



NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY



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State AGs: Who They Are and What They Do

State attorneys general (AGs) have both the motivation and authority to advance important public policy goals. This fact sheet provides an overview of state AGs and their authority, activities, and abilities to drive policy development at state and national levels.

What Do State AGs Do?

State AGs typically engage in activities that potentially make them natural allies in efforts to promote responsible children's food and beverage marketing practices. The vast majority of state AGs are publicly elected¹ and therefore directly accountable to voters.² This fact may be important from an advocate's perspective: research shows that elected state AGs tend to be more entrepreneurial in pushing policy outcomes beyond the status quo, while appointed ones tend to keep to more "ministerial" roles.³

In their capacity as the chief legal officers for their states, state AGs and their staff typically have two main roles. First, they serve as lawyers to the state's governor and state agencies, providing legal advice and representing these entities in court, administrative hearings, and other proceedings (such as legislative hearings). They also can serve as lawyers for the state as a whole, representing the interests of the state and its citizens — which includes suing on the state's behalf to enforce civil and criminal laws. For example (and of particular interest to those concerned about children's food and beverage marketing practices), state AGs have primary responsibility for enforcing state consumer protection and antitrust laws.

In these situations, state AGs generally do not represent individual consumers who may have been affected by the wrongful conduct; they are not class action attorneys. Rather, they represent the state.⁴ When AG staff members represent the governor or a state agency, the governor or agency is the "client." Otherwise, the client is essentially the state AG as the representative of the people of the state.

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.

State AGs engage in a wide variety of activities. While these vary from office to office, common duties include:⁵

- 1. Investigating possible violations of state laws and enforcing these laws,** including in some cases, criminal laws. Many state AGs also handle the bulk, if not all, of the criminal appeals for their states.
- 2. Mediating consumer complaints.** Most AG offices have staff that use alternative dispute resolution techniques to try to resolve consumer complaints.
- 3. Providing educational resources on consumer issues.** Many AG offices provide free publications on a variety of issues to educate the public and to help consumers avoid becoming victims of unethical or illegal business practices.⁶
- 4. Issuing opinions** that clarify or interpret state law, identify legal issues that may warrant legislative correction, or resolve issues that are unlikely to become the subject of litigation.
- 5. Participating in the legislative process** by, for example, proposing legislation, testifying at legislative hearings, lobbying Congress on regulatory issues through the National Association of Attorneys General, and in some cases, passing regulations to interpret consumer protection laws.

As this list shows, not only are state AGs the chief law enforcement officers for their states, but they also directly engage in policy-making and advocacy activities. In early 2010, for instance, Vermont Attorney General William Sorrell convened representatives from state government, community groups, industry, and other stakeholder groups to identify steps to reduce obesity in Vermont.⁷

State AGs also engage in policy-making indirectly, by bringing litigation that highlights the need for policy change or gaps in regulatory protection. These types of activities may help raise awareness about problematic children's food and beverage marketing practices.

Broad Authority, with Limits

State AGs derive their power to investigate and enforce laws, and otherwise act in the public interest, from state constitutions, statutory mandates, and common law (law made or interpreted by courts).⁸ As one of the cornerstone cases on state AG authority puts it:

[T]he attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.⁹

Thus, as legal scholars have noted, state AGs are “significant institution[s] in state government” because they “combin[e] democratic accountability with expansive powers to act in the public interest.”¹⁰

As this court opinion also suggests, however, in addition to being accountable to the voting public, state AGs must also be mindful of how state legislatures may view their actions. State legislatures can significantly impact state AG activity not only by passing legislation that may enhance or impose limits on the office's authority, but also through control of the office's budget.¹¹ These types of political considerations are helpful to keep in mind when dealing with state AGs because they impose practical, if unofficial, limits on state AG activities.

