAM MITCHELL
COLLEGE OF LAW

Connecting with State AG Offices

While state consumer protection laws vary across the nation,¹ every state has one or more laws that prohibit *deceptive* trade practices such as false or misleading advertisements.² A slim majority of states also prohibit *unfair* business acts or practices,³ and a few states prohibit *unconscionable* business practices.⁴

State attorneys general (AGs) have a history of using their responsibility to enforce state consumer protection laws and the visibility of their offices to draw attention to the problem of obesity, as well as to address problematic food marketing practices.⁵ This fact sheet explores how state AGs decide which issues to pursue, and offers suggestions for how to approach state AG offices with concerns about questionable children's food and beverage marketing practices.

Many researchers and advocates concerned about childhood obesity have looked to state attorneys general (AGs) with a hopeful eye. This fact sheet is one of a series from NPLAN about state AGs and their potential as effective allies in efforts to curb questionable and unhealthy food and beverage marketing practices aimed at children. All of these resources are available at www.nplan.org.

How Do State AGs Choose Their Cases?

The issues that state AGs pursue depend very much on the priorities (and sometimes the personality) of a particular AG. While state consumer protection divisions vary widely in size and focus,⁶ almost all take complaints from consumers. Complaint forms are available on nearly every state AG's website.⁷

These complaints are an important resource for state AGs in identifying possible consumer protection investigations or enforcement actions.⁸ In many AG offices, consumer complaints are tracked electronically, and companies that experience a high number of complaints or a sudden spike are noted. Typically, complaints will be reviewed by investigators or assistant AGs, who will research the issues raised to determine whether further action — up to and including filing a lawsuit — is warranted. While high complaint numbers may trigger a review, so can a single letter if the harm alleged is severe enough.⁹

Consumer complaints, however, are just one potential source of cases. Some state AGs encourage staff to monitor questionable industry trends or emerging practices, to

spot potential impact cases. These state AGs are “looking to reform what they believe to be improper, but widely practiced or tolerated, marketplace activity,” according to one former state consumer protection manager.¹⁰ But even state AGs who are willing to go out on a limb to take on a new practice or issue will generally (though not always) want to ground the case in tried-and-true consumer protection theories, such as deceptive or misleading advertising.

A study that looked at how the Massachusetts Attorney General’s Office handled consumer protection case decisions in the 1970s made some observations that still ring true today.¹¹ Understandably, state AGs typically want cases they believe they can win.¹² The study suggested, however, that while legal merit was an important factor in deciding which potential cases to pursue, other considerations are often as important, including “the political associations of the persons complaining, the type of complaint, the size and type of business complained against, the attitudes and expectations of the parties, and the business’s familiarity with the [Consumer Protection Division].”¹³

This study also noted that the criteria for a good case included whether a large refund or savings could be obtained quickly without requiring significant staff effort; whether the case presented a chance to eliminate a business practice that generates repeated complaints; and whether the case presented an opportunity for good press.¹⁴ These observations reflect a realistic approach to state consumer law enforcement.

Finally, it should be noted that state AGs, like politicians in general, tend to move in groups. Most prefer not to be too far ahead nor left behind. This means they may be more willing to sign on to certain *amicus* (“friend of the court”) briefs or participate in other multistate campaigns when they believe there is already a critical mass of states on board.¹⁵ Moreover, state AGs must also be aware of how the state legislature may view their actions. State legislatures can significantly impact state AG activity at a practical level not only by passing legislation that may expand or limit the office’s authority, but also through control of the office’s budget.¹⁶ So some state AGs may be reluctant to take on an untried legal theory or otherwise swim against the tide, lest they run afoul of their political colleagues.

Issues of Interest

State AGs tend to be particularly concerned about issues that implicate health or safety claims (especially scientific claims whose truthfulness can be proven or disproven), issues where children or other vulnerable populations are victims, and/or issues that implicate a breach of public trust.¹⁷ For example, in addition to its consumer protection standing committee and project, the National Association of Attorneys General (NAAG) maintains special committees including a health and public safety committee, a social networking task force, and a committee on youth access to alcohol and drugs.¹⁸ In 2008, NAAG undertook a special initiative called “Year of the Child: Protecting and Empowering Our Next Generation.”¹⁹

In the context of food and beverage marketing, state AGs frequently focus on cases involving deceptive practices used to market health products,²⁰ questionable health benefit or nutrition claims made on food or supplement products,²¹ and food safety issues.²² State AGs also often pursue companies that prey on consumers’ vulnerabilities — for example, by using deceptive tactics to market weight loss products and programs.²³ Food and beverage marketing practices that implicate these kinds of tactics are more likely to draw scrutiny from state AG offices, particularly if they target children.