Driving and Shaping Public Policy

These political considerations aside, state AGs have demonstrated a willingness to exercise their broad powers to act in the public interest to advance important public policy issues at both state and federal levels. For example, they have acted to fill regulatory gaps left by federal authorities. They have brought “impact cases” — investigations and litigation meant to change industry practices or build support for legislation. In doing so, they often have been in the forefront on certain issues that significantly affect public health, welfare, and safety,¹² such as data privacy,¹³ abusive lending practices,¹⁴ and tobacco control.¹⁵ State AGs can also draw attention to important public health issues using other tools, as demonstrated by the Vermont attorney general's statewide obesity initiative.

Filling the gaps

State AGs have significantly stepped up their activities during the past three decades to address regulatory gaps resulting from federal inability or unwillingness to act,¹⁶ including failures to act on claims made in food marketing and labeling.¹⁷ Observing that the federal government had become hostile to nearly all kinds of regulations, state AGs realized that they had a significant role to play as government regulators and they mobilized accordingly.¹⁸

State AGs began to work together by suing the federal government to enforce, or compel compliance with, federal laws,¹⁹ intervening as *amici curiae* (“friends of the court”) in private litigation to challenge federal officials' interpretations of federal law or to express the states' position,²⁰ and lobbying Congress for authority to enforce federal consumer protection laws and other laws where there was doubt about the federal will to enforce particular laws.²¹ Where these efforts were not successful, AGs began working with their own state legislatures to pass regulatory laws mirroring federal laws that state AGs could enforce.²²

Pooling Resources

One important way that state AGs enforce consumer protection laws is through multistate investigations and litigation. The National Association of Attorneys General frequently facilitates these multistate activities,²³ which can involve anywhere from two to all of the states and territories.²⁴

Generally speaking, in multistate cases each state opens its own investigation file and/or files its own lawsuit. The participating states then coordinate their efforts by issuing similar requests for information, sharing information through common interest agreements, collaborating on their investigative or litigation strategies, and engaging in joint negotiations.²⁵ If the group is relatively large, often one or a few states will lead the group.²⁶ The staff from these leading states can play an important role in driving the progress of a multistate initiative, depending on how closely the states' activities are coordinated.

Multistate lawsuits have been described as one of the most important policy tools for state AGs because, as analysts have noted, these lawsuits “effectively serve to enforce regulatory policy at a national level.”²⁷ This is because the injunctive relief resulting from a multistate lawsuit (the court order requiring the defendant to do or refrain from doing something) will usually have national effect — even if not all or even most of the 50 states participated in it — given that the injunctive relief applies in more than one state. Generally, it may be simpler for defendants in multistate actions to change their practices everywhere they operate rather than only in the states that sued them, which would potentially leave them open to future lawsuits brought by the other states.

Political Dynamics

State AG actions, whether brought by a single AG or as a multistate initiative, can be very effective in advancing important public policy goals. But state AGs, like any elected official, operate within a political context and may be cautious about taking on issues they perceive as controversial. Also, because multistate actions by definition involve several states, there is a chance that regional or other interests could influence their direction, or that the compromises reached to achieve consensus within the group might be less than satisfactory from an advocate's perspective. On the other hand, the “strength in numbers” approach can serve to bring in states that might not be able or willing to take action by themselves.

Some issues may hold particular appeal to activist state AGs who are willing to take risks for the right cause. These officials may be just as inclined to strike out on their own as to try to mobilize a multistate action, depending on their personalities, the available resources, and the nature of the issue, among other factors.

While different state AG offices have varying priorities and levels of resources, all have both the authority and the legal tools to act in the public interest on important public policy issues, whether through education, advocacy, or litigation. This fact sheet was designed to provide an overview of state AGs and their powers, activities, and abilities to promote policy development at a national level. For more information on state AGs and their consumer protection activities, particularly relating to food and beverage marketing practices, see the companion fact sheets in this series 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 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 17 (Emily Myers & Lynn Ross eds., 2d ed. 2007) [hereinafter 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES]. In five states, the attorneys general are appointed (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming), and in two states, they are chosen by the state legislature and the state supreme court (Maine and Tennessee, respectively). *Id.* In the District of Columbia, the mayor appoints the attorney general. *Id.*
- ² PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 85 (William Buzbee ed., 2009) [hereinafter PREEMPTION CHOICE].
- ³ Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS: J. OF FEDERALISM 37, 52–53 (2003).
- ⁴ 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 1, at 237.
- ⁵ See generally *id.* at 11–15; Cornell Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policy Makers*, 56 REV. POLS. 525, 528 (1994).
- ⁶ 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 1, at 237–38. Some counties that have their own consumer protection ordinances also try to mediate consumer complaints. See, e.g., Broward County, Florida, Filing a Consumer Complaint, www.broward.org/PermittingAndLicensing/Consumer/Pages/filingacomplaint.aspx (last visited Feb. 9, 2010).
- ⁷ Office of the Attorney General: The State of Vermont, Attorney General's Obesity Initiative, www.atg.state.vt.us/issues/consumer-protection/obesity.php (last visited Apr. 20, 2010).
- ⁸ 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 1, at 38.
- ⁹ Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 268–69 (5th Cir. 1976) (citations omitted).
- ¹⁰ PREEMPTION CHOICE, *supra* note 2, at 97.
- ¹¹ Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2003 (2001).
- ¹² See Prentiss Cox, *Regulatory Perspectives and Initiatives: State Attorneys General Case Selection and Investigation*, 1591 PLI/CORP 83, 87–88 (2007).
- ¹³ See, e.g., Consent Judgment, State v. US Bancorp, Inc., No. 99-8972 (D. Minn. 1999); State v. Fleet Mortgage Corp., 158 F. Supp. 2d 962 (D. Minn. 2001); State v. Fleet Mortgage Corp., 181 F. Supp. 2d 995 (D. Minn. 2001).
- ¹⁴ NAT'L CONSUMER LAW CTR., PREEMPTION AND REGULATORY REFORM: RESTORE THE STATES' TRADITIONAL ROLE AS "FIRST RESPONDER" 18–19 (2009). See also 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 1, at 242.
- ¹⁵ Master Settlement Agreement, Nov. 23, 1998, available at <http://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf>.
- ¹⁶ This increased activity is attributed to a trend of deregulation at the federal level in the 1980s, which resulted in shifting larger regulatory burdens to the states (e.g., for environmental protection). Clayton, *supra* note 5, at 531–32.; Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 610 (2006).
- ¹⁷ Richard M. Cooper, et al., *History of Health Claims Regulation*, 45 Food Drug Cosm. L.J. 655, 678 (1990).
- ¹⁸ Provost, *Politics of Consumer Protection*, *supra* note 16, at 610.
- ¹⁹ See, e.g., Ohio v. E.P.A., 62 USLW 2063 (D.C. Cir. 1993) (nine state AGs sued for an order requiring the EPA to implement waste site cleanups under Superfund); New York v. Ruckelshaws, 14 ENVTL. L. REP. 20,873 (1986) (eight AGs from the New England states sued the EPA to require it to enforce acid rain provisions under section 126 of the Clean Air Act).
- ²⁰ See, e.g., School Board of Nassau v. Arline, 480 U.S. 273 (1987).
- ²¹ Clayton, *supra* note 5, at 535.
- ²² Common "mirror" statutes include little RICO (Racketeer Influenced Corrupt Organization) laws, antitrust, and civil rights laws.
- ²³ Provost, *The Politics of Consumer Protection*, *supra* note 16, at 610; see also Nat'l Ass'n of Attorneys Gen., Consumer Protection, www.naag.org/consumer_protection.php (last visited Feb. 14, 2010) (describing NAAG's Consumer Protection Project activities).
- ²⁴ These include American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands.
- ²⁵ In addition to relying on the articles cited herein, the author is a former assistant attorney general from the Minnesota Attorney General's Office who served in the Antitrust and Consumer Protection Divisions, and has experience with multistate investigations and litigation.
- ²⁶ Lynch, *supra* note 11, at 2004.
- ²⁷ Provost, *The Politics of Consumer Protection*, *supra* note 16, at 609.