When pitching a case to a state AG’s office, particularly a novel or potentially controversial one (as a case targeting junk food marketing to kids is likely to be), knowing your audience is key. Research indicates that state AGs who are elected, who are in states that are more progressive, and who have more full-time attorney staff are more likely to initiate or join consumer protection cases.²⁴ Common sense and observations of how state AG offices work also suggest that knowing which state AGs are interested in certain issues, and specifically whom on their staff to talk to about those issues, is also important.

Finally, resource considerations may play a decisive role. Historically, state AGs have been more likely to pursue food or beverage marketing cases that involve health benefit or nutrition claims. However, these kinds of cases tend to be more expensive to take on because they can require expert help to analyze the research or studies necessary to either substantiate or disprove the claims.

Additionally, while state AGs and their staff may care passionately about public health issues like childhood obesity, they also know that if they open an investigation, ultimately they could end up having to prove their case to a court against a well-funded and determined opponent. For example, when several state AGs investigated Kellogg for questionable food marketing claims in the late 1980s, Kellogg sued the Iowa and Texas AG offices, seeking to enjoin the investigations.²⁵ Food companies have not shied away from legal fights with state AGs, and state AG offices can reasonably anticipate that food or beverage marketing cases may require significant commitment of staff time and resources. Particularly in tight economic times, concerns about resources should not be underestimated.

Approaching the State AG’s Office

Advocates can and have played an important role in encouraging and supporting state AG consumer protection efforts. The Center for Science in the Public Interest, for example, has a long history of reaching out to AG offices through presentations at NAAG meetings and other venues, and has filed lawsuits of its own and otherwise drawn public attention to food and beverage marketing practices that are also of concern to state AGs.²⁶

Keeping media attention focused on these issues is one of a number of ways advocates can support state AGs who are interested in pursuing improper business practices but have to make decisions about how to allocate scarce staff and office

resources. Here are some suggestions for how to approach state AG offices with concerns about food and beverage marketing issues, drawn from history, practical experience, and informal conversations with current and former AG consumer protection staff from around the country.²⁷

1. Identify the state AG offices that are more likely to be interested in looking into your concern, whether as a pioneer or as part of a multistate initiative. This includes finding out which staff members in that state AG's office are working on that or a related issue. Finding this information will take some work, but these ideas might help:

- Research recent state AG actions relating to your issue. Many state AG press releases will include the name of the staff attorney who handled a case. Also, if there were any court documents filed, they generally will be signed by the staff attorney(s) working on the case. (Be aware that press releases alone likely will not give an accurate picture of the depth of a state AG's interest in an issue.)
- Contact the National Association of Attorneys General (NAAG)²⁸ to find out which state AGs belong to — or better yet, lead — the committees or projects that most relate to the issues you are concerned about.
- Contact the National State Attorneys General Program at Columbia Law School, which is headed by a former Maine Attorney General (James Tierney) and features current state AG staff who teach as adjunct professors for the program. This program is another potential source of information about how state AG offices work. It also recently launched a Health Law Initiative, and announced that it is available as a resource “for public health advocates as they consider meeting with state attorneys general.”²⁹ (See the “Additional Resources” at the end of this fact sheet.)
- Former AG staff may also be a good source of referrals; see if your local law school has a consumer law clinic or if it offers a class on consumer protection law, and who teaches it. Current or former assistant attorneys general may teach in these programs as adjunct professors.

2. Take the long view, and focus on building relationships.

Once you have identified key staff members in an AG's office, take the time necessary to cultivate relationships and trust. If you are able to develop a good relationship with the AG and staff, you will likely have more opportunities to provide your perspective and inform the state AG office's activities in a meaningful way — for example, by providing ideas about what might be desirable settlement terms from a public health perspective, or what kinds of information the AG should seek in order to build a case. Moreover, if a staff attorney is willing to champion a case within his or her office and/or with a multistate group, there is a better chance that the case may go somewhere. You are more likely to find that potential champion if you have a good working relationship with the AG's office.

3. Focus on marketing practices that are likely to result in deception claims. These are the bread-and-butter cases of AG consumer protection staff. Health or nutritional claims, like “Smart Choice” or “Boosts your child's immunity,” are good examples (see “Enforcing Food Marketing Laws: A Brief History,” another fact sheet in this series from NPLAN). You should still make any unfairness or unconscionability arguments that you think apply, but these arguments should be add-ons to deception claims. In addition, cases based on established science will appeal to state AG staff more than those based on emerging science.

4. If you can, offer reliable and free expert help — but don't offer it lightly. Companies may provide state AGs with studies to substantiate their questionable health claims, and evaluating the research typically requires expert help. Because state AG offices are unlikely to have nutritional experts on their staff, they may need to hire or find outside assistance but may not always have adequate resources to do so. Free, reliable, reputable expert help would be invaluable to them. But make sure you have the time and resources to follow through before making such an offer. Some AG staff have had the experience of being offered expert help by advocates, only to have the help evaporate when it was most needed. Finally, make sure to establish clear expectations and guidelines with the state AG staff about what kind of expert help your organization may be willing and able to provide, anticipated timelines or deadlines, and what the chances may be, for example, that your expert might be asked to testify in any resulting litigation. Filing a lawsuit triggers certain discovery and evidentiary requirements regarding experts, depending on whether a party plans to call the expert to testify at the trial.³⁰ The state AG staff cannot represent you or your expert, or give you legal advice about this or any other situation. So if you have questions or concerns, you should consult with legal counsel who can represent you or give you legal advice.

5. Identify opportunities to reach the AG directly. Like most politicians, AGs are likely to respond to their peers or associates, as well as to media attention. Getting the AG's ear directly through someone who knows him or her (or the AG's high-level staff), or at a town hall meeting (preferably when the cameras are rolling), can also be a way to get attention focused on your cause, at least initially.

6. Don't be discouraged by one-way conversations. When talking to state AG staff, be aware that they are limited in what they can share with the public about what they may be working on. Typically, state AG investigations cannot be made public until or unless the AG takes some public action (like filing a lawsuit, or reaching a settlement agreement). So try not to get frustrated or disappointed if it seems like you are always having a one-way conversation; that is actually normal. Even if you feel like you are not getting what you hoped for in terms of action

from an AG's office, focus instead on strengthening the relationship. It may be that the case is not as simple as you think it is, that it will cost more to pursue than you realize, or that you simply don't know the whole picture because the investigation is confidential. This is not to say that state AG staff are always right or never make mistakes. They are only human, after all. But ultimately, they — and their AGs — have to make the calls about what matters they pursue, and how.

For more information about state AGs and their consumer protection authority and activities, see the other fact sheets in this series, available at www.nplan.org.

Additional Resources:

- *State Attorneys General and Public Health: Capacity and Impact*, a 2010 memo from the National State Attorneys General Program and the Rudd Center on Food Policy and Obesity, available at www.law.columbia.edu/center_program/ag/policy/health/Obesity
- The National State Attorneys General Program has launched a Health Law Initiative to provide resources and convene events on the role of attorneys general in health advocacy and enforcement. For more information, see www.law.columbia.edu/center_program/ag/policy/health



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¹ For an overview of the state consumer protection laws in the fifty states as of February 2009 (with a focus on comparing the strengths and weaknesses of each state's laws), see CAROLYN CARTER, NAT'L CONSUMER LAW CTR. INC., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), available at www.consumerlaw.org/issues/udap/content/UDAP_Report_Feb09.pdf; Alan S. Brown et al., *Comparison of Consumer Statutes Across the Fifty States*, FDCC Q. (2005), available at http://findarticles.com/p/articles/mi_qa4023/is_200504/ai_n14800199/?tag=content;col1. See also David L. Belt, *The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. BAR J. 247 (2006) (discussing the unfairness standards in the 28 jurisdictions that have unfair business practices laws).

² MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3:1 (2009); see also CARTER, *supra* note 1, at 11.

³ See Belt, *supra* note 1, at 303.

⁴ PRIDGEN, *supra* note 2, at § 3:15.

⁵ For more information about this history, see *State AG Enforcement of Food Marketing Laws: A Brief History* (NPLAN Fact Sheet 2010), available at www.nplan.org.

⁶ STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 238 (Emily Myers & Lynn Ross eds., 2d ed. 2007) [hereinafter 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES].

⁷ *Id.* at 239.

⁸ Prentiss Cox, *Regulatory Perspectives and Initiatives: State Attorneys General Case Selection and Investigation*, 1591 P.L.I./CORP 83, 86 (2007).

⁹ *Id.*

¹⁰ *Id.* at 89.

¹¹ Susan S. Sibley, *Case Processing: Consumer Protection in an Attorney General's Office*, 15 LAW & SOC'Y REV. 849 (1980–81).

¹² For example, one study of state AGs found that chances of winning and availability of resources (both financial and legal) were more important than public opinion in terms of influencing AG decisions to litigate in the U.S. Supreme Court (whether as a direct party or as a friend-of-the-court). Eric Waltenburg et al., *The Supreme Court as a Policy Arena: The Strategies and Tactics of State Attorneys General*, 27 POL'Y STUD. J. 242, 253 (1999).

¹³ Sibley, *supra* note 11, at 865.

¹⁴ *Id.*

¹⁵ See Cornell Clayton, *Law, Politics, and the New Federalism: State Attorneys General as National Policy Makers*, 56 REV. POLS. 525, 543 (1994).

¹⁶ Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2003 (2001).

¹⁷ Cox, *supra* note 8, at 85.

¹⁸ Nat'l Ass'n of Attorneys Gen., NAAG Standing Committees, www.naag.org/naag_standing_committees.php (last visited Feb. 14, 2010).

¹⁹ Nat'l Ass'n of Attorneys Gen., Year of the Child, www.naag.org/year-of-the-child1.php (last visited Feb. 14, 2010).

²⁰ See, e.g., Consent Judgment, State v. Central Coast Nutraceuticals, No. CV2008-033069 (Ariz. Super. Ct., Maricopa County June 22, 2009) (on file with author) (involving deceptive marketing of health supplements).

²¹ See, e.g., Press Release, Conn. Attorney Gen.'s Office, Attorney Gen., DCP Reach Settlement with Snack Food Companies to Stop Unproven Health Claims (May 25, 2004), available at www.ct.gov/AG/cwp/view.asp?A=1779&Q=284312.

²² For example, the California Attorney General has brought consumer protection and food safety lawsuits against candy companies and several fast food chains and snack food companies, relating to harmful substances in their products. See Press Release, Office of the Attorney Gen.: State of Cal., Attorney General Lockyer Announces Settlement With Hershey and Mars Subsidiaries To Reduce Lead In Mexican Candy Popular with Children (June 29, 2006), available at <http://ag.ca.gov/newsalerts/release.php?id=1317>; Office of the Attorney Gen.: State of California, Atty. Gen. Brown Settles Potato Chip Lawsuit with Heinz, Frito-Lay & Kettle Foods, <http://ag.ca.gov/newsalerts/release.php?id=1595&> (last visited Apr. 24, 2010) (describing AG lawsuits over companies' failure to disclose presence of acrylamide, a carcinogen, found in certain of their products, and including links to the resulting settlements); Complaint, People v. Snyders of Hanover, Inc., et al., (Cal. Super. Ct., Alameda County June 1, 2009), available at <http://ag.ca.gov/prop65/pdfs/snyders.pdf>.

²³ See, e.g., *In re Coca Cola Co.*, Assurance of Discontinuance (Wash. Super. Ct., Thurston County Feb. 26, 2009) (example of Assurance settling allegations made in multistate by 27 state AGs that Coca Cola and others deceptively marketed tea beverage Enviga by claiming that drinking three cans a day would burn 60 to 100 calories), available at www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2009/EnvigaAOD02-25-09.pdf. Several states have settled investigations or cases with the operators of LA Weight Loss Centers and other such centers. See, e.g., Press Release, Wash. Attorney Gen., Attorney General McKenna Announces New Settlements with LA Weight Loss Following Ongoing Complaints (Nov. 27, 2006), available at www.atg.wa.gov/pressrelease.aspx?id=4348 (includes links to Assurances of Discontinuance with companies); Press Release, Or. Attorney Gen., Attorney General John Kroger Announces Settlement With LA Weight Loss (May 4, 2009), available at www.doj.state.or.us/releases/2009/re1050409.shtml (includes links to stipulated partial judgment and Assurance of Voluntary Compliance with companies).

²⁴ Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS: J. OF FEDERALISM 37, 51–52 (2003).

²⁵ Luther C. McKinney et al., *What to Do When the Attorney General Calls: State Regulation of National Advertising*, 3 DEPAUL BUS. L.J. 119, 130 & 131 (1991).

²⁶ *Id.* at 131–32.

²⁷ For additional recommendations aimed at private consumer protection attorneys, see STEPHEN GARDNER, THE ROLE OF STATE ATTORNEYS GENERAL IN CONSUMER PROTECTION (2009) (on file with author).

²⁸ Nat'l Ass'n of Attorneys Gen., About NAAG, www.naag.org/contact.php (last visited Apr. 24, 2010).

²⁹ National State Attorneys General Program et al., *State Attorneys General and Public Health: Capacity and Impact 2* (2010), available at www.law.columbia.edu/center_program/ag/policy/health/Obesity.

³⁰ See, e.g., Fed. R. Civ. Proc. 26(a)(2) and Fed. R. Evid. Art. VII.